

**United States District Court
District of North Dakota**

Missouri Valley Communications, Inc.,)
)
Plaintiff,)
vs.)
)
North Dakota Public Service Commission and)
Kevin Cramer, Bonny Fetch and Brian Kalk,)
In their official capacities as Commissioners of)
the North Dakota Public Service Commission)
)
and)
)
Midcontinent Communications,)
A South Dakota Partnership,)
)
Defendants.)

COMPLAINT

Case No: 4:12-cv-091

Jurisdiction

1. The court has jurisdiction under 28 USC § 1331 because this action arises under federal law, 47 USC § 151 et. seq., including § 252 (e)(6) specifically conferring jurisdiction in any case where a party is aggrieved by a determination of a State commission under § 252. Missouri Valley Communications, Inc. ("Missouri Valley") seeks relief under § 252 (e)(6) and a declaratory judgment under 28 USC § 2201, et. seq.

Nature of Action

2. Missouri Valley Communications, Inc. and Midcontinent Communications ("Midcontinent") are telecommunications companies as defined in the Communications Act, 47 USC §151 et. seq. (The "Act")

3. On November 14, 2011, Midcontinent filed a petition with the North Dakota Public Service Commission ("PSC") seeking arbitration under § 252 of Midcontinent's request for interconnection under § 251 (a) for the purpose of exchanging local telecommunications traffic in the Williston, North Dakota exchange.

4. On November 21, 2011, Missouri Valley moved for dismissal of Midcontinent's petition.

5. On March 21, 2012, the PSC issued its order denying Missouri Valley's motion for dismissal ("March 2012 PSC Order").

6. On June 27, 2012, the PSC entered its order approving an interconnection agreement between Midcontinent and Missouri Valley adopted by arbitration. A copy the PSC decision and order (the "Interconnection Order") is attached hereto as exhibit 1.

7. Midcontinent claims rights to an interconnection with Missouri Valley's facilities under the Telecommunications Act of 1996, 47 U.S.C. § 251(a) for the purpose of exchanging local telecommunications traffic in the Williston exchange.

8. In its letter requesting interconnection with Missouri Valley and its petition for arbitration, Midcontinent requested a facilities based interconnection for the purpose of exchanging local telecommunications traffic under § 251(a) of the Act. See Interconnection Order, page 2.

9. Missouri Valley claims its duties under § 251(a) do not include interconnection for the exchange of local telecommunications traffic.

10. Missouri Valley is aggrieved by the PSC's determinations in its case No. PU-11-697 because the PSC's determinations do not meet all of the requirements of § 251.

Count 1

The PSC's determination does not meet the requirements of 47 USC § 251.

11. Midcontinent's 2011 petition for arbitration under § 252 of the Act, a request for interconnection for exchanging traffic under § 251(a), petitions for action by the PSC that is not authorized under the Communications Act.

12. Missouri Valley is not obliged under § 251(a) to interconnect with Midcontinent for the purpose of exchanging local telecommunications traffic in the Williston exchange.

13. Arbitration under § 252 is not authorized as a procedure for Midcontinent to obtain § 251(a) interconnection with Missouri Valley for the purpose of exchanging local telecommunications traffic in the Williston exchange.

14. The PSC and Midcontinent contend the FCC "clarified" the duties of a rural telephone company under § 251(a) in *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* (the "Declaratory Ruling"). See Interconnection Order at 2-3.

15. Missouri Valley contends the Declaratory Ruling did not and cannot change the interconnection obligations from which Missouri Valley is exempt as a "rural telephone company" under Act § 251(f).

16. Unless and until its rural exemption is terminated as provided in the

Act, Missouri Valley is exempt from the duty to interconnect with Midcontinent for the purpose of exchanging local telecommunications traffic.

Count 2 – Res Judicata

17. Missouri Valley is exempt from § 251(c)(2) interconnection duties, under § 251(f)(1)(A) (the “rural exemption”). There is a statutory procedure, § 251(f)(1)(B), to obtain § 251(c)(2) interconnection, a procedure invoked by Midcontinent in 2008.

18. Res judicata bars Midcontinent from relitigating its request for interconnection in Missouri Valley's Williston exchange after litigation in 2008 in which the PSC ordered “The rural exemption under 47 USC §251(f)(1)(A) for interconnection in Missouri Valley's Williston exchange is not terminated.” Order, PSC Case No. PU-08-61 (the “Rural Exemption Order, exhibit 2).

