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December 21, 2011

Darrell Nitschke
Executive Director
North Dakota Public Service Commission
Capitol
600 East Boulevard, Twelfth Floor
Bismarck, North Dakota 58505

Re: Midcontinent Communications/Missouri Valley Communications, Inc.
PU-11-697

Dear Mr. Nitschke:

Enclosed for filing are the original and seven copies of *Opposition to Motion to Dismiss* along with an *Affidavit of Service*.

This document is also being transmitted electronically to your office. Also enclosed is page one of the Opposition to Motion to Dismiss to be filed stamped and returned in the self-addressed, stamped envelope.

Thank you for your attention to this matter.

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

Sincerely,

PEARCE & DURICK

ZACHARY E. PELHAM
Counsel to Midcontinent Communications

ZEP/ak
Enclosures
cc: David J. Hogue

STATE OF NORTH DAKOTA

PUBLIC SERVICE COMMISSION

Midcontinent Communications / Missouri Valley Communications, Inc.
Interconnection Medication

Case No. PU-11-697

AFFIDAVIT OF SERVICE

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

Annette Kirschenheiter, being first duly sworn, deposes and says that on the 21st day of December, 2011, she emailed and mailed copies of the foregoing **OPPOSITION TO MOTION TO DISMISS** by placing true and correct copies thereof in an envelope, addressed to the following:

David J. Hogue
Pringle & Herigstad, P.C.
P.O. Box 1000
Minot, ND 58702-1000
dhogue@srt.com

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

Annette Kirschenheiter
Annette Kirschenheiter

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

Suzanne M Cahill
Notary Public

SUZANNE M CAHILL
Notary Public
State of North Dakota
My Commission Expires Jan. 29, 2017

STATE OF NORTH DAKOTA

PUBLIC SERVICE COMMISSION

IN THE MATTER OF

Midcontinent Communications, a South Dakota Partnership,	)	Case No. PU-11-697
Complainant,	)	
vs.	)	
Missouri Valley Communications, Inc.	)	
Respondent.	)	

OPPOSITION TO MOTION TO DISMISS

December 21, 2011

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STATE OF NORTH DAKOTA

PUBLIC SERVICE COMMISSION

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vs.	)	
Missouri Valley Communications, Inc.	)	
Respondent.	)	

OPPOSITION TO MOTION TO DISMISS

Midcontinent Communications ("Midcontinent"), by its attorneys, hereby submits this opposition to the Motion to Dismiss Petition for Arbitration (the "Motion") filed in the above-referenced proceeding by Missouri Valley Communications, Inc. ("Missouri Valley"). For the reasons described below, the Missouri Valley petition is entirely without merit. Indeed, it depends almost completely on mistaken assumptions about this proceeding and about the nature of Section 251(a) interconnection under the federal Communications Act.

I. Introduction

This proceeding focuses on a narrow set of questions concerning the terms and conditions under which Missouri Valley is required to provide interconnection by Section 251(a) of the federal Communications Act.[1] It does not concern whether interconnection is required. That is settled by the text of Section 251(a).

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[1] 47 U.S.C. § 251(a).

Nevertheless, Missouri Valley argues that Midcontinent's Petition for Arbitration (the "Petition") should be dismissed because it is barred by the doctrine of claim preclusion, in large part because Missouri Valley misconstrues this proceeding as being about the question of whether Midcontinent is entitled to interconnect. Remarkably, Missouri Valley also claims that, in light of the rural exemption, "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" despite a ruling from the Federal Communications Commission (the "FCC") that comes to precisely the opposite conclusion.[2] Both of these claims are entirely incorrect.

II. This Request Is Not Precluded by the Result of the Earlier Litigation

A. Claim Preclusion Applies Only When Specific Requirements Are Met.

Missouri Valley's theory is that, in short, the Petition is barred by claim preclusion because a Section 251(a) claim could have been made at the time Midcontinent sought to eliminate Missouri Valley's rural exemption. The test for claim preclusion in North Dakota is set out in *Missouri Breaks, LLC v. Burns,* 2010 ND 221, 791 N.W.2d 33 (2010), which explains that claim preclusion applies when four factors are present:

1. A final decision on the merits in the first action by a court 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[.][3]

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[2] Motion at 1-2; *see* Petition of CRC Communications of Maine, Inc. and Time Warner Cable for Preemption Pursuant to Section 253 of the Communications Act, as Amended, *Declaratory Ruling,* 26 FCC Rcd 8259, 8286-70 (2011) (the *"Section 251(a) Declaratory Ruling"*).

