

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

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IN THE MATTER OF

PUBLIC SERVICE COMMISSION

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

RECOMMENDED DECISION

This recommended decision addresses the open issues in the arbitration between Midcontinent Communications (“Midcontinent”) and Missouri Valley Communications, Inc. (“Missouri Valley”). As identified by the parties and the arbitrator, the open issues and related sections of the proposed interconnection agreement are as follows:

1. Effective date of the agreement – Sections 1.1 & 2.2
2. Dispute resolution for disputes concerning points of interconnection – None needed
3. Reciprocal compensation for termination of local traffic – Sections 3.2.1 & 3.2.2
4. Compensation for ISP-bound traffic- Sections 1.1-1.2
5. Compensation for toll traffic- Section 3.2.3
6. Determination of amount of transitional compensation – Sections 3.1.2 & 3.6
7. Obligations to transfer customers- Section 3.1.5
8. Charges for implementing carrier changes- Pricing attachment

The arbitrator also asked the parties to brief certain additional issues related to the extent to which the potential impact of competition can be considered in this proceeding

and whether the arbitrator can consider a stay request if one should be submitted. This recommended decision addresses each of the enumerated issues.

I. Procedural History

A. Delineation of Issues

Midcontinent requested interconnection and exchange of local traffic under § 251(a) and (b)(5) of the Telecommunications Act by letter dated June 14, 2011. Thereafter, it filed its petition for arbitration. In its November 14, 2011 Petition for Arbitration, Midcontinent summarized its positions and unresolved issues for a facilities-based interconnection. Issues raised by Midcontinent for arbitration at that time were: (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.

Missouri Valley filed a response on December 8, 2011. The parties further refined the issues in this proceeding through the exchange of drafts of a proposed interconnection agreement, first from Midcontinent to Missouri Valley on February 3, 2012, and then from Missouri Valley to Midcontinent on February 28, 2012.

Midcontinent submitted a chart showing the remaining open issues on March 14, 2012, and based on the chart, the arbitrator provided the parties with a memorandum detailing issues to be considered at the hearing in advance of the final prehearing conference on April 2, 2012.

B. Motion to Dismiss

Missouri Valley filed a motion to dismiss Midcontinent's petition on November 21, 2011. The parties briefed the motion, and the Commission held a hearing on the motion on February 10, 2012. Following post-hearing briefs, the motion was denied on March 21, 2012.

C. Testimony, Exhibits and Hearing

The parties submitted prefiled testimony on March 28, 2012. Midcontinent submitted testimony for two witnesses, W. Thomas Simmons and Timothy J. Gates. Missouri Valley submitted testimony for two witnesses as well, Mike Kilgore and Chad A. Duval.

On April 1, 2012, Midcontinent filed a motion to strike portions of the testimony of Messrs. Kilgore and Duval as being outside the scope of the issues the parties had defined in the request for interconnection and exchange of local traffic and by subsequent narrowing of issues through negotiation. That motion was granted by the arbitrator on April 4, 2012. In addition, during the hearing, Midcontinent challenged the admission of Attachment 4 to Mr. Kilgore's testimony, and admission of that exhibit was also denied.

An evidentiary hearing was held on April 4 and 5, 2012. Each party presented its witnesses and was afforded the opportunity for cross-examination of the other party's witnesses and the introduction of relevant exhibits. A total of 17 exhibits, including the prefiled testimony of each witness and supplemental testimony by Mr. Duval, were admitted into evidence and made a part of the Public Service Commission record in this matter.

The parties submitted post-hearing briefs on April 20, 2012. Each party also submitted a proposed recommended decision and proposed interconnection agreement.

II. Scope of the Proceedings and Legal Issues

In both the letter requesting interconnection and petition for arbitration, Midcontinent sought to obtain facilities-based interconnection “for the purpose of exchanging local traffic” under Section 251(a) of the Communications Act and reciprocal compensation and number portability under Section 251(b) of the Communications Act. Midcontinent proposed to retain the companies’ current arrangements for the exchange of intrastate toll traffic.

