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April 26, 2012

Darrell Nitschke
Executive Director
North Dakota Public Service Commission
Capitol
600 East Boulevard, Twelfth Floor
Bismarck, ND 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 *Supplemental Brief of Midcontinent Communications* along with an *Affidavit of Mailing*.

Midcontinent acknowledges that the length of the supplemental brief was set by the arbitrator at five pages. Despite best efforts, Midcontinent's brief went slightly over this limit and is about five and a half pages long. To the extent there is an objection to the length of the brief, Midcontinent requests permission for an extension of the page limitation to allow for the attached brief to be filed.

These documents are also being transmitted electronically to your office. Also enclosed is a first page to each document to be file stamped and returned in the self-addressed, stamped envelope.

Thank you.

Sincerely,

PEARCE & DURICK

Zachary E. Pelham
Counsel to Midcontinent Communications

ZEP/ak
Enclosures
cc: David J. Hogue
Patrick J. Ward

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.	)	

SUPPLEMENTAL BRIEF OF MIDCONTINENT COMMUNICATIONS

Midcontinent Communications ("Midcontinent"), by its attorneys, hereby submits this supplemental brief in the above-referenced proceeding. Midcontinent continues to rely on the arguments in its initial brief as to most of the issues in this proceeding. This brief focuses on the attempts of Missouri Valley Communications ("Missouri Valley") to reargue the motion to dismiss and on specific misstatements of the law applicable to this proceeding. While Missouri Valley is entitled to reserve its right to assert the claims in the motion to dismiss in an appeal, that decision is binding at this stage in the proceeding. If Missouri Valley wished to reargue the Commission's decision, it should have sought reconsideration. Further, elements of Missouri Valley's argument are either foreclosed by prior rulings by the arbitrator or entirely incorrect.

I. The References to Missouri Valley's Claimed Revenue Losses Must Be Disregarded.

Missouri Valley's brief refers repeatedly to amounts of money that the company claims it will lose as a result of interconnection, and to possible economic impacts on Missouri Valley.[1] While the brief cites to Mr. Kilgore's testimony, in fact the only support for those amounts or for any particular economic impact came from a proposed exhibit to his

[1] *See, e.g.,* Post-Hearing Brief of Missouri Valley, Apr 20, 2012 at 5, 7, 9, 16, 23 (the "Missouri Valley Brief").

testimony, which was excluded from the record at the arbitration.[2] Thus, there is no factual basis for the arbitrator or the Commission to consider any claimed losses by Missouri Valley.

It is particularly important to disregard these claimed losses because the proposed exhibit was not excluded on the basis of a technicality. It was excluded because Mr. Kilgore, the sponsoring witness, could not explain how the exhibit was created.[3] He was unable to provide any basis for the cost projections in the exhibit other than a vague claim that Missouri Valley had discovered "anomalies" in the audited financial reports from 2007 and 2008, and could not explain how changes in 2007 and 2008 would affect expenses in 2012 through 2016.[4] Mr. Kilgore also did not know whether the exhibit's projected access revenues included revenues from toll free calls, the new FCC access recovery charge or money from the federal universal service fund.[5] In other words, the exhibit was excluded because there was no reason to believe that any of projections it included were accurate, let alone that the arbitrator or the Commission could rely on the bottom line. As a result, there is no basis for crediting any portion of that exhibit or any testimony that referred to it. Therefore, all of the references to Missouri Valley's claimed losses should be disregarded.

II. Missouri Valley's Suggestion that the Commission Modify Midcontinent's Certificate Is Barred by the Decision on the Motion to Strike.

Missouri Valley's prefiled testimony proposed that Midcontinent be required to serve the entire Williston exchange before the agreement could go into effect.[6] This portion of the testimony was outside the scope of the arbitration and inconsistent with the requirements of Section 253 of the Communications Act.[7] Consequently, Midcontinent's motion to strike this

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[2] Tr. at 307-16 (Kilgore cross-examination).
[3] Mr. Kilgore did not create the exhibit, and Missouri Valley did not produce the individual who did prepare it. Tr. at 312 (Kilgore cross-examination).
[4] Tr. at 307-10 (Kilgore cross-examination).
[5] Tr. at 312-13 (Kilgore cross-examination).
[6] *See* Prefiled Testimony of Mike Kilgore, Mar. 28, 2012, at 5 (passage subsequently deleted pursuant to order on motion to strike).
[7] Midcontinent Motion to Strike, Apr. 1, 2012, at 4, 6-7.

testimony was granted.[8] Missouri Valley now says Midcontinent should be required to operate as an eligible telecommunications carrier in Williston. This proposal is barred by the decision on the motion to strike and, further, ignores Midcontinent's current status in Williston.