[3] *Mo. Breaks, LLC v. Burns,* 2010 ND 221, ¶ 12, 791 N.W.2d 33, *citing Ungar v. North Dakota State Univ.,* 2006 ND 185, ¶ 10, 721 N.W.2d 16 (2006)).

In most cases, the focus is on the third and fourth elements of the test, and as the North Dakota Supreme Court explained in 2007, "[u]nder traditional *res judicata* principles, the doctrine is not applicable to issues not considered or decided in the prior proceeding, and the doctrine applies only when the issues in the prior and current proceedings are 'substantially identical.'"[4] Similarly, as the court determined in *Littlefield v. Union State Bank,* claim preclusion applies "[i]f the subsequent claims are based upon the identical factual showing as the claims in the prior proceeding."[5]

In addition, and as Missouri Valley acknowledges, claim preclusion "is applied more 'circumspectly'" in administrative proceedings than in judicial proceedings, particularly in light of administrative agencies' broader public interest obligations.[6] That is why the Legislature specifically gave the Commission the authority "at any time" to "rescind, alter, or amend any decision made by it."[7] This narrowing of *res judicata* for administrative agencies also recognizes the continuing nature of the obligations that they regulate.

As shown below, Missouri Valley's claim fails both the third and the fourth elements of the claim preclusion test. The purposes of the 2008 proceeding and this proceeding were different, and the issues decided in 2008 have no bearing at all on the issues in this proceeding; at the same time, the facts have changed in ways that demonstrate that the 2008 decision would be incorrect today. In addition, Missouri Valley's attempt to cast Midcontinent's current

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[4] *State ex rel. Workforce Safety & Ins. v. JRK Raingutters, LLC,* 2007 ND 80, ¶ 22, *quoting Nodland v. Nokota Co.,* 314 N.W.2d 89, 92 (N.D. 1981).
[5] *Littlefield v. Union State Bank,* 50 N.W.2d 881, 8814 (N.D. 1993). *Littlefield* concerns claims that should have been brought in a bankruptcy proceeding, which by its nature sweeps all claims the petitioner may have into the case because the debtor or trustee has an obligation to the creditors to pursue all valid claims.
[6] Motion at 15, *quoting Landrum v. Workforce Safety and Insurance,* 2011 ND 108, ¶¶ 12-13, 798 N.W.2d 669 (ND 2011).
[7] N.D.C.C. § 49-05-09.

interconnection request as a stealth version of a Section 251(c) request should be rejected outright, as it is entirely inconsistent with anything Midcontinent has done in 2011.

B. Section 251(a) Interconnection Was Not Within the Scope of the Petition for Removal of Missouri Valley's Rural Exemption.

The fundamental issue in addressing any claim preclusion argument is whether the claim in the later proceeding is so effectively intertwined with the claim in the earlier proceeding that the new claim should have been brought to the adjudicator in the earlier proceeding. Both the third and fourth elements of the claim preclusion test require such a connection or, as the *JRK Raingutters* court put it, that the "current and prior proceedings are 'substantially identical.'"[8] At base, the issue is whether the petitioner was asking for the same thing in the first proceeding and in the second proceeding. The 2008 proceeding and this proceeding do not meet that test.

The 2008 proceeding was about whether Midcontinent would be granted a right to interconnection with Missouri Valley that was precluded by the rural exemption. Had the Commission granted Midcontinent's petition in 2008, Midcontinent would have been allowed to interconnect under 251(c) and the Commission would have set a schedule for implementation.[9] That proceeding would not have determined the point of interconnection, the technical terms of interconnection, the terms for intercarrier compensation or any other specific term of interconnection between the parties. Indeed, there was no mention in Midcontinent's 2008 petition, and no testimony from either party, about the terms and conditions of interconnection that would apply if the petition were granted.

This proceeding, however, is entirely about the terms and conditions of interconnection. It does not address the question of whether Midcontinent has a right to interconnect with

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[8] *State ex rel. Workforce Safety & Ins. v. JRK Raingutters, LLC,* 2007 ND 80, ¶ 22, *quoting Nodland v. Nokota Co.,* 314 N.W.2d 89, 92 (N.D. 1981).
[9] 47 U.S.C. § 251(f)(1)(B).