United States Code § 47 USC § 251 provides that each telecommunications carrier has a duty to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers and in § 251(b), each local exchange carrier has an additional duty to (1) not impose unreasonable or discriminatory conditions or limitations on the resale of its telecommunication services, (2) provide number portability, (3) provide dialing parity which includes the duty to permit all providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays, (4) access to rights of way, and (5) reciprocal compensation, which is a duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

Missouri Valley retains its status as an exempt rural telephone company under § 251(f) and Midcontinent does not at this time request that the state terminate that rural exemption. Because Missouri Valley retains its rural exemption, the additional obligations on incumbent local exchange carriers at § 251(c) do not apply to Missouri Valley. These include among others the (1) duty to negotiate in good faith, (2) interconnection for transmission and routing of telephone exchange service and exchange access, (3) unbundled access, and (4) collocation.

The application of 47 USC §§ 251(a) and (b) to rural incumbent local exchange carriers was recently clarified in a declaratory ruling by the Federal Communications Commission on May 26, 2011. 26 FCC Rcd at 8272. That opinion clarified that the rural exemption does not exempt rural LECs from the requirements of § 251(b) including § 251(b) number portability obligations. The FCC there stated, “For consumers to have a choice of service providers, competitive carriers must be able to interconnect their networks with incumbent providers . . . [and] . . . when incumbent carriers resist interconnection with competitive telecommunication carriers, it impedes the development of facilities based voice services in those areas.” This decision clarified that all carriers, including rural carriers, have a basic duty to interconnect their networks under § 251(a) and that all LECs, including rural LECs covered by § 251(f) (1) have the obligation to comply with the requirements set out in § 251(b). They further noted that their clarification means that the rural exemption only exempts a rural carrier from the requirements of § 251(c) and does not release it from its obligations under § 251(a) or (b).

In paragraph 19 of that decision, the FCC also clarified that requests made to incumbent LECs for interconnection and services pursuant to § 251(a) and (b) are subject to state commission arbitration and are also subject to voluntary negotiation remedies including mediation by the state commission.

Section 252(e) directs the state commission to review “any interconnection agreement adopted by negotiation or arbitration,” and grants the state commission authority to reject any interconnection agreement “if it finds the agreement does not meet the requirements of § 251.”

In that decision, the FCC recognized that the obligation of a rural incumbent LEC under § 251(a) and (b) includes basic interconnection, dialing parity, number portability and reciprocal compensation, even when the rural incumbent LEC is exempt from the more rigorous obligations under § 251(c). Petition of CRC Communications of Maine, Inc., and Time Warner Cable Inc., FCC declaratory ruling, released May 26, 2011. 26 FCC Red at 8272.

Section 47, USC § 252 spells out the powers of a state commission and arbitrator in resolving interconnection disputes under § 251(a) and (b). Section 252(b)(4)(A) provides that the state commission shall *limit its consideration of any petition to the issues set forth in the petition and in the response*. Subsection 4(C) provides that the state commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required.

III. Effective Date of the Interconnection Agreement

Midcontinent proposes that the interconnection agreement become effective the day it is approved by the Commission unless a stay of the effectiveness of the agreement is granted. Missouri Valley proposes to delay the effective date until the completion of any appeals. Midcontinent's proposal is adopted.

The evidence shows that Missouri Valley's other interconnection agreements do not have a provision comparable to this one. Midcontinent demonstrated that Missouri Valley will have ample opportunity to obtain a stay of the effective date of the agreement if Missouri Valley can demonstrate that it has a meritorious appeal and that it will be irreparably harmed by implementation of the agreement. Midcontinent also showed that delaying the effective date of the agreement could have adverse effects on customers in Williston and on Midcontinent.

Given the opportunity that Missouri Valley will have to obtain a stay from either the Commission or a Court of Review, and the potential disadvantages to consumers and to Midcontinent from a delay in implementation, there is no benefit to adopting Missouri Valley's proposal. In addition, delaying implementation would be contrary to the Congressional intent, expressed in the provisions of the federal Communications Act governing arbitration and approval of interconnection agreements, to ensure that interconnection is made available expeditiously. *See* 47 U.S.C. § 252.

Therefore, Midcontinent's proposed language shall be adopted, as follows:

General Terms and Conditions

1.1 This Agreement must be filed with the North Dakota Public Service Commission (Commission). If the Commission does not act to approve or reject the Agreement within 30 days after submission, the Agreement shall be deemed approved, subject to the parties' respective rights to bring an action in an appropriate Federal district court to determine whether the Agreement meets the requirements of sections 251 and 252 of the Act. Any such action shall not affect the effectiveness of this Agreement unless the Commission or the court issues a stay of the effective date. The Agreement is between Missouri Valley Communications, Inc. (MVC), a North Dakota corporation and Midcontinent Communications a South Dakota General Partnership (Midcontinent).