19. The PSC's Rural Exemption Order was affirmed in Midcontinent's action in Federal District Court for judicial review of the Order. See April 15, 2012 Order, DND Case No. 1:09-cv-017.

20. Midcontinent's earlier request dates back to February 8, 2008, when Midcontinent commenced a proceeding before the PSC seeking a determination that Missouri Valley had waived its rural exemption or, in the alternative, that Missouri Valley's rural exemption should be terminated.

21. An administrative hearing was held before the PSC on July 9-10, 2008.

22. On October 8, 2008, the PSC issued—the Rural Exemption Order, denying Midcontinent's request for termination of Missouri Valley's rural exemption.

23. On December 3, 2008, the PSC denied Midcontinent's petition for rehearing.

24. On April 8, 2009, Midcontinent brought an action in federal court. Midcontinent requested that the Court enter a declaratory judgment finding that the Rural Exemption Order is invalid and unenforceable as a matter of federal law, order the PSC and individual commissioners to suspend Missouri Valley's rural exemption as to Midcontinent immediately, issue a permanent injunction to prohibit the PSC from taking any action to enforce the PSC's Order, order Missouri Valley to conclude an interconnection agreement with Midcontinent, and award Midcontinent damages, attorney's fees, and interest.

25. Midcontinent and Missouri Valley each filed a motion for summary judgment.

26. On April 15, 2010, the court entered its order denying Midcontinent's motion and granting Missouri Valley's motion, effectively affirming the PSC's Rural Exemption Order denying Midcontinent's request for termination of Missouri Valley's rural exemption from interconnection for the exchange of local telecommunications traffic.

27. Midcontinent's November 14, 2011 petition for arbitration raised an issue actually litigated or which could have been litigated in PSC Case No. PU-08-61 and Federal District Court case No. 1:09-cv-017, to wit: whether Missouri

Valley has a duty under § 251(a) to interconnect with Midcontinent for the exchange of local telecommunications traffic in the Williston exchange.

28. Res judicata bars Midcontinent from relitigating its request for interconnection in Missouri Valley's Williston exchange after litigation in PSC Case No. PU-08-61 and Federal District Court case No. 1:09-cv-017.

Relief Sought

Missouri Valley requests, in the alternative,

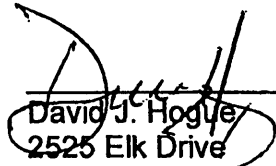
1. That the Court enter an order and declaratory judgment that the North Dakota Public Service Commission's June 27, 2012 Interconnection Order in its Case No. PU-11-697 is invalid and unenforceable as a matter of federal law under §§ 251(a), 251(c), 251(f) and 252 of the Communications Act, and that Missouri Valley is not obliged under the interconnection agreement adopted in arbitration and approved in Case No. PU-11-697.

2. That the Court enter an order and declaratory judgment that Midcontinent's November 2011 petition for arbitration of its request for interconnection under 47 USC under §§ 251(a) and 252 is barred and the North Dakota Public Service Commission's June 27, 2012 Order in its case No. PU-11-697 and the interconnection agreement approved on June 27, 2012 are invalid and unenforceable as a matter of federal and state common law of res judicata, and that Missouri Valley is not obliged under the interconnection agreement adopted in arbitration and approved in Case No. PU-11-697.

3. Missouri Valley also requests other relief as appropriate.

Dated this 9th day of July, 2012.

Pringle & Herigstad, P.C.

A handwritten signature in black ink, appearing to read "David J. Hogue", is written over a horizontal line. The signature is stylized and somewhat cursive.

David J. Hogue
2525 Elk Drive
P.O. Box 1000
Minot, ND 58702-1000
(701) 852.0381
Attorneys for the Plaintiff

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:

she is over the age of 18 years and not a party to this action and, on the 28th day of June, 2012, she deposited in the United States Mail, at Bismarck, North Dakota, two envelopes with certified postage, return receipt requested, fully prepaid, securely sealed and containing a photocopy of:

Order

The envelopes were addressed as follows:

Patrick Durick
Pearce & Durick
PO Box 400
Bismarck ND 58502

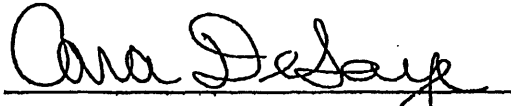
David Hogue
Pringle & Herigstad, P.C.
PO Box 1000
Minot ND 58702


Cert. No. 7011 2000 0002 0363 3691

Cert. No. 7011 2000 0002 0363 3707

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

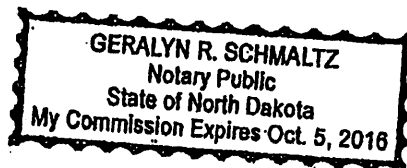
Subscribed and sworn to before me
this 28th day of June, 2012.