Missouri Valley. This is because Section 251(a) grants Midcontinent (and, for that matter, Missouri Valley) an absolute right to interconnection with any other telecommunications carrier.[10] Put differently, the only question in the 2008 proceeding – Midcontinent's right to interconnect – is not at issue in this proceeding at all.

While the Motion claims that the "complete statement of the issue" in this proceeding "is whether Missouri Valley is obligated under Section 251(a) to interconnect with Midcontinent for the purpose of exchanging local telecommunications traffic in the Williston exchange[,]" this is simply incorrect.[11] Section 251(a) establishes that Missouri Valley has that obligation in the plainest possible language: "Each telecommunications carrier has the duty . . . to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers[,]" and the FCC has affirmed this obligation every time it has been asked to interpret that provision.[12] While Missouri Valley may attempt to argue that it should not be required to interconnect, the possibility that Missouri Valley may make such an argument as a defense against the Petition does not result in a valid claim preclusion argument. Claim preclusion looks to the claims made by the party that lost, not by the prevailing party.

Further, since the 2008 proceeding concerned only Midcontinent's ability to invoke Section 251(c), there was no result in that proceeding that could have affected Midcontinent's

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[10] 47 U.S.C. § 251(a); *Section 251(a) Declaratory Ruling,* 26 FCC Rcd at 8267. There was, as Missouri Valley notes, discussion of Section 251(a) interconnection in 2008. Motion at 20. However, the context of that discussion was that Section 251(a) interconnection is available as of right, a point that Missouri Valley never chose to dispute. While, in light of that failure, there would be an argument that Missouri Valley is subject to issue preclusion as to the availability of Section 251(a) interconnection, it is unnecessary for the Commission to reach that issue because the statute and the FCC's decisions on the topic have made it clear that Section 251(a) interconnection is unencumbered by the rural exemption.

[11] *Id.* at 18.

[12] 47 U.S.C. § 251(a); *see Section 251(a) Declaratory Ruling,* 26 FCC Rcd at 8267, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, *First Report and Order,* 11 FCC Rcd 15499, 15991 (1996) (subsequent history omitted) (holding that "section 251(a) interconnection applies to all telecommunications carriers including those with no market power").

rights under Section 251(a). As the FCC confirmed in the *Section 251(a) Declaratory Ruling,* Section 251(a) rights are not subject to the rural exemption.[13] In this context, Missouri Valley's argument that claim preclusion applies to this proceeding is akin to arguing that failing a driver's test means that the applicant no longer can walk on the sidewalk. While both are means of getting from one place to another, the two rights are substantially different in practice, and are independent of one another.

Finally, Missouri Valley's argument is, in essence, that both proceedings started with a request for interconnection and so they must be the same.[14] This is true as far as it goes, but it does not go very far. First, the two requests asked for different things: Section 251(c) interconnection in 2007 and Section 251(a) interconnection in 2011, and as the Motion acknowledges, they are in fact significantly different.[15] Second, the issue for claim preclusion is whether the proceedings are addressing the same issues, and that simply is not the case for the reasons described above.

C. Claim Preclusion Does Not Affect a Party's Ability to Assert Continuing Rights.

Claim preclusion is based on the idea that a party's rights relating to a specific dispute are fixed as of a certain time, and that the prevailing party must be protected against the losing party's attempts to relitigate that dispute.[16] Interconnection, however, is not a right fixed in time. Because interconnection is a continuing right, claim preclusion does not apply.

The nature of the right to interconnection is established by the terms of the federal Communications Act. Under both Section 251(a) and Section 251(c), a carrier can ask for interconnection at any time. It can make a request, then drop that request and make a new one

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[13] *Section 251(a) Declaratory Ruling,* 26 FCC Rcd at 8267
[14] Motion at 22-23.
[15] *Id.* at 25

later. Carriers can, and have, sought arbitration for one interconnection request and then, later, made another interconnection request and obtained a second arbitration, often on many of the same issues that were litigated the first time.[17] There is no schedule or statute of limitations for asserting interconnection rights; instead, the statute merely establishes a timeline for asserting arbitration rights for each individual interconnection request.[18] The only consequence under the statute for missing the deadline for an arbitration petition is that the requesting carrier must start the process over again; there is no preclusive effect.

