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I. NATURE OF ACTION

This is an action under 47 USC §252(e)(6) for judicial review of an order of the North Dakota Public Service Commission (“PSC”) approving an arbitrated interconnection agreement between Missouri Valley Communications, Inc. (“Missouri Valley”) and Midcontinent Communications (“Midcontinent”). This action is the second time the parties have litigated in this court about the underlying issue, to wit: whether Missouri Valley is obliged by the Federal Communications Act to interconnect with Midcontinent for the purpose of exchanging local telecommunications traffic in Williston, North Dakota.

Like the first case, this second case comes to the court under Rule 56 because judicial review procedures do not present the court with any genuine issue as to any material fact. The complaint asserts legal issues and conclusions that defendants genuinely dispute. Midcontinent Answer ¶¶ IX, X and XI; PSC Answer ¶¶ 9 through 18, 27 and 29 . The gravamen of the complaint is admitted by both defendants as to the facts. This case, like the first where Midcontinent moved for summary judgment (*United States District Court, DND, Case No. 1:09-cv-017*) is ripe for summary judgment because there is no genuine issue as to any material fact.

A. Background Summary

In November, 2007 Midcontinent requested interconnection with Missouri Valley under 47 USC §251(c). Missouri Valley denied the request. After proceedings in the North Dakota Public Service Commission under 47 USC §251(f) where Missouri Valley prevailed, in 2009 Midcontinent commenced an action in this court for judicial review of the PSC’s Order in Case No. PU-08-61, (the “Rural Exemption Order”), Appendix A. The Court dismissed Midcontinent’s action, effectively affirming the PSC’s decision and order. *Order, United States District Court, DND, Case No. 1:09-cv-017, Apr. 15, 2010* (the “Federal Court Order”,

Appendix B.)

In June 2011, Midcontinent again requested interconnection between Missouri Valley and Midcontinent in Williston, ND for the purpose of exchanging local telecommunications traffic in the Williston exchange. Missouri Valley again denied the request. On November 14, 2011, Midcontinent petitioned the PSC to arbitrate its request and compel Missouri Valley to interconnect with Midcontinent, citing 47 USC §§ 251(a) and 252(b) and a 2011 declaratory ruling, *FCC 11-83* (the “Ruling,” *Appendix C.*)

Missouri Valley moved to dismiss Midcontinent’s November 14, 2011 petition on two grounds:

- 1) Missouri Valley is not obliged under Act § 251(a) to interconnect with Midcontinent and interconnection may not be compelled under § 252(b) for the purpose of exchanging local traffic.
- 2) Res judicata bars Midcontinent from relitigating in 2011 its request for interconnection in Missouri Valley’s Williston exchange after litigation in 2008, and

On March 21, 2012, the PSC denied Missouri Valley’s motion to dismiss (“PSC 2012 Order,” *Appendix D*) and on June 27, 2012 approved an interconnection agreement produced in compulsory arbitration, (the “Interconnection Order” *Appendix E.*) Missouri Valley commenced this action for judicial review of the PSC’s action under § 252(e)(6) because the PSC’s action does not meet the requirements of § 251, particularly § 251(f).

B. Summary of Argument

Section 251(a) of the Communications Act does not include duties of interconnection for the exchange of local traffic. Those duties are addressed in § 251(c)(2). Missouri Valley is exempt from § 251(c)(2) interconnection duties under the Communications Act, § 251(f)(1)(A). There is a statutory procedure, § 251(f)(1)(B), for a CLEC to obtain § 251(c)(2) interconnection

with an exempt rural ILEC. There is no statutory procedure other than § 251(f)(1)(B) for Midcontinent to obtain interconnection for the exchange of local traffic in Missouri Valley's Williston exchange. Section 252(b) does not authorize the PSC to compel interconnection where there is no duty of interconnection under § 251(a).

Midcontinent is barred under *res judicata* from relitigating its previous request for interconnection with Missouri Valley for the purpose of exchanging local telecommunications traffic in the Williston exchange.

C. The Parties

Missouri Valley is a North Dakota corporation authorized by the PSC under a certificate of public convenience and necessity to provide local exchange telecommunications services in the Williston, North Dakota exchange. Missouri Valley is an incumbent local exchange carrier ("ILEC") and a rural telephone company. (*Orders, PSC Cases No. PU-2779-02-451 and 452.*)

Midcontinent is a South Dakota general partnership registered with the PSC to provide local exchange telecommunications services. Midcontinent is a competitive local exchange company ("CLEC") and is a reseller of telecommunications service in the Williston exchange. Midcontinent has a certificate of public convenience and necessity to provide facilities based competitive local exchange telecommunications services throughout North Dakota, subject to the rights of rural telephone companies under 47 U.S.C. § 251(f). (*Orders, PSC Cases No. PU-04-546 and PU-04-638.*)

Midcontinent and Missouri Valley are parties to a resale agreement (*PSC Case No. PU-04-638*) and their facilities are indirectly interconnected. The interconnection agreement adopted

by arbitration in PSC Case No. PU-11-697 compelled a direct interconnection. *Interconnection Order, Appendix E.*

D. Interconnection Duties under the Telecommunications Act

In 1996, Congress enacted the Telecommunications Act of 1996, amending the 1934 Communications Act and codified as 47 U.S.C. §§ 151 et. seq. (the “Act.”) The Act includes provisions to develop competition in local telecommunications service by requiring interconnections. The Act also includes provisions to exempt rural telephone companies such as Missouri Valley from some interconnection duties.

Under the Act, certain duties are imposed on all “telecommunications carriers” (Act § 153(44)) including “local exchange carriers” (“LECs”). “The term ‘local exchange carrier’ means any person that is engaged in the provision of telephone exchange service or exchange access.” Act § 153(26). “The term ‘telephone exchange service’ means (A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service.” Act § 153(47).

(“Exchange access” is the service that local exchange carriers provide to interexchange carriers/long distance companies in order that long distance calls can be originated by a subscriber in one local exchange and terminated at the location of a subscriber in a distant local exchange. Act § 153(16). Exchange access is not involved in this case.)

There are two kinds of LECs, incumbent local exchange carriers (“ILECs”) and competitive local exchange carriers (“CLECs”). Section 251(h)(1) defines ILECs as LECs that provided local telephone exchange service before enactment of the 1996 amendments. CLEC is a common acronym for “competitive local exchange carrier (or company)”, a term not defined in federal statutes or regulations until late in 2011. “A Competitive Local Exchange Carrier is any local exchange carrier, as defined in §51.5, that is not an incumbent local exchange carrier.” 47 CFR § 51.903(a). ILECs are sub-categorized between ILECS that are and are not “rural telephone companies.” Act § 153 (37). CLECs and rural ILECs are also sub-categorized between those that do and do not provide video programming. § 251(f)(1)(C).

Missouri Valley and Midcontinent are both LECs. Midcontinent is a CLEC that provides video programming. Missouri Valley is an ILEC and is also a rural telephone company that does not provide video programming.

Act § 251 provides a graduated set of interconnection requirements. Section 251(a) sets forth general duties applicable to all telecommunications carriers, not only LECs, including the duty “to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers.”

Under § 251(c) ILECs are subject to additional duties including CLEC/ILEC interconnection, “The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network - (A) for the transmission and routing of telephone exchange service....” §251(c)(2). Under § 251(c)(1) an ILEC and a CLEC that requests interconnection are obliged to negotiate the particular terms and conditions of interconnection agreements. Any impasse may be resolved by compulsory arbitration under § 252(b).

E. The Rural Exemption from Interconnection Duties

Section 251(f)(1)(A) (the “rural exemption”) provides “EXEMPTION - Subsection (c) of this section shall not apply to a rural telephone company until . . .” (i) a CLEC makes a bona fide request for interconnection and (ii) the State commission determines under § 251(f)(1)(B) procedures and standards that the exemption should be terminated. ILECs that are rural telephone companies are exempt from all duties under §251(c), including the §251(c)(2) duty to interconnect with CLECs “for the transmission and routing of telephone exchange service.”

The exemption does not apply with respect to a CLEC/ILEC interconnection request from a cable operator providing video programming that seeks interconnection with a rural telephone company that provides video programming. § 251(f)(1)(C). “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).” *Rural Exemption Order*, ¶ 11 *Appendix A*.

Midcontinent’s 2011 petition and Missouri Valley’s motion to dismiss and this action involve all these principles and provisions of the Act, principally the § 251(a) and (c)(2) interconnection duties, and the rural exemption provisions of § 251(f)(1)(A) and (B).

Missouri Valley relies on the statutory rural exemption and on the 2008 Rural Exemption Order where the PSC ordered “The rural exemption under 47 USC §251(f)(1)(A) for interconnection in Missouri Valley’s Williston exchange is not terminated.” (*Rural Exemption Order*, affirmed by the *Federal Court Order, DND, Case No. 1:09-cv-017, Appendices A and B*). Res judicata bars Midcontinent from relitigating its request for interconnection in Missouri Valley’s Williston exchange.

F. Procedure and Jurisdiction

Procedures for the PSC to address a CLEC’s request for interconnection are provided by

a combination of federal and state law. The federal act provides for administration of Act §§ 251 and 252 by “State commissions” (Act § 153(41)) but does not directly delegate jurisdiction to the PSC because the PSC is a state agency that receives its jurisdiction only from the North Dakota Legislature. NDCC § 49-21-01.7, subsections 8, 9 and 11 empower the PSC to administer the provisions of Act sections §§ 251 and 252 that are involved in this case. The power is exercised under the Administrative Agencies Practices Act, NDCC Ch. 28-32 and the North Dakota Administrative Code, Ch. 69-02-10.

Where a CLEC requests § 251(c)(2) CLEC/ILEC interconnection with a rural ILEC that is exempt under § 251(f)(1)(A), § 251(f)(1)(B) provides a procedure for the CLEC to request the State commission to terminate the rural ILEC’s exemption from § 251(c)(2) interconnection. A rural ILEC’s exemption from the § 251(c)(2) interconnection duty is in effect unless and until the State commission determines under statutory standards and procedures that the exemption should be terminated. If a rural ILEC’s exemption is terminated under § 251(f)(1)(B), the State commission shall establish an implementation schedule for compliance with the request for interconnection.

In this case, Midcontinent petitioned for arbitration under § 252(b), attempting to avoid the rural exemption and procedures under § 251(f)(1). Missouri Valley moved to dismiss Midcontinent’s petition for arbitration, asserting, inter alia, there is no statutory procedure other than § 251(f)(1)(B) for Midcontinent to obtain interconnection for the exchange of local traffic in Missouri Valley’s Williston exchange. After denial of Missouri Valley’s motion to dismiss, an interconnection agreement was adopted in arbitration and approved by the PSC. *Appendix E*.

G. Standard of Review

Missouri Valley's motion to dismiss Midcontinent's 2011 petition presented issues of law, whether the petition is precluded under res judicata and whether Act § 251(a) includes a duty of interconnection for the exchange of local telecommunications traffic. These are issues of law not based on resolution of disputed issues of fact. Though the PSC's 2012 Order is labeled with the words "findings of fact," the PSC's denial of Missouri Valley's motion was not based on the PSC's resolution of issues fact addressed in an evidentiary hearing. The motion was presented as a motion for summary judgment. The case was considered on a stipulated record; neither party nor the PSC asserted the presence of a genuine issue of material fact. *PSC 2012 Order* ¶¶ 13, 14, 16, *Appendix D*.

After Missouri Valley moved to dismiss Midcontinent's petition, the PSC established a two track procedure, 1) for the PSC to hear and decide the motion to dismiss, and 2) for an arbitrator to hear and decide interconnection agreement issues if it were determined by the PSC that Missouri Valley is obliged to interconnect. The PSC denied Missouri Valley's motion to dismiss. *PSC 2012 Order, Appendix D*. Arbitration proceeded, resulting in the arbitrated interconnection agreement that was submitted to and approved by the PSC. *Appendix E*. In this action under § 252(e)(6), Missouri Valley asserts the arbitrated interconnection agreement does not meet the requirements of section 251, particularly §251(f)(1), the rural exemption from local exchange interconnection.

When reviewing an agency's order, the district court applies the same standard of review as does the appellate court. *Iowa Telecommunications Services, Inc. v. Iowa Utilities Board*, 563 F.3d 743, 748 (8th Cir. 2009); *Federal Court Order, Appendix B*. The district court owes no deference to the PSC's interpretations of federal law, and the review is *de novo*. Though the

review is *de novo*, the argument below includes comments about the PSC's errors addressing both issues of law, res judicata and interconnection duties under the Act.

H. The issues

1. Midcontinent asserts its June 14, 2011 request for interconnection for the purpose of exchanging local telecommunications traffic is made under Act § 251(a). Missouri Valley asserts § 251(a) does not include a duty of direct interconnection for the exchange of local telecommunications traffic.

2. Missouri Valley asserts Midcontinent's request for an interconnection is substantially a request for CLEC/ILEC interconnection under § 251(c)(2), interconnection that Missouri Valley is exempt from providing under § 251 (f)(1)(A), the "rural exemption."

3. Midcontinent asserts its 2011 request for interconnection is made under Act § 251(a) and (b), not under § 251(c) as in 2007, and asserts Missouri Valley's rural exemption under § 251(f)(1)(A) does not apply to § 251(a).

4. Midcontinent asserts Act § 252(b) and NDCC § 49-21-01.7 authorize the PSC to compel Missouri Valley to comply with Midcontinent's request for interconnection for the exchange of local telecommunications traffic in Missouri Valley's Williston exchange.

5. Missouri Valley asserts the arbitration provisions under § 252(b) and NDCC § 49-21-01.7 do not authorize CLEC/ILEC interconnection to be compelled because Missouri Valley's § 251(f)(1)(A) rural exemption from § 251(c)(2) interconnection has not been terminated. Under § 251(f)(1)(A), Missouri Valley's rural exemption from § 251(c)(2) CLEC/ILEC interconnection is in effect "until" the State Commission were to determine under § 251(f)(1)(B) procedures that the exemption should be terminated. There is no statutory procedure other than § 251(f)(1)(B) for Midcontinent to obtain CLEC/ILEC interconnection with Missouri Valley.

6. Missouri Valley also asserts Midcontinent's request for arbitration of its request for interconnection under § 251(a) is precluded under *res judicata*, because Midcontinent's request for interconnection for the purpose of exchanging local telecommunications traffic in the Williston exchange was denied in prior § 251(f)(1)(B) proceedings between the parties. The 2008 Rural Exemption Order and the 2009 Federal Court Order bar Midcontinent from relitigating in 2011 its request for CLEC/ILEC interconnection with Missouri Valley.

The issue is not whether Missouri Valley is obliged to interconnect; it is obliged to interconnect, under the general terms of § 251(a). The issue is whether it is obliged to interconnect with Midcontinent "for the purpose of exchanging local telecommunications traffic in the Williston exchange." to use the words of Midcontinent's 2011 request, *Appendix G*, "for the transmission and routing of telephone exchange service" to use the words of §251(c)(2). See § 153(47), the definition of "telephone exchange service." [Underlining added.]

II. ARGUMENT

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

Midcontinent's 2011 Petition requested the PSC to compel CLEC/ILEC interconnection under § 251(a), despite the PSC's Rural Exemption Order in 2008 "The rural exemption under 47 USC § 251(f)(1)(A) for interconnection in Missouri Valley's Williston exchange is not terminated." *Appendix A at 10*. In 2011 Midcontinent asserted its §251(a) theory to obtain a CLEC/ILEC interconnection with Missouri Valley for the purpose of exchanging local telecommunications traffic – and it cites a recent FCC Declaratory Ruling, FCC 11-83 (herein Ruling, *Appendix C*) in support of its 2011 Petition.

Neither § 251(a) nor the FCC's 2011 Ruling obliges Missouri Valley to interconnect with Midcontinent for the purpose of exchanging local telecommunications traffic. The PSC's

opinion misconstrued the Ruling. If the Ruling were construed as obliging Missouri Valley to interconnect with Midcontinent for the purpose of exchanging local telecommunications traffic (as argued by both Midcontinent and the PSC), the Ruling thus construed does not control because it conflicts with the plain terms of the Act and the rural exemption.

Midcontinent's 2011 Petition and §251(a) theory is addressed first by review of statutory provisions and second by review of the Ruling.

B. Act § 251(a) does not oblige Missouri Valley to make a CLEC/ILEC Interconnection with Midcontinent.

Act § 251 provides a graduated set of interconnection requirements. Section 251(a) sets forth general duties applicable to all telecommunications carriers, not only LECs, including the duty to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers. Missouri Valley and Midcontinent are indirectly connected. *PSC 2012 Order ¶ 4, Appendix D*. Section 251(b) provides duties affecting only LECs. Section 251(b) duties do not include interconnection but may affect terms and conditions of interconnections.

Under § 251(c) ILECs are subject to additional obligations including CLEC/ILEC interconnection, "The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network - (A) for the transmission and routing of telephone exchange service" § 251(c)(2). The obligation to interconnect "for the transmission and routing of telephone exchange service and exchange access...." is imposed by the specific terms of § 251(c)(2) and is not included in the general duties of § 251(a). The hierarchy of escalating obligations under section 251 is plain to read and plainly described by the FCC in its *Ruling, ¶ 4 and footnote 57, Appendix C*.

Under § 251(f)(1)(A) (the “rural exemption”), ILECs that are rural telephone companies are exempt from all duties under §251(c). ILECs that are rural telephone companies are exempt from the §251(c)(2) duty to interconnect with CLECs “for the transmission and routing of telephone exchange service.” The rural exemption does not apply to the general duty of interconnection under §251(a).

The rural exemption from CLEC/ILEC interconnection is subject to termination. Under § 251(f)(1)(A) “Subsection (c) of this section shall not apply to a rural telephone company until...” (i) a CLEC makes a bona fide request for interconnection and (ii) the State Commission determines under § 251(f)(1)(B) procedures that the exemption should be terminated. “Until” a rural telephone company’s exemption is terminated under § 251(f)(1)(B) the rural exemption from § 251(c)(2) interconnection is in effect, as a matter of statutory law. *See also, FCC v. Iowa at 762* (“The use of the word ‘until’ suggests that the rural telephone companies have a continuing exemption”) *Id.*

After failing its 2008 effort for §251(c) interconnection and termination of Missouri Valley’s rural exemption under § 251(f)(1)(B) procedures, in 2011 Midcontinent requested interconnection “for the purpose of exchanging local telecommunications traffic” with Missouri Valley in Williston. Midcontinent described its 2011 request as made under §251(a). Appendix G. Missouri Valley asserts the interconnection requested by Midcontinent in 2011, claimed under § 251(a), is really a request for CLEC/ILEC interconnection under § 251(c)(2) “for the transmission and routing of telephone exchange service...,” the kind of interconnection Missouri Valley is exempt from providing under § 251 (f)(1)(A), the “rural exemption.” See § 153(47), the definition that shows the interconnection requested by Midcontinent in 2011, ostensibly under § 251(a), is in reality a request for CLEC/ILEC interconnection under §

251(c)(2)

Midcontinent's assertion that its request for interconnection is made under §251(a) and not under §251(c) has one purpose and one effect—if successful—avoidance of Missouri Valley's rural exemption from §251(c) interconnection “for the transmission and routing of telephone exchange service....”