Notary Public

SEAL



**STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION**

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

Case No. PU-11-697

ORDER ON INTERCONNECTION AGREEMENT

June 27, 2012

Appearances

Commissioners Kevin Cramer and Brian P. Kalk.

Patrick Ward, Arbitrator, 316 N. 5th Street, Bismarck, North Dakota 58502-1695:

Patrick Fahn, Director Compliance and Competitive Markets, North Dakota
Public Service Commission.

Mark Gruman, Legal Counsel, North Dakota Public Service Commission

Preliminary Statement

On June 14, 2011 Midcontinent Communications (Midcontinent) requested from Missouri Valley Communications, Inc. (Missouri Valley) interconnection and exchange of local traffic under § 251(a) and (b)(5) of the Telecommunications Act. After the matter was unable to be resolved in mediation (please see Case No. PU-11-543), on November 14, 2011 Midcontinent filed with the North Dakota Public Service Commission (Commission) a petition for arbitration.

On November 21, 2011 Missouri Valley filed a motion to dismiss Midcontinent's petition for arbitration. 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.

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.

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, including the regulations prescribed by the Commission pursuant to section 251, or the standards set forth in subsection (d) [of section 252]."

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 Rcd 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.* (emphasis added). 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.

On April 27, 2012 Arbitrator Pat Ward issued an Arbitrator's decision, constituting a resolution of the remaining issues submitted for arbitration. Those issues are: (1) Effective Date of the Interconnection Agreement; (2) Dispute Resolution for Impasses as to Points of Interconnection; (3) Reciprocal Compensation; (4) Compensation for ISP-Bound Traffic; (5) Compensation for Termination of Toll Traffic; (6) Calculation of Transition Payments; (7) Obligations to Transfer Customers; (8) Administrative Charges for Customer Changes.

On May 29, 2012 Midcontinent filed with the Commission an Interconnection Agreement, pursuant to Arbitrator Ward's April 27, 2012 Arbitrator's decision and N.D. Admin. Code § 69-02-10-30.

N.D. Admin. Code § 69-02-10-32 requires approval or rejection of the May 29, 2012 Interconnection Agreement within thirty days of its filing with the Commission.

The Commission makes the following Conclusions of Law and Order:

Conclusions of Law

1. The Commission has jurisdiction over the parties and subject matter hereto.

2. The Commission takes Administrative Notice of Docket Item 62 for Case No. PU-11-697, "Recommended decision of the arbitrator."

3. The Commission takes Administrative Notice of Public Service Commission Docket Item 65 for Case No. PU-11-697, "Jointly filed interconnection agreement."

4. The May 29, 2012 agreement filed by Midcontinent with the Commission is an Interconnection Agreement for the purposes of N.D. Admin. Code § 69-02-10-30.

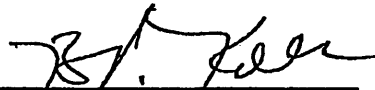
Order

The Commission Orders that the May 29, 2012 Interconnection Agreement is APPROVED.

PUBLIC SERVICE COMMISSION



**Kevin Cramer
Commissioner**



**Brian P. Kalk
Chairman**

Vacant

STATE OF NORTH DAKOTA

PUBLIC SERVICE COMMISSION

**Midcontinent Communications/Missouri
Valley Communications, Inc.
Rural Exemption
Investigation**

Case No. PU-08-61

**Missouri Valley Communications, Inc.
Suspend/Modify Interconnection Requirements
Application**

Case No. PU-08-176

AFFIDAVIT OF SERVICE BY CERTIFIED MAIL

**STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH**

John Hamre deposes and says that:

he is over the age of 18 years and not a party to this action and, on the 27 day of October, 2008, he deposited in the United States Mail, at Bismarck, North Dakota, two envelopes with certified postage, return receipt requested, fully prepaid, securely sealed and containing a photocopy of:

Corrected Findings of Fact, Conclusions of Law, and Order

The envelopes were addressed as follows:

John M. Olson, P.C.
Attorney for: Midcontinent
Communications, Inc.
418 E. Broadway Ave., Suite 9
Bismarck, ND 58501