In this context, it is apparent that claim preclusion simply does not apply. If it did, there would be no second arbitrations, and no opportunities to restart the clock by making a new interconnection request. That is because interconnection obligations are continuous obligations that do not disappear because of the passage of time or because they were not invoked at a specific moment. Indeed, a carrier's obligation to interconnect is a fundamental element of its status as a carrier, and cannot be avoided absent specific exemptions. Saying that claim preclusion applies to interconnection requests is akin to saying that it applies to the obligation to serve customers as a common carrier.

D. Claim Preclusion Does Not Apply Because the Petition Is Based on Facts that Were Not Present in the Earlier Proceeding.

As noted above, there is no claim preclusion if the party making the claim is relying on different facts than those that existed at the time of the original claim. In the most obvious example, a judgment that there was no negligence in a slip and fall case does not preclude a later

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[16] *See Nodland v. Nokota Co.*, 314 N.W.2d 89, 92 (N.D. 1981) (proceedings must be "substantially identical").

[17] *See, e.g.*, Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia Corporation Commission regarding Interconnection Disputes with Verizon Virginia, Inc. and for Expedited Arbitration, *Memorandum Opinion and Order*, 17 FCC Rcd 27039, 27087-94 (2002) (addressing proposals to modify terms concerning trunk forecasts). The *Virginia Arbitration Order* also decided a host of issues that had not been raised in the first round of arbitrations in Virginia, which under Missouri Valley's theory would have been subject to claim preclusion.

claim concerning a different accident involving the same parties. Here, two of the most significant elements of the Commission's original decision have been affected by subsequent events, and the most important predicate for this proceeding is different as well.

First, Missouri Valley no longer is meeting its obligations as a carrier of last resort in Williston. Since Missouri Valley's ability to meet those obligations was central to the earlier decision, its failure to do so now means that a key premise of that decision no longer is valid. In 2008, the Commission specifically found that "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[.]"[19] This factual conclusion supported a later determination that the financial impact of interconnection with Midcontinent would impair Missouri Valley's ability to meet this obligation.[20]

Three years later, it has become apparent that Missouri Valley cannot meet its obligations even without facilities-based competition from Midcontinent. As detailed in the Petition, Missouri Valley's performance has dropped off significantly since 2008:

> Midcontinent has found that Missouri Valley no longer can install service in a timely fashion; that Missouri Valley often takes much longer to respond to service requests than Midcontinent would take in its other markets; and that in some cases Missouri Valley is unable to provide service at all in areas where Midcontinent has cable facilities and could provide facilities-based service if interconnection were in place.[21]

As the Petition goes on to note, in many cases the reason that Missouri Valley cannot provide service is that it has not constructed facilities to locations where there is customer demand; indeed, in many of these cases there are many more customers who have been left without service than just the ones who are choosing to buy their telephone service from

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[18] 47 U.S.C. § 252(b).
[19] *2008 Order*, ¶ 4.
[20] *See, e.g., id.*, ¶ 30 (concluding that "loss of revenue" would "damage" Missouri Valley's ability to offer services).

Midcontinent.[22] Moreover, in addition to the examples provided in the Petition, the Commission now has before it a specific customer complaint concerning Missouri Valley's inability to meet Midcontinent's requests for service because Missouri Valley has not constructed plant to the location where service is required.[23]

These specific factual claims call into question the continuing accuracy of the Commission's 2008 determination in two ways. First, it is apparent that Missouri Valley is not meeting its obligations, and so the 2008 determination no longer is correct. Second, and equally significant, given that Midcontinent has facilities in places where Missouri Valley does not, ensuring that Midcontinent has interconnection actually will make service available to more customers in Williston than could be served by Missouri Valley alone. In other words, the premise that Williston is best served by a monopoly on facilities-based service no longer is correct.

Moreover, the 2008 Order relies to a large extent on conclusions about the impact of interconnection on Missouri Valley under the then-extant high cost universal service regime.[24] Even more specifically, the 2008 Order noted that Missouri Valley's witness "testified that universal service is being redefined and the new expanded definition of universal service will likely include broadband Internet access."[25]

The regime that the Commission used to evaluate the impact of interconnection on universal service now has been changed. The FCC has adopted the new universal service and intercarrier compensation rules, and the new rules significantly change the rights and obligations

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[21] Petition at 2.
[22] *Id.* at 3. For instance, Midcontinent has pending service requests to an office building with multiple tenants; thus, to the extent that Midcontinent cannot obtain service, other tenants or residents must be facing the same situation.
[23] *See* Complaint of Tori Vader, email from S. Sheldon, North Dakota Public Service Commission, to Mary Lohnes, Midcontinent, Nov. 23, 2011.

of rural carriers like Missouri Valley.[26] Regardless of the Commission's conclusions in 2008, it is apparent that this new regime alters the way that high cost carriers will be expected to operate going forward. This change in the regulatory landscape means that the Commission's earlier conclusions about the impact of Midcontinent's entry into Williston as a facilities-based carrier on universal service no longer are reliable.