Midcontinent claims that it has been consistent in claiming interconnection under § 251(a), not § 251(c). *Midcontinent brief in opposition to motion to dismiss at 14 – 15, P Exhibit 1, Dkt # 9; Midcontinent post argument brief at 5, Exhibit 1, Dkt # 30.* But to repeat an argument does not strengthen it, and counter-argument requires more than persistent disagreement. Analysis is required.

Section 251(a) does not include a duty of direct interconnection for the exchange of telecommunications traffic. *See AT&T Corp v Atlas, 317 F.3d 227, 234 (D.C. Cir. 2003)*, where the court affirmed an FCC Order that a telecommunications carrier's § 251(a) “duty to ‘interconnect’ [refers] `solely to the physical linking of two networks, and *not* to the exchange of traffic between networks.’” *Id. at 235.* The court's opinion emphasized there is no ambiguity about the limits of § 251(a). “As the Commission points out, both the text of § 251(a)(1) and the structure of § 252 strongly indicate that to `interconnect' and to exchange traffic have distinct meanings.” *Id.* Section 251(a) does not include additional duties to provide direct interconnection to exchange local telecommunications traffic. Those additional duties are duties under § 251(c)(2), duties from which Midcontinent is exempt under § 251(f)(1)(A) unless and until the exemption were terminated under § 251(f)(1)(B). *See also the Federal Court Order, Appendix B,4-5* that affirmed the *Rural Exemption Order* where this Court recognized interconnection duties under § 251(c)(2) are duties additional to general duties under § 251(a).

Nowhere in § 251(a) is there any reference to "telephone exchange service and exchange access" i.e., local traffic. Midcontinent claims that it is entitled to local interconnection § 251(a) "for the purpose of exchanging local telecommunications traffic" (*Midcontinent's request and Petition, Appendix G*), but the kind of interconnection it requests is "telephone exchange service and exchange access" (i.e., local traffic) is addressed only in the more rigorous provisions of § 251(c) from which Missouri Valley, as a rural telephone company under § 251(f), is exempt.

Midcontinent's effort to avoid the rural exemption is based on its argument there are technical differences between an interconnection under § 251(a) and an interconnection under § 251(c). Midcontinent claimed its 2011 request for facilities based interconnection for the purpose of exchanging local traffic is a § 251(a) request and not a § 251(c) request because Midcontinent is not demanding interconnection at any technically feasible point in Missouri Valley's network, but merely seeks interconnection at a mutually agreed point. *Midcontinent brief in opposition to motion to dismiss at 14 - 15; PU-11-697.*

According to Midcontinent, "The central difference between Section 251(a) interconnection and Section 251(c) interconnection is that, under Section 251(c) the competitive carrier effectively controls all technical decisions about how interconnection will be accomplished, while Section 251(a) interconnection does not give a competitive carrier that power." *Id. at 13.*

The process of making technical engineering decisions is not the central difference between §§ 251(a) and 251(c). The central difference is the exchange of local telecommunications traffic is an ILEC's obligation under the specific terms of §251(c), not a duty under the general terms of §251(a). Section 251(c) includes the duty to interconnect to exchange local traffic as defined in § 153(47). Section 251(a) does not include the duty to

interconnect to exchange local traffic. As the heading of § 251(c) indicates, § 251(c) contains “additional” interconnection obligations for ILECs, additional to the general interconnection duty under § 251(a) that does not include the obligation to exchange traffic. Congress included § 251(c) in the Act for a reason. Otherwise § 251(a) would be sufficient to require any interconnection a CLEC might request.

Where the ILEC is a rural telephone company there is an additional crucial difference, the rural exemption. The essence of the rural exemption is economic burden – not the process of making technical engineering decisions. Congress evidently intended to protect rural telephone companies from undue economic burdens of local exchange interconnection, not to subject them to interconnection with protection only from a CLEC’s control about technical decisions. It is a gross misinterpretation of §251 in its entirety for Midcontinent to propose it can unilaterally wave away Missouri Valley’s rural exemption from the economic burden of interconnection by offering to negotiate or arbitrate technical decisions rather than assert Midcontinent’s unilateral control over technical decisions.

Midcontinent’s technical decisions argument is an artificial distinction, wrong for several reasons. From Midcontinent’s realistic point of view, the distinction makes no difference because technical decisions about how interconnection would be accomplished do not impact Midcontinent’s purpose to obtain an interconnection for the exchange of local telecommunications traffic. From Missouri Valley’s realistic point of view, technical decisions make no difference in the economic burden caused by an interconnection for the exchange of local telecommunications traffic. From the point of view of the FCC, a CLEC’s control of technical decisions is not the difference that makes a local interconnection more “rigorous” for rural ILECs. From the point of view of the Congress, the distinction makes no difference

regarding the essential point of the rural exemption it enacted – a rural telephone company is exempt from interconnection for the transmission and routing of telephone exchange service that would cause an undue economic burden. The rigorous economics of interconnection, not technical decisions, is the central difference.

The “central difference between Section 251(a) interconnection and Section 251(c) interconnection” is not, as Midcontinent argues, how “technical decisions” are made. The true central difference is two pronged: (a) § 251(a) does not include a duty that an ILEC interconnect with a CLEC for the exchange of local telecommunications traffic, and (b) under §251(f)(1) rural ILECs are exempt from the §251(c) CLEC/ILEC interconnection obligation. The claimed technical decisions difference does not affect Midcontinent’s or any other CLEC’s request for interconnection with a non-rural ILEC for the exchange of local traffic, because of the interconnection obligation under §251(c). The trumped-up technical decisions “central difference” is nonexistent with respect to a non-rural non-exempt ILEC. The technical decisions central difference argument affects only Midcontinent’s endeavor to use §251(a) as a vehicle to obtain local exchange interconnection with a rural ILEC, interconnection it is not obliged to make under §251(c) because of the §251(f)(1) rural exemption. The rural exemption is the critical difference.

Midcontinent’s technical decisions argument collapses when Congressional policy underlying the rural exemption is considered. The economic burden of interconnection is the statutory reason Midcontinent did not get past §251(f)(1)(B) to obtain local exchange interconnection under section § 251 in 2008. *Rural Exemption Order Conclusion of Law 2*, Appendix A, Missouri Valley’s bearing a multi-million dollars economic burden in exchange for the opportunity to negotiate or arbitrate technical decisions about interconnection is not a trade

compelled by § 251 considered in its entirety. If Congress intended such a stark exception to the rural exemption, it would not require such a tortured interpretation of § 251 that the process of technical decisions determines whether the exemption does or does not apply. Where Congress did intend an exception to the rural exemption, it was clearly provided. The exemption is not available to a rural telephone company that provides video programming. § 251(f)(1)(C).

Midcontinent's arguments—if successful—would move CLEC/ILEC interconnection from § 251(c) and the § 251(f)(1)(A) rural exemption sections to the § 251(a) duty section and transform the rural exemption from interconnection “for the transmission and routing of telephone exchange service....” into a duty, no matter what the economic burden. Midcontinent's “cramped reading” of the statute would not merely weaken, it would destroy the rural exemption, “the broad protection Congress granted to rural telephone companies” under § 251(f)(1)(A). *Iowa Utilities Board v Federal Communications Commission*, 219 F.3d 744,761 (8th Cir. 2000). To weaken or destroy Missouri Valley's rural exemption is Midcontinent's goal, but that goal is contrary to Congressional intent. If Congress had wanted rural telephone companies to be subject to a duty of interconnection for the purpose of exchanging local telecommunications traffic, it could easily have said so. That is not what Congress wanted and not what it said. What Congress wanted and what the statute says is rural telephone companies are not subject to a duty of interconnection for the purpose of exchanging local telecommunications traffic.

It is another “cramped reading” for Midcontinent to assert that the PSC is empowered under § 252 to impose on Missouri Valley an interconnection agreement for the purpose of exchanging local telecommunications traffic. The PSC has that power under § 251(f)(1)(B), a power to be exercised only after the PSC were to find (on Midcontinent's burden of proof on

economic issues) that Missouri Valley's § 251(f)(1)(A) exemption from § 251(c)(2) CLEC/ILEC interconnection should be terminated. Missouri Valley's position that § 252 does not authorize the PSC to compel CLEC/ILEC interconnection where there is no duty of interconnection because of the rural exemption is supported by *Iowa v FCC*, where the court enforced the clear Congressional intent that the rural telephone company § 251(f)(1)(A) exemption from CLEC/ILEC interconnection remains in effect unless and until terminated under § 251(f)(1)(B).

At the end of the statutory analysis, it is necessary to point out that the PSC engaged in no such analysis. Instead, the PSC explained its decision was compelled by the FCC Ruling made in 2011. *PSC 2012 Order ¶ 25, Appendix D; Interconnection Order at 2-3, Appendix E*. The statute is controlling, and the argument below shows that the FCC Ruling does not support Midcontinent's argument or the PSC's decision that Missouri Valley is obliged under § 251(a) to make an interconnection for the exchange of local telecommunications traffic.

1. **The FCC's 2011 Ruling does not support Midcontinent's Petition to obtain CLEC/ILEC interconnection with Missouri Valley under § 251(a).**

Midcontinent's 2011 Petition requested the PSC to compel CLEC/ILEC interconnection, despite the *Rural Exemption Order* and the *Federal Court Order* in 2008 and 2009. Midcontinent cites the FCC's recent Ruling (FCC 11-83) in support of its 2011 Petition. The PSC cited the Ruling as the basis of the *2012 PSC Order ¶ 25, App. D*.

Missouri Valley's position that Section 251(a) does not oblige a rural telephone company to interconnect with a CLEC for the exchange of local telecommunications traffic is supported by the May 2011 FCC Ruling that the PCS mistakenly applied in its Order.

The Ruling did not "create de facto a new regulation" under the guise of interpretation. *Christensen v Harris County, 529 U.S. 576, 588 (2000)*. As a precedent, the Ruling "clarified" and provided "guidance" regarding the scope of sections §§ 251 and 252. See *Ruling ¶¶ 1, 2, 4*,

5, 14, 15, 17, 19, 25 and 28, *App. C*. In formulating its guidance, the FCC made it clear that the Ruling addresses only duties under Act § 251 (a) and (b) as subjects of arbitration under § 252(b) and “allows the rural incumbent LEC to retain its exemption from the more rigorous section 251(c)(2) obligations.... We find that this reading of the statute better preserves the protections that Congress intended for the rural LECs.” *Ruling*, ¶ 25.

Midcontinent obviously read the Ruling and recognizes it does not support a petition for arbitration of Midcontinent’s request for a § 251(c)(2) interconnection with Missouri Valley’s network. So, Midcontinent described its request as made under § 251(a). *Midcontinent’s June 14 request and 2011 Petition, at 1-2, App. G*.

The CLEC/ILEC interconnection that Midcontinent requested is a “direct interconnection ...in the Williston exchange ... for the purpose of exchanging local telecommunications traffic.” Local traffic is referred to 3 more times in Midcontinent’s request. Midcontinent’s request/letter of June 14, 2011. See also Midcontinent’s 2011 Petition at 2 and attached exhibit A. *Id.*

The words that Midcontinent used to describe its requested interconnection are equivalent to the words of § 251(c)(2), “interconnection with the local exchange carrier's network--(A) for the transmission and routing of telephone exchange service.” See § 153(47), the definition that shows the words’ equivalence.

The interconnection that Midcontinent requests in the 2011 Petition is not a basic or moderate interconnection under § 251(a) that might be subject to arbitration under § 252 and the Ruling. It matters not that Midcontinent crams its request under § 251(a); the interconnection it requests is the “rigorous section 251(c)(2) interconnection” that is the subject of the rural exemption under § 251(f)(1)(A), the exemption that is retained under the plain words of the Ruling. Midcontinent’s cramped reading of Act § 251 and the PSC’s reading of the Ruling are

impermissible. *Iowa v FCC*, 761 (“In the Act, Congress sought both to promote competition and to protect rural telephone companies. . . . FCC has impermissibly weakened the broad protection Congress granted to small and rural telephone companies.”)

Rural telephone companies and their advocates often regard the FCC to be affected by an institutional disdain for the rural exemption, exemplified by the burden of proof issue in *Iowa v FCC*. Some might regard the FCC’s 2011 *Ruling* as another chapter in that story. But the FCC did not ignore the lesson of *Iowa v FCC* when it made its 2011 Ruling. The *Ruling* was clear in preserving the rural exemption. *Ruling* ¶ 25. The FCC’s Ruling’s “approach [that] allows the rural incumbent LEC to retain its exemption from more rigorous section 251(c)(2) interconnection” is consistent with *Iowa v FCC* where the court vacated rules that impermissibly weakened the rural exemption. The 2011 Ruling does not (nor could it) weaken the rural exemption or contradict the *Iowa v FCC* decision. The Ruling is precise in emphasizing that rural ILECs are not exempt from § 251(a) and (b) duties, declaring that those duties are enforceable via § 252 arbitration proceedings, and equally precise that the Ruling does not weaken rural ILECs’ “exemption from more rigorous section 251(c)(2) interconnection.” *Ruling* ¶ 25.

Considering the *Iowa v FCC* decision that invalidated the FCC’s promulgation of regulations that would have impermissibly weakened the rural exemption, the FCC was obviously careful that its 2011 Ruling did not make the same mistake. If to weaken the rural exemption by regulation is impermissible, certainly the exemption cannot be disregarded or circumvented under a Ruling published as “guidance.” The PSC clearly erred when it interpreted the *Ruling* as enabling Midcontinent to obtain under § 251(a) the interconnection it could not obtain under §§ 251(c) & (f). *2012 PSC Order*, ¶ 25, *Appendix D*.

The Ruling did not weaken the rural exemption from the “rigorous section 251(c)(2) interconnection.” *Ruling* ¶ 25. The Ruling did not create a loophole that allows Midcontinent to bypass the specific provisions of § 251(f)(1)(A) and (B). Nothing in the Ruling supports Midcontinent’s 2011 Petition for Missouri Valley’s rural exemption from the “rigorous section 251(c)(2) interconnection” to be wrested away in compulsory arbitration proceedings under § 252(b). The 2011 Ruling did not award Midcontinent a rematch where it might undo the outcome of the PSC’s 2008 Rural Exemption Order in Case No. PU-08-61.

The PSC should have dismissed Midcontinent’s 2011 Petition, consistent with Act § 251, consistent with *Iowa v FCC*, and consistent with the FCC’s 2011 Ruling. The court should correct the PSC’s error. The Court should enter an order and declaratory judgment that the North Dakota Public Service Commission’s June 27, 2012 Interconnection Order in its Case No. PU-11-69 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.

The PSC explained its decision was compelled by the FCC Ruling made in 2011. *PSC 2012 Order* ¶ 25, *Appendix D; Order on Interconnection* ¶ 3, *Appendix E*. The argument above shows that the FCC Ruling does not support the PSC’s decision. The argument below shows the FCC Ruling – as understood by the PSC – is inconsistent with § 251 and the FCC is impotent to oblige a rural telephone company to make an interconnection for the exchange of local telecommunications traffic, because of the rural exemption.

2. **If the Ruling were interpreted as obliging a rural telephone company to interconnect with a CLEC to exchange local traffic, the Ruling is invalid.**

Despite the FCC’s declarations that the Ruling’s “approach allows the rural incumbent LEC to retain its exemption from more rigorous section 251(c)(2) interconnection,” (*Ruling* ¶ 25),

the PSC regarded the *Ruling* as “clarifying” that Missouri Valley is obliged under § 251(a) to interconnect for the exchange of local telecommunications traffic even though it is exempt from that obligation under section 251(c) and (f).

“Paragraph 2 of the 2011 FCC Order specifically states: ‘We clarify that LECs are obligated to fulfill all of the duties set forth in sections Act § 251(a) and (b) of the [1996 Telecommunications]Act, including the duty to interconnect and exchange traffic, even if the LEC has a rural exemption from the obligations set forth in section 251(c).’ ” *PSC 2012 Order ¶ 25, Appendix D*;

“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).” *Order on Interconnection ¶ 3, Appendix E*.

If the PSC correctly interpreted the FCC’s Ruling – that rural ILECs are obliged under § 251 (a) to interconnect for the exchange of local traffic– that interpretation by the FCC cannot stand under the entire § 251 and controlling Eighth Circuit judicial precedent, *Iowa v FCC*.

Iowa v FCC challenged several regulations promulgated by the FCC in the early implementation of the 1996 Act, including 47 CFR § 405 affecting proceedings for the termination of the rural exemption. The 8th Circuit Court invalidated and vacated those rules as an arbitrary and unreasonable interpretation of the Act, owing no deference to an agency’s interpretation that would frustrate Congressional policy enacted by the rural exemption. *Id, at 761-6*. (Curiously, those invalid rules remain on the books, a situation that stands in stark contrast to the absence of any FCC rules specifically providing that rural ILECs are obliged under § 251(a) to interconnect for the exchange of local traffic.)

The 2011 Ruling was an order declaring rights of parties to on-going litigation in other states, explained in an opinion described as providing “clarity” and “guidance” about rural ILECs’ “duties set forth in sections 251(a) and (b) of the Act, including the duty to interconnect and exchange traffic, even if the LEC has a rural exemption from the obligations set forth in

section 251(c).” *Ruling* ¶¶ 1 & 2. *See also Ruling* ¶¶ 4, 5, 14, 15, 17, 19, 25 and 28, *App. E*. Sections 251(a) and 252(b) of the Act have not been amended from 2008 to 2011 by Congressional action and no new regulations affecting either section were issued or old ones amended by the Ruling. The Ruling did not create new or expanded interconnection duties under normal rulemaking procedures. The PSC interpreted the Ruling as de facto a new regulation promulgated under the guise of a precedential interpretation, a regulation the FCC is powerless to install directly or indirectly.

As stated above, rural telephone companies and their advocates often regard the FCC as harboring disdain for the rural exemption enacted by Congress, exemplified by *Iowa v FCC*. If the PSC correctly interpreted the FCC’s 2011 Ruling as another chapter in that story, then the court must follow *Iowa v FCC* where the 8th Circuit Court vacated the FCC’s rules that impermissibly weakened the rural exemption. Whereas the rules invalidated in *Iowa v FCC* would have impermissibly weakened the rural exemption, “the broad protection Congress granted to rural telephone companies” (*Id. at 761*), the FCC’s 2011 Ruling would impermissibly destroy the rural exemption by making interconnection for the exchange of local traffic an absolute obligation rather than an obligation tempered by the exemption and termination procedure of § 251(f). If to weaken the rural exemption by regulation is impermissible, certainly the exemption cannot be disregarded or circumvented under a ruling published as “guidance.”

C. **Midcontinent is barred from relitigating its request for CLEC/ILEC interconnection with Missouri Valley**

Under res judicata principles, Midcontinent is barred from relitigating in 2011 its previous request for CLEC/ILEC interconnection with Missouri Valley for the purpose of exchanging local telecommunications traffic in the Williston exchange.

In November 2007, Midcontinent requested “a facilities based interconnection agreement

with number portability for the Williston, North Dakota, exchange” and in 2008 commenced proceedings under § 251(f)(1)(A) and (B) seeking termination of Missouri Valley’s rural exemption from CLEC/ILEC § 251(c)(2) interconnection duties. *App. G*. The outcome was the PSC’s *Rural Exemption Order* that “The rural exemption under 47 USC §251(f)(1)(A) for interconnection in Missouri Valley’s Williston exchange is not terminated.” *Federal Court Order* affirming the *Rural Exemption Order, Appendices A and B*.

