



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

**ZACHARY E. PELHAM**

zep@pearce-durick.com

February 24, 2012

**RECEIVED**

FEB 24 2012

**PUBLIC SERVICE COMMISSION**

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

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

Dear Mr. Nitschke:

Enclosed for filing are the original and seven copies of the following:

1. Post-Argument Brief in Opposition to Motion to Dismiss;
2. (Proposed) Order Denying Motion to Dismiss; and
3. Affidavit of Mailing.

These documents are also being transmitted electronically to your office. Also enclosed is an extra copy of each document 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  
Patrick J. Ward

**30 PU-11-697 Filed: 2/24/2012 Pages: 18**  
**Post-argument brief in opposition to motion to dismiss, proposed order denying motion to dismiss**

Midcontinent Communications

Zachary Pelham

**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. )

**AFFIDAVIT OF MAILING**

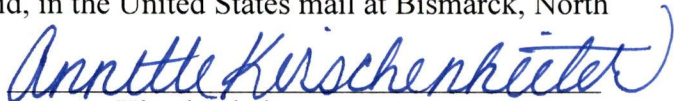
STATE OF NORTH DAKOTA )  
 ) ss.  
COUNTY OF BURLEIGH )

Annette Kirschenheiter, being first duly sworn, deposes and says that on the 24<sup>th</sup> day of February, 2012, she mailed copies of the foregoing *Post-Argument Brief in Opposition to Motion to Dismiss* and proposed *Order Denying Motion to Dismiss* by placing a 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

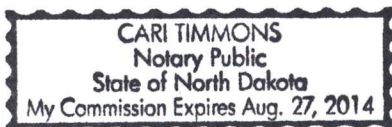
Mr. Patrick J. Ward  
Zuger Kirmis & Smith  
P.O. Box 1695  
Bismarck, ND 58502-1695

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

  
Annette Kirschenheiter

Subscribed and sworn to before me this 24 day of February, 2012.

  
\_\_\_\_\_  
Notary Public



**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.	)	

**POST-ARGUMENT BRIEF IN OPPOSITION TO MOTION TO DISMISS**

Midcontinent Communications (“Midcontinent”), by its attorneys, hereby submits this post-argument brief opposing 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 during the argument, in Midcontinent’s opposition to the Motion and below, the Motion should be denied forthwith.

**I. Introduction**

This proceeding is about the terms for interconnection to be made available to Midcontinent under Section 251(a) of the federal Communications Act.<sup>1</sup> The Commission never has decided that question, and certainly did not do so in the 2008 decision on whether Missouri Valley’s exemption from Section 251(c) should have been retained.

Missouri Valley attempts to sidestep this fact by making two closely related claims. First, it argues that Midcontinent really wants interconnection under Section 251(c). This argument is belied by the terms of Midcontinent’s interconnection request and the petition for arbitration.

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<sup>1</sup> 47 U.S.C. § 251(a). See Petition for Arbitration of Midcontinent Communications (filed Nov. 21, 2011) (the “Petition”) at 1-2 (describing Midcontinent request for interconnection under Section 251(a)).

Second, Missouri Valley argues that, because the earlier proceeding determined Midcontinent's rights under Section 251(c), that decision necessarily precluded Midcontinent from enforcing its pre-existing rights under Section 251(a). That argument depends on the theory that the Commission could have determined whether Midcontinent was entitled to Section 251(a) interconnection in that proceeding when, in fact, the Commission could not have done so.

The Motion also cannot succeed if any relevant facts have changed since the 2008 order. The 2008 order depended, in particular, on determinations that were tied to the then-current universal service rules and to Missouri Valley's ability to serve its customers and make necessary investments in Williston. The original universal service analysis no longer applies because the FCC has undertaken the most comprehensive reform of universal service in the last 25 years.<sup>2</sup>

More important, though, is that Missouri Valley no longer is serving Williston efficiently. As described below, this is particularly significant because demand for local telecommunications service in Williston is booming. Midcontinent's inability to offer facilities-based local telephone service in Williston means that the public is being deprived of the service it wants and needs.<sup>3</sup>

## **II. The Rural Exemption Does Not Affect Midcontinent's Request for Interconnection Under Section 251(a).**

One cornerstone of Missouri Valley's argument is that Midcontinent, by requesting direct interconnection, effectively was seeking interconnection that is subject to the rural exemption. This is wrong as a matter of both law and fact.