Given that these two factual considerations were central to the Commission's decision in the *2008 Order,* the changes that have occurred since that time mean that one of fundamental requirements for claim preclusion no longer can be met: The underlying factual predicate for the Petition simply is not the same as the factual predicate for the 2008 request to lift Missouri Valley's rural exemption. Thus, this situation is just like two accidents that occur years apart: Given the absence of an identity of material facts, claim preclusion simply cannot apply.[27] Missouri Valley may dispute these facts, of course, but Midcontinent is entitled to an opportunity to prove that the current situation is different from 2008 and that the differences are significant. Until Missouri Valley proves that Midcontinent is incorrect as a matter of fact, claim preclusion cannot apply.

Finally, the differences between the two requests also establish that the factual predicate of the two proceedings is different. In 2008, the Commission was considering a Section 251(c)

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[24] *2008 Order,* ¶¶ 36-42.
[25] *Id.,* ¶ 38.
[26] Connect America Fund, *Report and Order and Further Notice of Proposed Rulemaking,* FCC 11-161, Docket Nos. 10-90 *et al.* (rel. Nov. 18, 2011).
[27] It is possible that Missouri Valley will argue that these facts are not relevant to a Section 251(a) interconnection request because, as noted above, a Section 251(a) request is made as of right and that, therefore, they do not affect the question of whether claim preclusion applies. This argument is incorrect for two reasons. First, if the facts that were relevant in 2008 are not relevant to this proceeding, then it is apparent that there is no common nucleus of operative facts, so claim preclusion cannot apply. Second, Missouri Valley's response to the Petition makes it clear that Missouri Valley believes that the terms of the transition from the current resale arrangement to facilities-based interconnection are significant to it because of the potential impact on universal service. *See* Missouri Valley's Response to Midcontinent's Petition for Arbitration, Dec. 8, 2011, at 4 ("Missouri Valley Response"). In other words, Missouri Valley already has claimed that, at least, universal service issues are relevant to this proceeding.

request and in 2011, the Commission is considering a Section 251(a) request.[28] Missouri Valley attempts to treat the requests as part and parcel of the two proceedings, but that is not the case.[29] Rather, the requests form part of the factual predicate for the two proceedings, much as a contract would form part of the predicate for a claim that one party had breached the agreement. Just as most contracts do not result in legal action, most interconnection requests do not result in arbitration or rural exemption proceedings. Rather, an interconnection request can lead to a negotiated agreement, an adopted agreement, an arbitration, a petition to lift the rural exemption or no further action at all.[30] While the specifics of a request shape the nature of any proceeding that follows, that is a matter of fact – Midcontinent's current request, for instance, does not allow it to claim that it is entitled to collocation, which it could claim under Section 251(c).

In this way, the 2007 request under Section 251(c) and the current request under Section 251(a) are analogous to two separate contracts, each with its own terms. No court would conclude that claim preclusion would apply to claims relating to contracts with different terms and conditions, even if those contracts were between the same two parties and for the same good or service. Here, the request in 2007 and the current request are factually different, and as a result will be evaluated under different standards. Consequently, claim preclusion cannot apply to this proceeding.

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[28] Missouri Valley argues in the Motion that the current request is effectively a Section 251(c) request. For the reasons described in Part III(B), *infra,* this argument is wrong and the current request plainly is a Section 251(a) request.

[29] *See, e.g.,* Motion at 22-23 (describing the 2008 and 2011 "actions" as commencing with the 2007 and 2011 interconnection requests).

[30] As the Commission is aware, the most common result of an interconnection request is for the parties to enter into an agreement without an arbitration. The Commission has approved literally hundreds of voluntary agreements, including many involving rural carriers, and has engaged in only a small number of arbitrations.

III. Arbitration Is Available for this Request

Missouri Valley devotes the last section of its motion to an argument that arbitration is not available in this case. The two principle elements of this argument are that requiring an arbitration for Section 251(a) interconnection would vitiate the rural exemption and that Midcontinent's request is not really a Section 251(a) request. There is no basis for either of these claims.