First, this proposal is, at best, a variation of the proposal made in Missouri Valley's stricken prefiled testimony. As a result, it is both outside the scope of the arbitration and inconsistent with the market-opening requirements of Section 253, in just the same way as Missouri Valley's original proposal. That is more than sufficient reason to disregard it.

Second, Missouri Valley's claim that such a proceeding would be consistent with Section 253(f) misreads the law. Section 253(f) bars regulators from imposing requirements on competitors that wish to serve rural markets unless those requirements can be met by resale. It does not allow a regulator to impose any obligation to build out facilities.[9] Further, making Midcontinent an eligible telecommunications carrier would have no effect because Midcontinent already can serve customers in the market via resale. As a result, the proceeding would serve no useful purpose and would instead continue to deny the benefits of competition to Williston.

III. Missouri Valley Misstates the Legal Standard for Approval of an Agreement.

Missouri Valley repeatedly claims that the Commission should not approve any agreement reached through the arbitration because an agreement would not be in the public interest.[10] That argument is not properly raised at this time, since approval comes only after a final agreement has been submitted to the Commission. More significantly, though, Missouri Valley has misstated the applicable legal standard for approval.

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[8] Order Granting Midcontinent's Motion to Strike Testimony, Apr. 4, 2012.

[9] 47 U.S.C. § 253(f). Thus, if a rural carrier refuses to make resale available, a state regulator cannot impose eligible telecommunications carrier requirements on the competitor; if there is resale, the state regulator can require the competitor to purchase service from the incumbent to meet eligible telecommunications carrier obligations.

[10] Missouri Valley Brief at 10, 11-12, 20-24.

The relevant portion of Section 252(e) reads as follows:

> The State commission may only reject—
>
> > (A) *an agreement (or any portion thereof) adopted by negotiation* under subsection (a) of this section if it finds that—
> >
> > > (i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or
> > >
> > > (ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity; or
> >
> > *(B) an agreement (or any portion thereof) adopted by arbitration* under subsection (b) of this section if it finds that the agreement does not meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title, or the standards set forth in subsection (d) of this section.[11]

This text shows that the standards for approval of negotiated agreements and for arbitrated agreements are distinct. The public interest standard applies only to negotiated agreements. Arbitrated agreements can be rejected only for inconsistency with Section 251 or Section 252(d). Missouri Valley incorrectly imports the rule for negotiated agreements into the rule for arbitrated agreements. There is no basis to reject an arbitrated agreement as contrary to the public interest.

IV. Missouri Valley Mischaracterizes the Cases It Cites for the Proposition that the FCC's *Section 251(a) Declaratory Ruling* Is Incorrect.

As noted above, it was improper for Missouri Valley to argue the merits of the Commission's ruling on the motion to dismiss or the merits of Section 251(a) interconnection in its post-hearing brief. Midcontinent stands on the analysis in its opposition to the motion to dismiss and its post-argument brief on that motion. However, Missouri Valley makes new claims in its post-hearing brief based on a series of court decisions.[12] As shown below, Missouri Valley mischaracterizes those cases and Midcontinent's interconnection request.

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[11] 47 U.S.C. § 252(e)(2) (emphasis supplied).
[12] Missouri Valley Brief at 4-7.

First, *Iowa Utilities Board* addresses a specific statutory provision – the rural exemption in Section 251(f)(1), which applies only to Section 251(c) interconnection.[13] If the Congressional intent discussed in that decision has any relevance, it is that Congress wanted state commissions to consider economic burdens in evaluating Section 251(c) requests, but not in evaluating Section 251(a) requests.[14] Indeed, if Congress meant to apply the same analysis in section 251(a) cases, it would have made Section 251(a) subject to the rural exemption.

Second, the other cases cited by Missouri Valley have nothing to do with Section 251(a) . Nearly all of them refer to unbundled network elements, which are subject to Section 251(c)(3). Thus, the "blanket access" language in *AT&T v. Iowa Utilities Board,* the "equal partners" language in *U.S. Telecom Ass'n,* and the reference to "making a monopolist share . . . 'essential facilities'" in *Verizon New England* do not refer to interconnection at all.[15] Moreover, while *Southwestern Bell* does concern interconnection, it is Section 251(c) interconnection, and the Eighth Circuit affirmed a state decision to require interconnection consistent with FCC rules.[16]

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[13] *Iowa Utilities Bd. v. FCC,* 219 F.3d 744, [761] (2000).

