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APR 27 2012

**PUBLIC SERVICE COMMISSION**

April 26, 2012

North Dakota Public Service Commission  
ATTN: Mr. Darrell Nitschke  
600 East Boulevard Ave., Twelfth Floor  
Bismarck, ND 58505

**RE: Midcontinent Communications vs. Missouri Valley Communications, Inc.**  
**PU-11-543**

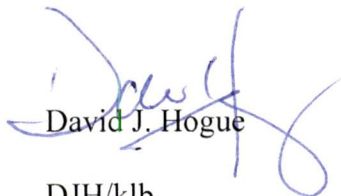
Dear Mr. Nitschke:

Enclosed please find one (1) original and eight (8) copies of the following document in the above-referenced matter:

***1. Missouri Valley Communications' Post Arbitration Reply Brief.***

If you have any questions regarding the same, please do not hesitate to contact me.

Very truly yours,

  
David J. Hogue

DJH/klb

cc: Patrick Durick  
Zachary Pelham  
J.G. Harrington  
Pat Ward  
Mike Kilgore

Enclosures

**64** **PU-11-697** Filed: 4/27/2012 Pages: 8  
**Post arbitration reply brief**

**STATE OF NORTH DAKOTA  
PUBLIC SERVICE COMMISSION**

Midcontinent Communications, a	)	
South Dakota Partnership,	)	Case No. PU-11-697
	)	
Petitioner,	)	<b>Missouri Valley Communications'</b>
vs.	)	<b>Post Arbitration Reply Brief</b>
	)	
Missouri Valley Communications, Inc.,	)	
	)	
Respondent.	)	

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Responding to the Arbitrator’s email invitation to file a reply brief “to respond to something in the other side’s briefing” of not more than five (5) pages, and resisting temptations to repeat arguments made previously made in comprehensive submissions, Missouri Valley responds to Midcontinent’s brief.

**1. “Stay” vs. “Implementation Date” of Proposed Interconnection Agreement.**

At the conclusion of the April 4-5, 2012 arbitration hearing in Bismarck, the Arbitrator directed the parties to submit briefs on specific issues, including whether the Arbitrator has the authority to recommend a stay of the implementation of the agreement?; and, if so, whether the North Dakota Public Service Commission (“Commission”) has the legal authority to impose a stay of the implementation of the agreement? Regardless of how the deferment occurs, Missouri Valley seeks to avoid a duplication and wasteful use of its limited resources by requiring the implementation not occur until judicial review. The Arbitrator and Commission possess the legal authority to defer interconnection either as a legal “stay” or by pushing back the implementation date of the interconnection agreement.

This is not a case in which a civil litigant seeks a stay as a means to avoid payment of a money judgment pending appeal. Indeed, in this case, Missouri Valley—the party requesting deferral of implementation—is likely to be the recipient of money from Midcontinent. Payment of money is not the

issue. Wasted labor resources in a business environment where a labor shortage is not readily filled, disconnecting and reconnecting approximately 2100 customers, and genuine concern about public safety, are all separate reasons to delay implementation of facilities based interconnection.

Midcontinent addressed the effective date of implementation of the Agreement as an issue calling for a legal stay, and it invites the Arbitrator to ignore the issue as not ripe for review, *Midcontinent brief at 28*, or not appropriate relief for failing to meet the elements of a legal stay under the North Dakota Rules of Civil Procedure. *Id. at 30*. Midcontinent overlooks the Commission's discretion to decide when its order should be effective under § 28-32-41, NDCC.

Missouri Valley addresses this issue in terms of a proposed interconnection agreement, the terms and conditions of which are within the authority of the Arbitrator. Midcontinent's brief suggests "the arbitrator's responsibility is to make a determination on 'the issues submitted for arbitration' and the issues submitted for arbitration do not include any discussion of a stay." *Id. at 29*. Missouri Valley agrees that the arbitrator's responsibility is to make a determination on the issues submitted for arbitration. But the issues submitted by Midcontinent for arbitration do include timing issues. The issue is not confined to whether a "stay" would be ordered by the Arbitrator. The issues are what should be the effective date and date of interconnection, issues that the parties might have agreed about or, lacking agreement, submitted to the Arbitrator as unresolved issues.