A. Section 251(a) Requests Are Subject to Arbitration.

The answer to Missouri Valley's argument that arbitrating a Section 251(a) request would violate the rural exemption is very simple: The FCC has held that arbitration of Section 251(a) requests is available regardless of whether a carrier is subject to the rural exemption. That is one of the two central holdings of the *Section 251(a) Declaratory Ruling,* and it could not have been stated more plainly:

> [W]e conclude that requests made to incumbent LECs for interconnection and services pursuant to sections 251(a) and (b) are subject to state commission arbitration as set forth in section 252, and that section 251(f)(1) does not exempt rural incumbent LECs from the compulsory arbitration process established in that provision.[31]

Missouri Valley also argues that applying Section 251(a) to rural carriers would violate Congressional intent to allow rural carriers to avoid the "duty of interconnection for the purpose of exchanging local telecommunications traffic."[32] This contradicts the plain language of Section 251(a), which requires interconnection by all carriers, the plain language of Section 251(f)(1), which applies the rural exemption only to Section 251(c) interconnection, and the FCC's determination in the *Section 251(a) Declaratory Ruling* to

> reaffirm that all telecommunications carriers, including rural carriers covered by section 251(f)(1), have a basic duty to interconnect their networks under section

[31] *Section 251(a) Declaratory Ruling,* 26 FCC Rcd 8269.
[32] Motion at 27.

> 251(a) and that all LECs, including rural LECs covered by section 251(f)(1), have the obligation to comply with the requirements set forth in section 251(b).[33]

The *Section 251(a) Declaratory Ruling* is now a final order, and constitutes the FCC's binding interpretation of Sections 251(a) and 252. As the Supreme Court has held, that interpretation is entitled to deference as an interpretation of a federal statute by the expert agency empowered to implement the statute.[34] Thus, there is no basis for Missouri Valley's claim that arbitration of a Section 251(a) request is improper.

B. Midcontinent's Request Plainly Is for Section 251(a) Interconnection

Much of the last part of Motion is devoted to arguing that Midcontinent's Section 251(a) interconnection request is not really a Section 251(a) request.[35] It is not clear how Missouri Valley could believe this, as at every step in this process Midcontinent has made it clear that this request is under Section 251(a).

The central difference between Section 251(a) interconnection and Section 251(c) interconnection is that, under Section 251(c) the competitive carrier effectively controls all technical decisions about how interconnection will be accomplished, while Section 251(a) interconnection does not give a competitive carrier that power. Under Section 251(c), a competitive carrier can demand interconnection "at any technically feasible point within the [incumbent] carrier's network," and the FCC's rules have clarified that an incumbent subject to Section 251(c) effectively is required to provide any form of interconnection that it already provides to another carrier, both as to location and as to technical specifications.[36] Under Section

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[33] *Section 251(a) Declaratory Ruling,* 26 FCC Rcd 8267.
[34] *Talk America, Inc. v. Michigan Bell,* ___ U.S. ____, 131 S.Ct. 2254 (2011).
[35] *See, e.g.,* Motion at 26, 31-33.
[36] 47 U.S.C. § 251(c)(2), 47 C.F.R. § 51.305(c).

251(a), all telecommunications carriers are entitled to interconnection, but it may be direct or indirect, and no technical requirements are specified in the statute or the FCC's rules.[37]

Midcontinent's request plainly is a Section 251(a) request. First, Midcontinent has said so, repeatedly and in writing – in its initial request to Missouri Valley, in its follow-up letter and in the Petition.[38] Midcontinent is, of course, bound by its representation that is seeking interconnection under Section 251(a).

Second, the specifics of Midcontinent's request for interconnection confirm that the request is made under Section 251(a). Midcontinent's initial request proposed interconnection at "a mutually-agreed point" between Missouri Valley's switch and Midcontinent's headend or "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."[39] Midcontinent offered to interconnect using standard electrical or optical facilities, at Missouri Valley's option. It did not demand a specific location or that Midcontinent be allowed to choose the type of interconnection, rights Midcontinent would have under Section 251(c), but does not have under Section 251(a).[40]

The nature of Midcontinent's request was confirmed in the July 12 Letter and in the Petition. The July 12 Letter stated that "Midcontinent's suggestion of interconnection at a meet point was simply a proposal, and Midcontinent was and remains open to other interconnection arrangements," and reiterated that Midcontinent "invited Missouri Valley to propose 'an alternative location' and to make 'an alternative proposal' if it did not wish to agree to any of

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[37] 47 U.S.C. § 251(a), 47 C.F.R. § 51.100(a)(1).