David J. Hogue
Pringle & Herigstad, PC
Attorney for: Missouri Valley
Communications, Inc.
PO Box 1000
Minot, ND 58702-1000

Cert. No. 7007 0710 0003 6055 1503

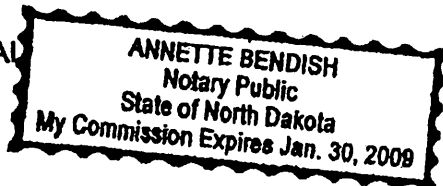
Cert. No. 7007 0710 0003 6055 1510

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

Subscribed and sworn to before me
this 27 day of October, 2008



Notary Public

SEAL



**STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION**

**Midcontinent Communications/Missouri Valley
Communications, Inc.
Rural Exemption
Investigation**

Case No. PU-08-61

**Missouri Valley Communications, Inc.
Suspend/Modify Interconnection Requirements
Application**

Case No. PU-08-176

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

October 8, 2008

Appearances

Commissioners Susan E. Wefald, Kevin Cramer, and Tony Clark.

John M. Olson, John M. Olson, P.C., 418 East Broadway, Suite 9, 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.

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

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

Allen Hoberg, Office of Administrative Hearings, 1701 North Ninth Street, Bismarck, North Dakota 58501-1882, as Administrative Law Judge.

Preliminary Statement

On November 14, 2007, Midcontinent Communications (Midcontinent) made a request for a facilities based interconnection agreement with local number portability (LNP) services for the Williston North Dakota exchange from Missouri Valley Communications, Inc. d/b/a Nemont (Missouri Valley). 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, Case No. PU-08-61.

Midcontinent requests that the Commission determine that Missouri Valley has waived its rural exemption, or in the alternative that the Commission conduct an inquiry

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Corrected Findings of Fact, Conclusions of Law, and
Order

Public Service Commission

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Order

Public Service Commission

under the provisions of 47 USC § 251(f)(1)(A) for the purpose of determining whether to terminate Missouri Valley's exemption from providing its services as requested by Midcontinent.

On April 9, 2008, Missouri Valley filed an Application for Suspension under 47 USC § 251(f)(2), Case No. PU-08-176. Missouri Valley requests that the Commission grant to Missouri Valley a suspension of the requirements of subsections (b) and (c) of section 251 for Missouri Valley's telephone exchange service facilities in the Williston exchange area for such duration as the Commission determines.

On May 1, 2008, Administrative Law Judge Allen Hoberg issued an Order for Consolidation and Scheduling pursuant to Stipulation for Consolidation filed by the parties consolidating these cases for hearing.

On May 7, 2008, the Commission issued a Notice of Consolidated Hearing scheduling a hearing in Cases No. PU-08-61 and No. PU-08-176 for July 9, 2008, and identifying the following issues:

1. Whether the request of Midcontinent is unduly economically burdensome.
2. Whether the request of Midcontinent is technically feasible.
3. Whether the request of Midcontinent is consistent with 47 U.S.C. § 254 (other than subsections (b)(7) and (d)(1)(D) thereof).
4. The implementation schedule for compliance with the request should the exemption be terminated.
5. Whether suspension or modification is necessary.
6. Whether suspension or modification is consistent with public interest, convenience, and necessity.
7. The extent and duration should any suspension or modification be granted.

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

The Commission finds:

1. 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).

2. 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 is also a cable operator providing video programming. 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. Missouri Valley provides the nine services or functionalities designated in Federal Communications Commission (FCC) rules, 47 CFR 54.101. These are: (1) voice grade access to the public switched network; (2) flat rated local service pricing where the incremental cost of local usage to the customer is free; (3) dual tone multi-frequency (DTMF) signaling, commonly referred to as touch tone to support efficient call set up; (4) single party service; (5) access to emergency services through compliance with E911 requirements; (6) access to operator services; (7) 1 plus equal access to interexchange carriers; (8) access to directory assistance through the dialing of 411; and (9) toll limitation for qualifying low-income consumers and the offering of lifeline service. Missouri Valley complies with the requirement to advertise the availability and charges for these nine services.

4. 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, including low income, low density, rural insular, and high cost customers in a manner that is reasonably comparable and at rates equivalent to those charged in the municipality of Williston.