* * *

2.2 Term of Agreement

2.2.1 This Agreement shall become effective upon approval under Section 1.1 unless stayed by the Commission or the Federal district court. This Agreement shall be binding upon the Parties for a term of three (3) years unless terminated earlier pursuant to Section 2.2.3. It shall remain effective following the initial term on a month-to-month basis until the Parties enter into a successor agreement or the Agreement is terminated pursuant to Section 2.2.3.

IV. Dispute Resolution for Impasses as to Points of Interconnection

Midcontinent proposes that impasses related to negotiations on future points of interconnection under the agreement be resolved under the dispute resolution provisions

of the general terms and conditions. Missouri Valley proposed to exempt such impasses from the dispute resolution provisions; however, Mr. Kilgore testified and Missouri Valley stated at page 12 of its brief that it has no objection to future disputes under the agreement being resolved by binding arbitration. Midcontinent's proposal is adopted.

If the Commission were to adopt the position that there should be no provision for resolving disputes over future points of interconnection, it would leave the parties in an uncertain position if such disputes do arise, as it would be unclear whether they would be able to seek relief from the Commission or would be barred from seeking any relief at all. As Midcontinent notes in its brief, the possibility of such disputes is real, particularly as carriers move to Internet Protocol-based interconnection in the future. Given that Missouri Valley has not objected to applying the dispute resolution provisions of the agreement to any other type of dispute, and given the necessity of having a mechanism for resolving interconnection disputes, Midcontinent's proposal is the better approach.

Midcontinent's proposal does not require changing any language in the agreement as proposed and, therefore, no contractual language need be provided to adopt that proposal.

V. Reciprocal Compensation

The parties disagree over the rate of reciprocal compensation. Midcontinent has proposed bill-and-keep compensation for termination of local traffic or, in the alternative, adoption of a rate of no more than \$0.004/minute with a ramp-down to bill-and-keep over a four year period, with a "collar" that would limit a party's obligation to pay reciprocal compensation to months when the traffic balance is worse than 60/40. Missouri Valley has proposed to adopt a rate of \$0.0302409, based on the rate in its two existing interconnection agreements with wireless providers. Missouri Valley has demonstrated

there will be some inconvenience and fiscal disruption resulting from interconnection, at least in the short term.

Under the FCC's current rules, reciprocal compensation rates set via arbitration can be set in one of two ways:

An incumbent LEC's rates for transport and termination of telecommunications traffic shall be established, at the election of the state commission, on the basis of:

- (i) The forward-looking economic costs of such offerings, using a cost study pursuant to § 51.505 and 51.511; or
- (ii) A bill-and-keep arrangement, as provided in § 51.713.

These rules apply to any reciprocal compensation rates set after December 29, 2011, and therefore apply to this proceeding.

Missouri Valley, the party in possession of the information necessary to prepare a cost study, did not do so, and neither did Midcontinent. In addition, the record shows that the rates for reciprocal compensation under Missouri Valley's current interconnection agreements will be reset to bill-and-keep on July 1, 2012, as a result of the recent changes in the FCC's intercarrier compensation rules. Thus, if Missouri Valley's rate were adopted, Midcontinent would be the only carrier paying that 3 cent/minute rate. This record does not provide sufficient basis to conclude that Missouri Valley's proposed rate is in compliance with the FCC's requirements to base reciprocal compensation rates on forward-looking economic costs.

Missouri Valley also argues that there is reason to believe that traffic will not be balanced, and that it will be the party that terminates the most traffic from the other party. In support of this argument, Missouri Valley witness Duval produced an analysis of a scenario in which traffic would not be in balance. That scenario was not based on a traffic study and was shown to be highly sensitive to the assumptions made when the

study was constructed. Neither that analysis nor the claims made by Missouri Valley's other witness, Mr. Kilgore, concerning traffic balance, provided sufficient evidence to conclude that traffic will not be in balance. Neither party provided convincing or conclusive evidence on this issue.