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<sup>2</sup> 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).

<sup>3</sup> Midcontinent notes that Missouri Valley also has argued that arbitration is not available for Section 251(a) interconnection. This claim was not pursued during the argument and, in any event, the FCC has determined that Section 251(a) interconnection is subject to arbitration. *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, 8269 (2011) (the "*Section 251(a) Declaratory Ruling*").

**A. Direct Interconnection Under Section 251(a) Is Not Subject to the Rural Exemption.**

Missouri Valley starts by claiming that, in essence, all direct interconnection is Section 251(c) interconnection, and subject to the rural exemption. However, Section 251(a), by its own terms, encompasses direct interconnection. Under Section 251(a), “[e]ach telecommunications carrier has the duty . . . to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers.”<sup>4</sup> If this language were not clear enough, the FCC has affirmed repeatedly that Section 251(a) permits either direct or indirect interconnection, most recently in the *Section 251(a) Declaratory Ruling*.<sup>5</sup>

At the same time, and contrary to Missouri Valley’s claims during the argument, the rural exemption under Section 251(f)(1) does not preclude direct interconnection. Rather, it exempts rural carriers from the specific requirements of Section 251(c), and only those requirements.<sup>6</sup>

Section 251(c) contains a series of detailed requirements for interconnection, including obligations to provide interconnection “at any technically feasible point,” that is “at least equal in quality” to all other interconnection provided by the incumbent and at prices determined under Section 252(d).<sup>7</sup> Section 251(f)(1) exempts rural carriers not from interconnection – it does not mention either interconnection or Section 251(a) at all – but from these detailed requirements.

The distinction between the legal rights a carrier has under Section 251(c) and under Section 251(a) have a significant practical impact as well. As described during the argument, because Section 251(a) interconnection is not subject to the detailed requirements of Section 251(c), an arbitration for Section 251(a) interconnection has a much wider range of potential outcomes than an arbitration for Section 251(c) interconnection. For instance, the arbitrator can

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<sup>4</sup> 47 U.S.C. § 251(a)(1).

<sup>5</sup> See *Section 251(a) Declaratory Ruling*, 26 FCC Rcd at 8267..

<sup>6</sup> See 47 U.S.C. § 251(f)(1) (stating that “[s]ubsection (c) of this section shall not apply to a rural telephone company” until the exemption is lifted).

<sup>7</sup> 47 U.S.C. § 251(c)(2).

decide that indirect interconnection is sufficient; can choose the point of interconnection; can choose any technical interconnection arrangements; and can adopt pricing for interconnection that is reasonable, rather than requiring TELRIC pricing. These differences are not technicalities, but are substantive and affect the cost, convenience and quality of interconnection. Indeed, because the arbitrator can consider questions such as the cost to the interconnecting carrier, a Section 251(a) arbitration can lead to results that are much more favorable to the incumbent carrier than a Section 251(c) arbitration.

The FCC also has been consistent in concluding that the rural exemption does not apply to Section 251(a) interconnection, starting with the 1996 *Local Competition Order*, and reaffirmed that conclusion in its 2007 *North Carolina Order* and the *Section 251(a) Declaratory Ruling*.<sup>8</sup> Notably, the *Section 251(a) Declaratory Ruling* specifically rejected claims that the rural exemption could apply to any type of Section 251(a) interconnection:

Consistent with Commission precedent, we reaffirm that all telecommunications carriers, including rural carriers covered by section 251(f)(1), have a basic duty to interconnect their networks under section 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). We also clarify that a rural carrier's exemption under section 251(f)(1) offers an exemption only from the requirements of section 251(c) and does not impact its obligations under sections 251(a) or (b).<sup>9</sup>

Thus, a request for Section 251(a) interconnection, whether for direct or indirect interconnection, is not subject to the rural exemption.

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<sup>8</sup> See *Section 251(a) Declaratory Ruling*, 26 FCC Rcd at 8267; Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers, *Memorandum Opinion and Order*, 22 FCC Rcd 3513 (WCB 2007); 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").

<sup>9</sup> *Section 251(a) Declaratory Ruling*, 26 FCC Rcd at 8267 (footnotes omitted).

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

Missouri Valley also has insisted that Midcontinent's interconnection request really is a Section 251(c) request in disguise. An examination of Midcontinent's initial request and every subsequent statement Midcontinent has made demonstrates that this claim is false.