5. In April 2008, there were 8,806 access lines in the Williston exchange, including 1,575 lines resold to Midcontinent and 7,231 lines served by Missouri Valley. The Williston exchange area is 390.6 square miles, including approximately 7.3 square miles that comprise the City of Williston. As of April 2008, Missouri Valley served the 8,806 access lines in the area over a network of 933.3 network route miles of telecommunications cable, of which 477 miles are in the City of Williston and 456.3 miles serve the rural portion of the exchange beyond the city limits. Of the 8,806 access lines, approximately 7,065 are inside the Williston City limits, including the lines that are resold to Midcontinent. 1,741 lines served by Missouri Valley are outside of the Williston city limits.

Bona Fide Request

6. Under Section 252(a)(1) of the Telecommunications Act of 1934 as amended by the Telecommunications Act of 1996 (Act), an incumbent local exchange carrier may negotiate and enter into a binding agreement with a requesting telecommunications

carrier upon receiving a request for interconnection, service or network elements under Section 251. Section 251(c) requires incumbent local exchange carriers to interconnect with competitive local exchange carriers and to negotiate the terms of interconnection agreements.

7. Under Section 251(c) of the Act, an incumbent local exchange carrier is obligated to provide (1) good faith negotiation, (2) facilities and equipment interconnection, (3) unbundled network elements, (4) retail services at wholesale rates, (5) notice of network changes, and (6) collocation of equipment.

8. Under Section 251(f)(1)(A) of the Act, a rural telephone company is exempt from the requirements of Section 251(c) until (1) the rural company has received a bona fide request for interconnection, services, or network elements, and (2) the state commission determines (under subparagraph B) that such request is not unduly economically burdensome, is technically feasible, and is consistent with Section 254 of the Act.

9. Missouri Valley acknowledged that Midcontinent's November 14, 2007 request for interconnection is a bona fide request.

10. Midcontinent has made a bona fide request for interconnection, which a local exchange carrier must provide under Section 251(c) of the Act. Midcontinent has specifically requested facilities-based interconnection with local number portability.

Rural Exemption

11. Under Section 251(f)(1)(A) of the Act, Missouri Valley is exempt from the requirement to provide the service requested until Missouri Valley has received a bona fide request from Midcontinent and the Commission determines (under subparagraph B) that such "...request is not unduly economically burdensome, is technically feasible, and is consistent with section 254..." To initiate a Commission proceeding to terminate Missouri Valley's rural exemption, Midcontinent is required to submit to the Commission a Section 251(f)(1)(B) notice of its bona fide request. Under Section 251(f)(1)(C), the rural exemption from interconnection is not available to a rural telephone company if the competitive local exchange carrier that has requested interconnection is a cable operator providing video programming and the rural telephone company also provides video programming. Midcontinent is a cable operator, but Missouri Valley is not, so the exemption remains in effect unless it is terminated under Section 251(f)(1)(B).

12. Under Section 251(f)(1)(B) of the Act and *Iowa Utilities Board v. Federal Communications Commission*, 219 F.3d 744, at 759-763 (8th Cir. 2000) Midcontinent has the burden of proving that Midcontinent's requested interconnection is not unduly economically burdensome, is technically feasible, and is consistent with Section 254.

Undue Economic Burden

13. Shawn Hanson, General Manager of Missouri Valley, testified that the economic impact from Midcontinent's requested interconnection would be a cumulative net revenue loss over the 2009-2012 timeframe of \$3.58 million due to Missouri Valley customers migrating to Midcontinent as a facilities-based service provider rather than as a service reseller. This impact would be a 31% reduction of annual net revenues in 2009 and a 56% reduction of annual net revenues in 2012. Hanson testified that such a loss of revenues would not damage Missouri Valley's ability to continue to offer service but would damage Missouri Valley's ability to invest in facility upgrades and replacements. Hanson testified that a loss of \$3.58 million would be unduly economically burdensome.

14. Midcontinent witness Scott Lundquist testified that the economic impact from the interconnection would be a cumulative net revenue loss over the 2009-2012 timeframe of \$888,577. The \$2.69 million difference between Lundquist's and Hanson's economic impact is due to four adjustments Lundquist proposed to Missouri Valley's impact analysis. The four adjustments were named and calculated as Migration Timing \$154,300, Resale Line Growth Factors \$572,600, Special Access Revenues \$367,600 and \$2.234 million adjustment to universal service fund (USF) revenue; or \$3.33 million total adjustment. Lundquist's testimony indicated the adjustments "interact" and therefore actually result in the \$2.69 million difference. Lundquist did not explain how the proposed adjustments interact or how much each adjustment contributed to the \$2.69 million.