Therefore, because there is some possibility that traffic will not be in balance, and to be consistent with the FCC's intention to adopt a gradual transition for landline carrier reciprocal compensation, Midcontinent's bill-and-keep proposal will not be completely rejected, and instead its alternative proposal for payment of \$0.004/minute with a ramp down and collar will be adopted. During the hearing, Midcontinent presented evidence demonstrating that \$0.004/minute was the highest reasonable rate to recover the incremental costs associated with reciprocal compensation, including a nationwide survey of state-adopted rates and an analysis of the rates in other rural carriers' agreements with Midcontinent. Further, as acknowledged by Missouri Valley witness Duval, under the FCC's former rules, a rate of \$0.004/minute was the highest proxy rate for reciprocal compensation that could be adopted, based on the FCC's analysis of the cost of terminating local traffic. While Mr. Gates presented evidence for Midcontinent that suggests that actual incremental costs are likely to be significantly lower than \$0.004/minute, and more likely approximately \$0.002/minute, the adoption of the \$0.004/minute rate for a period of two years guards against the possibility that Missouri Valley's costs might be higher than average.

Midcontinent's proposed ramp down will be adopted but with a hybrid incorporating Missouri Valley's proposed collar. The Commission has previously approved a 55°-45° collar. This seems appropriate for the first two years of the

agreement. Thereafter, the collar will also ramp down to follow the ramp down in reciprocal compensation. The collar is an appropriate mechanism to reduce administrative costs associated with collecting small, immaterial amounts of reciprocal compensation, and eventual adoption of a 60/40 collar will prevent collection of reciprocal compensation as a result of random fluctuations in traffic. The ramp down is consistent with the FCC's intent to reduce intercarrier compensation rates and for carriers to recover those costs over time from their own customers. In addition, under the FCC's access recovery mechanism, it is significant that Missouri Valley will be able to recover compensation for lost revenue from the ramp down.

Therefore, Midcontinent's proposed alternative language shall be adopted, with changes as follows:

Interconnection Attachment

3.2.1 Reciprocal compensation shall apply only to the transport and termination of Local Traffic and shall not apply to any other traffic or service. The parties agree to bill and pay each other monthly for Local Traffic exchanged under this Agreement unless the Local Traffic exchanged is balanced and falls within an agreed-upon threshold ("Traffic Balance Threshold"). The Parties agree that for purposes of this Agreement, the Traffic Balance Threshold is reached when the combined Local Traffic exchanged falls between 55-45 for the first two years and 60%/40% in either direction thereafter. When the actual usage data for three (3) consecutive months indicates that the combined Local Traffic falls within the Traffic Balance Threshold, then either Party may provide the other Party a written request, along with verifiable information supporting such request, to eliminate per minute billing for reciprocal compensation. Upon written consent by the Party receiving the request, which shall not be withheld unreasonably, there will be no billing for reciprocal compensation on a going forward basis unless combined Local Traffic falls outside the Traffic Balance Threshold for six (6) consecutive months. When the actual usage data for six (6) consecutive months indicates that the combined Local Traffic exchanged falls outside the Traffic Balance Threshold, then either Party may provide the other Party a written request, along with verifiable information supporting such request, to reinstate per minute billing for reciprocal compensation per minute. Upon written consent by the Party receiving the request, which shall not

be withheld unreasonably, per minute billing for reciprocal compensation will be reinstated on a going forward basis. If per minute for reciprocal compensation is reinstated, it shall be subject to termination if the Traffic Balance Threshold is achieved a second time for three (3) consecutive months and shall not thereafter be subject to reinstatement.

3.2.2 Reciprocal compensation for Local Traffic shall be at the rate of \$0.004/minute for the first two years of this Agreement and shall be reduced by \$0.001/minute on each anniversary of the effective date of this Agreement.

VI. Compensation for ISP-Bound Traffic.

Although it does not appear that there is much ISP-bound traffic in Williston, the evidence indicates that a Missouri Valley affiliate, Nemont Communications, does provide at least some dial-up internet service. Midcontinent proposes that the agreement include a provision to address such traffic and that ISP-traffic be treated in the same way as local traffic. Missouri Valley argues that ISP-bound traffic is not local traffic.

When the parties exchanged issues for arbitration, Missouri Valley proposed removing the last sentence of Section 3.2.2 from the agreement. On March 14, Midcontinent accepted this change. Therefore, the arbitrator declines to rule on this issue which was removed from open issues by mutual agreement. This interconnection agreement will not address ISP bound traffic. Section 3.2.3 is also deleted. Section 1.2 should be amended to clarify the agreement affects only the exchange of local telecommunications traffic as requested by Midcontinent in its petition for arbitration.

