

STATE OF NORTH DAKOTA  
PUBLIC SERVICE COMMISSION

Midcontinent Communications/Missouri Valley  
Communications, Inc.  
Interconnection Arbitration  
Application

Case No. PU-11-697

AFFIDAVIT OF SERVICE BY CERTIFIED MAIL

STATE OF NORTH DAKOTA  
COUNTY OF BURLEIGH

Cara DeSaye deposes and says that:

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Order

The envelopes were addressed as follows:

Patrick Durick  
Pearce & Durick  
PO Box 400  
Bismarck ND 58502

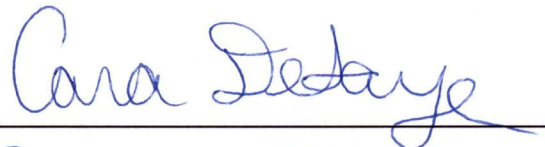
David Hogue  
Pringle & Herigstad, P.C.  
PO Box 1000  
Minot ND 58702

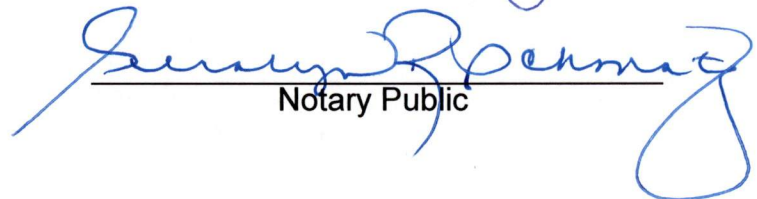
**Cert. No. 7009 2820 0002 9237 5459**

**Cert. No. 7009 2820 0002 9237 5466**

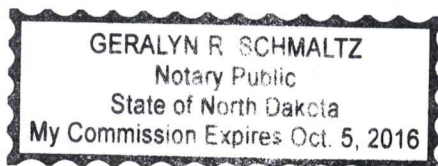
The address shown is the respective addressee's last reasonably ascertainable post office address.

Subscribed and sworn to before me  
this 23<sup>rd</sup> day of **March, 2012**.



  
Notary Public

SEAL



**STATE OF NORTH DAKOTA  
PUBLIC SERVICE COMMISSION**

**Midcontinent Communications/Missouri Valley  
Communications, Inc.  
Interconnection Arbitration**

**Case No. PU-11-697**

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

**March 21, 2012**

**Appearances**

Commissioners Tony Clark, Kevin Cramer and Brian P. Kalk.

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

Zachary Evan Pelham, 314 E. Thayer Ave., 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.

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

**Preliminary Statement**

On June 14, 2011, Midcontinent Communications (Midcontinent) made a request for facilities-based interconnection for the Williston, North Dakota exchange from Missouri Valley Communications, Inc. d/b/a Nemont (Missouri Valley). Midcontinent specified that their interconnection request was for the purpose of exchanging local traffic under 47 U.S.C. § 251(a) of the Federal Communications Act of 1934 (Act), Act § 252(b) and reciprocal compensation and number portability under Act § 251(b).

On July 6, 2011 Missouri Valley declined Midcontinent's request, asserting that it was exempt from mandated interconnection pursuant to its rural exemption under Act § 251(f)(1)(a).

On November 14, 2011, Midcontinent filed with the Commission its Petition for Arbitration, Case No. PU-11-697. Midcontinent requests that the Commission arbitrate open issues concerning the facilities-based interconnection agreement they have with Missouri Valley.

On November 21, 2011, Missouri Valley filed with the Commission a Motion to Dismiss Midcontinent's Petition for Arbitration.

On December 21, 2011 the Commission deemed Missouri Valley's November 21, 2011 Motion a *prima facie* case, for the purposes of N.D. Admin. § 69-02-02-02(4), and formally noticed a hearing for February 10, 2012. The hearing was held as scheduled.

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**

1. Missouri Valley Communications, Inc. d/b/a Nemont (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 Act § 153(b)(37).
2. Midcontinent Communications (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 facilities based competitive local exchange telecommunications services throughout North Dakota (Case No. PU-04-546).
3. As of the date of this Order, Midcontinent and Missouri Valley have a negotiated resale agreement with number portability under Act § 251(b)(2).
4. As of the date of this Order, Midcontinent's and Missouri Valley's facilities and equipment are interconnected indirectly for the Williston, North Dakota exchange. According to Midcontinent, this indirect interconnection does not allow for the local exchange of traffic. Missouri Valley has not contradicted Midcontinent's assertion in this regard.
5. In November 2007 Midcontinent requested facilities based interconnection for the Williston, North Dakota exchange, pursuant to Act § 251(c). Missouri Valley denied the request, relying on its Act § 251 (f)(1)(a) rural exemption status from Act § 251(c).
6. 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. Specifically Midcontinent requested that the Commission determine that Missouri Valley has waived its rural exemption or, in the alternative, that the Commission conduct an inquiry under the provisions of Act § 251 (f)(1)(a) for the

purpose of determining whether to terminate Missouri Valley's rural exemption from providing its services as requested by Midcontinent (Case No. PU-08-61).