15. Lundquist based his Migration Timing adjustment of \$154,300 on an assumption that Midcontinent would take six months, from January 1, 2009 through June 2009 to migrate its existing resale-based customers to Midcontinent's facilities. Missouri Valley's analysis assumes Midcontinent would complete the migration by January 1, 2009.

16. Midcontinent has not met its burden of proof on its proposed Migration Timing adjustment of \$154,300. Midcontinent's evidence about migration timing is not more persuasive than Missouri Valley's evidence.

17. Regarding the Resale Line Growth Factors adjustment of \$572,600, Lundquist projected linear growth and Hanson projected compounding growth in the numbers of Missouri Valley customers migrating to taking service from Midcontinent. Linear growth projections produce a lower estimate of the numbers of customers, and that produces a lower estimate of the financial impact of the interconnection. Missouri Valley's Exhibit 1 shows the projected growth in Midcontinent's customer count, beginning at 1,488 in 2007 growing to 3,663 over the study period through 2012, a total growth of about 1,800.

18. Midcontinent has not met its burden of proof on its proposed Resale Line Growth Factors adjustment of \$572,600. Midcontinent's evidence about resale line growth is not more persuasive than Missouri Valley's evidence.

19. Regarding the Special Access Revenues proposed adjustment of \$367,600, Lundquist testified Midcontinent could offer special access services over its existing cable TV facilities without the interconnection, so Missouri Valley's estimate of net revenue loss due to customer migration to Midcontinent's special access service would not occur because of the interconnection. Therefore, Lundquist's adjustment reflects no net revenue loss to Missouri Valley due to interconnection-related migration of special access service customers.

20. Hanson testified that business customers would move special access service at the same time voice service is moved.

21. Lundquist's testimony that there should be no net revenue loss to Missouri Valley due to migration of its customers to become special access customers of Midcontinent is not more persuasive than Hanson's testimony that there would be a net revenue loss due to migration of its customers to become special access customers of Midcontinent.

22. Midcontinent has not met its burden of proof on its proposed Special Access Revenues adjustment of \$367,600, but Missouri Valley makes a compelling argument that, over time with full facilities-based competition, special access service revenue to Missouri Valley will decline.

23. Lundquist testified that the interconnection-related revenue losses to Missouri Valley could be offset by significant additional federal universal service funding obtained via the safety valve mechanism. Lundquist therefore proposed a \$2.234 million adjustment to Missouri Valley's net revenue loss. Lundquist testified that additional funding under the federal Safety Valve mechanism would be available to Missouri Valley as line and revenue losses drive up per line costs.

24. Hanson testified that Missouri Valley does not qualify for support from the safety valve mechanism. Safety valve is an official shorthand expression to describe a provision of 47 CFR 54.305 that is unofficially referred to as the parent trap rule. The parent trap rule limits a rural telephone company's receipt of universal service funds for an acquired exchange that was not historically qualified under USF rules. Missouri Valley is a rural telephone company affected by the parent trap rule, because the Williston exchange was not qualified under USF rules when it was owned by Citizens Telecommunications Company of North Dakota, Inc. Specifically, the parent trap rule prevents a rural telephone company from receiving universal service funds to support or subsidize old investment in the exchange, investment that was not made by the rural telephone company but was made by the former owner. The safety valve exception permits a rural telephone company that is subject to the parent trap rule to receive some USF support for post-acquisition new investments in rural infrastructure, investments that are made by the rural telephone company. ("Universal Service Order," Fourteenth Report and Order, FCC 01-257 (May 23, 2001) Paragraphs 91-135.) The FCC's explanation of the safety valve exception emphasized that rural telephone companies "will only receive support for new investment in rural infrastructure." *Id.* The FCC also stated that excessive fund growth related to the impact on the fund of competitive entry

and incumbent line loss to CLECs in rural areas should be closely monitored (*Id.* Para 101, 124, 131.)

25. Lundquist proposed in his testimony that Missouri Valley apply for USF support under the safety valve rule where the post-acquisition number in the formulae is not new investments made by Missouri Valley, but is a post acquisition per line costs increase, "...which is likely to happen if Missouri Valley loses lines in the case of Midcontinent's entry."

26. The argument that Missouri Valley would be able to receive additional USF subsidies under the safety valve mechanism if Missouri Valley experiences interconnection-related line and revenue losses in the case of Midcontinent's entry is not persuasive.

27. Midcontinent witness Timothy Gates testified that a cumulative net revenue loss over the 2009-2012 timeframe of \$888,577 would not be unduly economically burdensome. Gates' testimony did not speak to whether any amounts larger than \$888,577 were not unduly economically burdensome.