The 2011 case began with Midcontinent’s letter requesting a “direct interconnection ...in the Williston exchange ... for the purpose of exchanging local telecommunications traffic.” Midcontinent’s 2011 petition sought arbitration of its request to “obtain facilities-based interconnection ‘for the purpose of exchanging local traffic’ under section 251(a) of the Communications Act...” (Petition at 2, quoting Midcontinent’s underlying request by letter dated June 14, 2011, *App. G*.)

Res judicata, also known as claim preclusion or collateral estoppel, is a basic principle governing civil litigation. A claim once litigated cannot be relitigated. The principle’s rationale has two basic points. Parties to concluded litigation should be able to continue in their lives and enterprises, secure that past judgments will not be undone by repetitious litigation. Courts and agencies should be able to attend to resolution of current cases, free of burdens imposed by repetitious litigation, past cases being relitigated by losers. A disappointed litigant might appeal a decision, but after appeal rights have either expired or were exercised and the decision affirmed, the losing party’s loss is final. “No rematch after a defeat fairly suffered.” *Astoria Federal Savings and Loan Association v Solimino*, 501 US 104, at 107,111 S.Ct. 2116 (1991).

“As we have stated ‘[a] party may not litigate a claim and then, on an unsuccessful disposition, revive the same cause of action with a new theory.’” *Friez v First American*

Bank & Trust, 324F.3d 580, 581 (8th Cir 2003) quoting Roach v Teamsters Local No. 688, 595 F.2d 446, 450 (8th Cir.1979).

The common law doctrine of res judicata applies to decisions made by administrative agencies. Administrative res judicata is presumed in the absence of a legislative intent to the contrary.

“We have long favored application of the common law doctrines of collateral estoppel (as to issues) and *res judicata* (as to claims) to those determinations of administrative bodies that have attained finality. Thus, where a common law principle is well established, as are the rules of preclusion, the courts may take it as a given that Congress has legislated with an expectation that the principle will apply except when a statutory purpose to the contrary is evident.” Astoria, 501 US at 107-108. (Citations omitted.)

The common law doctrine of res judicata also applies to decisions made by North Dakota’s administrative agencies. Landrum v Workforce Safety and Insurance, 2011 ND 108, ¶¶ 12-13 798 N.W.2d 669 (ND 2011) and Baier v. North Dakota Workers Compensation Bureau, 2000 ND 78, ¶ 22, 609 N.W.2d 722.

These recent decisions of the United States and North Dakota Supreme Courts show that res judicata applies in both jurisdictions to the PSC’s decisions under the federal act. Nothing in the Act implies that the PSC’s decisions under the Act should not have res judicata effect to preclude relitigation. Under state and federal law, res judicata bars Midcontinent from raising issues in its 2011 Petition that were or could have been resolved in 2008 in the PSC’s Case No. PU-08-61 and in the court’s Case No. 1:09-cv-017.

“For a claim to be precluded under the doctrine of res judicata due to a determination reached in a prior lawsuit, five elements must be satisfied. Those elements are:

“(1) the first suit resulted in a final judgment on the merits; (2) the first suit was based on proper jurisdiction; (3) both suits involve the same parties (or those in privity with them); and (4) both suits are based upon the same claims or causes of action. Furthermore, the party against whom res judicata is asserted must have had a full and fair opportunity to litigate the matter in the proceeding that is to be given preclusive effect.” *Rutherford v Kessel*, 560F.3d 874, 877(8th Cir. 2009)

All these elements are present to connect the 2008 first action, PSC Case PU-08-61 and the court’s Case No. 1:09-cv-017, so that the second action, the 2011 Petition, PU-11-697, is precluded.

1. Finality

Sections NDCC 28-32-21 and 28-32-39 established the Rural Exemption Order’s finality. If finality could be made more final, that happened to the Rural Exemption Order in the first action when Midcontinent’s federal court action was dismissed, affirming the PSC’s Order. *Federal Court Order, Case No. 1:09-cv-017, App. B*. The PSC’s Order in the first action case has acquired and is reinforced by the Federal Court Order and judicial res judicata under federal law. There is no dispute about finality. Appendix D, *PSC 2012 Order*, ¶ 18.

2. Jurisdiction

The first action was decided by an agency and by a court of competent jurisdiction. The PSC’s jurisdiction in the first action is not in doubt. Act § 251(f)(1)(A) and (B), and NDCC § 49-21-01.7 subd. 11. Midcontinent did not exercise its statutory right under NDCC § 28-32-42 to appeal the Rural Exemption Order for judicial review in North Dakota’s courts. Instead, Midcontinent commenced an action in federal district court for judicial review of the Rural

Exemption Order. Jurisdiction was specifically addressed and decided in that case. The federal court's jurisdiction in Federal Case No. 1:09-cv-017 is not in doubt.

Nor is there any doubt about either the PSC's jurisdiction in case No. PU-11-697 or the court's jurisdiction in this case. Midcontinent invoked the PSC's jurisdiction under § 252. Missouri Valley does not dispute the PSC's jurisdiction. The dispute is about the PSC's erroneous exercise of its jurisdiction. Section 252(b)(6) plainly confers jurisdiction on this court for judicial review of the PSC's determination.

3. Same Parties

The parties are the same in both actions. Midcontinent was the petitioner and Missouri Valley was the respondent in both actions before the PSC. Midcontinent and Missouri Valley were parties to the federal court action for judicial review of the first PSC action, Case No. 1:09-cv-017 and are the parties in this case. There is no dispute about identity of parties. *PSC 2012 Order*, ¶ 18, *App D*.

4. Same claims or causes of action

Missouri Valley asserts Midcontinent's second action in 2011 raised an issue actually litigated or which could have been litigated in the first action in 2008. In the 2008 proceeding, Midcontinent sought an interconnection under § 251(c) and termination of Midcontinent's rural exemption from § 251(c) interconnection. In the 2011 proceeding, Midcontinent sought an interconnection under § 251(a). In both actions Midcontinent claimed rights under § 251 of the Act, rights to interconnection with Missouri Valley in the Williston exchange for the exchange of local traffic.

The PSC concluded "A request for direct interconnection under Act § 251(a), and a request for interconnection under Act § 251(c), are different issues for the purpose of *res*

judicata and Act § 252(b).” and “Midcontinent's petition for Act § 251(a) interconnection does not raise an issue actually litigated, or which should have been litigated, in Case No. PU-08-61.” *PSC 2012 Order, Conclusions of Law ¶¶ 2 and 3, Appendix D.* These conclusions follow findings (¶¶ 20-26) including “Because the Commission has determined that Midcontinent's present request for interconnection pursuant to Act § 251(a) was not an act litigated in Case No. PU-08-61, nor should it have been litigated in Case No. PU-08-61, the Commission provides no comment upon whether this matter and Case No. PU-08-61 are similar causes of action for the purposes of *res judicata*.” (¶ 26). The PSC’s process of reasoning is flawed in its contradiction with the record in Case No. PU-08-61 and in its misunderstanding of the principle of *res judicata* that “different issues” may be barred. Even assuming that “A request for direct interconnection under Act § 251(a), and a request for interconnection under Act § 251(c), are different issues for the purpose of *res judicata*,” the record in the first case plainly shows that Midcontinent’s § 251(a) theory not only could have been but was actually litigated in Case No. PU-08-61, as analyzed under the “fair opportunity” element.

5. Opportunity to be heard

Midcontinent might argue that its 2011 claim under § 251(a) was not capable of being raised in the prior proceeding, before the FCC’s 2011 Ruling. But Midcontinent made no such argument in opposition to Missouri Valley’s motion to dismiss its petition. The PSC gratuitously installed this argument in the *PSC 2012 Order at ¶ 23, Appendix D.*

The essence of PSC 2012 Order ¶ 23 is the idea of requesting interconnection for the purpose of exchanging local telecommunications traffic and claiming the request is made under § 251(a) instead of under § 251(c)(2) and pursuing the request by arbitration under § 252(b) was

“not obvious and not settled ... at the time Case No. PU-08-61 was litigated” but was a new legal theory unavailable to Midcontinent at the time Case No. PI-08-61 was litigated.

The § 251(a) + § 252(b) idea is not a new law created by the FCC Ruling in May of 2011. The FCC did not create new duties affecting rural ILECs or new procedures for their enforcement. Sections 251(a) and 252(b) of the Act have not been amended from 2008 to 2011. No new regulations affecting either section were issued or old ones amended by the Ruling. The 2011 Ruling was an order declaring rights of parties to on-going litigation in other states, explained in an opinion that clarified statutory procedures and provided guidance regarding the scope of sections §§ 251 and 252. *Ruling ¶¶ 1, 2 and 28*. The Ruling may be a precedent for future cases where there are issues about the interaction of §§ 251 and 252, but the Ruling does not justify or authorize relitigation of past finalized cases.

The § 251(a) + § 252(b) idea occurred to parties involved in the Ruling in their endeavors to obtain interconnections with rural ILECs in Maine dating back to 2008, before the July 2008 hearing in North Dakota’s Case No. PU-08-61. *Ruling ¶ 8*. The § 251(a) + § 252(b) idea was alive and active in other States’ commissions’ proceedings and in some federal court actions before Midcontinent commenced proceedings in 2008. *Ruling ¶¶ 10 and 18 and notes 33 and 63*. And, Midcontinent did assert rights under § 251(a) in the 2008 case before the PSC and in the 2009 federal court action for review of the Rural Exemption Order.

The central issue raised in the second action in 2011 and Missouri Valley’s motion to dismiss Midcontinent’s petition is whether Missouri Valley is obligated under Act § 251(a) to interconnect with Midcontinent for the purpose of exchanging local telecommunications traffic in the Williston exchange. This issue raised in the second action is a legal theory that Midcontinent could have and should have raised in the first action in 2008. Could have, should

have, and did.

Midcontinent could have claimed that its November 14, 2007 request served not only as the foundation of proceedings under § 251(f)(1)(A) and (B), it might also have asserted in 2008 – as it did in its 2011 petition – that its June 14 letter requesting interconnection “constitutes a formal request for interconnection under §§ 251(a), 251(b) and 252 of the Communications Act...” Exhibit 1, *Dkt # 1*.

Midcontinent did not vigorously assert the § 251(a) theory that was available to it but the amount or quality of attention paid in 2008 is not the point. The point is that Midcontinent’s § 251(a) claim could have been made in 2008 and is barred from being resurrected in 2011. Midcontinent made no overt claim under § 251(a) its February 8 petition in the 2008 first action, but it was available. And the record in the first action in 2008 shows Midcontinent did address § 251(a).

In the first case in 2008, Midcontinent specifically asserted a potential alternative claim for interconnection under § 251(a). *See Midcontinent’s August 1, 2008 Initial Brief to the PSC in case No. PU-08-61, footnote 29, page 14 and the text at pages 5-7 of its November 4, 2008 Petition for Reconsideration of the Rural Exemption Order. Exhibit 2, 2008 Dkt ## 31 and 48.* See also Midcontinent’s October 9, 2009 brief in its federal court action, pp. 15-16 where Midcontinent repeated arguments that § 251(a) affected issues under § 251(f)(1)(B). Midcontinent did not pursue the § 251(a) claim in 2008 with the same zeal as in 2011 and 2012, but Midcontinent certainly had the opportunity and exercised the opportunity to assert a claim under § 251(a) in its first action seeking interconnection in Williston.

Had Midcontinent pursued in 2008 that its theory Missouri Valley was obliged under § 251(a) to interconnect for the purpose of exchanging of local telecommunications traffic, the

claim would have been resisted by Missouri Valley, litigated and argued with the same energy as the parties actually expended on the other issues that Midcontinent raised in the first action. Missouri Valley would have asserted in 2008 that the claim under § 251(a) lacks merit for the same reasons it asserts in 2011 under the second ground for dismissal of Midcontinent's 2011 Petition – that § 251(a) does not impose a duty of facilities based interconnection for the purpose of exchanging local telecommunications traffic. But whether or not Midcontinent's 2011 claim under § 251(a) has merit is irrelevant to the res judicata defense. It matters not. The claim could have been made in 2008, was made, and is precluded from being relitigated in 2011.

The fair opportunity element is satisfied.

The same claim/fair opportunity elements underlies the PSC's denial of Missouri Valley's motion to dismiss on res judicata grounds. *PSC 2012 Order ¶ 26. Appendix D*. Even though judicial review is de novo, it is pertinent to highlight the PSC's errors by comparison of the two cases, a comparison to show that the two cases involve the same claim and that Midcontinent had an opportunity to assert its claim in the first action. Midcontinent's opposition to res judicata preclusion was simply to assert its 2011 claim under § 251(a) is different from its 2008 claim under § 251(c) and § 251(f), an argument erroneously accepted by the PSC (*PSC 2012 Order ¶ 20-26*) and addressed below, returning to the fourth *res judicata* element.

D. Same claims or causes of action

In both the 2008 and 2011 actions Midcontinent claimed rights under § 251 of the Act, rights to interconnection with Missouri Valley in the Williston exchange for the exchange of local traffic.

One line of defense against the res judicata bar is Midcontinent's claim that it has consistently argued its 2011 request for interconnection is made under section §251(a), not under

§ 251(c). *Midcontinent brief in opposition to motion to dismiss at 14 – 15, PU-11-697; Midcontinent post argument brief at 5, Dkt # 30.* But to repeat an argument does not strengthen it or resurrect an argument previously settled, as most children and all parents know. The differences between these subsections of § 251 are addressed in part 2 of this brief, but those distinctions make no difference under *res judicata* analysis, because the § 251(a) claim was a claim included in the first action, and so it is barred from being relitigated.

Midcontinent’s request and petition for interconnection in 2011 is substantially identical to the request made in 2007 and the 2008 petition. Both sought facilities based interconnection for the purpose of exchanging local telecommunications traffic in the Williston exchange. Not only are the two requests and petitions identical with each other, the words that Midcontinent uses to describe its requested interconnection in both instances are equivalent to the words of § 251(c)(2): “interconnection with the local exchange carrier's network--(A) for the transmission and routing of telephone exchange service.” See § 153(47), the definition that shows the words’ equivalence.

Midcontinent had and exercised the opportunity to make a claim for interconnection under § 251(a) in its 2008 action to obtain interconnection with Missouri Valley in Williston.

The identity of claims element and the fair opportunity element are satisfied.

III. RES JUDICATA SUMMARY

Midcontinent’s primary line of defense against the *res judicata* bar to its claims under section 251(a) was to assert a “continuing right” to interconnection, essentially a claim of immunity from *res judicata* principles, a notion adopted by the *PSC 2012 Order*, ¶ 24. Appendix D. *Midcontinent brief in opposition to motion to dismiss, Dkt # 9 at 7.* The essence of the

continuing right argument is to say a claim once asserted, unsuccessfully, may be reasserted. One might as well argue that American jurisprudence should not include *res judicata*!

Rights may continue, but when asserted unsuccessfully rights are discontinued, precluded from being re-asserted when all the elements of *res judicata* are established, as in this case. It matters not that the second assertion includes enhanced arguments not made in the first case, as in this second case where Midcontinent cites the FCC's 2011 Ruling.

Midcontinent's 2011 request for interconnection masquerades as a unique request for interconnection under § 251(a) where it is in reality substantially identical to its 2007/2008 request for § 251(c)(2) CLEC/ILEC interconnection. The interconnection requested by Midcontinent in 2011 is not a new claim. The 2011 request uses a few different words to repeat the old claim. This reality shows it is true not only that the two actions present identical claims, it is also true that the interconnection that Midcontinent requests in 2011 was actually litigated in 2008, litigated for what it was, a request for "interconnection with the local exchange carrier's network--(A) for the transmission and routing of telephone exchange service." § 251(c)(2) Midcontinent's claim made in 2008 cannot be relitigated in 2011.

Res judicata subjects litigants to a use it or lose it discipline. It matters not why issues belatedly asserted in the second action were not vehemently asserted in the first. Issues that could have been raised in the first action but were not are lost in the second action whether or not raised in the first action. Midcontinent had the opportunity to assert a claim under § 251(a) and acknowledged that alternative theory in the first action in 2008. Therefore, under res judicata, Midcontinent's 2011 petition for interconnection under § 251(a) is precluded.

IV. Summary and Conclusion

Missouri Valley is a rural ILEC serving the Williston, North Dakota exchange.

Midcontinent is a CLEC that has, for the second time, requested interconnection with Missouri Valley for the purpose of exchanging local telecommunications traffic in the Williston exchange. Missouri Valley declined the second request, relying on its rural exemption from interconnection that was not terminated the first time Midcontinent requested CLEC/ILEC interconnection. *Rural Exemption Order and Federal Court Order, Appendices A and B.*

Midcontinent's initial response to Missouri Valley's motion to dismiss its petition declared "This proceeding focuses on a narrow set of questions concerning the terms and conditions under which Missouri Valley is required to provide interconnection by Section 251(a) of the federal Communications Act.' It does not concern whether interconnection is required. That is settled by the text of Section 251(a)." *Midcontinent brief in opposition to motion to dismiss at 1; Dkt # 9.*

Midcontinent misstates the issues. The single narrow question in this case is whether Missouri Valley is required to provide interconnection under Section 251(a) "for the purpose of exchanging local telecommunications traffic in the Williston exchange" as requested by Midcontinent. *Midcontinent's June 14, 2011 request and 2011 Petition, pp1-2; Exhibit 1, Dkt # 1.* If there is no statutory duty to provide a local exchange interconnection, there are no terms and conditions, nothing to negotiate or arbitrate. The text of Section 251(a) does not require an exempt rural telephone company to provide a local exchange interconnection.

Under res judicata, that question was settled by the first action, even though it was not exhaustively argued in Case No. PU-08-61. Alternatively, it should be settled now that the Telecommunications Act and the FCC's 2011 Declaratory Ruling do not support Midcontinent's theory that Missouri Valley's Valley duty to provide interconnection under Section 251(a) includes the duty to exchange local telecommunications traffic in the Williston exchange.

The words of Midcontinent's 2007 request, the words of its 2011 request and Petition and the words of § 251(c)(2) are a trifecta of synonyms, alternate ways of describing CLEC/ILEC interconnection. In 2011 Midcontinent wrapped its old §251(c) request in new paper that cited § 251(a) but in reality requests § 251(c) interconnection. CLEC/ILEC interconnection was rejected by the Commission in 2008, should have been rejected by the Commission in 2012 and should be rejected on judicial review. No matter what verbal maneuvers Midcontinent might practice, the interconnection it requests in 2011 "for the purpose of exchanging local telecommunications traffic in the Williston exchange" is the "rigorous section 251(c)(2) interconnection" "for the transmission and routing of telephone exchange service," the kind of interconnection that Missouri Valley is exempt from providing under § 251(f)(1)(A), under the 2008 Rural Exemption Order, the Federal Court Order and under the FCC's 2011 Ruling.