Midcontinent's Opposition describes at length the reasons why its request is a Section 251(a) request.<sup>10</sup> In short:

- Midcontinent's initial request and every subsequent letter and filing have described the request as falling under Section 251(a), which, as described above, greatly limits Midcontinent's rights.
- Midcontinent did not demand interconnection at any technically feasible point or any specific level of quality. In fact, Midcontinent asked Missouri Valley to propose a different location or technical form of interconnection if it had a preference different than Midcontinent's initial proposal.
- Midcontinent did not demand that interconnection be priced at TELRIC rates.

In fact, the only similarity between Midcontinent's request and a Section 251(c) request is that Midcontinent asked for direct interconnection. As described above, however, direct interconnection specifically is permitted under Section 251(a).<sup>11</sup>

Missouri Valley's argument comes down to the notion that Midcontinent should not be taken at its word. Midcontinent's specific representations in its request, its filings and at the oral argument, however, are binding, and subject Midcontinent to the Section 251(a) regime. As a result, this interconnection request can be treated only as Section 251(a) request that is not subject to the rural exemption.

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<sup>10</sup> Opposition at 13-16

<sup>11</sup> Midcontinent notes that Missouri Valley asserted once again during the argument that the companies have an indirect interconnection arrangement. However, as Midcontinent explained in the Opposition, it appears that Missouri Valley is referring to indirect interconnection to exchange toll traffic, not local traffic and, in any event, the existence of indirect interconnection would not prevent Midcontinent from requesting direct interconnection. The desirability of direct interconnection would then be an issue for the arbitrator to decide. Opposition at 16, n. 45.

### III. Res Judicata Does Not Apply to this Proceeding.

In North Dakota, res judicata prevents a party from making a claim to a court or administrative agency when four requirements are met:

1. There has been final decision on the merits in the first action by a court or agency that had jurisdiction over the claim that was asserted;
2. The same parties (or closely related parties) are involved in both cases;
3. The second action raises an issue actually litigated or which should have been litigated in the first action; and
4. There is an identity of the causes of action[.]<sup>12</sup>

All four requirements must be met for *res judicata* to apply, so unless Missouri Valley can show that all of them are present, the Motion must be denied.

Midcontinent and Missouri Valley agree that the factors that are relevant to this case are the third and fourth factors, as is true in most *res judicata* cases. The North Dakota Supreme Court has explained that the third factor “applies only when the issues in the prior and current proceedings are ‘substantially identical.’”<sup>13</sup> The fourth factor, similarly, is met only “[i]f the subsequent claims are based upon the identical factual showing as the claims in the prior proceeding.”<sup>14</sup> Neither of those requirements can be met in this case.

#### A. Section 251(a) Interconnection Could Not Have Been Considered in the Earlier Proceeding.

For Missouri Valley to meet the third prong of the *res judicata* test, the question of whether Section 251(a) interconnection was available has to have been an issue that Midcontinent should have raised in the earlier proceeding. There are two distinct reasons why Missouri Valley fails this prong of the test: Midcontinent never needed to ask the Commission

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

<sup>13</sup> *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).

<sup>14</sup> *Littlefield v. Union State Bank*, 50 N.W.2d 881, 8814 (N.D. 1993).

for permission to exercise its Section 251(a) rights and the 2008 proceeding was limited to considering whether Missouri Valley's rural exemption should be lifted.<sup>15</sup>

First, there was no reason for Midcontinent to ask permission to exercise its Section 251(a) rights because those rights are not conditioned in any way. As described above, Section 251(a) interconnection is available to any carrier, at any time, and is not subject to the rural exemption, as the FCC has affirmed since 1996. In other words, the question of whether Midcontinent could obtain Section 251(a) interconnection literally could not have been adjudicated in the 2008 proceeding because there was nothing to adjudicate.

The difference between the two proceedings is illustrated by Midcontinent's initial filings. In 2008, Midcontinent asked the Commission to lift the rural exemption, so that Section 251(c) interconnection would be available.<sup>16</sup> In the Petition, Midcontinent asks the Commission "to arbitrate the open issues in a facilities-based interconnection agreement[.]"<sup>17</sup> Again, Midcontinent does not request that the Commission determine the extent of its Section 251(a) rights in the Petition because there is no need to do so.