28. Gates testified that unduly economically burdensome is a point at which the competition damages Missouri Valley's ability to operate efficiently or to continue to offer services.

29. The Commission's interpretation is guided by the opinion of the Court in *Iowa Utilities Board v Federal Communications Commission*, 219 F.3d 744 (8th Cir. 2000) which states in pertinent parts:

In the Act, Congress sought both to promote competition and to protect rural telephone companies as evidenced by the Congressional debates. ... There can be no doubt that it is an economic burden on an incumbent local exchange carrier (ILEC) to provide what Congress has directed it to provide to new competitors in 251(b) or 251(c). Because the small and rural ILECs, while they may be entrenched in their markets, have less of a financial capacity than larger and more urban ILECs to meet such a request, the Congress declared that their statutorily granted exemption should continue unless the state commission found all three pre-requisites for terminating the exemption. By limiting the phrase 'unduly economically burdensome' to exclude burdens ordinarily associated with competitive entry, the FCC has impermissibly weakened the broad protection Congress granted to small and rural telephone companies. (*Iowa v FCC*, at 761)

30. The rural exemption is not limited to protection against the most extreme economic burdens such as threats to economic survival. Even though the loss of revenue might not threaten Missouri Valley's ability to offer existing services in the immediate future, its efficiency in offering those services would be damaged because

the revenue loss would unduly impair Missouri Valley's ability to invest in facility upgrades and replacements.

31. Gates testified that the impact on the Nemont group of companies in total should be the relevant benchmark for determining undue economic burden. Neither Section 251(f)(1) of the Act, 47 CFR 51.405, nor the FCC's Local Competition Order supports a finding that the impact on the Nemont group of companies in total should be the relevant benchmark. The Commission agrees that consideration as to economic burden that the interconnection would impose must be limited to the economic burden that the interconnection would impose on Missouri Valley.

32. Midcontinent has not proven that a cumulative net revenue loss over the 2009-2012 timeframe of \$3.58 million is not unduly economically burdensome, or that a smaller financial impact is not unduly economically burdensome.

33. Midcontinent's evidence that the economic impact is \$888,577 is not more persuasive than Missouri Valley's evidence that the economic impact is \$3.58 million.

Technical Feasibility

34. Midcontinent presented testimony that the interconnection with number portability is technically feasible. Missouri Valley does not contend that interconnection is not technically feasible.

35. The interconnection, with number portability, is technically feasible.

Consistent with Section 254

36. Under 47 U.S.C. § 254, the policies for the preservation and advancement of universal service are based on the principles that quality services should be available at just, reasonable, and affordable rates; that advanced telecommunications and information services should be provided in all regions of the Nation; that consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services that are reasonable comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas; that elementary and secondary schools and classrooms, health care providers, and libraries should have access to advanced telecommunications services.

37. Gates testified that the "...key issue" of 'unduly economically burdensome' also affects "... whether interconnection will harm Missouri Valley's ability to meet its universal service requirements." Gates testified the interconnection would not be unduly economically burdensome to Missouri Valley and that "Midcontinent's interconnection with Missouri Valley will not harm Missouri Valley's ability to maintain its universal service obligations."

38. Hanson testified that economic burdens of the interconnection would impair Missouri Valley's performance of its universal service obligations. Hanson testified Midcontinent's impact analysis showed that Missouri Valley's annual net revenues would be substantially reduced as a consequence of the interconnection while its universal service obligations and the expenses to perform those obligations would be unchanged and likely increased. Hanson testified that universal service is being redefined and the new expanded definition of universal service will likely include broadband Internet access. ILECs and eligible telecommunications carriers will likely be required to have reliable, predictable, and sufficient financial resources to upgrade facilities to comply with this revised definition of universal service. Loss of substantial proportions of revenue as a consequence of the interconnection would impair Missouri Valley's ability to perform its universal service obligations in the entire Williston exchange area, including all the area outside the city of Williston where its line costs are far greater and where Midcontinent has no facilities.

39. Hanson testified that Missouri Valley does not have the same financial resources as other rural telephone companies to perform its universal service obligations. There are six universal service support categories that are applicable to rural ILECs. Missouri Valley does not qualify to receive universal service support under five categories. Missouri Valley, designated as an eligible telecommunications carrier in the Williston exchange, is eligible to receive universal service support for providing Lifeline services.