When it is recognized that Midcontinent's 2011 request only masquerades as a § 251(a) request where it is in reality a request for § 251(c)(2) CLEC/ILEC interconnection, it follows that the two grounds for dismissal are consistent, each supporting the other. Midcontinent had the opportunity to assert a claim under § 251(a) in its first action in 2008 seeking interconnection in Williston. The interconnection that Midcontinent requests in 2011 was litigated in 2008, litigated for what it was, a request for § 251(c)(2): "interconnection with the local exchange carrier's network--(A) for the transmission and routing of telephone exchange service." It was a claim that could have been made and was made in 2008, a claim that cannot be relitigated in 2011 under *res judicata*.

The PSC's 2012 Order and its approval of the arbitrated interconnection do not meet the requirement of § 251 that a rural telephone company is not obliged to interconnect unless and until its exemption is terminated under § 251(f)(1)(B). Under § 251(e)(6) the Court should enter

an order and declaratory judgment that the North Dakota Public Service Commission's June 27, 2012 Interconnection Order in its Case No. PU-11-69 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.

Dated this 17th day of October, 2012.

/s/ David J. Hogue
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APPENDIX A

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

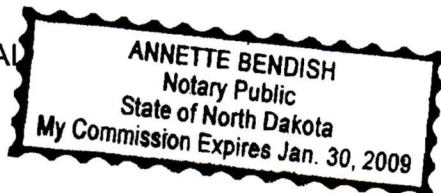
Each address shown is the respective addressee's last reasonably ascertainable post office address.

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



Annette Bendish
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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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.

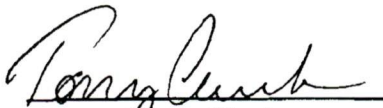
From the foregoing Findings of Fact and Conclusions of Law, the Commission makes the following:

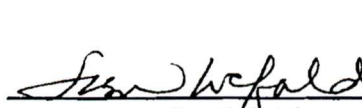
Order

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. Wefald
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

APPENDIX C

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Petition of CRC Communications of Maine, Inc. and Time Warner Cable Inc. for Preemption Pursuant to Section 253 of the Communications Act, as Amended)	WC Docket No. 10-143
)	
A National Broadband Plan for Our Future)	GN Docket No. 09-51
)	
Developing a Unified Intercarrier Compensation Regime)	CC Docket No. 01-92
)	
T-Mobile <i>et al.</i> Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs)	

DECLARATORY RULING

Adopted: May 25, 2011

Released: May 26, 2011

By the Commission: Chairman Genachowski issuing a statement; Commissioner Copps concurring and issuing a statement; Commissioner Clyburn approving in part, concurring in part and issuing a statement; Commissioner Baker not participating.

I. INTRODUCTION

1. In this Declaratory Ruling, we reaffirm basic interconnection rights for competitive providers of voice services. The purpose of this ruling is to clarify statutory rights under section 251 of the Communications Act of 1934, as amended (the Act), in light of apparently conflicting determinations in several states. Our decision will promote competition and spur investment in communications networks and services, particularly in rural areas, by encouraging the deployment of facilities-based voice services. The decision will also give competitors the opportunity to offer “triple-play” services (voice, video, and data) by providing interconnection with incumbent carriers in the same area. Moreover, our decision will provide clarity and guidance to incumbent local exchange carriers (LECs), competitive providers, and state commissions about the rights and obligations regarding negotiation and arbitration under section 251.

2. We clarify that LECs are obligated to fulfill all of the duties set forth in sections 251(a) and (b) of the Act, including the duty to interconnect and exchange traffic, even if the LEC has a rural exemption from the obligations set forth in section 251(c).¹ We also clarify that the rural incumbent LECs’ obligations under sections 251(a) and (b) can be implemented through the state commission arbitration and mediation provisions in section 252 of the Act.² Finally, we reaffirm that providers of wholesale telecommunications services enjoy the same rights as any other telecommunications carrier

¹ See 47 U.S.C. §§ 251(a), (b), (f)(1); Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (1996 Act or the Act). The rural exemption is set forth in 47 U.S.C. § 251(f)(1).

² See 47 U.S.C. § 252.

under sections 251(a) and (b) of the Act.³ We believe the guidance provided in this Declaratory Ruling is necessary to remove substantial uncertainty regarding the scope of sections 251 and 252 in state commission proceedings.

3. CRC Communications of Maine, Inc. (CRC) and Time Warner Cable Inc. (TWC) asked the Commission to preempt an order by the Maine Public Utilities Commission (Maine PUC) addressing issues similar to the ones we address in this Declaratory Ruling.⁴ The Oklahoma Western Telephone Company (OWTC) filed a Petition for Clarification asking “that the Commission clarify that the determination of an exempt rural carrier’s interconnection, reciprocal compensation and other duties imposed by section 251(a) and (b) of the Act are not subject to the mandatory negotiation and arbitration procedures respectively specified in sections 251(c) and section 252 of the Act.”⁵ We decline to grant these petitions. We find that our Declaratory Ruling will clarify parties’ rights and obligations under sections 251 and 252 and that preemption is unnecessary. CRC and TWC may submit a request for interconnection under section 251(a) and (b) and may invoke the arbitration procedures of section 252 if the parties are unable to reach a negotiated agreement. We also recognize that state commissions have the responsibility in the first instance for determining whether, and the extent to which, the provisions in section 251(f) apply in a particular context.

II. BACKGROUND

4. *Section 251 Duties.* Section 251 provides a graduated set of interconnection requirements and other obligations designed to foster competition in telecommunications markets, particularly local markets. The nature and scope of these obligations vary depending on the type of service provider involved. Section 251(a) sets forth general duties applicable to all telecommunications carriers, including the duty “to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers.”⁶ Section 251(b) sets forth additional duties for LECs pertaining to resale of services, number portability, dialing parity, access to rights-of-way, and reciprocal compensation – the duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications (*i.e.*, arrangements for exchange of traffic terminating on another carrier’s network).⁷ Section 251(c) sets forth the most detailed obligations, which apply to *incumbent* LECs, the group of local telephone companies that, prior to the 1996 Act, generally had been subject to little or no competition.⁸ These section 251(c) obligations include: the duty to “negotiate in good faith in accordance with section 252 the particular terms and conditions of agreements” to fulfill the section 251(b) and (c) requirements; additional direct, physical interconnection obligations; requirements to unbundle network elements; the duty to allow resale of telecommunications services at wholesale rates; requirements to

³ See *Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, WC Docket No. 06-55, Memorandum Opinion and Order, 22 FCC Rcd 3513 (WCB 2007) (*TWC Order*).

⁴ Petition of CRC Communications of Maine, Inc. and Time Warner Cable Inc. for Preemption Pursuant to Section 253 of the Communications Act, as Amended, WC Docket No. 10-143 (filed July 15, 2010) (CRC/TWC Petition).

⁵ See *Developing a Unified Intercarrier Compensation Regime; T-Mobile et al. Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs*, Oklahoma Western Telephone Company Petition for Clarification of Declaratory Ruling and Report and Order, CC Docket No. 01-92, at 1 (filed Nov. 27, 2006) (OWTC Petition).

⁶ 47 U.S.C. § 251(a)(1).

⁷ 47 U.S.C. § 251(b).

⁸ 47 U.S.C. § 251(c); see also 47 U.S.C. §§ 251(h), 252(j) (defining incumbent LEC).

provide notice of network changes; and a requirement to allow collocation of equipment.⁹

5. *The Rural Exemption.* Section 251(f)(1), known as the rural exemption, states that section 251(c) “shall not apply to a rural telephone company”¹⁰ until the rural telephone company, or rural LEC, has received a bona fide “request for interconnection, services, or network elements,” and the relevant state commission determines that the request is not unduly economically burdensome, is technically feasible, and is consistent with section 254.¹¹ The Commission has stated that Congress intended exemption from the section 251(c) requirements to be the exception rather than the rule, and to apply only to the extent, and for the period of time, that policy considerations justify such exemption.¹² In 1997, the Commission addressed the scope of the rural exemption in the context of section 251(b)’s number portability obligations.¹³ The Commission found that because section 251(f)(1) does not exempt rural LECs from the requirements of section 251(b), rural LECs remain subject to the section 251(b) number portability obligations even if they also are subject to section 251(f)(1)’s rural exemption.¹⁴

6. *Section 252.* Section 252 directs state commissions to mediate and arbitrate interconnection disputes involving an incumbent LEC,¹⁵ as well as to review interconnection agreements arrived at “by negotiation and arbitration.”¹⁶ The Commission has declined to adopt rules advising the state commissions on how to conduct mediations and arbitrations, and has stated that the states are in a better position to develop mediation and arbitration rules that support the objectives of the 1996 Act.¹⁷ Under section 252(a), when an incumbent LEC receives a request for “interconnection, services, or network elements pursuant to section 251,” and enters into voluntary negotiations, the incumbent LEC may negotiate without regard to the standards set forth in sections 251(b) and (c).¹⁸ Any party voluntarily negotiating such an interconnection agreement may ask a state commission to mediate any differences.¹⁹

⁹ 47 U.S.C. § 251(c).

¹⁰ See 47 U.S.C. § 153(37) (defining “Rural Telephone Company”). The Commission also has defined the term “rural incumbent local exchange carrier” as a carrier that is both an incumbent LEC and satisfies the definition of rural telephone company. See 47 C.F.R. § 54.5.

¹¹ 47 U.S.C. § 251(f)(1)(A).

¹² See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98, 95-185, First Report and Order, 11 FCC Rcd 15499, 16118, para. 1262 (1996) (subsequent history omitted) (*Local Competition Order*). As noted by the Maine rural LECs, section 251(f) reflects a balance between the goals of universal service and local competition, which “sometimes complement and sometimes compete with each other.” See Letter from Joseph G. Donahue, Counsel for Lincolnville Networks, Inc., Tidewater Telecom, Inc., Oxford Telephone Company, and Oxford West Telephone Company, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-143, at 2 (dated Dec. 23, 2010) (Rural LECs Dec. 23, 2010 *Ex Parte* Letter).

¹³ See *Telephone Number Portability*, CC Docket No. 95-116, RM 8535, First Memorandum Opinion and Order on Reconsideration, 12 FCC Rcd 7236, 7303-05, paras. 117-21 (1997) (*First Number Portability Reconsideration Order*).

¹⁴ See *id.* at 7303-04, para. 117.

¹⁵ 47 U.S.C. §§ 252(a)(2), (b)(1).

¹⁶ 47 U.S.C. §§ 252(a)(1), (e)(1).

¹⁷ See *Local Competition Order*, 11 FCC Rcd at 16127, para. 1283.

¹⁸ 47 U.S.C. § 252(a)(1).

¹⁹ See 47 U.S.C. § 252(a)(2).

Additionally, section 252(b) sets forth a mandatory arbitration scheme for interconnection disputes.²⁰

7. *Time Warner Cable (TWC) Order.* In 2007, the Wireline Competition Bureau (Bureau) released the *TWC Order*, in which it granted Time Warner Cable's petition asking the Commission to declare that telecommunications carriers are entitled to interconnect and exchange traffic with incumbent LECs pursuant to sections 251(a) and 251(b) of the Act when providing telecommunications services to other service providers, including VoIP service providers.²¹ In that Order, the Bureau reaffirmed that such "wholesale" providers of telecommunications services are telecommunications carriers for the purposes of sections 251(a) and (b) of the Act, and are entitled to the rights of telecommunications carriers under those provisions.²² The Bureau concluded that "state commission decisions denying wholesale telecommunications service providers the right to interconnect with LECs pursuant to sections 251(a) and (b) of the Act are inconsistent with the Act and Commission precedent and would frustrate the development of competition and broadband deployment."²³

8. *CRC Communications and Time Warner Cable Petition for Preemption.* On July 15, 2010, CRC and TWC filed a petition with the Commission seeking preemption²⁴ of a May 5, 2008 Order (*Maine PUC Order*) issued by the Maine PUC.²⁵ In that Order, the Maine PUC held that rural incumbent LECs have no obligation to negotiate in good faith under sections 251(a) and (b) of the Act and, until the rural exemption in section 251(f)(1) is lifted, "there is . . . nothing to arbitrate" under section 252.²⁶ In

²⁰ From the 135th to 160th day after the date on which an incumbent LEC receives a request for negotiation under section 252, the carrier or any other party to the negotiation may petition a state commission "to arbitrate any open issues." 47 U.S.C. § 252(b)(1).

²¹ See *TWC Order*, 22 FCC Rcd 3513, para. 1; 47 U.S.C. § 251.

²² See *TWC Order*, 22 FCC Rcd at 3517, paras. 8-9.

²³ *Id.* at 3513, para. 1; see also 47 U.S.C. § 153(43) (defining "telecommunications"); 47 U.S.C. § 153(46) (defining "telecommunications service"); 47 U.S.C. § 153(44) (defining "telecommunications carrier"); *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 22033, para. 264 (1996) (subsequent history omitted) (concluding that wholesale services are included in the definition of "telecommunications service"); *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9177-78, para. 785 (1997) (subsequent history omitted).

²⁴ *CRC/TWC Petition.* Section 253 of the Act, 47 U.S.C. § 253, directs the Commission to preempt any State or local statute, regulation, or other legal requirement if it determines that the State or local statute, regulation, or other legal requirement prohibits or has the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

²⁵ *CRC Communications of Maine, Inc. Petition for Consolidated Arbitration with Independent Telephone Companies Towards an Interconnection Agreement Pursuant to 47 U.S.C. 151, 252, Order*, Docket No. 2007-611 (Maine Pub. Utils. Comm'n May 5, 2008) (*Maine PUC Order*).

²⁶ *Maine PUC Order* at 14. The Maine PUC ordered an evidentiary hearing to determine whether the rural exemption should be terminated as to the five rural LECs at issue in the proceeding. *Id.* CRC chose not to appeal the *Maine PUC Order* and instead filed petitions to lift the rural exemption as to the five rural LECs. *CRC/TWC Petition* at 7. The Maine PUC initially dismissed those five petitions in November 2008 without holding an evidentiary hearing, and CRC filed renewed petitions in January 2009. *Id.* at 7-8. The Hearing Examiner's Report granted CRC's request to lift the rural exemption as to two of the five rural LECs. See *CRC Communications of Maine's Requests of UniTel, Inc. Lincolnville Telephone Company, Tidewater Telecom, Inc., Oxford Telephone Company, and Oxford West Telephone Company*, Examiner's Report, Docket Nos. 2009-40, 2009-41, 2009-42, 2009-43, 2009-44, at 73-75 (Maine Pub. Utils. Comm'n May 27, 2010). However, by order issued July 9, 2010, the Maine PUC denied CRC's renewed petitions on the grounds that CRC had failed to meet its evidentiary burden. *CRC Communications of Maine, Inc. Investigations Pursuant to 47 U.S.C. § 251(f)(1) Regarding CRC* (continued....)

reaching this conclusion, the Maine PUC found that the statutory source of an incumbent LEC's obligation to negotiate an interconnection agreement with competitive carriers is section 251(c)(1), and that rural LECs were exempt from this provision pursuant to section 251(f)(1).²⁷ The Maine PUC acknowledged that a rural incumbent LEC "is not exempt from the obligations set forth in § 251(a) and § 251(b)," but concluded that it did not have authority to directly enforce the requirements of those provisions because its arbitration authority "presumes a duty on the part of an ILEC to engage in good faith negotiations regarding the terms of such an agreement in the first instance."²⁸ CRC and TWC asked the Commission to direct the Maine PUC to compel the rural LECs to negotiate pursuant to sections 251(a) and 251(b) of the Act, and direct the Maine PUC to commence an arbitration should negotiations prove unsuccessful.²⁹ On July 29, 2010, the Wireline Competition Bureau (Bureau) issued a Public Notice seeking comment on the Petition and the arguments raised therein regarding interconnection obligations under sections 251 and 252 of the Act.³⁰

9. *Oklahoma Western Telephone Company Petition.* In November 2006, Oklahoma Western Telephone Company (OWTC) filed a petition requesting that the Commission clarify that the determination of an exempt rural carrier's interconnection, reciprocal compensation, and other duties imposed by sections 251(a) and (b) are not subject to the mandatory negotiation and arbitration procedures, respectively, in section 251(c) and section 252 of the Act.³¹ Specifically, OWTC requests clarification of whether a rural incumbent LEC subject to the section 251(f)(1) rural exemption may be compelled to engage in contractual negotiations and arbitration with another carrier.³²

10. A number of other state commissions that have considered similar issues have reached varying conclusions.³³ For example, the New Hampshire Public Utilities Commission, the Vermont

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 Communications of Maine's Requests of UniTel, Inc. Lincolnville Telephone Company, Tidewater Telecom, Inc., Oxford Telephone Company, and Oxford West Telephone Company, Order, Docket Nos. 2009-40, 2009-41, 2009-42, 2009-43, 2009-44, at 54 (Maine Pub. Utils. Comm'n July 9, 2010). The Maine PUC also dismissed CRC's petition as to one rural LEC on the grounds that CRC's request to interconnect was not *bona fide*. *Id.* We recognize that the Maine PUC has expended significant time and resources in reaching its conclusion that the 251(f)(1) rural exemption should not be lifted in this case, and note that such findings may be useful in future proceedings.

²⁷ *Maine PUC Order* at 14.

²⁸ *Id.*

²⁹ CRC/TWC Petition at 29.

³⁰ *Comment Sought on CRC Communications of Maine and Time Warner Cable Petition for Preemption*, WC Docket No. 10-143, Public Notice, 25 FCC Rcd 10360 (2010). We therefore reject assertions by the Maine rural LECs that interested parties have not been properly noticed or given an adequate opportunity to address these issues. See Rural LECs Dec. 23, 2010 *Ex Parte* Letter at 2. A list of commenters responding to the Public Notice is provided in the Appendix.

³¹ OWTC Petition. For convenience, in this Declaratory Ruling we refer to a rural LEC that is subject to the exemption in section 251(f)(1) as an *exempt* rural carrier.

³² OWTC Petition at 5.

³³ Compare *IDT America, Corp. Petition for Arbitration of an Interconnection Agreement with Union Tel. Co.*, Final Order, No. 09-048, 2009 WL 3332257, at 18, available at: <http://www.puc.nh.gov/Regulatory/Orders/2009orders/25022t.pdf> (N.H. Pub. Utils. Comm'n Oct. 7, 2009) (finding a duty to provide interconnection under sections 251(a) and (b) of the Act, "which is not affected by the rural exemption") (*New Hampshire Order*); *Petitions of Vt. Tel. Co., Inc. (VTel), and Comcast Phone of Vt., LLC, d/b/a Comcast Digital Phone (Comcast), for Arbitration of an Interconnection Agreement Between VTel and Comcast, Pursuant to Section 252 of the Telecomm. Act of 1996, and Applicable State Laws*, Order, No. 7469, 2009 WL 290190, at *9, 44 (Vt. Pub. Serv. Bd. Feb. 2, 2009) (*Vermont Order*) (same); *Cambridge Tel. Co. et al. Petitions for* (continued....)

Public Service Board, and the Illinois Commerce Commission found that the rural exemption did not affect the incumbent LEC's obligation to provide interconnection under section 251(a) and (b). The Public Utilities Commission of Texas, the North Carolina Utilities Commission, and the Maine PUC found that incumbent LECs that qualified for a rural exemption under section 251(f)(1) were relieved of the obligation to negotiate in good faith.