[38] *See* Letter of Nancy Vogel, Director of Revenue Assurance, Midcontinent Communications, to Mike Kilgore, General Manager, Missouri Valley (June 14, 2011), at 1, attached to the Petition as Exhibit B (the "June 14 Letter"); Letter of Nancy Vogel, Director of Revenue Assurance, Midcontinent, to Mike Kilgore, General Manager, Missouri Valley (July 12, 2011), at 1 (attached hereto as Exhibit 1); Petition at 2, 4.

Midcontinent's suggestions."[41] The Petition proposes direct interconnection "at a mutually-agreed point" or at any point in the Williston exchange "where Missouri Valley interconnects with another carrier," and requests that interconnection be accomplished using either electrical or optical facilities. In all of its correspondence, Midcontinent never has demanded a specific location for interconnection or a specific technical approach to interconnection; instead, it has solicited proposals from Missouri Valley and offered alternatives every step of the way.[42]

The Motion attempts to argue that even requesting a form of interconnection that would satisfy Section 251(c)(2) must constitute a Section 251(c) request.[43] This is nonsensical. First, Section 251(a) specifically permits direct interconnection, so Midcontinent's proposal falls squarely within the terms of that provision.[44] Second, a party to a negotiation is perfectly entitled to propose a solution that it finds preferable to other alternatives. Midcontinent proposed direct interconnection because it believes that direct interconnection is preferable, it is more reliable and less expensive for both parties in the long run; it would not be rational to propose a form of interconnection that Midcontinent thought was less reliable and more expensive. In any event, Midcontinent's proposal is just that: a suggestion from one party about how to proceed. Considering that Missouri Valley did not offer a single proposal of its own for interconnection

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[39] June 14 Letter at 1.
[40] *Id.*
[41] July 12 Letter at 1.
[42] Indeed, Midcontinent notes that, although it did not propose interconnection at the Missouri Valley switch, it is willing to accept such interconnection, as proposed in Missouri Valley's response to the Petition. *See* Missouri Valley Response at 2.
[43] Motion at 31-33.
[44] 47 U.S.C. § 251(a)(1) (imposing a "duty" on "[e]ach telecommunications carrier" "to interconnect directly or indirectly"). The Motion seems to argue that "local telecommunications traffic" is not a form of "telecommunications service." Motion at 32. That, of course is incorrect. The Motion also argues that, under *AT&T Corp. v. Atlas,* Section 251(a) cannot be read to require the exchange of traffic. *Id.* at 28. This proves too much. The only reason for interconnection is to exchange traffic. What *Atlas* (and the underlying order that it affirmed) addressed was whether Section 251(a) required payment of specific compensation to a traffic pumper. It is correct that Section 251(a) does not address compensation, but compensation is addressed in Section 251(b), which also is a subject of the Petition, and is not subject to the rural exemption. 47 U.S.C. §251(b)(5).

prior to the time it submitted its response, it is disingenuous for Missouri Valley to claim that a mere suggestion from Midcontinent of the best way to achieve interconnection constituted a Section 251(c) demand.[45]

IV. Conclusion

For all of these reasons, the Commission should deny the Motion and complete the arbitration to determine the terms and conditions of interconnection for exchange of local traffic between Midcontinent and Missouri Valley.

Dated: December 21, 2011

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[45] Midcontinent also notes that Missouri Valley asserts that the parties already interconnect indirectly. Motion at 28. If Missouri Valley is arguing that Midcontinent and Missouri Valley exchange interexchange traffic that way, it is correct, but the exchange of access traffic is irrelevant to Midcontinent's request. If Missouri Valley is arguing that the parties can exchange local traffic through some existing arrangements, it is incorrect. There is no agreement between the companies concerning local traffic, and therefore no terms and conditions for exchange of local traffic exist. To the extent, however, that Missouri Valley is arguing that indirect interconnection to exchange local traffic would preferable, that claim is not relevant to this motion, and would be a matter for Commission determination in this arbitration proceeding.

Exhibit 1

Midcontinent July 12 Letter

Midcontinent
COMMUNICATIONS

3901 North Louise Avenue
Sioux Falls, South Dakota 57107

Exhibit 1

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,

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.