1.2 This Agreement sets forth the terms, conditions and pricing for interconnection between MVC and Midcontinent for the purpose of exchanging local telecommunications traffic within the Williston, ND exchange in which both Parties are providing local exchange service at that time, and for which MVC is the incumbent local exchange carrier with the State of North Dakota for purposes of providing local Telecommunications Services. This Agreement is available for the term set forth herein.

VII. Compensation for Termination of Toll Traffic

The parties were asked to address the question of how to account for access traffic sent from one party to the other (that is, the termination of toll calls, as opposed to local calls). Midcontinent's position is that the parties should be required to pay standard access charges for such traffic, and that the charges should be set by the terminating party's access tariff. Missouri Valley argues that this is a resolved issue and not an open issue.

As noted above with regard to Section 1.2, Section 1.1 should also be amended to clarify the agreement affects only the exchange of local telecommunications traffic as originally requested by Midcontinent, excluding ISP Bound Traffic and EAS Traffic, as agreed at the hearing. References to ISP Bound Traffic and EAS Traffic must also be deleted from other sections of the Interconnection Agreement and Attachments where required.

Midcontinent noted, that it is customary for parties to include language to this effect in their interconnection agreements, and such language was included in Midcontinent's initial draft agreement. Nonetheless, due to constraints on the scope of the arbitration, Missouri Valley's proposed language on this issue is adopted, as follows:

1.2 This Interconnection Agreement sets forth specific terms, conditions, and pricing for network interconnection arrangements between MVC and Midcontinent for the purpose of exchanging local telecommunications traffic within the Williston, ND exchange that is originated by an End-User Customer of one Party and is terminated to an End-User Customer of the other Party, where each Party directly provides Telephone Exchange Service to its End-User Customers physically located in the Exchange Area. This Interconnection Agreement shall apply only to the transport and termination of local traffic and shall not apply to any other traffic or service.

VIII. Calculation of Transition Payments

The primary question relating to the proposed transition payments is whether the per-customer payment should be set at the outset of the transition or calculated on a per-customer basis. Midcontinent proposes that the calculation be made at the beginning of the transition period. Missouri Valley has proposed that the calculation be made individually for each customer subject to the transition. Missouri Valley's position is adopted. The evidence shows that there are currently about 2100 resale customers between these parties. Also, it has been demonstrated that Missouri Valley and Midcontinent will need to work together to effectuate this transition. As customers are transitioned, calculations can be done to determine exact compensation.

Midcontinent proposed an initial payment of transitional financial assistance to Missouri Valley. Each side presented a per customer labor rate. Missouri Valley proposed \$38.50 and Midcontinent \$22.50. I believe a reasonable resolution is to use the Midcontinent rate of \$22.50 as the base rate and at the end of the 12 month period if all customers have been ported over, a final calculation will then be performed and Midcontinent will pay as an incentive bonus the difference between total amounts paid at the per customer rate and \$70,000, which was Mr. Gates' estimate of the projected up-front payment previously suggested by Midcontinent

In other words, if there is delay on the part of Missouri Valley, they receive no more than the \$22.50 offer, but if transition is completed successfully in one year, as they have agreed and as it should be, they are entitled to be paid the balance as an incentive bonus.

Section 3.6 of the Interconnection Agreement shall provide:

3.6 Transitional Compensation

Midcontinent agrees to pay to MVC \$22.50 as a per customer charge for transitioning each Midcontinent resale customer to Midcontinent's network, payable monthly after the date interconnection is completed. If all current resale customers of Midcontinent have been transitioned within a one year period from interconnection, Midcontinent will pay a bonus to Missouri Valley of the difference between total actual per customer payments and \$70,000.

IX. Obligations to Transfer Customers

Missouri Valley has proposed language to limit a party's obligation to disconnect a customer moving to another carrier. Midcontinent has stated that it will accept that language with modifications to ensure that Missouri Valley will comply with its number portability obligations and that Missouri Valley will complete the transition from resale to facilities-based service within the twelve month period that Missouri Valley agreed it would meet. Midcontinent's proposal is adopted with the additional bonus incentive set out in the previous section.

Midcontinent has proposed two changes to Missouri Valley's language. First, Midcontinent would insert language to ensure that both parties comply with the terms of the number portability attachment that require them to port the numbers of customers who are changing carriers. This language clarifies the parties' obligations and ensures there is no confusion.