III. DISCUSSION

11. We believe it is important to remove the uncertainty surrounding the proper interpretation of sections 251 and 252 in situations where the rural exemption applies. We expect today's Declaratory Ruling will resolve this uncertainty.³⁴ The Commission has broad discretion to issue a declaratory ruling,³⁵ and the record reflects uncertainty about whether section 252's negotiation and arbitration provisions apply to requests made to rural incumbent LECs for interconnection and services pursuant to sections 251(a) and (b).³⁶ Parties assert that this uncertainty impedes efforts to promote local competition

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Declaratory Ruling and/or Suspension or Modification Relating to Certain Duties under Section 251(b) and (c) of the Federal Telecomm. Act, Pursuant to Section 251(f)(2) of that Act; And For Any Other Necessary or Appropriate Relief, Order, No. 05-0259, 2005 WL 1863370 slip op. at 5, 13 (III. Commerce Comm'n July 13, 2005) (*ICC Order*) (finding that "an exemption from Section 251(c) does not encompass the obligations imposed in Section 251(b)" and that the rural incumbent LEC was required to "negotiate the terms and conditions for interconnection" under section 251(a) with the requesting telecommunications carrier) *with Petition of Sprint Communications, LP for Arbitration with Pineville Tel. Co.; Application of Sprint Communications Co. L.P. for an Amendment to its Certificate of Public Convenience and Necessity*, Order Holding Sprint's Petition to Establish an Interconnection Agreement in Abeyance, Nos. P-120 SUB-26, P-294 SUB 7, at 11-12, available at: <http://ncuc.commerce.state.nc.us/cgi-bin/webview/senddoc.pgm?dispfmt=&itype=Q&authorization=&parm2=BAAAAA41001B&parm3=000131039> (N.C. Utils. Comm'n Jan. 14, 2010) (finding that the rural LEC was exempt from negotiating an interconnection agreement regarding 251(b) obligations until the state commission terminates the rural exemption) (*North Carolina Order*); *Maine PUC Order* at 14 (finding that the Maine PUC lacks authority to enforce a rural LEC's section 251(a) and (b) obligations because rural LECs have no duty to negotiate in good faith to fulfill those obligations). Compare also *Harrisonville Tel. Co. v. Ill. Commerce Comm'n*, No. 06-73-GPM, slip op. at 8-9 (S.D. Ill. Sept. 5, 2007) (concluding that "47 U.S.C. § 251(f)(1) provides no exemption for the ILECs from the obligations imposed in" section 251(b)) and *Vermont Tel. Co., Inc. v. Comcast Phone of Vermont, LLC, et al.*, No. 2:09-cv-00198, slip op. at 11 (D. Vt. Feb. 5, 2010) (finding that the rural exemption "does not affect the substantive duties imposed on communications carriers and LECs" by sections 251(a) and (b)) *with Sprint Communications Co. L.P. v. Pub. Util. Comm'n of Tex.*, No. A-06-CA-065-SS, 2006 WL 4872346, at *4-5 (W.D. Tex. 2006) (*Brazos*) (finding that Brazos, the rural incumbent LEC, had no duty to negotiate any interconnection agreement under 251(a) unless and until its rural exemption was lifted).

³⁴ See also CRC/TWC Petition at 1 (requesting that the Commission issue an order to "eliminate a significant obstacle that the Maine Public Utilities Commission . . . has placed in the way of voice competition and broadband deployment" pursuant to "Sections 1.1 and 1.2 of the Commission's rules and Section 253" of the Act) (emphasis added); CRC/TWC Reply at 7 (stating that the petition also "requests relief pursuant to the rule that authorizes declaratory rulings" and that "the formal mechanism through which the Commission provides relief is ultimately academic").

³⁵ See *Yale Broadcasting Co. v. FCC*, 478 F.2d 594, 602 (D.C. Cir. 1973). Under Section 1.2 of the Commission's rules, the Commission may issue a declaratory ruling either to terminate a controversy or to remove uncertainty. 47 C.F.R. § 1.2.

³⁶ See *infra* note 33 (listing varying state commission and court determinations applying these statutory provisions); Letter from Matthew Brill to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-143, at 1-2 (filed Jan. 21, 2011) (TWC Jan. 21, 2011 *Ex Parte* Letter) (explaining that the North Carolina Utilities Commission adopted the reasoning of the *Brazos* court and compelled Sprint to initiate a rural exemption proceeding in order to interconnect and exchange traffic pursuant to sections 251(a) and (b)); Letter from Mary McManus, Comcast, to Marlene H. (continued....)

and broadband deployment in some parts of the nation.³⁷ By interpreting the pertinent provisions of the Communications Act, we clarify parties' rights under the statute and do not find it necessary to address the substance of any particular state decisions at this time.³⁸

A. Scope of the Rural Exemption

12. For consumers to have a choice of service providers, competitive carriers must be able to interconnect their networks with incumbent providers.³⁹ Further, as the 1996 Act recognized, without the

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 Dortch, Secretary, FCC, WC Docket No. 10-143 (filed Feb. 17, 2011) (Comcast Feb. 17, 2011 *Ex Parte* Letter) (asserting that the pendency of this proceeding has delayed Comcast's attempt to negotiate an interconnection agreement in Vermont). We therefore reject the Maine rural LECs' assertion that "it would be inappropriate to use a declaratory ruling mechanism to resolve some undefined 'controversy.'" *See* Rural LECs Dec. 23, 2010 *Ex Parte* Letter at 1; *see also* Letter from Thomas J. Moorman, Counsel for UniTel, Inc. to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-143, at 2 (filed Jan. 14, 2011) (Rural LECs Jan. 14, 2011 *Ex Parte* Letter); Letter from Joseph G. Donahue, Counsel for Lincolnville Networks, Inc., Tidewater Telecom, Inc., Oxford Telephone Company, and Oxford West Telephone Company, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-143, at 2 (filed Mar. 3, 2011) (Rural LECs Mar. 3, 2011 *Ex Parte* Letter).

³⁷ *See, e.g.*, Charter Comments at 5-6 (asserting that by granting the petition, the Commission will promote greater competition and further investment in broadband networks in rural communities); VON Comments at 2 (arguing that because VoIP is a driver of broadband services, the Maine PUC's decision will slow demand for broadband in rural areas); Verizon Reply at 3 (asserting that rural carriers that refuse to comply with section 251(b) contravene Congress's and the Commission's longstanding policy goals of removing barriers to entry and promoting broadband deployment); Comcast Feb. 17, 2011 *Ex Parte* Letter at 2 (asserting that Comcast and other competitive providers may be foreclosed from entering rural areas in other states to offer competitive voice services until the Commission clarifies this issue).

³⁸ We disagree with Unitel's assertion that petitioners must "pursue any claims they believe they have before a federal court" under section 252. *See* Letter from Thomas J. Moorman, Counsel for UniTel, Inc. to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-143, at 1 (dated Oct. 27, 2010). CRC and TWC's petition was filed pursuant to section 253 of the Act and section 1.2 of the Commission's rules, not section 252(e)(5). *See supra* note 35. Given our decision to act pursuant to section 1.2 of the Commission's rules, the Commission's authority over particular state decisions is not at issue here. *See also* *Petition for Commission Assumption of Jurisdiction of Low Tech Designs, Inc.'s Petition for Arbitration with Ameritech Illinois Before the Illinois Commerce Commission*; *Petition for Commission Assumption of Jurisdiction of Low Tech Designs, Inc.'s Petition for Arbitration with BellSouth Before the Georgia Public Service Commission*; *Petition for Commission Assumption of Jurisdiction of Low Tech Designs, Inc.'s Petition for Arbitration with GTE South Before the Public Service Commission of South Carolina*, CC Docket Nos. 97-163, 97-164, 97-165, Memorandum Opinion and Order, 13 FCC Rcd 1755, 1776, para. 38 (1997) (*Low Tech Designs Order*) (noting the Commission's concern about state requirements that "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service," and stating that if petitioner chooses "to file a section 253 petition, [the Commission] would place such a petition on public notice pursuant to section 253(d)" and "[u]pon review of the record received from all interested parties," take appropriate action). Further, as discussed *infra* note 47, the Act establishes, and courts have confirmed, the primacy of federal authority with regard to several of the local competition provisions of the Act.

³⁹ *See, e.g.*, FCC, OMNIBUS BROADBAND INITIATIVE (OBI), CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN, GN Docket No. 09-51, at 49 (2010) (NATIONAL BROADBAND PLAN) ("For competition to thrive, the principle of interconnection—in which customers of one service provider can communicate with customers of another—needs to be maintained."); *see also* COMPTTEL Comments at 3 (arguing that the *Maine PUC Order* prevents competitors from entering the incumbent LECs' markets, preserves the incumbent LECs' monopoly status, and gives rural carriers the unilateral right to veto a competitor's market entry); Charter Comments at 6 (explaining that Charter has successfully entered into interconnection and/or traffic exchange agreements with over 150 RLECs in 17 states relying on the rights conferred under section 251(a)).

ability to exchange telecommunications traffic with the local incumbent carrier, no competitive provider would be able to compete effectively.⁴⁰ Thus, when incumbent carriers resist interconnection with competitive telecommunications carriers, it impedes the development of facilities-based voice services in those areas.⁴¹ Competition in local telecommunications markets can deliver significant benefits to consumers in rural communities, including advanced features and cost savings.⁴² Such competition can also spur incumbent providers to improve their voice offerings and offer new services, such as broadband, to compete for customers.⁴³

13. The ability to provide competitive voice services also drives network investment decisions.⁴⁴ The ability to provide such services can play a significant role in enabling a service provider to justify additional investments in broadband network facilities and services.⁴⁵ Without interconnection for voice service, a broadband provider, which may partner with a competitive telecommunications carrier to offer a voice-video-Internet bundle, or “triple-play” services, is unable to capture voice revenues that may be necessary to make broadband entry economically viable.⁴⁶

14. Thus, we believe that a uniform, national policy concerning the scope of the rural exemption is necessary to promote local competition, prevent conflicting interpretations of carriers’ statutory obligations under the Act, and eliminate a potential barrier to broadband investment.⁴⁷ State commissions and federal courts have reached different conclusions about the obligation to negotiate and

⁴⁰ See NATIONAL BROADBAND PLAN at 49; *Local Competition Order*, 11 FCC Rcd at 14506, para. 4.

⁴¹ See CRC/TWC Petition at 5 (asserting that five rural incumbent LECs in Maine refused their request to interconnect and exchange traffic pursuant to section 251(a) and (b) because they claimed they were exempt from those duties under the rural exemption); Charter Comments at 6-7 (explaining that Charter has experienced many instances in which a rural LEC has “delayed, objected or refused to indirectly interconnect, provide dialing parity, agree to reciprocal compensation at symmetrical rates, and/or provide number portability within mandated timeframes”); COMPTTEL Comments at 6-7 (asserting that urgency for Commission action is “exacerbated by the fact that other state commissions have reached similar results” as the Maine PUC); see also NATIONAL BROADBAND PLAN at 49; Letter from Matthew A. Brill, Latham & Watkins, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 09-51, at 5 & Table (filed Nov. 12, 2009) (TWC Nov. 12, 2009 *Ex Parte* Letter); Verizon Comments at 5 (asserting that the Maine PUC’s decision effectively insulates those rural incumbent LECs from the obligation to comply with section 251(b), impeding TWC and other providers from introducing VoIP competition into the rural incumbent LECs’ service territories).

⁴² See CRC/TWC Petition at 3 (asserting that, in areas of rural Maine where CRC and TWC have entered, TWC offers flat-rate unlimited local, in-state, and long-distance calling; Caller ID on TV; and discounts on bundles that include its video and broadband Internet access service).

⁴³ See *id.* at 3-4.

⁴⁴ See, e.g., NATIONAL BROADBAND PLAN at 49; CRC/TWC Petition at 9; Charter Comments at 5-6; Letter from Matthew A. Brill to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-143, at 1 (filed Mar. 1, 2011) (TWC Mar. 1, 2011 *Ex Parte* Letter).

⁴⁵ See NATIONAL BROADBAND PLAN at 49; TWC Mar. 1, 2011 *Ex Parte* Letter at 1.

⁴⁶ See *id.*

⁴⁷ The Supreme Court has stated that “the question . . . is not whether the Federal Government has taken the regulation of local telecommunications competition away from the States. With regard to the matters addressed by the 1996 Act, it unquestionably has.” *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 379 n.6 (1999). See also *Southwestern Bell Tel. Co. v. Connect Communications Corp.*, 225 F.3d 942, 946-47 (8th Cir. 2000) (“The new regime for regulating competition in this industry is federal in nature . . . and while Congress has chosen to retain a significant role for the state commissions, the scope of that role is measured by federal, not state law.”).

arbitrate under section 251(a) and (b) in the event that the incumbent LEC has a rural exemption under section 251(f)(1). Therefore, to further the Commission's goals in promoting facilities-based competition, we take this opportunity to clarify the relationship between the section 251(a) and (b) obligations and the section 251(f)(1) rural exemption.⁴⁸ Consistent with Commission precedent, we reaffirm that all telecommunications carriers, including rural carriers covered by section 251(f)(1), have a basic duty to interconnect their networks under section 251(a) and that all LECs, including rural LECs covered by section 251(f)(1), have the obligation to comply with the requirements set forth in section 251(b).⁴⁹ We also clarify that a rural carrier's exemption under section 251(f)(1) offers an exemption only from the requirements of section 251(c) and does not impact its obligations under sections 251(a) or (b).⁵⁰

15. This interpretation flows directly from the language of section 251 itself. As explained above, section 251(a), which applies to "[e]ach telecommunications carrier," imposes a basic duty "to interconnect directly or indirectly" with other telecommunications carriers.⁵¹ Section 251(b) provides that all LECs must provide certain services designed to foster competition for local telecommunications services, including the obligation to provide number portability and dialing parity, as well as establish reciprocal compensation arrangements.⁵² Section 251(f)(1) states that section 251(c) "shall not apply to a rural telephone company" until certain requirements have been met.⁵³ By its terms, section 251(f)(1) does not grant an exemption from the requirements of sections 251(a) or (b). Because sections 251(a) and (b) are separate statutory mandates from section 251(c), the requirements of sections 251(a) and (b) apply to a rural LEC even if it is covered by the section 251(f)(1) exemption.⁵⁴

16. To interpret section 251(f)(1) otherwise would undercut sections 251(a) and (b) and significantly impede compliance with these provisions by rural LECs until termination of the section 251(f)(1) exemption by a state commission. In particular, if section 251(f)(1) were construed to exempt rural LECs from their section 251(a) and (b) duties, unless and until a state commission has terminated the rural exemption, a competing carrier could not avail itself of the rights to interconnection and other services that must be provided under sections 251(a) and (b), which could have a detrimental impact on

⁴⁸ See 47 C.F.R. § 1.2 ("The Commission may . . . on motion or its own motion issue a declaratory ruling terminating a controversy or removing uncertainty.").

⁴⁹ See 47 U.S.C. §§ 251(a)(1), (b); see also 47 C.F.R. §§ 51.100, 51.305. We note, of course, that carriers might obtain relief from the section 251(b) obligations in some instances pursuant to section 251(f)(2).

⁵⁰ See 47 U.S.C. § 251(f)(1); see *First Number Portability Reconsideration Order*, 12 FCC Rcd at 7305, para. 121, n.401 ("Rural LECs are not exempt from Sections 251(a) or (b) requirements under Section 251(f)(1)."); see also *Atlas Telephone Co. v. Oklahoma Corp. Com'n*, 400 F.3d 1256, 1266 (10th Cir. 2005) ("If Congress had intended § 251(c)(2) to provide the sole governing means for the exchange of local traffic, it seems inconceivable that the drafters would have simultaneously incorporated a rural exemption functioning as a significant barrier to the advent of competition. In sum, accepting [the rural carriers'] interpretation of § 251(c) would compel us to assume too much and ignore altogether the express language of the statute.").

⁵¹ 47 U.S.C. § 251(a)(1).

⁵² See 47 U.S.C. § 251(b).

⁵³ See 47 U.S.C. § 251(f)(1) ("Subsection (c) of this section shall not apply to a rural telephone company until (i) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines . . . that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 . . .").

⁵⁴ See *First Number Portability Reconsideration Order*, 12 FCC Rcd at 7304, para. 119; 47 U.S.C. §§ 251(a), (b), (c), (f)(1). We note that the Maine PUC reached the same determination regarding rural incumbent LECs' duties under sections 251(a) and (b). See *supra* text accompanying note 28.

the ability of rural Americans to benefit from competition, innovation, and investment in communications networks and services. We find that such an interpretation would be contrary to Congress's mandate that all telecommunications carriers interconnect directly or indirectly with other telecommunications carriers. Moreover, that section 251(f)(1) makes no mention of the section 251(a) and 251(b) obligations, including the duty to provide dialing parity and establish reciprocal compensation arrangements, is compelling evidence that Congress did not intend to exempt rural LECs from upholding their section 251(a) and 251(b) obligations.⁵⁵ Thus, we clarify that rural carriers exempt under section 251(f)(1) from the obligations of section 251(c) remain subject to the obligations set forth in sections 251(a) and (b).

17. We recognize that section 251(c)(1) imposes on incumbent LECs and requesting carriers the duty to negotiate in good faith to fulfill the requirements of section 251(b).⁵⁶ The rural exemption therefore relieves covered rural telephone companies from the obligation under 251(c)(1) to "negotiate in good faith" the particular terms and conditions of agreements to fulfill their obligations under section 251(b). However, the obligation to fulfill the requirements set forth in sections 251(a) and (b) does not arise from, or depend upon, the section 251(c)(1) duty to negotiate in good faith. If it did, the three-tiered hierarchy of section 251 would collapse, leaving non-exempt incumbent LECs as the only carriers subject to any duties under section 251.⁵⁷ For example, under such a reading of section 251, competitive LECs could not be compelled to interconnect with other competitive LECs under section 251(a), nor provide such competitors with any services set forth in section 251(b).⁵⁸ We find that this reading of the Act does not comport with the plain language and design of section 251.⁵⁹

B. Forum for Implementation of Rural Incumbent LECs' Section 251(a) and (b) Obligations

18. Having concluded that carriers covered by section 251(f)(1)'s rural exemption remain subject to the duties in sections 251(a) and (b), we next clarify the processes through which those requirements may be implemented.⁶⁰ We find that the Act is ambiguous as to whether the section 252 arbitration process can be invoked to implement and enforce the obligations in sections 251(a) and (b).⁶¹ Specifically, we note that the text of sections 251 and 252 does not expressly address this issue.⁶²

⁵⁵ See *First Number Portability Reconsideration Order*, 12 FCC Rcd at 7304, para. 119; see also *Atlas Tel. Co. v. Oklahoma Corp. Com'n*, 400 F.3d at 1266.

⁵⁶ 47 U.S.C. § 251(c)(1).

⁵⁷ Section 251(a) imposes relatively limited obligations on all telecommunications carriers; section 251(b) imposes moderate duties on local exchange carriers; and section 251(c) imposes more rigorous obligations on incumbent LECs. See *supra* para. 4.