7. On July 9, 2008 the Commission conducted a formal hearing to determine Midcontinent's February 8, 2008 petition.

8. On October 8, 2008 the Commission denied Midcontinent's February 8, 2008 petition to have Missouri Valley's rural exemption terminated. As a result Midcontinent's Bona Fide Request for Services and Interconnection, pursuant to Act § 251(c), was moot. This position was affirmed by the United States District Court, Case No. 1:09-CV-017.

9. On June 14, 2011, Midcontinent made a bona fide request for facilities-based interconnection for the Williston, North Dakota exchange from Missouri Valley. Midcontinent specified that their bona fide request was for the purpose of exchanging local traffic under Act § 251(a) and reciprocal compensation and number portability under Act § 251(b). Midcontinent proposes to retain the company's current arrangements for the exchange of intrastate toll traffic, to interconnect at Williston using two-way direct interconnection facilities, and indicated that it would be willing to interconnect at a mutually-agreed upon point between Missouri Valley's Williston switch and Midcontinent's headend, or at any other location in the Williston exchange where Missouri Valley interconnects with another carrier. Midcontinent also proposes that the parties adopt the terms of their existing resale agreement for the transfer of customers, directory listings and other related matters.

10. On July 6, 2011 Missouri Valley declined Midcontinent's request, asserting that it was exempt from mandated interconnection pursuant to its rural exemption under Act § 251(f)(1)(a).

11. In their November 14, 2011 Petition for Arbitration, Midcontinent summarized its positions and unresolved issues for a facilities-based interconnection. Issues raised by Midcontinent for arbitration are: (1) General Terms and Conditions; (2) Other terms and conditions of interconnection and number portability; (3) Technical interconnection requirements; (4) Point of interconnection; (5) Reciprocal compensation; (6) Number portability; (7) Compensation for non-local traffic; (8) Date of interconnection; and (9) Transition from current resale arrangements.

12. In their November 21, 2011 Motion to Dismiss Midcontinent's Petition for Arbitration, Missouri Valley seeks dismissal on the following 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 Act § 251(c) interconnection, Case No. PU-08-61; 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 Act § 251(a).

## **Legal Standard**

13. Missouri Valley submits their motion for dismissal pursuant to Rule 56 of the N.D. Rules of Civil Procedure. Missouri Valley's motion "shall be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Id.*

14. Missouri Valley, as the movant for summary judgment, bears the burden to prove that there is no genuine issue of material fact and Midcontinent, as the party opposing the motion, will be given all favorable inferences which may reasonably be drawn from the evidence. *Wolff v. Light*, 156 N.W.2d 175 (N.D. 1968).

15. In North Dakota the doctrine of *res judicata* bars a party from litigating a claim to a court or an administrative agency when the following four requirements are met, as so articulated in *Missouri Breaks, LLC v. Burns*, 791 N.W.2d 33, 39 (N.D. 2010):

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

## **The Record**

16. On February 8, 2012 Missouri Valley and Midcontinent entered into a Stipulation of Exhibits for Oral Argument, stipulating that the exhibits, cited documents, cited case law or statutory law submitted within each parties respective briefs related to Missouri Valley's Motion to Dismiss Petition For Arbitration, and including any documents or references to a 2008 matter before the Commission (Case No. PU-08-61) are properly admissible in this matter.

## **Motion to Dismiss**

17. Missouri Valley advocates that Midcontinent's current request for facilities-based interconnection pursuant to Act § 251(a) is barred by *res judicata* and previous litigation in Case No. PU-08-61, as it was: (1) actually litigated, or should have been litigated, and (2) claims an identical cause of action.

18. Both Missouri Valley, and Midcontinent, agree that a final decision on the merits was achieved in Case No. PU-08-61, and that Case No. PU-08-61, and this matter, involve the same parties. Therefore the first two factors of the *res judicata* standard, as so articulated in *Missouri Breaks*, are not at issue in this matter.

19. The May 26, 2011 FCC Declaratory Ruling determined that all "[Local Exchange Carriers (LEC)]s are obligated to fulfill ... the duties set forth in sections 251(a) and (b)

of the Act, including the duty to interconnect and exchange traffic, even if the LEC has a rural exemption from the obligations set forth in section 251(c).” *Section 251(a) Declaratory Ruling*, 26 FCC Rcd at 8267 (2011 FCC Order) (emphasis added). The 2011 FCC Order also clarified that “the rural incumbent LEC’s obligations under sections 251(a) and (b) can be implemented through the state commission arbitration ... provisions in section 252 of the Act.” *Id.*

20. Missouri Valley advocates that Midcontinent’s request for Act § 251(a) facilities-based interconnection in these proceedings, and their request for Act § 251(c) interconnection in 2007, are sufficiently similar to satisfy the “same issues” *res judicata* factor. Additionally, Missouri Valley argues that, if the Commission were to find that Midcontinent’s request for interconnection under Act § 251(a) and Act § 251(c) are identical, then Midcontinent’s request for facilities based interconnection pursuant to Act § 251(a) is precluded by Act § 251(f)(1)(a), Missouri Valley’s rural exemption status.