The second change that Midcontinent proposes modifies language that limits Missouri Valley's obligation to transfer customers when Missouri Valley is attending to the needs of continuing customers. The testimony at the hearing demonstrated that such instances should be quite rare as Missouri Valley has the capacity to transfer as many as fifteen customers a day and there are few instances in which service outages will require

the attention of the personnel responsible for transferring customers. Thus, it is reasonable to adopt language that safeguards against abuse of the principle that a carrier should serve its own customers first. Midcontinent's proposal, which is limited to ensuring that the agreed to twelve-month transition is completed in a timely fashion, is a reasonable safeguard and does not impose an undue burden on Missouri Valley. At the time of the Commissioner's 2008 opinion, Midcontinent had 1575 resold lines with Missouri Valley. Currently, there are approximately 2100. If all 2100 Midcontinent resale customers chose to move for direct connection with Midcontinent, an average of 40 per week will need to be ported over for full transition within one year from interconnection. If, in fact, there are days when as many as 15 can be ported over and other days where the technicians have emergencies that take priority, it seems quite manageable that the transition can be done within the 12 month timeframe to which the parties previously agreed. In fact, the numbers suggest that as the technicians become more competent in the process, at a rate of 75 per week, all 2100 could be done in 28 weeks. Combined with the financial incentive in the previous section for Missouri Valley, the timeframes in this paragraph suggest that Missouri Valley will obtain a per customer compensation of \$33.33 minimum if all customers move to Midcontinent, and a slightly higher per customer rate if some do not.

Therefore, both of Midcontinent's modifications are appropriate. Consequently,

Midcontinent's proposal on this issue is adopted, as follows:

Pre-Ordering, Ordering, Provisioning, Maintenance and Repair Attachment

3.1.5 A Party's services in the transfer of its End User Customers to the other Party will be limited to disconnection of its service to the customer and compliance with its obligations under the Number Portability Attachment. Subject to MVC's obligations to complete the transfer of

customers within a twelve month period after the effective date of this Agreement and to transfer roughly an equal number of customers each week during the transition period, in cases of work schedule conflicts, a Party may attend to its continuing customers in preference to disconnection of a customer to be transferred.

X. Administrative Charges for Customer Changes

Under the current resale agreement, the charge for the processes necessary to sign up a new customer for resale service is \$22.50. Midcontinent has proposed to continue to use this charge in the new agreement; Missouri Valley has proposed to raise this charge to \$38.50 per request. Midcontinent's proposal is adopted.

Missouri Valley did not provide sufficient cost support for its proposed rate. While Missouri Valley witness Kilgore indicated that a cost analysis had been performed, his testimony also indicated that the analysis was based on fully loaded costs, not incremental costs, as required by the FCC's number portability rules. Although Mr. Kilgore suggested that high labor costs were a factor in setting the rate, he did not provide any evidence that his negotiated actual union labor costs in Williston are higher than in other rural areas of North Dakota where Midcontinent provides service, and Midcontinent showed that Missouri Valley's proposed rate would be 40 to 80 percent higher than what other rural carriers in North Dakota charge for the same functionalities.

The evidence also showed that the functions associated with changing a customer from one carrier to another are no more complex or time-consuming than the functions associated with activating a resale customer under the current agreement at the current rate. Therefore, there is no additional cost to be awarded for providing these functions.

In addition, Missouri Valley does not charge either Verizon Wireless or Sagebrush Cellular for the same functions, even though there is no material difference between performing these functions for wireless providers and performing them for a

landline carrier. This fact would justify reducing the charge, or eliminating it entirely, based on discrimination between providers. However, because Midcontinent has not objected to continuing to pay the current charge, the charge will not be eliminated.

The parties also disagreed about the extent to which charges under the agreement may be changed at the discretion of the parties. Midcontinent notes that there are benefits to certainty and that there are opportunities to modify charges as appropriate at a later date. Midcontinent's position on this issue is reasonable and does not foreclose the opportunity to ensure that legitimate costs are recovered.

For these reasons, Midcontinent's proposal on this issue is adopted, as follows:

Pricing Attachment

General.

The rates contained in this Pricing Attachment are the rates as referenced in the various sections on the Interconnection Agreement. MVC shall provide updated versions of the Tariff prior to the effective date of such change.