⁵⁸ This is because competitive LECs are not subject to the section 251(c)(1) obligation to negotiate in good faith in this situation, since the obligations imposed by section 251(c) apply only to negotiations involving incumbent LECs. See 47 U.S.C. § 251(c).

⁵⁹ *Local Competition Order*, 11 FCC Rcd at 15505, para. 3.

⁶⁰ See, e.g., CRC/TWC Petition at 23-24 (requesting preemption of the *Maine PUC Order* because, "[c]ontrary to the MPUC's ruling, the plain language of Section 252 authorizes state commissions to arbitrate disputes arising from requests for interconnection under Sections 251(a) and (b)"); CRC/TWC Reply at 3 (asserting that the Commission should declare that a state commission has the affirmative duty to arbitrate interconnection agreements under section 252).

⁶¹ See *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 397 (1999) ("It would be gross understatement to say that the 1996 Act is not a model of clarity. It is in many important respects a model of ambiguity or indeed even self-contradiction.").

⁶² 47 U.S.C. §§ 251, 252.

Because the statute provides no definitive guidance as to how requests made to incumbent LECs for interconnection and services pursuant to sections 251(a) and (b) are to be implemented, state commissions and federal courts that have addressed the issue have reached different conclusions on the matter.⁶³

19. For the reasons discussed below, we conclude that requests made to incumbent LECs for interconnection and services pursuant to sections 251(a) and (b) are subject to state commission arbitration as set forth in section 252, and that section 251(f)(1) does not exempt rural incumbent LECs from the compulsory arbitration process established in that provision. In addition to arbitration, requests for interconnection and services pursuant to sections 251(a) and (b) are also subject to voluntary negotiation remedies, including mediation by the state commission.⁶⁴ As discussed in greater detail below, our conclusion is consistent with the language, structure, and intent of sections 251 and 252.

20. As an initial matter, the statutory text itself persuades us that this is a reasonable interpretation of the Act.⁶⁵ Much of the language of section 252 speaks broadly of the states' role in implementing section 251. We find ample support to conclude that Congress did not intend to restrict the arbitration authority of state commissions to matters arising under section 251(c). For example, several of section 252's jurisdictional and procedural provisions, on their face, refer generally to *all* interconnection disputes arising under section 251; these provisions do not restrict the arbitration authority of state commissions to matters arising under section 251(c). First, section 252(a) states that an incumbent LEC may negotiate and enter into a binding agreement upon "receiving a request for interconnection, services, or network elements pursuant to section 251."⁶⁶ Second, section 252(c) establishes general standards for state commission arbitration regarding "the requirements of section 251."⁶⁷ Third, section 252(e) directs the state commission to review "[a]ny interconnection agreement adopted by negotiation or arbitration," and grants the state commission authority to reject any interconnection agreement "if it finds that the agreement does not meet the requirements of section 251."⁶⁸ We emphasize that none of these provisions refer to a specific subclause in section 251, but rather to section 251 in general. Moreover, where

⁶³ Compare, e.g., *New Hampshire Order*, at 18 (finding that the right to conduct an arbitration for purposes of enforcing obligations under sections 251(a) and (b) is not barred by section 251(f)); *Cellco Partnership d/b/a Verizon Wireless*, Order of Arbitration, Docket No. 03-00585, Slip Copy, 2006 WL 707481, at *6 (Tenn. Reg. Auth. Jan. 12, 2006) (finding that to the extent section 251(a) and (b) obligations are not resolved through negotiations, they are properly resolved through section 252 arbitration proceedings); *Petition for Arbitration of an Interconnection Agreement Between Level 3 Communications and CenturyTel of Wash.*, Pursuant to 47 U.S.C. Section 252, Third Supplemental Order Confirming Jurisdiction, Docket No. UT-023043, 2002 WL 32866416, *2 (Wash. Utils. & Transp. Comm'n October 2002) (holding that "the duty to interconnect set forth in Section 251(a) is enforceable through the arbitration provisions of Section 252(b)" because "[n]othing in Section 252(a) limits the negotiation and arbitration processes to matters falling within Section 251(c)") with *North Carolina Order*, at 20 (finding that section 252's arbitration provisions require negotiations to have taken place, and that the rural LEC was exempt from such negotiations under section 251(f)); *Maine PUC Order* at 14.

⁶⁴ See 47 U.S.C. § 252(a)(2).

⁶⁵ See *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 & n.11 (holding that an agency's interpretation of a statutory scheme it is entrusted to administer is entitled to deference unless "arbitrary, capricious, or manifestly contrary to the statute," and that a court "need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding").

⁶⁶ 47 U.S.C. § 252(a). Section 252(a)(1) also requires the submission of "any interconnection agreement negotiated" before the enactment of the 1996 Act to the state commission." 47 U.S.C. § 252(a)(1).

⁶⁷ 47 U.S.C. § 252(c).

⁶⁸ 47 U.S.C. § 252(e) (emphasis added).

Congress intended to refer only to a specific subsection of section 251, it did so expressly.⁶⁹ For example, section 252(d) describes the pricing standard to be used in arbitrating the rates for reciprocal compensation pursuant to section 251(b)(5).⁷⁰ We therefore conclude that Congress intended section 252 to apply to requests to incumbent LECs for interconnection, services, or network elements made pursuant to sections 251(a) and (b), as well as pursuant to section 251(c).⁷¹

21. We note that, in this Declaratory Ruling, we do not address obligations associated with section 251(a) in isolation.⁷² The obligations of section 251(b) are not self-effectuating.⁷³ Rather, they are implemented in agreements that may implicate the interconnection obligations set forth in section 251(a) in a way not raised by section 251(a) in isolation. For example, when a LEC interconnects directly or indirectly with other carriers for the exchange of access traffic, that does not currently implicate section 251(b), and the pricing of the transport and termination of that traffic is governed by state and federal access charge rules.⁷⁴ When carriers interconnect directly or indirectly for the exchange of reciprocal compensation traffic, by contrast, details of the interconnection arrangement can be relevant to determining the appropriate reciprocal compensation rates under sections 251(b)(5) and 252(d)(2) and the Commission's rules.⁷⁵ We find it consistent with the structure and purpose of the Act for the state commissions, which are tasked with, at a minimum, arbitrating or reviewing any agreements relating to section 251(b) obligations, to also review issues relating to section 251(a) interconnection where issues relating to both sets of obligations are implicated in the same request for interconnection. Because this Declaratory Ruling addresses the authority of a state to arbitrate section 251(a) issues in conjunction with its arbitration of section 251(b) issues, we find inapposite prior Commission decisions suggesting that the procedures of section 252 are not applicable in matters involving section 251(a) alone.⁷⁶

⁶⁹ See, e.g., 252(d)(1), (d)(3), (g), (j).

⁷⁰ 47 U.S.C. § 252(d)(2).

⁷¹ We therefore deny OWTC's petition, and, as discussed *supra*, clarify that section 251(a) and (b) interconnection requests made to incumbent LECs are subject to the state commission arbitration authority set forth in section 252.

⁷² We therefore reject the arguments of the Maine rural LECs that the conclusions we reach today constitute an "attempt to utilize section 251(a) to usurp a state commission's jurisdiction over wholly intrastate services not specifically identified in section 251(b) and (c)," see Rural LECs Dec. 23, 2010 *Ex Parte* Letter at 3, or that "a declaratory ruling allowing a carrier to have the same forms of interconnection as those exclusively enumerated in sections 251(b) and (c) under some construction of section 251(a) would be the very type of end run on the jurisdiction of state commissions that section 251(f) of the Act does not allow." See Rural LECs Jan. 14, 2011 *Ex Parte* Letter at 3.

⁷³ See, e.g., Verizon Comments at 8.

⁷⁴ See, e.g., 47 C.F.R. § 51.701(b)(1) (specifically excluding "interstate or intrastate exchange access, information access, or exchange services for such access" from the scope of the reciprocal compensation pricing rules).

⁷⁵ See 47 U.S.C. §§ 251(b)(5), 252(d)(2)(A); *Local Competition Order*, 11 FCC Rcd at 16012-25, paras. 1033-59. We note that by permitting a state commission to suspend or modify a rural carrier's section 251(b) obligations in section 251(f)(2), Congress gave states an important role when weighing local competition concerns against universal service needs. See 47 U.S.C. § 251(f)(2).

⁷⁶ This Declaratory Ruling therefore has no impact on the continuing validity of the Commission's prior decisions arising under section 251(a) in isolation. See, e.g., *CoreComm Communications, Inc., and Z-Tel Communications, Inc., v. SBC Communications, Inc. et al.*, File No. EB-01-MD-017, Order on Reconsideration, 19 FCC Rcd 8447, 8454-55, para.18 (2004) (vacated on other grounds) (*Z-Tel*) (asserting that "[n]either the general interconnection obligation of section 251(a) nor the interconnection obligation arising under section 332 is implemented through the negotiation and arbitration scheme of section 252"); *Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual* (continued....)

22. This interpretation of the statute advances the goals of the Communications Act in several respects. For one, this interpretation advances the Act's competition policy goals. As the Commission has recognized, Congress did not intend to insulate small or rural LECs from competition, preventing subscribers in those communities from obtaining the benefits of competitive local exchange service, including innovative offerings.⁷⁷ We therefore reject the arguments of some commenters that oppose state arbitration of section 251(a) and (b) requirements without recognizing any alternative forum for enforcement of those requirements.⁷⁸ Were we to find that section 252 does not apply to requests made to incumbent LECs for interconnection or services under sections 251(a) and (b), our interpretation of the statute would foreclose an important avenue for implementing section 251(a) and (b) obligations.⁷⁹

23. Although, in theory, enforcement of sections 251(a) and (b) might occur through the courts or Commission proceedings, we believe that state arbitration pursuant to section 252 is more consistent with Congressional intent, given the Act's overall framework for implementing section 251. Congress purposefully established a role for state commissions to arbitrate and approve interconnection agreements in the first instance, permitting the Commission to preempt a state commission's jurisdiction only upon a failure to carry out its duties.⁸⁰ As a result, state commissions have built up significant expertise in adjudicating interconnection disputes under sections 251(a) and (b). Given the central role of state commissions in implementing section 251, we do not believe that Congress intended to deprive rural

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Arrangements under Section 252(a)(1), WC Docket No. 02-89, Memorandum Opinion and Order, 17 FCC Rcd. 19337, 19341, n.26 (2002) (stating that "only those agreements that contain an ongoing obligation relating to section 251(b) or (c) must be filed" with the state commission pursuant to section 252(a)(1)). See also Letter from Matthew A. Brill, Counsel for TWC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-143 (Jan. 11, 2011) (stating that "the Petition arises from CRC's requests to interconnect and exchange traffic with the RLECs pursuant to Sections 251(a) and (b)" and denying that the Petition or any of Petitioners' pleadings asserted a right to arbitration under section 251(a) standing alone).

⁷⁷ *Local Competition Order*, 11 FCC Rcd at 16118, para. 1262; see also *supra* paras. 12-13 (discussing the benefits of competition, including the ability of competitors to offer a "triple play" of voice, video, and data services). State commissions similarly have recognized the benefits of competition in rural areas. See, e.g., *ICC Order*, Docket No. 05-0259, at 13 ("Competition in the telecommunications industry has brought significant technological advances that few who live in rural Illinois have been able to take advantage of.").

⁷⁸ See, e.g., Rural LEC Comments at 2; Unitel Comments at 10-11; Unitel Reply at 2, 4; see also *Brazos*, 2006 WL 4872346 at *4-5.

⁷⁹ The Act does not contain an exemption from the duty to interconnect under section 251(a), and as the Commission has previously recognized, "the only statutory avenue for relief from the Section 251(b) requirements" is for a rural incumbent LEC to request suspension or modification of those requirements under the procedure established by section 251(f)(2). *First Number Portability Reconsideration Order*, 12 FCC Rcd at 7304, para. 117. "A local exchange carrier with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide may petition a State commission for a suspension or modification of the application of a requirement or requirements of" section 251(b) or (c). 47 U.S.C. § 251(f)(2); see also COMPTTEL Comments at 3; *Vermont Tel. Co., Inc. v. Comcast Phone of Vermont, LLC, et al.*, No. 2:09-cv-00198, slip op. at 11 (D. Vt. Feb. 5, 2010) (rejecting the argument that rural incumbent LECs are bound by the substantive requirements of 251(b) but are not bound by the "mandatory arbitration process that would lead to an eventual agreement" as "circular" and as ignoring the canon of statutory interpretation that you must view a specific provision in light of the statutory whole); *New Hampshire Order*, at 19 (finding that absent recourse to section 252 arbitration, a competitive carrier may be unable to obtain interconnection under sections 251(a) and (b) for the purpose of providing local service, notwithstanding its right to such interconnection). This is particularly true given that rural carriers subject to the section 251(f)(1) rural exemption do not have a statutory duty to negotiate in good faith pursuant to section 251(c) to implement the requirements of section 251(b).

⁸⁰ See 47 U.S.C. § 252(b)(1), (e)(1), (e)(5).

carriers and their competitors of the benefits of this expertise.⁸¹ Further, under the Act, it is the state commission that has authority to suspend or modify the requirements of section 251(b) in appropriate circumstances.⁸² Thus, state arbitration of section 251(a) and (b) obligations is consistent with the role envisioned by Congress for state commissions, and draws upon the expertise states have developed in arbitrating and approving interconnection agreements pursuant to section 252. Our interpretation also provides competing carriers with a clear path for seeking implementation of a rural incumbent LEC's local competition obligations under sections 251(a) and (b), including basic interconnection, dialing parity, number portability, and reciprocal compensation, even when the rural incumbent LEC is exempt from the more rigorous obligations of section 251(c).

24. We reject commenters' claims that, because "[s]ection 251(f)(1) . . . exempts rural carriers from the duty to negotiate in good faith over the terms and conditions of agreements to fulfill the duties of section 251(b),"⁸³ such carriers cannot be compelled to arbitrate pursuant to section 252.⁸⁴ As explained above, rural incumbent LECs have a duty to provide the interconnection and services set forth in sections 251(a) and (b), even if exempt from the section 251(c) "duty to negotiate in good faith" the terms and conditions of agreements to fulfill those duties. Moreover, section 252(b) does not link state arbitration authority to "negotiation" by an incumbent LEC, but to the incumbent LEC's receipt of "a request for negotiation under this section."⁸⁵ Consequently, we reject arguments that the prerequisite for arbitration is that negotiations have taken place.⁸⁶ Therefore, if a rural carrier were to decline or refuse to negotiate with a carrier that has requested to negotiate an agreement for "interconnection, services, or network elements,"⁸⁷ then the arbitration provisions in section 252(b)(1) would be triggered after the statutorily-prescribed time period has passed. In such case, either carrier could petition the state commission to arbitrate "any open issues" relating to the request for interconnection and services made pursuant to sections 251(a) and (b).⁸⁸ Such an interpretation is consistent with the language of sections

⁸¹ To the extent that Congress intended to relieve incumbent LECs of some of their obligations under section 251, Congress provided for that relief through section 251(f)(1)-(2). Congress further recognized the expertise of state commissions by leaving to the states determinations regarding exemptions, suspensions, and modifications pursuant to section 251(f) in the first instance.

⁸² 47 U.S.C. § 251(f)(2). The state commission shall grant such a request "to the extent that, and for such duration as, the State commission determines that such suspension or modification (A) is necessary (i) to avoid a significant adverse economic impact on users of telecommunications services generally; (ii) to avoid imposing a requirement that is unduly economically burdensome; or (iii) to avoid imposing a requirement that is technically infeasible; and (B) is consistent with the public interest, convenience, and necessity." *Id.*

⁸³ *First Number Portability Reconsideration Order*, 12 FCC Rcd at 7304, para. 117, n.393.

⁸⁴ See Maine PUC Comments at 9, n.7; Rural LECs Comments at 3; Unitel Comments at 12-13.

⁸⁵ See *Brazos* at *5; Maine PUC Comments at 10-11; Rural LECs Comments at 2; MPA/NASUCA Comments at 10-11.

⁸⁶ To the contrary, as stated above, the statutory prerequisite for a petition to the state commission for arbitration is a "request" for negotiation. 47 U.S.C. § 252(b)(1); see also *Vermont Tel. Co., Inc. v. Comcast Phone of Vermont, LLC, et al.*, No. 2:09-cv-00198, slip op. at 11-12 (D. Vt. Feb. 5, 2010) ("Even without negotiation under § 251(c), the Board still has jurisdiction to arbitrate 'any open issues' under § 252(b)(1) . . ."); *Vermont Order* at *44 (holding that "the triggering event for the Board's arbitration jurisdiction is 'a request to negotiate' an interconnection agreement, not actual negotiations"); Verizon Comments at 6 (arguing that a request to a rural incumbent LEC to implement the section 251(b) duties is sufficient to initiate the negotiation and arbitration process).

⁸⁷ 47 U.S.C. § 252(a)(1).

⁸⁸ 47 U.S.C. § 252(b)(1).

251 and 252, provides for a coherent relationship between these statutory provisions, and supports the overall pro-competitive and market-opening purposes of the Act. By contrast, if we were to construe the statute to compel arbitration only after an exempt rural incumbent LEC had entered into voluntary negotiations, that interpretation would provide a disincentive for such carriers to begin voluntary negotiations to fulfill their obligations under sections 251(a) and 251(b), which conflicts with these pro-competitive, market-opening purposes of the Act.

25. Finally, we reject the contention of some commenters that, to enforce the section 251(a) and (b) obligations, an interconnecting carrier must first have the rural exemption lifted by the state commission.⁸⁹ We observe that such an approach would subject the rural incumbent LEC to the full range of section 251(c) obligations, in addition to those of sections 251(a) and (b). By contrast, our approach allows the rural incumbent LEC to retain its exemption from more rigorous section 251(c)(2) interconnection, as well as unbundling and wholesale access requirements, while still providing it the procedural protections of having state commissions arbitrate section 251(a) and (b) interconnection and services requests. We find that this reading of the statute better preserves the protections that Congress intended for rural LECs.

C. Wholesale Carriers

26. We also reaffirm the Bureau's conclusion in the *TWC Order* that the Act does not differentiate between the provision of telecommunications services on a wholesale or retail basis for the purposes of sections 251(a) and (b), as well as that Order's holding that providers of wholesale telecommunications services enjoy the same rights as any other "telecommunications carrier" under those provisions of the Act.⁹⁰ The definition of "telecommunications services" in the Act does not specify whether those services are "retail" or "wholesale," but merely specifies that "telecommunications" be offered for a fee "directly to the public, or to such classes of users as to be effectively available directly to the public."⁹¹ As was more fully explained by the Bureau in the *TWC Order*, the definition of "telecommunications services" has long been held to include both retail and wholesale services under Commission precedent.⁹² We reaffirm the Bureau's finding that wholesale telecommunications carriers are entitled to interconnect and exchange traffic with incumbent LECs pursuant to sections 251(a) and (b) when providing telecommunications services to other service providers, including for the specific purpose of providing wholesale services to interconnected VoIP providers.⁹³ As the Bureau stated, a contrary decision would impede the important development of wholesale telecommunications and facilities-based VoIP competition, as well as broadband investment and deployment, by limiting the ability of wholesale carriers to offer service.⁹⁴

⁸⁹ See, e.g., Unitel Comments at 11 (asserting that section 252 does not apply unless and until a carrier is subject to section 251(c)(1)); Unitel Reply at 2, 4 (same).