[14] Missouri Valley's characterization of the difference between Section 251(a) and Section 251(c) interconnection as an "artificial dichotomy" is simply wrong. Just as with any statutory provision that specifies conditions before it applies, Section 251(c) interconnection has particular characteristics, including interconnection at any technically feasible point. 47 U.S.C. § 251(c)(2). A request that omits the specific Section 251(c) requirements is not a Section 251(c) interconnection request. Further, while Missouri Valley has focused on the point of interconnection, in fact Midcontinent did not ask for any of the other elements of interconnection specific to Section 251(c)(2). *See, e.g.,* Letter of Nancy Vogel, Director of Revenue Assurance, Midcontinent Communications, to Mike Kilgore, General Manager, Missouri Valley (June 14, 2011), at 1, attached to the Petition for Arbitration as Exhibit B). Missouri Valley's theory that any direct interconnection must be Section 251(c) interconnection has been rejected by the FCC since 1996 and by this Commission when it denied the motion to dismiss.

[15] *AT&T Corp. v. Iowa Utilities Bd.,* 525 U.S. 366, 390, 119 St. Ct. 721, 142 L.Ed. 835 (1999); *U.S. Telecom Ass'n v. FCC,* 290 F.3d 415, 424 (D.C. Cir. 2002), *Verizon New England, Inc. v. Maine Public Utilities Comm'n,* 509 F.3d 1, 9 (1st Cir. 2007). *AT&T* addressed interconnection issues, but the cited language is from the discussion of unbundled elements.

[16] *Southwestern Bell Tel., L.P. v. Missouri Pub. Serv. Comm'n,* 530 F.2d 676, 683-4 (8th Cir. 2008). The Eighth Circuit's conclusion that interconnection could be required was confirmed by the Supreme Court in *Talk America, Inc. v. Michigan Bell,* ___ U.S. ____, 131 S.Ct. 2254 (2011).

Third, the FCC's *Section 251(a) Declaratory Ruling* is a binding order.[17] It leaves no doubt that Midcontinent can request Section 251(a) interconnection and obtain arbitration. Missouri Valley's claim that this proceeding is vulnerable to appeal does not address three facts: (1) the *Section 251(a) Declaratory Ruling* is consistent with 15 years of FCC decisions; (2) the decision was not appealed by any party, and is now a final order; and (3) *Talk America* requires courts to give FCC interpretations of federal communications law great deference.[18] No decision that Missouri Valley cites is inconsistent with the *Section 251(a) Declaratory Ruling,* or touches on Section 251(a), and all of them were decided before *Talk America.* Even if those decisions were inconsistent with the declaratory ruling, they would be entitled to little weight.[19]

V. Conclusion

The arbitrator should recommend that the Commission adopt an interconnection agreement consistent with the proposals contained in Midcontinent's initial brief.

Dated: April 26, 2012

PEARCE & DURICK

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[17] Petition of CRC Communications of Maine, Inc. and Time Warner Cable for Preemption, *Declaratory Ruling,* 26 FCC Rcd 8259, 8269 (2011) (the *"Section 251(a) Declaratory Ruling"*).

[18] *Talk America,* ___ U.S. ____, 131 S.Ct. 2254.

[19] Midcontinent also notes that Missouri Valley claims that the Commission concluded that "Midcontinent and Missouri Valley's facilities are presently indirectly interconnected under the resale agreement." Missouri Valley Brief at 8, citing Order on Motion to Dismiss at 2. That is not what the order says. The order says – in separate paragraphs – that there is a resale agreement, and that the parties are indirectly interconnected for the purpose of exchanging long distance traffic. The resale agreement contains no provision for interconnection.

STATE OF NORTH DAKOTA

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Complainant,	)	
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vs.	)	
	)	
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	)	
Respondent.	)	

AFFIDAVIT OF MAILING

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

Annette Kirschenheiter, being first duly sworn, deposes and says that on the26th day of April, 2012, she mailed a copy of the foregoing *Supplemental Brief of Midcontinent Communications* by placing a true and correct copy thereof in an envelope, addressed to the following:

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Mr. Patrick J. Ward
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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
Annette Kirschenheiter

Subscribed and sworn to before me this 26 day of April, 2012.

Laurie Weigel
Notary Public

LAURIE WEIGEL
Notary Public
State of North Dakota
My Commission Expires Sept. 20, 2012