Service Order Charges

1. Service Order Charge (LSR)	
Facility Administration Charge	\$ 22.50
Primary Charge	\$ 18.00/request
Subsequent Charge	\$ 12.00/request
2. Service Order Cancellation Charge	\$ 12.00/request
3. Expedited Due Date in addition to SOC	\$ 32.00/request
4. Order Change Charge	\$ 12.00/request

Rate elements listed in this Attachment are not all inclusive.

XI. Consideration of the Financial Impact of Facilities-Based Interconnection

At the arbitrator's request, the parties briefed two related questions: (a) the extent to which the financial impact of facilities-based interconnection on Missouri Valley can be considered in this proceeding; and (b) whether there is any obligation to ensure that Missouri Valley is made whole for its losses as a result of the implementation of

facilities-based interconnection. The briefing demonstrated that the financial impact may not be considered as a general matter in an arbitration proceeding, and that there are alternative mechanisms available to Missouri Valley if it is financially impaired.

Section 252 of the Communications Act specifically limits arbitrators to considering open issues relating to the terms and conditions of the requested interconnection, and forecloses consideration of other matters. Matters outside the scope of the open issues are not subject to arbitration. Consideration of matters relating to the impact of competition on an incumbent carrier also would be a violation of the market-opening requirements of Section 253 of the Communications Act, which prohibits regulators from imposing barriers to competition. The imposition of conditions in an arbitration based on the impact of competition on the incumbent plainly would constitute a barrier to competition, and therefore would violate Section 253.

For these reasons, an arbitration also cannot consider whether to take actions to make an incumbent carrier “whole” for any presumed losses from competition. As Midcontinent noted, when given the opportunity to adopt a pricing mechanism for reciprocal compensation and other functionalities provided by incumbents that would have included recovery of “opportunity costs” related to competition, the FCC concluded that such additional compensation was inconsistent with the Communications Act.

Midcontinent also proved that Missouri Valley will have opportunities to recover lost revenues. The FCC’s access recovery mechanism discussed in detail in the testimony of Mr. Gates, for instance, will cover a substantial portion of Missouri Valley’s lost access revenues. In addition, Missouri Valley may seek regulatory relief from the Commission if it can demonstrate hardship, including rate increases, a waiver of its

carrier of last resort obligations or a suspension of obligations under Section 251(b) of the Communications Act, including the reciprocal compensation requirement for termination of local traffic. Additional relief is available from the FCC under its universal service and intercarrier compensation rules.

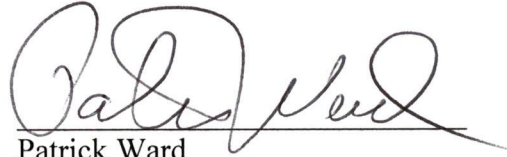
XII. Stay of Implementation of the Interconnection Agreement.

The parties also were asked to brief questions relating to the possibility that a stay might be requested and whether action on such a stay would be appropriate at this time. For the reasons described below, it is clear that an arbitrator in this particular proceeding does not have the power to grant a stay. In addition, there would be no basis to grant a stay even if an arbitrator had such power. First, the result of this arbitration – this decision – is a *recommendation*, not an *action of the Commission*. As a consequence, it is not ripe for a stay. The Commission is empowered, within the limits of the Communications Act, to modify or approve this recommended decision within 30 days and the power to adopt a different result. Until the final result is known, there is nothing to stay.

Second, an arbitrator in this particular proceeding lacks the power to grant a stay. The North Dakota Administrative Code specifically defines the authority of arbitrators, and that authority is limited to the matters required to arbitrate interconnection agreement disputes and to the issues presented by the petition and response as to open issues remaining between the parties. The Code does not confer any plenary power to decide issues beyond that limited scope granted by statute and rule and the issues presented by the parties after negotiation. The arbitrator has been guided by these fundamental principles in both excluding evidence at the hearing and drafting this opinion.

THEREFORE, IT IS RECOMMENDED THAT THE COMMISSION ADOPT AN ORDER CONSISTENT WITH THE CONCLUSIONS AND RECOMMENDATIONS ABOVE. COUNSEL FOR MIDCONTINENT IS REQUESTED TO PREPARE A DRAFT INTERCONNECTION AGREEMENT WHICH RECONCILES AND INCORPORATES THE RECOMMENDATIONS IN THIS ARBITRATION DECISION.

Dated: April 27, 2012

A handwritten signature in black ink, appearing to read "Patrick Ward", written over a horizontal line.

Patrick Ward
Arbitrator