This distinction also is reflected in the Commission's own actions in 2008. The Notice of Consolidated Hearing for that proceeding and its Findings of Fact, Conclusions of Law, and Order both delineate the specific issues to be considered. The issues are limited to the specific questions to be addressed under the rural exemption provision of the Communications Act:

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<sup>15</sup> Midcontinent also notes that, as discussed during the argument, *res judicata* has not been applied in arbitration proceedings, even when the exact issue has been decided previously. *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).

<sup>16</sup> *See* Notice of Bona Fide Request for Services and Interconnection and Petition to Find Rural Exemption Waived, Case No. 80-61 (filed Feb. 8, 2008) at 2 (requesting the Commission to "conduct an inquiry for the purpose of determining whether Midcontinent's request for a facilities based interconnection 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)").

<sup>17</sup> Petition at 1.

economic burden, technical feasibility, universal service and a potential implementation schedule.<sup>18</sup> The limitation on the questions to be considered in the proceeding would have prevented Midcontinent from raising other issues even if Section 251(a) interconnection rights were subject to Commission approval. Indeed, any attempt to raise such a question would have been subject to objection from Missouri Valley and likely ruled out of order.

Finally, during the argument, Missouri Valley claimed that all of these distinctions were unimportant because Midcontinent's ultimate goal in each proceeding was to obtain the "revenue stream" from facilities-based service. This claim is both irrelevant and incorrect. Under the case law, the test is not what a party's goal might be, but whether the legal claims are so closely related that both should have been raised at the same time.<sup>19</sup> Even if the party's "goal" were the standard, though, Missouri Valley still would be wrong, because of the substantial differences between Section 251(c) and Section 251(a) interconnection, which have a real world impact on what kind of interconnection Midcontinent receives and the costs Midcontinent will incur.

**B. Material Facts Have Changed Since the Time of the Earlier Proceeding.**

The fourth prong of the *res judicata* test asks whether the parties are litigating claims that are based on the identical factual showing. The facts have changed, so the test is not met.

In 2008, the Commission's decision depended heavily on a determination 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[.]"<sup>20</sup> This determination supported conclusions concerning the economic

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<sup>18</sup> Midcontinent Communications/Missouri Valley Communications, Inc. Rural Exemption Investigation, *Notice of Consolidated Hearing*, Case No. PU-08-61 (May 7, 2008) at 1-2; Midcontinent Communications/Missouri Valley Communications, Inc. Rural Exemption Investigation, *Findings of Fact, Conclusions of Law, and Order*, Case No. PU-08-61 (Oct. 8, 2008) at 2 (the "2008 Order").

<sup>19</sup> For instance, *res judicata* would not prevent a company from suing on two different occasions for separate violations of the same contract, even though its goal in both cases would be to enforce the contract.

<sup>20</sup> 2008 Order, ¶ 4.

effect of Section 251(c) interconnection. That determination no longer is accurate because Missouri Valley is unable to keep up with the demands of the Williston market. Midcontinent included specific examples of these problems in both the Petition and the Opposition, and they are widespread and ongoing.<sup>21</sup> As a result, new customers are unable to obtain service promptly and repairs are intolerably slow. Given the economic boom in Williston, as discussed during the argument, these problems raise the question of whether Missouri Valley ever will make the investments necessary to serve Williston properly. Moreover, because Midcontinent is willing to invest in that market, it already has facilities in places that Missouri Valley does not serve, and could provide telephone service in those areas (and many more) if it had interconnection. These significant factual changes show that the rationale that supported the 2008 order no longer is correct, so that *res judicata* cannot apply. Indeed, even if *res judicata* could apply, these changes in Williston are a textbook example of why administrative agencies have the discretion not to apply *res judicata* when the public interest demands a different result.<sup>22</sup>

The 2008 Order also was based in large part on the existing universal service regime.<sup>23</sup> That regime now has been changed significantly. As a result, any conclusions based on the previous universal service rules cannot be relied upon today. These changes, by themselves, bar a *res judicata* claim

Missouri Valley has suggested that these factual changes are irrelevant. In fact, both of these changes are specifically relevant to issues in the arbitration proceeding. For instance, issues concerning service and service quality are relevant to the length of the period

Midcontinent has requested for the transition from resale to facilities-based service, and issues

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<sup>21</sup> See Petition at 2-3, Opposition at 8-9. While these statements technically are allegations, in the context of Missouri Valley's Motion the Commission must treat them as if they have been proven.