The Arbitrator does have authority to include a deferred effective date and interconnection date in an arbitrated agreement. Midcontinent has specified that the effective date and date of interconnection are issues for the arbitrator's consideration.

There are two related issues addressed by this question, 1) the effective date of an interconnection agreement, and 2) the date of interconnection. The two issues are intertwined, as the date of interconnection would be 60 days after the effective date. If the effective date is postponed so is the date of interconnection postponed.

Both are issues in arbitration under Midcontinent's November 14, 2011 petition and list of issues and Missouri Valley's December 8, 2011 response. The effective date of an agreement is included under

the issue that Midcontinent named General terms and conditions. Midcontinent listed Date of interconnection as a separate issue. Both were addressed in detail in Midcontinent's February 3, 2012 proposed interconnection agreement and Missouri Valley's February 28, 2012 response and in Missouri Valley's proposed interconnection agreement submitted with its April 20 brief. Midcontinent proposed the interconnection agreement would be effective on approval by the Commission and that interconnection be completed within 60 days after the Commission's approval of the agreement. Missouri Valley proposed the effective date and interconnection be deferred until federal judicial review. The parties might have agreed but did not, so the issue is squarely before the Arbitrator.

Whatever terms of an interconnection agreement are recommended by the Arbitrator, it is likely the Commission's action will be subjected to judicial review under Act § 252 (e)(6), a process that could be completed within one year, as indicated by the record of the earlier interconnection litigation between Midcontinent and Missouri Valley. Midcontinent's action for judicial review of PSC Case No. PU-08-61 was commenced in April 2009 by Midcontinent and concluded in April 2010 with U.S. District Judge Daniel Hovland's rejection of Midcontinent's petition for review. Midcontinent waited six months from receipt of the Commission's decision to seek judicial review. *Complaint*, ¶ 53, *Midcontinent v. NDPSC, et al. Civ. No. 1:09-cv-017, United States District Court for the District of North Dakota.*

Midcontinent has imagined scenarios about Missouri Valley intentionally prolonging judicial review, *Midcontinent brief at 5 citing Simmons testimony*, but Missouri Valley is on record as committing to judicial review within 30 days of a final Commission decision.

The arbitrator heard testimony from witnesses for both Midcontinent and Missouri Valley about the complications of interconnection and subsequent transition of over 2000 customers over a one year period after interconnection. If the effective date and date of interconnection are not deferred and judicial review and interconnection and transition activities were to proceed simultaneously, the outcome might be reversal of a completed process or perhaps reversal of interconnection processes still underway. To undo interconnection would obviously involve more costly complications and inconvenience to both parties and their customers.

The Arbitrator does have authority to include a deferred effective date and interconnection date in an arbitrated agreement because Midcontinent has specified that the effective date and date of interconnection are issues in the arbitration process. The record is clear about the practicality of a delay in the effective date and interconnection date under the agreement until the legal issues are finally resolved.

**2. The Arbitrator Should Reject Midcontinent's Irrelevant Competition and Service Quality Evidence and Rhetoric.**

Midcontinent has denied that its current proposal for facilities based interconnection is a § 251(c) request, but proceeds to offer evidence and legal argument as though it were. Midcontinent laces its pre-filed and live testimony, as well as its post-arbitration brief, with irrelevant philosophical arguments about the benefits of competition, while disparaging Missouri Valley's service quality in the Williston exchange. Missouri Valley acknowledges that consumers benefit from competition. Missouri Valley also acknowledges service quality by any telecommunications provider is an issue that deserves scrutiny from the Commission. But the benefits and detriments of competition, and service quality, are irrelevant issues within this arbitration as requested by Midcontinent.

Competition and service quality should be squarely addressed in a proceeding to determine whether a telecommunications company's "rural exemption" under Act § 251(f)(1) should be terminated. That is where Congress allowed that benefits of competition be weighed against competing policy concerns of Universal Service, and maintaining the financial viability of a rural company with carrier of last resort obligations. Under the Act, the Commission is directed by Act § 251(f)(1) to decide whether termination of a rural company's exemption from "competition" is in the public interest, i.e., consistent with the seven Universal Service principles the Congress identified in Act § 254.