21. Midcontinent states that the distinction between Act § 251(a) and Act § 251(c) interconnection is significant. Specifically, Act § 251(c) includes 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 Act § 252(d). Midcontinent indicates that an arbitrator, in Act § 251(a) interconnection, is free to determine that indirect interconnection is sufficient; can choose the point of interconnection; can choose any technical interconnection arrangement; and can adopt pricing for interconnection that is reasonable, rather than requiring Total Element Long Run Incremental Cost (TELRIC) pricing. Midcontinent argues that these differences are substantive and affect the cost, convenience and quality of interconnection.

22. A request for direct interconnection under Act § 251(a) and Act § 251(c) are different issues for the purpose of *res judicata* and Act § 252(b). This is supported by the distinctions indicated by Midcontinent above, as well as the 2011 FCC Order requiring LECs to submit to arbitration under Act § 252, notwithstanding a LEC’s rural exempt status. Therefore, the Commission finds that Midcontinent’s request for Act § 251(a) interconnection in this matter was not litigated in PU-08-61.

23. Missouri Valley argues that Midcontinent could have, and should have, requested Act § 251(a) interconnection in 2008. The Commission disagrees. Although Missouri Valley is correct in that Competitive Local Exchange Carriers (CLECs) had asserted Act § 251(a) interconnection requests, in lieu of Act § 251(c) interconnection requests, prior to the 2008 matter, the circumstances relating to this legal theory are not in conformance with the overall purpose of *res judicata*. As indicated by Midcontinent, Act § 251(c) interconnection is superior to Act § 251(a) interconnection. Additionally, the status of Act § 251(a) interconnection, and the applicability of the rural exemption, was not obvious and not settled by Federal Statute, the 8<sup>th</sup> Federal Circuit Court of Appeals, the Federal Communications Commission, or the United States Supreme Court at the time Case No. PU-08-61 was litigated. The 2011 FCC Order provided substantial clarification towards requests for Act § 251(a) interconnection.

24. Additionally, Midcontinent advocates that because interconnection is a continuing right, *res judicata* cannot preclude their current request for Act § 251(a) interconnection. Midcontinent argues that 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. The Commission agrees, therefore providing additional support towards denying Missouri Valley's motion to dismiss as it relates to *res judicata*.

25. Both parties were asked, during the February 10, 2012 hearing, whether their current indirect interconnection satisfied Act § 251(a)'s "duty to interconnect directly or indirectly". (emphasis added). Midcontinent asserts that it does not, because Midcontinent's indirect interconnection arrangement with Missouri Valley does not provide for the exchange of local traffic. Missouri Valley counters that the definition of interconnection, as well as the 2011 FCC Order and persuasive case law (including *AT&T Corp. v. Atlas*, 317 F.3d 227 (D.C. Cir. 2003)), contradicts Midcontinent's assertions in this regard. Specifically, Missouri Valley argues that interconnection, pursuant to 47 C.F.R. § 51.5, allows only for a physical linkage of the two networks and does not allow for traffic. The Commission agrees with Midcontinent. Paragraph 2 of the 2011 FCC Order specifically states: "We clarify that LECs are obligated to fulfill all of the duties set forth in sections Act § 251(a) and (b) of the [1996 Telecommunications] Act, including the duty to interconnect and exchange traffic, even if the LEC has a rural exemption from the obligations set forth in section 251(c)."

26. Because the Commission has determined that Midcontinent's present request for interconnection pursuant to Act § 251(a) was not an act litigated in Case No. PU-08-61, nor should it have been litigated in Case No. PU-08-61, the Commission provides no comment upon whether this matter and Case No. PU-08-61 are similar causes of action for the purposes of *res judicata*.

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. A request for direct interconnection under Act § 251(a), and a request for interconnection under Act § 251(c), are different issues for the purpose of *res judicata* and Act § 252(b). This is supported by the distinctions indicated by Midcontinent above, as well as the 2011 FCC Order requiring LECs to submit to arbitration under Act § 252, notwithstanding a LEC's rural exempt status.
3. Midcontinent's petition for Act § 251(a) interconnection does not raise an issue actually litigated, or which should have been litigated, in Case No. PU-08-61.

4. The Act and the implementing provisions of North Dakota law do permit arbitration for the purpose of interconnection under Act § 251(a).

5. Because Interconnection is a continuing right, *res judicata* cannot apply towards Midcontinent's current request for Act § 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 Midcontinent's Petition for Arbitration is denied.

### PUBLIC SERVICE COMMISSION



**Kevin Cramer**  
Commissioner



**Tony Clark**  
Chairman



**Brian P. Kalk**  
Commissioner