<sup>22</sup> See N.D.C.C. § 49-05-09 (granting the Commission the authority "at any time" to "rescind, alter, or amend any decision made by it"); see also *Landrum v. Workforce Safety and Insurance*, 2011 ND 108, ¶¶ 12-13, 798 N.W.2d 669 (ND 2011) (noting that *res judicata* "is applied more 'circumspectly'" in administrative proceedings").

<sup>23</sup> 2008 Order, ¶¶ 36-42.


concerning universal service are relevant to Midcontinent's proposal for transitional financial support to Missouri Valley.<sup>24</sup> However, if Missouri Valley were right and these facts were not relevant, then its claim that the two proceedings are inextricably linked becomes untenable: If the central factual questions in the 2008 proceeding are not relevant to the current proceeding, then it is impossible to conclude that the two cases are "substantially identical" and that they are "based upon the identical factual showing," as the North Dakota Supreme Court requires.

#### **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: February 24, 2012

PEARCE & DURICK



PATRICK W. DURICK, ND #03141  
ZACHARY E. PELHAM, ND #05904  
Individually and as a Member of the Firm  
314 E. Thayer Avenue  
P.O. Box 400  
Bismarck, ND 58502-0400  
(701) 223-2890  
(701) 333-0126 – Fax  
pwd@pearce-durick.com

/s/ J.G. Harrington

J.G. HARRINGTON  
Dow Lohnes PLLC  
1200 New Hampshire Avenue, NW  
Suite 800  
Washington, DC 20036  
(202) 776-2818  
(202) 776-2222 - Fax  
jharrington@dowlohn.com

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<sup>24</sup> See Petition, Exhibit A at 2-3.

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

**ORDER DENYING MOTION TO DISMISS**

**Preliminary Statement**

On June 14, 2011, Midcontinent Communications (“Midcontinent”) requested interconnection under Section 251(a) of the federal Communications Act, 47 U.S.C. § 251(a), from Missouri Valley Communications, Inc. (“Missouri Valley”) in the Williston exchange. Following correspondence between the parties and mediation in accordance with Section 252(a)(2) of the Communications Act, 47 U.S.C. § 252(a)(2), which did not result in a negotiated interconnection agreement, Midcontinent filed a petition for arbitration with the Commission, pursuant to Section 252(b) of the Communications Act, the Federal Communications Commission (“FCC”) decision in its *Section 251(a) Declaratory Ruling* and the rules of the Commission.<sup>1</sup>

Midcontinent requests that the Commission determine the terms and conditions for interconnection between Midcontinent and Missouri Valley under the terms of Section 251(a). In the Petition, Midcontinent proposed terms for, among other things, the point of interconnection, technical interconnection requirements, exchange of traffic, number portability and the transition from its current resale arrangement to facilities-based service.

On November 14, 2011, Missouri Valley filed a motion to dismiss Midcontinent’s Petition.<sup>2</sup> The Motion seeks dismissal on two grounds: (1) that the Petition is barred by the legal doctrine of *res judicata* in light of the Commission’s 2008 decision on Midcontinent’s request to lift Missouri Valley’s rural exemption from Section 251(c) interconnection; and (2) that the federal Communications Act and the implementing provisions of North Dakota law do not permit arbitration for the purpose of interconnection under Section 251(a).

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<sup>1</sup> Petition for Arbitration of Midcontinent Communications (filed Nov. 14, 2011) (the “Petition”).

<sup>2</sup> Motion to Dismiss Petition for Arbitration of Missouri Valley (Nov. 14, 2011) (the “Motion”).

Midcontinent filed its opposition to the Motion on December 21, 2011 and Missouri Valley filed a reply on January 3, 2012. The Commission heard oral argument on the motion on February 10, 2012, and the parties submitted post-argument briefs on February 24, 2012.

This proceeding is of particular significance because of the rapid economic and population growth in the Williston exchange and throughout the northern portion of the State. Consumers and businesses in Williston have a great need for efficiently-provided, economical communications services, including traditional switched voice telephone service, broadband and other advanced services. The ability of service providers in Williston to meet those needs will affect the long-term growth of that area and will have an impact across the rest of North Dakota.