**3. The Existing Resale Agreement between Midcontinent and Missouri Valley is not Relevant for Determining the terms of a proposed Facilities Based Interconnection Agreement.**

Midcontinent asks the Arbitrator and Commission to selectively adopt provisions of the current resale agreement between the parties as a basis for the proposed agreement for facilities based

interconnection. The Arbitrator and Commission should reject Midcontinent's misleading, apples to oranges comparisons. For example, Midcontinent suggests the existing LSR charges of \$22.50 under the existing resale agreement between Missouri Valley and Midcontinent should be the cost for transitioning customers. *Midcontinent post arbitration brief at 21*. Through the live testimony of general manager Mike Kilgore, Missouri Valley has described that the logistical process of transitioning a Midcontinent resale customer to a facilities based Midcontinent customer. *Kilgore live test. at 240, 7-20*. For a current Missouri Valley customer who transitions to a Midcontinent resale customer, Missouri Valley need only change its billing from the customer to Midcontinent. Under the existing resale arrangement, there is no work in Missouri Valley's central office, no "lift and lay" at the customer's home, and no coordination for restoring dial tone between the two companies.

An agreement between an ILEC and requesting CLEC to obtain access lines for the purpose of reselling local service is a way for the CLEC to directly compete with the ILEC. In this case, Midcontinent purchases a block of access lines from Missouri Valley at a discounted wholesale rate, offers the voice service with cable television, and internet, and promotes a "bundled" package that permits Midcontinent to effectively compete with Missouri Valley (and competing satellite video providers as well).

The duty of an ILEC to provide the resale of its access lines to a CLEC is a § 251(c) duty. 47 U.S.C. § 251(c) (4). Though Missouri Valley is a rural company that is exempt from all § 251(c) interconnection duties, including the duty to resell its access lines to a competitor such as Midcontinent under § 251(c)(4), Missouri Valley voluntarily entered into a resale agreement with Midcontinent.

Missouri Valley's willingness to submit to competition via resale with Midcontinent is based on Missouri Valley's conclusion resale based competition is in the public interest because it does not materially impair Missouri Valley's ability to serve the entire 393 square mile Williston exchange.

Facilities based competition is vastly different from resale competition, however. Most importantly, facilities based competition deprives Missouri Valley of the \$817,000 of annual revenue it would otherwise use to serve the entire 393 square mile Williston exchange. The Arbitrator and the

Commission should not be distracted by Midcontinent's gratuitous offer of a one time payment of \$70,000, as though it were some reasonable compromise for removing \$817,000 of revenue that would otherwise go to support the entire Williston exchange and transferring that sum to a South Dakota partnership and the shareholders of Comcast.

Dated this 26<sup>th</sup> day of April, 2012.

**Pringle & Herigstad P.C.**

**By:** /s/ David J. Hogue  
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STATE OF NORTH DAKOTA

PUBLIC SERVICE COMMISSION

Midcontinent Communications, a )
South Dakota Partnership, )
Petitioner, )
vs. )
Missouri Valley Communications, Inc., )
Respondent. )

Case No. PU-11-697

STATE OF NORTH DAKOTA )
COUNTY OF WARD )

AFFIDAVIT OF MAILING

Kristi Bailie being first duly sworn, deposes and states:

That she is a citizen of the United States of America, of legal age and is not a party to nor interested in the above entitled action; that on the 26th day of April, 2012, this Affiant deposited in the mailing department of the United States Post Office at Minot, North Dakota, a sealed envelope with postage thereon duly prepaid, containing a true and correct copy of the following documents in this action:

- 1. Missouri Valley Communications' Post Arbitration Reply Brief; and
2. Affidavit of Mailing.

That said envelopes were addressed to the following persons at their known addresses as follows:

Patrick W. Durick
Zachary E. Pelham
Pearce & Durick
P.O. Box 400
Bismarck, ND 58502-0400

J.G. Harrington
Dow Lohnes, PLLC
1200 New Hampshire Avenue, NW
Suite 800
Washington, DC 20036

The above documents were duly mailed in accordance with the provisions of the North Dakota Rules of Civil Procedure.

[Handwritten signature of Kristi Bailie]
Kristi Bailie

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

DAVID J. HOGUE
Notary Public
State of North Dakota
My Commission Expires Nov. 23, 2012

[Handwritten signature of David J. Hogue]
Notary Public
For the state of North Dakota