⁹⁰ See *TWC Order*, 22 FCC Rcd at 3517, para. 9; see also *id.* at n.19 (affirming the longstanding Commission usage of a wholesale transaction of a service or product as an input to further sale to an end user, in contrast to a retail transaction for the customer's own personal use or consumption).

⁹¹ 47 U.S.C. § 153(46).

⁹² See *TWC Order*, 22 FCC Rcd at 3517-18, paras. 11-12 (explaining that under Commission precedent, the definition of "telecommunications service" is not limited to retail services, but also includes wholesale services when offered on a common carrier basis).

⁹³ Just as section 251(c) interconnection was not at issue—and therefore not addressed—in the *TWC Order*, we likewise do not address the interpretation or application of section 251(c) in this Order.

⁹⁴ See *TWC Order*, 22 FCC Rcd at 3517, para. 8.

27. In reaffirming these interconnection rights, we promote facilities-based voice competition, and also bolster the case for deploying additional broadband facilities and upgrading existing broadband networks in rural areas.⁹⁵ We reaffirm that VoIP providers may obtain access to and interconnection with the local exchange network through competitive carriers. Therefore, today's clarifications regarding the rights of wholesale carriers to interconnect pursuant to sections 251(a) and (b) advance the objectives of the Communications Act.⁹⁶

D. CRC/TWC Petition for Preemption

28. Because we clarify in this Declaratory Ruling that (i) rural incumbent LECs which are exempt from the requirements of section 251(c) nevertheless are subject to the obligations imposed by sections 251(a) and (b); and (ii) requests for interconnections and services made to incumbent LECs pursuant to sections 251(a) and (b) can be implemented and enforced through the section 252 arbitration process, we need not address CRC's and TWC's request to preempt the *Maine PUC Order*.⁹⁷ Our clarification in this Declaratory Ruling provides guidance to parties in Maine and elsewhere about the rights and obligations to negotiate and arbitrate the provisions of section 251(a) and (b), even in the face of a section 251(f)(1) rural exemption.

IV. ORDERING CLAUSES

29. Accordingly, IT IS ORDERED, pursuant to sections, 1, 3, 4, 201-205, 251, 252, and 303(r), of the Communications Act, as amended, 47 U.S.C. §§ 151, 153, 154, 201-205, 251, 252, 303(r), and section 1.2 of the Commission's rules, 47 C.F.R. § 1.2, that the Declaratory Ruling in WC Docket No. 10-143 and GN Docket No. 09-51 IS ADOPTED.

30. IT IS FURTHER ORDERED, pursuant to section 1.103(a) of the Commission's rules, 47 C.F.R. § 1.103(a), that this Declaratory Ruling SHALL BE EFFECTIVE upon release.

31. IT IS FURTHER ORDERED, pursuant to section 253 of the Communications Act, as amended, 47 U.S.C. § 253, that the Petition for Preemption filed by CRC Communications of Maine, Inc. and Time Warner Cable Inc. in WC Docket No. 10-143 on July 15, 2010 IS DISMISSED WITHOUT PREJUDICE.

⁹⁵ See TWC Nov. 12, 2009 *Ex Parte* Letter at 1. In affirming the rights of wholesale carriers, we also make clear that today's decision in no way diminishes the ongoing obligations of these wholesalers as telecommunications carriers, including compliance with any technical requirements imposed by the Commission or state commissions.

⁹⁶ We note that the regulatory classification of the service provided to the ultimate end user has no bearing on the wholesale provider's rights as a telecommunications carrier to interconnect under section 251. As such, we clarify that the statutory classification of a third-party provider's VoIP service as an information service or a telecommunications service is irrelevant to the issue of whether a wholesale provider of telecommunications may seek interconnection under section 251(a) and (b). We do not address in this ruling the statutory classification of VoIP services. See *IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, 19 FCC Red 4863 (2004).

⁹⁷ For these same reasons, we deny petitioners' request for preemption under section 251(d)(3). 47 U.S.C. § 251(d)(3); CRC/TWC Petition at 18 n.49.

32. IT IS FURTHER ORDERED, pursuant to section 1.2 of the Commission's rules, 47 C.F.R. § 1.2, that the Petition for Clarification of Declaratory Ruling and Report and Order filed by Oklahoma Western Telephone Company on November 27, 2006 in CC Docket No. 01-92 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX

List of Commenters
WC Docket No. 10-143

Commenter	Abbreviation
Charter Communications, Inc.	Charter
Lincolnton Networks, Inc., Tidewater Telecom, Inc., Oxford Telephone Company, and Oxford West Telephone Company	Rural LECs
Maine Public Utilities Commission	Maine PUC
Maine Public Advocate and the National Association of State Utility Consumer Advocates	MPA/NASUCA
National Cable & Telecommunications Association	NCTA
NTCH, Inc.	NTCH
Telephone Association of Maine	TAM
Unitel, Inc.	Unitel
Verizon	Verizon

Reply Comments

Reply Commenter	Abbreviation
CRC Communications of Maine, Inc. and Time Warner Cable Inc.	CRC/TWC
Lincolnton Networks, Inc., Tidewater Telecom, Inc., Oxford Telephone Company, and Oxford West Telephone Company	Rural LECs
Maine Public Utilities Commission	Maine PUC
Maine Public Advocate and the National Association of State Utility Consumer Advocates	MPA/NASUCA
Telephone Association of Maine	TAM
Unitel, Inc.	Unitel
Texas Statewide Telephone Cooperative, Inc.	TSTCI
Verizon	Verizon

**STATEMENT OF
CHAIRMAN JULIUS GENACHOWSKI**

Re: *Petition of CRC Communications of Maine, Inc. and Time Warner Cable Inc. for Preemption Pursuant to Section 253 of the Communications Act, as Amended; A National Broadband Plan for Our Future; Developing a Unified Intercarrier Compensation Regime; T-Mobile et al. Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs, WC Docket No. 10-143, GN Docket No. 09-51, CC Docket No. 01-92*

This Declaratory Ruling resolves uncertainty regarding the rights of new market entrants to interconnect with incumbent telephone companies, facilitating increased competition and broadband deployment. We affirm that new entrants seeking to interconnect with the incumbent's network may require the incumbent carrier to negotiate terms of access, and, if the negotiations prove unsuccessful, new entrants may invoke rights to state arbitration. These rights to negotiation and arbitration apply even if the incumbent carrier is a rural carrier, and thus exempt from certain interconnection and other obligations (section 251(c) obligations).

Carriers and state commissions look to the Commission for guidance about ambiguous provisions of the Communications Act, such as the relationship between the rural exemption and the interconnection negotiation and arbitration provisions, which is at issue here. Over the past few years, different jurisdictions have reached varying conclusions on this issue, creating uncertainty, fostering disputes, and inhibiting competition and broadband deployment. Other states will likely face the issue in the future.

Our statutory interpretation is fully consistent with the pro-competitive goals of the Communications Act: It will enable competitors to offer triple play packages – voice, video, and broadband – by interconnecting with incumbent telephone networks, which may be necessary to offer voice service to rural consumers.

Congress gave state commissions primary responsibility for determining when a carrier should be exempt from specific interconnection obligations, and today's ruling does not alter that authority. The ruling instead provides clarity about how to apply other aspects of the Communication Act's local competition requirements when a carrier is entitled to such an exemption.

**CONCURRING STATEMENT OF
COMMISSIONER MICHAEL J. COPPS**

Re: *Petition of CRC Communications of Maine, Inc. and Time Warner Cable Inc. for Preemption Pursuant to Section 253 of the Communications Act, as Amended; A National Broadband Plan for Our Future; Developing a Unified Intercarrier Compensation Regime; T-Mobile et al. Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs, WC Docket No. 10-143, GN Docket No. 09-51, CC Docket No. 01-92*

Competition and Universal Service are cornerstones of the 1996 Telecommunications Act. In order to achieve those goals, Congress created important roles for both state and federal regulators. The narrow legal question before us requires this result but a good policy outcome pulls us in another direction. I'm concerned about the unintended consequences of today's decision on consumers in Maine who rely on these rural phone companies for service. I believe the Maine PUC is best equipped to balance the interests of Maine consumers and carrier responsibilities.

**STATEMENT OF
COMMISSIONER MIGNON L. CLYBURN
Approving in Part, Concurring in Part**

Re: *Petition of CRC Communications of Maine, Inc. and Time Warner Cable Inc. for Preemption Pursuant to Section 253 of the Communications Act, as Amended; A National Broadband Plan for Our Future; Developing a Unified Intercarrier Compensation Regime; T-Mobile et al. Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs*, WC Docket No. 10-143, GN Docket No. 09-51, CC Docket No. 01-92

Given that there are conflicting interpretations of rural local exchange carriers' obligations to negotiate for interconnection under Sections 251(a) and (b), I support the findings made in this Declaratory Ruling. Providing clarity for incumbents, competitors, and state regulators will likely avoid unnecessary pleadings, hearings, and delays with respect to local telephone competition and network deployment. Unfortunately, in Maine, the Public Utilities Commission ("PUC"), along with the competitors and rural local exchange carriers, already expended significant resources conducting a Section 251(f)(1) evidentiary hearing. As a result, the Maine PUC found that local phone competition in some limited areas in its state would be an undue economic burden and that universal service would be impaired as a result. Congress clearly contemplated a role for state regulators in determining whether local competition serves the public interest and universal service goals pursuant to Section 251(f) with respect to areas served by rural local exchange carriers. Moreover, I believe the findings that the Maine PUC already made are germane to the issues raised in Time Warner Cable Petition. As such, I would have preferred more acknowledgment in the Declaratory Ruling of the tension this decision is creating in Maine, as a result of our findings. Nonetheless, to the extent that the rural local exchange carriers and the Maine PUC believe that the PUC's conclusions remain applicable, Section 251(f)(2) provides an avenue for relief from the Section 251(b) interconnection obligations.

In this proceeding, Time Warner Cable duly noted that the National Broadband Plan recommended that the Commission clarify interconnection obligations because the uncertainty can deter private investment in broadband networks.¹ Of course, this isn't the only recommendation in the Plan that addresses possible barriers to broadband deployment. Recommendation 8.19 of the Plan states, in part, that Tribal, state, regional and local governments should have the flexibility to address their own broadband needs when the private sector has not done so. Yet, some broadband providers continue to ignore this recommendation, as they unwisely encourage state legislatures to pass bills that would discourage, and in some cases, prevent local and regional governments from investing in broadband networks themselves.² In fact, Time Warner Cable has been actively supporting such legislation in North Carolina which, unfortunately, has now become law.

I am disheartened by these efforts, as there are many areas of the nation that need broadband in order to promote economic development, support small businesses, and create new jobs, in addition to serving residential consumers. The Commission is working hard to address the barriers to deployment outlined in the National Broadband Plan to encourage deployment and adoption in unserved and underserved areas. Indeed, in March, we adopted an Order to streamline pole access and reduce pole costs for broadband providers, and we adopted a Notice of Inquiry to review how this Commission can work with our state, local, Tribal, and federal partners to improve policies for providers' access to rights

¹ Petition at 3-4, & 10 (citing the National Broadband Plan at 49 & 66 n. 93).

² Statement by FCC Commissioner Mignon L. Clyburn, On Proposed Anti-Municipal Broadband Legislation (rel. April 4, 2011), available at <http://www.fcc.gov/commissioners/clyburn/statements.html> (last visited April 13, 2011).

of way and for wireless facilities siting. Of course, we are not stopping there. This Commission also has committed itself to reforming the Universal Service Fund so that every American has access to broadband at home.³ State legislation that erects barriers to broadband deployment is contrary to the National Broadband Plan's goals of encouraging broadband deployment and adoption, and the work this Commission has undertaken to address our nation's broadband needs.

³ Statement by FCC Commissioners, Making Universal Service and Intercarrier Compensation Reform Happen (March 15, 2011) available at <http://blog.broadband.gov/?entryId=1335554> (last visited May 25, 2011).

APPENDIX D

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 23rd day of **March, 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

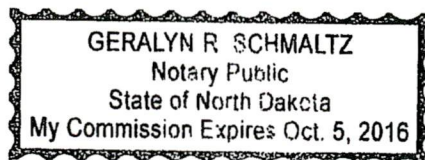
Cert. No. 7009 2820 0002 9237 5459

Cert. No. 7009 2820 0002 9237 5466

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

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

SEAL



Cara DeSaye

Jessy R. Schmalz

Notary Public

**STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION**

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

Case No. PU-11-697

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

March 21, 2012

Appearances

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

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

Zachary Evan Pelham, 314 E. Thayer Ave., Bismarck, ND 58501, and J.G. Harrington, Dow Lohnes, PLLC, 1200 New Hampshire Ave., NW. Suite 800, Washington, D.C. 20036, on behalf of Midcontinent Communications.

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

Preliminary Statement

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

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

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

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

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

Having allowed all interested persons an opportunity to be heard and having heard, reviewed and considered all testimony and evidence presented, the Commission makes the following:

Findings of Fact

1. Missouri Valley Communications, Inc. d/b/a Nemont (Missouri Valley) is an incumbent local exchange carrier authorized by the Commission to provide telecommunications services in the Williston exchange. Missouri Valley is a rural telephone company as defined under Act § 153(b)(37).
2. Midcontinent Communications (Midcontinent) is a South Dakota general partnership registered with the Commission to provide local exchange telecommunications services. Midcontinent is a competitive local exchange carrier and is a reseller of telecommunications service in the Williston exchange (Case No. PU-04-638). Midcontinent has a certificate of public convenience and necessity to provide facilities based competitive local exchange telecommunications services throughout North Dakota (Case No. PU-04-546).
3. As of the date of this Order, Midcontinent and Missouri Valley have a negotiated resale agreement with number portability under Act § 251(b)(2).
4. As of the date of this Order, Midcontinent's and Missouri Valley's facilities and equipment are interconnected indirectly for the Williston, North Dakota exchange. According to Midcontinent, this indirect interconnection does not allow for the local exchange of traffic. Missouri Valley has not contradicted Midcontinent's assertion in this regard.
5. In November 2007 Midcontinent requested facilities based interconnection for the Williston, North Dakota exchange, pursuant to Act § 251(c). Missouri Valley denied the request, relying on its Act § 251 (f)(1)(a) rural exemption status from Act § 251(c).
6. On February 8, 2008 Midcontinent filed with the Commission its Notice of Bona Fide Request for Services and Interconnection and Petition to Find Rural Exemption Waived. Specifically Midcontinent requested that the Commission determine that Missouri Valley has waived its rural exemption or, in the alternative, that the Commission conduct an inquiry under the provisions of Act § 251 (f)(1)(a) for the

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

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

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

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

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

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

12. In their November 21, 2011 Motion to Dismiss Midcontinent's Petition for Arbitration, Missouri Valley seeks dismissal on the following grounds: (1) that the Petition is barred by the legal doctrine of *res judicata* in light of the Commission's 2008 decision on Midcontinent's request to lift Missouri Valley's rural exemption from Act § 251(c) interconnection, Case No. PU-08-61; and (2) that the Federal Communications Act and the implementing provisions of North Dakota law do not permit arbitration for the purpose of interconnection under Act § 251(a).

Legal Standard

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

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

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

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

The Record

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

Motion to Dismiss

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

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

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

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

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

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

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

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

24. Additionally, Midcontinent advocates that because interconnection is a continuing right, *res judicata* cannot preclude their current request for Act § 251(a) interconnection. Midcontinent argues that interconnection obligations are continuous obligations that do not disappear because of the passage of time or because they were not invoked at a specific moment. The Commission agrees, therefore providing additional support towards denying Missouri Valley's motion to dismiss as it relates to *res judicata*.

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

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

From the foregoing Findings of Fact, the Commission now makes its:

Conclusions of Law

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

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

5. Because Interconnection is a continuing right, *res judicata* cannot apply towards Midcontinent's current request for Act § 251(a) interconnection.

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

Order

The Commission Orders:

Missouri Valley's Motion to Dismiss Midcontinent's Petition for Arbitration is denied.

PUBLIC SERVICE COMMISSION



**Kevin Cramer
Commissioner**



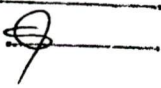
**Tony Clark
Chairman**



**Brian P. Kalk
Commissioner**

APPENDIX E

APPROVED

DATE: 6-27-12


MOTION

June 27, 2012

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

Case No. PU-11-697

I move the Commission adopt the Order On Interconnection Agreement concerning the interconnection agreement jointly filed by Midcontinent Communications and Missouri Valley Communications, Inc., Case No. PU-11-697.

PJF

**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

APPENDIX F

STATE OF NORTH DAKOTA

PUBLIC SERVICE COMMISSION

Case No. _____

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

NOTICE OF BONA FIDE REQUEST FOR SERVICES AND INTERCONNECTION AND PETITION TO FIND RURAL EXEMPTION WAIVED

Pursuant to 47 U.S.C. §251(f)(1)(B) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (the "Act"), Midcontinent Communications ("Midcontinent") hereby provides notice that by letter dated November 14, 2007, a copy of which is marked as Exhibit "A" and attached hereto, it made a bona fide request to Missouri Valley Communications, Inc. d/b/a Nemont ("MVC") under the provisions of 47 U.S.C. §251(c) of the Act for a facilities based interconnection agreement with number portability for the Williston, North Dakota, exchange. By letter dated January 30, 2008, marked as Exhibit "B" and attached hereto, MVC by its attorney, David Houge, advised Midcontinent that it was relying on the rural exemption under 47 U.S.C. §251(f)(1)(A) of the Act, and denied Midcontinent's request.

Midcontinent respectfully avers that MVC has waived its right to the rural exemption under the Act by previously entering into an interconnection agreement with Midcontinent for the purpose of resale. Said interconnection agreement was filed with this Commission on December 3, 2004, as PU-04-638. Midcontinent's request for a facilities based interconnection agreement hereunder is merely a request for an amendment to the existing interconnection agreement now in force between the parties.

WHEREFORE, Midcontinent respectfully requests:


1. That the Commission find that by previously entering into an interconnection agreement with Midcontinent for the purpose of resale, MVC has waived its right to claim the rural exemption under the Act with respect to a request by Midcontinent for a facilities based interconnection agreement; or in the alternative,

2. That pursuant to the provisions of 47 U.S.C. §251(f)(1)(A) of the Act, the Public Service Commission conduct an inquiry for the purpose of determining whether Midcontinent's request for a facilities based interconnection agreement with number portability from MVC under 47 U.S.C. §251(c) of the Act is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of Title 47 U.S.C. (other than subsections (b)(7) and (c)(1)(D) of Section 254 of that Title), and

3. That the Commission establish an implementation schedule for compliance with Midcontinent's request for facilities based interconnection with number portability for the Williston exchange.

Dated this 8th day of February, 2008.

PEARCE & DURICK



PATRICK W. DURICK ND #03141
Individually and as a Member of the Firm
314 E. Thayer Avenue
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Bismarck, ND 58502-0400
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Attorneys for Midcontinent Communications, Inc.