### **Legal Background**

#### *Federal Communications Act*

The Commission's consideration of the Motion is grounded in the interaction among four provisions of the Communications Act: Section 251(a), which governs interconnection among all carriers; Section 251(c), which creates special rules for interconnection between competitive local exchange carriers and incumbent local exchange carriers; Section 251(f)(1), which grants an exemption from Section 251(c) to rural carriers; and Section 252(b), which sets out the regime for arbitration of interconnection requests. The FCC has spoken directly about this interaction on several occasions, most recently in the 2011 *Section 251(a) Declaratory Ruling*.<sup>3</sup> In that decision, the FCC reaffirmed that Section 251(a) interconnection is available to all carriers and that the Section 251(f)(1) rural exemption does not affect Section 251(a) interconnection. Because the FCC has held repeatedly that Section 251(a) interconnection is not subject to the rural exemption, a carrier seeking to obtain Section 251(a) interconnection from a rural incumbent local exchange carrier does not need to seek the permission of a state regulatory commission to obtain that interconnection.

The FCC also held in the *Section 251(a) Declaratory Ruling* that Section 252(b) arbitration is available to carriers requesting Section 251(a) interconnection. The FCC decision is a binding order, in effect according to its terms, and the FCC's interpretation of the federal Communications Act is entitled to great deference.<sup>4</sup> Consequently, the Commission shall be guided by the FCC's determinations on the issues in that order that are relevant to the Motion.

Section 251(a) interconnection and Section 251(c) interconnection are substantially different. Section 251(c) contains a series of specific requirements, including an obligation to provide interconnection at any technically feasible point requested by the requesting carrier; an obligation to provide interconnection that is equal in quality to all other interconnection; and an obligation to price interconnection in accordance with the requirements of Section 252(d) of the Communications Act. 47 U.S.C. § 252(d). These requirements do not apply to Section 251(a) interconnection. While Section 251(c) interconnection generally is direct interconnection, a

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<sup>3</sup> 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 (2011) (the "*Section 251(a) Declaratory Ruling*").

<sup>4</sup> *Talk America, Inc. v. Michigan Bell*, \_\_\_ U.S. \_\_\_, 131 S.Ct. 2254 (2011).

request for direct interconnection that does not seek to enforce the specific obligations of Section 251(c) is a Section 251(a) request.

### *Res Judicata*

The doctrine of *res judicata* entitles parties to finality of judgments they have received, and permits later efforts to seek relief for the same injury to be dismissed. In North Dakota, four requirements must be met before *res judicata* can be applied:

1. There must be 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. There is an identity of the causes of action[.]<sup>5</sup>

North Dakota courts have held that under the third factor, *res judicata* “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.’”<sup>6</sup> They also have held that the fourth factor is met only “[i]f the subsequent claims are based upon the identical factual showing as the claims in the prior proceeding.”<sup>7</sup>

The doctrine of *res judicata* “is applied more ‘circumspectly’” in administrative proceedings than in judicial proceedings, in recognition of administrative agencies’ obligation to consider the public interest.<sup>8</sup> The Legislature has given the Commission the authority “at any time” to “rescind, alter, or amend any decision made by it,” regardless of whether *res judicata* might otherwise apply.<sup>9</sup>

### **Findings of Fact**

The Commission finds:

1. 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 has a certificate of public convenience and necessity to provide

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<sup>5</sup> *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). The parties agree that the first and second elements of this test have been met.

<sup>6</sup> *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).

<sup>7</sup> *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.

<sup>8</sup> Motion at 15, quoting *Landrum v. Workforce Safety and Insurance*, 2011 ND 108, ¶¶ 12-13, 798 N.W.2d 669 (ND 2011).

<sup>9</sup> N.D.C.C. § 49-05-09.

facilities-based competitive local exchange telecommunications services throughout North Dakota (Case No. PU-04-546).

2. 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).

3. Midcontinent's petition to the Commission in 2008 asked the Commission to lift the rural exemption as to Missouri Valley and to set a schedule for implementation of Section 251(c) interconnection. The 2008 petition did not ask the Commission to consider any issues relating to Section 251(a) interconnection.

4. Midcontinent has made an interconnection request under Section 251(a) of the federal Communications Act, and not under Section 251(c). The request specifically refers to Section 251(a) and does not demand that Missouri Valley meet any of the obligations that are specific to Section 251(c) interconnection. Midcontinent's other correspondence with Missouri Valley and filings with the Commission consistently have requested Section 251(a) interconnection.