40. Lundquist testified, "... despite the 'parent trap' rule, Missouri Valley may be able to receive significant additional USF subsidies...via the safety valve mechanism," \$2.234 million over the 2009-2012 timeframe. The Commission is not persuaded that Missouri Valley would be able to receive additional USF subsidies under the safety valve mechanism.

41. Missouri Valley provides discounts to Lifeline consumers. Hanson testified that the interconnection resulting in Missouri Valley's declining revenues would have a negative impact on Missouri Valley's ability to continue to offer the Lifeline discount. Midcontinent has not requested and is not designated as an eligible telecommunications carrier to receive universal service support for providing Lifeline services in the Williston exchange (Order, Case No. PU-05-272).

42. Missouri Valley's testimony regarding the parent trap rule and safety valve mechanism are persuasive and Midcontinent has not met its burden of proof that the interconnection would be consistent with 47 U.S.C. § 254 regarding universal service.

Implementation Schedule

43. Midcontinent witness Tom Simmons testified that implementation should allow 30 days for negotiations and 60 days for actual connection and that interconnection could be implemented sooner than 90 days. Missouri Valley testified that interconnection could be implemented within 90 days.

44. An implementation schedule for the interconnection is an issue if the Missouri Valley's rural exemption is terminated, the issue is moot if the rural exemption is not terminated.

Suspension of Interconnection Requirements

45. Suspension of Missouri Valley's interconnection requirements is an issue if the Missouri Valley's rural exemption is terminated, the issue is moot if the exemption is not terminated.

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. Midcontinent failed to prove that the request of Midcontinent to Missouri Valley for interconnection in the Williston exchange is not unduly economically burdensome.
3. Midcontinent failed to prove that the request of Midcontinent to Missouri Valley for interconnection in the Williston exchange is consistent with 47 U.S.C. §254, regarding universal service.
4. The issue of technical feasibility is moot, where Midcontinent failed to prove that the request of Midcontinent to Missouri Valley for interconnection is unduly economically burdensome and not consistent with 47 U.S.C. §254, regarding universal service.

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

Order

The Commission Orders:

The rural exemption under 47 U.S.C. § 251(f)(1)(A) for interconnection in Missouri Valley's Williston exchange is not terminated.

PUBLIC SERVICE COMMISSION


Tony Clark
Commissioner


Susan E. Weald
President


Kevin Cramer
Commissioner

DISSENT
Commissioner Susan Wefald

October 8, 2008

**Midcontinent Communications/Missouri
Valley Communications, Inc.
Rural Exemption
Investigation**

Case No. PU-08-61

**Missouri Valley Communications, Inc.
Suspend/Modify Interconnection
Requirements
Application**

Case No. PU-08-176

I do not agree with Conclusion of Law #2 in this Order which states that "Midcontinent failed to prove that the request of Midcontinent to Missouri Valley for interconnection in the Williston exchange is not unduly economically burdensome."

The Findings of Fact in this Order, #s 14, 15, 17, 19, 23, demonstrate that Midcontinent put forth strong factual arguments on the potential economic impact to Missouri Valley if the rural exemption is lifted. For example, in Finding of Fact #15, the order notes that Midcontinent witness Lundquist based his Migration Timing adjustment of \$154,300 on an assumption that Midcontinent would take six months, from January 1, 2009 through June 2009, to migrate its existing resale-based customers to Midcontinent's facilities. Missouri Valley's analysis assumes Midcontinent would complete the migration by January 1, 2009. I agree with Midcontinent on this matter, since Missouri Valley has a limited ability to handle new orders, and some 1570 customers need to be migrated. Midcontinent's testimony stated that in similar situations in South Dakota, it has taken five to seven months to migrate its embedded customer bases from resold service to Midcontinent's own facilities.

Also, the Commission's Findings of Fact in this Order do not reflect any of the information that was presented by Midcontinent regarding depreciation expenses, and that Missouri Valley did not invest all, most, or even one-third of their cash flow in 2007 (\$2.75 million) in its plant and network. (pages 7 and 8, Reply Brief of Midcontinent Communications dated August 11, 2008.)

My preference in this case, based on the facts, would have been to terminate Missouri Valley's rural exemption and then require a suspension of that termination until Midcontinent met the requirements in 47 USC Section 214 E 1 to be a designated eligible communication carrier. This would require Midcontinent to serve the entire service area (not just the City of Williston) as an eligible communication carrier, just as Missouri Valley does now.


Susan E. Wefald, Commissioner