5. Midcontinent's request for arbitration of the terms and conditions of Section 251(a) interconnection is not substantially identical to its request to lift the rural exemption in 2008 for three reasons. First, because the Section 251(a) interconnection right is not covered by the rural exemption, there was no need to ask the Commission for authority to interconnect under that provision. Second, Section 251(a) interconnection is very different from Section 251(c) interconnection because it is not governed by the strict terms of Section 251(c) interconnection. Third, the Petition seeks only the Commission's determination of the terms and conditions of interconnection, not a determination of Midcontinent's right to interconnection.

6. Midcontinent's Petition was timely filed and otherwise in conformance with the requirements for petitions for arbitration.

7. The Commission's proceeding on Midcontinent's request to remove Missouri Valley's rural exemption was limited in scope to the specific issues described in Section 251(f)(1) by the scheduling order in that proceeding.<sup>10</sup> The only issues that could have been considered in that proceeding were those relating to the rural exemption.

8. The specific limitations in the Commission's scheduling order in the 2008 proceeding mean that any effort to seek Section 251(a) interconnection at that time would have been ruled beyond the scope of the proceeding.

9. The *2008 Order* held 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[.]"<sup>11</sup>

10. For purposes of consideration of the Motion (and only such purposes):

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

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<sup>10</sup> Midcontinent Communications/Missouri Valley Communications, Inc. Rural Exemption Investigation, *Findings of Fact, Conclusions of Law, and Order*, Case No. PU-08-61 (Oct. 8, 2008) at 2 (the "2008 Order").

<sup>11</sup> *Id.*, ¶ 4.

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.<sup>12</sup>

11. The changes in Missouri Valley's ability to serve Williston alleged by Midcontinent since the *2008 Order* constitute a change in material facts that were relevant to the decision in that order. As a consequence, the claims in this proceeding and the claims in the prior proceeding are not based upon the identical factual showing.

12. The *2008 Order* concluded that under the then-extant universal service support program, lifting the rural exemption could harm universal service in Williston.<sup>13</sup>

13. On October 27, 2011, the FCC adopted an order substantially revising the previous system for providing universal service support in high cost areas.<sup>14</sup> This order modifies, among other things, the rules governing support provided to rural carriers and creates a new support mechanism to permit rural carriers to recover revenues lost under the FCC's reform of the access charge rules.

14. The change in the federal universal service program since the *2008 Order* constitutes a change in material facts that were relevant to the decision in that order. As a consequence, the claims in this proceeding and the claims in the prior proceeding are not based upon the identical factual showing.

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. Section 251(a) interconnection is not subject to the rural exemption under Section 251(f)(1).
3. Section 251(a) interconnection is available to all carriers at all times and is not subject to *res judicata*.
4. Direct interconnection is available under Section 251(a) and becomes Section 251(c) interconnection only if the requesting carrier demands that the incumbent local exchange carrier meet the obligations specifically delineated in Section 251(c).
5. Section 251(a) interconnection is subject to arbitration under Section 252(b) of the Communications Act.

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<sup>12</sup> Petition at 2. These allegations are assumed to be true for the purpose of evaluating the Motion. The arbitrator shall determine the extent to which Midcontinent can support these allegations during the arbitration.

<sup>13</sup> *2008 Order*, ¶¶ 36-42.

<sup>14</sup> 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).

6. Missouri Valley has not met its burden of demonstrating that any issue that was litigated or should have been litigated in the 2008 rural exemption proceeding is being raised in this proceeding, and therefore *res judicata* does not apply.

7. Missouri Valley has not met its burden of demonstrating that this proceeding is based on an identical factual showing to the one made in the 2008 rural exemption proceeding, and therefore *res judicata* does not apply.

8. Even if Missouri Valley had met its burden to demonstrate that *res judicata* could apply, given the public interest in ensuring that customers in Williston have access to high-quality, promptly-available local telephone service and advanced services on reasonable terms and conditions, the Commission would exercise its discretion under N.D.C.C. § 49-05-09, and reopen the 2008 proceeding to the extent necessary to consider appropriate terms and conditions for Section 251(a) interconnection.

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

### **Order**

The Commission Orders:

Missouri Valley's Motion to Dismiss Petition for Arbitration is denied.

### **PUBLIC SERVICE COMMISSION**

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**Kevin Cramer**  
**Commissioner**

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**Tony Clark**  
**Chairman**

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**Brian P. Kalk**  
**Commissioner**