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PATRICK W. DURICK

pwd@pearce-durick.com

November 14, 2007

VIA EXPRESS MAIL - RETURN RECEIPT REQUESTED

Mr. Ben Boreson, President
Missouri Valley Communications, Inc.
d/b/a Nemont
P.O. Box 600
61 HWY 13 S.
Scoby, MT 59263-0600

Re: Midcontinent Communications Request for Section 251(c)(2) Facilities
Based Interconnection Agreement

Dear Mr. Boreson:

I am writing on behalf of Midcontinent Communications (Midcontinent). The purpose of this letter is to request from Missouri Valley Communications, Inc. d/b/a Nemont ("MVC") a facilities based interconnection agreement, with LNP, for the Williston exchange.

This request is made under the provisions of Section 251(c)(2) of the Act, 47 U.S.C. § 251(c)(2), and is intended to trigger the time periods for negotiation and arbitration under Section 252 of the Act.

To facilitate discussions, I have enclosed a proposed agreement. We look forward to negotiating and reaching an acceptable agreement with MVC for the Williston exchange.

Sincerely,

PEARCE & DURICK


PATRICK W. DURICK

PWD/ak
Enclosure

cc: Nancy Vogel
Mary Lohnes
Matthew Knierim, Esq.

EXHIBIT A

DONALD A. NEGAARD
JAMES E. NOSTDAHL
CAROL K. LARSON
DAVID J. HOGUE
REED A. SODERSTROM
BRENT M. OLSON
DEBRA L. HOFFARTH
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RETIRED
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MARK F. PURDY
JAN M. SEBBY

KENNETH G. PRINGLE
(1914-1983)
MITCHELL H. MAHONEY
(1929-1996)
ROGER O. HERIGSTAD
(1919-2003)

January 30, 2008

Patrick W. Durick
Pearce & Durick
314 East Thayer Avenue
P.O. Box 400
Bismarck, ND 58502-0400

**RE: Midcontinent Communications request for Section 251(c)(2) Facilities-
Based Interconnection Agreement**

Dear Mr. Durick:

As attorney Matthew Knierim indicated by electronic mail, I am assisting Missouri Valley Communications, Inc. ("Missouri Valley") with Midcontinent Communications' ("Midcontinent") request for a facilities-based interconnection agreement based on 47 U.S.C. Section 251(c)(2) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (the "Act").

Missouri Valley is a "rural telephone company" as that term is used in § 251(f) of the Act. See also 47 U.S.C. § 153(37). As provided in the Act, Missouri Valley is statutorily exempt from negotiating and executing a § 251(c) interconnection agreement as Midcontinent requests. Accordingly, Missouri Valley denies the request for interconnection as made by Midcontinent.

If you have any questions regarding this matter, please contact me.

Very Truly Yours,

David J. Hogue

DJH/klo



EXHIBIT B

APPENDIX G



3901 North Louise Avenue
Sioux Falls, South Dakota 57107

June 14, 2011

Mr. Mike Kilgore, General Manager
Missouri Valley Communications, Inc.
PO Box 600
61 Hwy 13 S
Scobey, MT 59263-0600

Dear Mr. Kilgore:

I am writing on behalf of Midcontinent Communications ("Midcontinent"), and in accordance with Sections 251(a), 251(b) and 252 of the federal Communications Act of 1934, as amended, 47 U.S.C. § § 251(a) (b), 252, to request interconnection between Missouri Valley Communications (doing business as Nemont) and Midcontinent in Williston, ND.

Section 251(a) requires all telecommunications carriers to provide direct or indirect interconnection to all other telecommunications carriers, and Section 251(b) imposes other obligations related to reciprocal compensation, number portability and other interconnection-related issues. These obligations apply regardless of whether a carrier is subject to the Section 251(f)(1) rural exemption.

Midcontinent makes this request, in part, because we have determined that we are unable to provide our customers the level of service they expect under the current resale arrangements, both as a matter of the quality of service received and our ability to respond to customer inquiries and complaints. For instance, while Midcontinent's goal is to respond to all customer requests for service within one business day, in recent months it has been our experience that it can take three business days or more for Missouri Valley to respond to a service request from Midcontinent.

Midcontinent proposes that the parties interconnect at Williston using two-way direct interconnection between Missouri Valley's Williston End Office Switch (WLSTNDBCDSO) and the Midcontinent head end, with a point of interconnection at a mutually-agreed meet point between the two locations. Midcontinent is willing to interconnect using either electrical facilities (at a DS1 or DS3 level) or via optical facilities. Midcontinent also is willing to interconnect at any other location in the Williston exchange where Missouri Valley interconnects with other carriers, if such a location would be more convenient for Missouri Valley.

Mr. Mike Kilgore
June 14, 2011
Page 2

The interconnection will be for the purpose of exchanging local telecommunications traffic. The local traffic would be exchanged under the terms of Section 251(b)(5), which governs reciprocal compensation for local traffic. Midcontinent proposes that the parties exchange local traffic using bill and keep, which we understand is the same compensation methodology used by Missouri Valley when it exchanges traffic with wireless providers. Midcontinent proposes that the parties continue to exchange intrastate toll traffic under the same arrangements they use today.

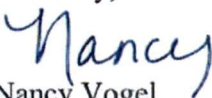
In connection with the exchange of traffic and interconnection, Midcontinent also will require number portability. It is our understanding that Missouri Valley already has implemented number portability, so please provide us with information on your procedures for port requests. Midcontinent anticipates that the parties would follow the procedures and practices set forth in their resale agreement for transfer of customers, directory listings and other related matters.

In accordance with the Federal Communications Commission's May 25, 2011 *Declaratory Ruling* concerning Section 251(a) and (b) interconnection, this letter constitutes a formal request for interconnection under Sections 251(a), 251(b) and 252 of the Communications Act, and begins the period for negotiation and arbitration under Section 252.¹ If Midcontinent and Missouri Valley are unable to reach an agreement prior to the close of the period to initiate arbitration under Section 252, Midcontinent intends to seek arbitration for a final agreement on these matters.

Please inform me by June 30, 2011 if Missouri Valley will agree to interconnect at the location described above or if it prefers an alternative location. A response by this date will assist Midcontinent in planning our deployment of fiber facilities to serve the Williston area. Also please inform me if Missouri Valley accepts the financial terms described above or has an alternative proposal. If you have any questions about Midcontinent's technical proposal, please contact me at (605) 357-5485 or email nancy_vogel@mimi.net.

Thank you for your attention to this matter.

Sincerely,



Nancy Vogel
Director of Revenue Assurance

Cc: Patrick Durick – Pearce & Durick

¹ See Petition of CRC Communications of Maine, Inc. and Time Warner Cable Inc. for Preemption Pursuant to Section 253 of the Communications Act, as Amended, *Declaratory Ruling*, WC Docket No. 10-143, GN Docket No. 09-51, CC Docket No. 01-92 (rel. May 25, 2011), ¶¶ 18-24.

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

IN THE MATTER OF)	
)	Case No. PU-11-543
Midcontinent Communications, a)	
South Dakota Partnership,)	
)	
Complainant,)	
)	
vs.)	
)	
Missouri Valley Communications, Inc.)	
)	
Respondent.)	

PETITION FOR ARBITRATION OF MIDCONTINENT COMMUNICATIONS

Midcontinent Communications (“Midcontinent”), pursuant to Section 252(b)(1) of the federal Communications Act of 1934, 47 U.S.C. § 252(b) and Chapter 69-02-10 of the North Dakota Administrative Code, and consistent with the FCC’s *Section 251(a) Declaratory Ruling*, hereby petitions the North Dakota Public Service Commission to arbitrate the open issues in a facilities-based interconnection agreement between Midcontinent and Missouri Valley Communications, Inc. (“Missouri Valley”).¹ The open issues are listed on the attached Summary of Outstanding Issues for Arbitration marked as Exhibit A and attached hereto.

BACKGROUND

By letter dated June 14, 2011, Midcontinent requested facilities-based interconnection from Missouri Valley Communications. A copy of this letter is attached hereto as Exhibit B. As

¹ Under the *Section 251(a) Declaratory Ruling*, a competitive local exchange carrier seeking interconnection pursuant to Section 251(a) of the federal Communications Act is entitled to arbitration of any issues that are unresolved by negotiation with a rural incumbent local exchange carrier. 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, 8286-70 (2011) (the “*Section 251(a) Declaratory Ruling*”).

described in the letter, 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. Midcontinent proposed to interconnect at Williston using two-way direct interconnection facilities, and indicated that it would be willing to interconnect at a mutually-agreed point between Missouri Valley’s Williston switch and Midcontinent’s headend, or at any other location in the Williston exchange where Missouri Valley interconnects with another carrier. Midcontinent also proposed that the parties adopt the terms of their existing resale agreement “for transfer of customers, directory listings and other related matters.”

Midcontinent needs to obtain interconnection because providing service in Williston via resale has become increasingly difficult. While it is considerably more expensive for Midcontinent to use resale than its own facilities, the more serious concern is that Midcontinent cannot meet its own customer service objectives by relying on Missouri Valley.²

First, as the population in Williston has grown over the last several years, Midcontinent has found that Missouri Valley no longer can install service in a timely fashion; that Missouri Valley often takes much longer to respond to service requests than Midcontinent would take in its other markets; and that in some cases Missouri Valley is unable to provide service at all in areas where Midcontinent has cable facilities and could provide facilities-based service if interconnection were in place. Based on Midcontinent’s experience, it appears that Missouri Valley simply cannot keep up with the demand that has been spurred by the burgeoning oil

² Although Midcontinent’s expenses for providing service in Williston are much higher than in the rest of its service territory because it is forced to rely on resale, Midcontinent currently charges the same rates to customers in Williston as in the rest of North Dakota.

business in northern North Dakota even in those areas where Missouri Valley can provide service. For instance, one prospective Midcontinent customer ordered service on October 14 and Midcontinent installed cable and Internet service on October 19. Missouri Valley provided a firm order confirmation date of October 28, two weeks after the order, and installation did not actually occur until November 1, 18 days after the order was placed. This delay resulted in considerable damage to Midcontinent's relationship with the customer, as it is difficult for customers to understand why it takes so long to turn on telephone service when their neighbors have service already. Such installation issues are entirely out of Midcontinent's control under the current resale arrangement, but could be addressed (indeed, likely would not exist) if Midcontinent were providing facilities-based services and could set its own installation schedules.

In many cases, the installation delays are because Missouri Valley, despite its status as a carrier of last resort, has not built out facilities to the locations where customers need and want service. In those cases, Midcontinent has to wait for Missouri Valley to construct those facilities before it can provide service. Often, these customers already are passed by Midcontinent's facilities, so they could be served immediately if Midcontinent had interconnection. In fact, as of the date of this filing Midcontinent has eight customers waiting for Missouri Valley to extend facilities to locations that could be served by Midcontinent's existing plant. Given the housing growth projections in Williston, there is every indication that this situation will continue to escalate.

In addition, relying on Missouri Valley as a resale provider means that Midcontinent is unable to offer services available in other Midcontinent markets, such as caller ID on the customer's television screen, a service Midcontinent plans to introduce for its facilities-based

customers in 2012. Midcontinent makes every effort to offer all of its telephone customers the same services whenever possible, whether those customers are in Bismarck or in a small rural community, but today that is not possible in Williston. In other words, the lack of interconnection is now affecting Midcontinent's ability to serve its customers and in some cases is preventing customers from getting any landline telephone service when they want it.

Missouri Valley's initial response, in a letter dated July 6, 2011, was to reject Midcontinent's interconnection request.³ Subsequent to the initial response, and after Midcontinent sought mediation from the Commission, Missouri Valley agreed to enter mediation. The mediation has not produced an agreement or, to this point, even a framework for interconnection.

BASIS FOR ARBITRATION PETITION

Section 252(b)(1) of the federal Communications Act, 47 U.S.C. § 251(b)(1), provides that between the 135th and 160th days after the date on which an incumbent local exchange carrier receives a bona fide request for interconnection, the party requesting those services may petition a State commission to arbitrate any open issues. In the *Section 251(a) Declaratory Ruling*, the FCC held that the arbitration rights granted under Section 252(b)(1) apply to requests for interconnection under Section 251(a) of the Communications Act, even when the incumbent local exchange carrier is a rural carrier subject to the rural exemption.⁴ Based on the date of

³ Midcontinent notes that, under the *Section 251(a) Declaratory Ruling*, Missouri Valley is not obligated to negotiate in good faith. *Section 251(a) Declaratory Ruling*, 26 FCC Rcd at 8272. Thus, while Missouri Valley's decision not to provide a responsive proposal makes it impossible for Midcontinent to describe Missouri Valley's specific positions in Exhibit A, Midcontinent is not seeking a finding that Missouri Valley improperly failed to negotiate.

⁴ *See id.* at 8273 ("Finally, we reject the contention of some commenters that, to enforce the section 251(a) and (b) obligations, an interconnecting carrier must first have the rural exemption lifted by the state commission.") (footnote omitted).

Midcontinent's request to Missouri Valley, the 135th day following the request was October 28 and the 160th day following the request will be November 22.⁵

CONTACT INFORMATION FOR MISSOURI VALLEY

The contact information for Mike Kilgore, General Manager and CEO of Missouri Valley, and David Hogue, outside counsel to Missouri Valley, is as follows:

Mike Kilgore
General Manager and CEO
Missouri Valley Communications, Inc.
Highway 13 South
Post Office Box 600
Scobey, Montana 59263-0600
(406) 783-5125
Email: mike.kilgore@nemont.coop

David Hogue
Pringle & Herigstad, P.C.
225 Elk Drive
Post Office Box 1000
Minot, North Dakota 58702
(701) 852-0381
Email: dhogue@srt.com

PARTICIPANTS IN NEGOTIATIONS

It is anticipated that the following persons will participate as representatives of the parties:

Midcontinent Communications

Patrick W. Durick ND #03141
Pearce & Durick
314 E. Thayer Avenue
Post Office Box 400
Bismarck, North Dakota 58502-0400
(701) 223-2890
pwd@pearce-durick.com

⁵ Missouri Valley has not indicated the date on which it received the request. In an abundance of caution, however, Midcontinent is filing this petition 153 days after the request was mailed, which should be more than enough time to ensure that 135 days have elapsed since the request was received by Missouri Valley.

Zachary E. Pelham ND #05904
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Nancy Vogel
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Missouri Valley Communications, Inc.

Midcontinent anticipates that the individuals named above as contacts will be Missouri Valley's representatives in this proceeding.

SUMMARY OF NEGOTIATIONS

As described above, Missouri Valley initially indicated that it did not intend to negotiate an agreement, but later agreed to mediation. The parties have held a mediation session and had follow-up contact, but have not reached agreement on any terms for interconnection.

UNRESOLVED ISSUES AND POSITIONS OF THE PARTIES

A summary of Midcontinent's positions and the presently unresolved issues for a facilities-based interconnection agreement between Midcontinent and Missouri Valley is attached hereto as Exhibit A. Midcontinent is not aware of any specific positions of Missouri Valley on the issues described in Exhibit A because Missouri Valley has not indicated its willingness to agree to any specific terms.

RELEVANT DOCUMENTATION

Midcontinent and Missouri Valley currently are parties to a resale agreement dated November 29, 2004.⁶ Midcontinent has proposed that the resale agreement serve as the basis for the basic terms and conditions of the parties' facilities-based interconnection agreement.

Dated: November 14, 2011.

PEARCE & DURICK



PATRICK W. DURICK, ND #03141

Individually and as a Member of the Firm

314 E. Thayer Avenue

P. O. Box 400

Bismarck, ND 58502-0400

(701) 223-2890

(701) 333-0126 - Fax

pwd@pearce-durick.com

Attorneys for Midcontinent Communications

⁶ The agreement was filed with the Commission on December 2, 2004 and approved under docket number PU-04-638.

Exhibit A

Summary of Outstanding Issues for Arbitration

The following is a summary of the outstanding issues for arbitration. It is based on Midcontinent's request for interconnection. It does not contain any specific information on Missouri Valley's positions because Missouri Valley has not provided any specific response to Midcontinent's request.

Issue	Midcontinent Position	Missouri Valley Position
General terms and conditions	Midcontinent proposes that the parties adopt the general terms and conditions in their current resale agreement.	Missouri Valley has not proposed any general terms and conditions.
Other terms and conditions of interconnection and number portability	Terms and conditions for interconnection and number portability can be based on existing facilities-based interconnection agreements between Midcontinent and other North Dakota rural incumbent local exchange carriers, such as Midcontinent's agreement with Turtle Mountain Communications, Inc. <i>See</i> Docket No. PU-10-20.	Missouri Valley has not proposed any terms and conditions for interconnection and number portability.
Technical interconnection requirements	Midcontinent proposes that the parties interconnect using either electrical facilities (DS-1 or DS-3) or optical facilities.	Missouri Valley has not proposed any technical interconnection requirements.
Point of interconnection	Midcontinent proposes that the parties interconnect within the Williston exchange at a mutually-agreed point between Missouri Valley's switch and Midcontinent's headend or at any point in the exchange where Missouri Valley interconnects with another carrier (<i>i.e.</i> , wireless carriers or interexchange carriers).	Missouri Valley has not proposed any point of interconnection.
Reciprocal compensation	Midcontinent proposes that the parties adopt bill and keep	Missouri Valley has not proposed any rates or other terms for reciprocal

Issue	Midcontinent Position	Missouri Valley Position
	for reciprocal compensation for local traffic.	compensation.
Number portability	Midcontinent proposes that the parties provide service provider number portability to each other in accordance with the terms under which Missouri Valley provides number portability to wireless carriers or, alternatively, in accordance with the requirements of the FCC's rules.	Missouri Valley has not proposed any terms for the provision of service provider number portability.
Compensation for non-local traffic	Midcontinent proposes that arrangements for non-local traffic exchanged by the parties remain the same as today, to the extent those arrangements are consistent with the requirements of the FCC and the Commission. (For purposes of clarity, Midcontinent is not requesting any change in these arrangements, but recognizes that either the FCC or the Commission may change the relevant rules in the future, in which case the amounts or other terms of compensation would be changed.)	Missouri Valley has not proposed any terms for compensation for non-local traffic.
Date of interconnection	Midcontinent proposes that interconnection be completed within 60 days of the date that a final interconnection agreement is approved by the Commission.	Missouri Valley has not made a proposal on the timing of interconnection.
Transition from current resale arrangements	<p>(1) Midcontinent proposes a one year transition period, starting with date interconnection is put into effect. Over that time, Midcontinent resale customers would be switched to Midcontinent's facilities on a schedule that would switch an equal number of customers each week, subject to any mutually-agreed modifications.</p> <p>(2) Midcontinent proposes to provide transitional financial assistance to Missouri Valley. Under that arrangement, Midcontinent would pay 75% of the access charges attributable to each customer switched from resale to facilities-based service (based on average access charges</p>	Missouri Valley has not made any proposal for the transition from the parties' current resale arrangements.

Issue	Midcontinent Position	Missouri Valley Position
	per customer) to Missouri Valley for a period of six months after the change occurs. To the extent that Missouri Valley's access charges are reduced by rules adopted by the FCC or the Commission during the transition period, those reductions would be reflected in the transitional financial assistance as well.	

Exhibit B

Midcontinent Request for Interconnection



3901 North Louise Avenue
Sioux Falls, South Dakota 57107

June 14, 2011

Mr. Mike Kilgore, General Manager
Missouri Valley Communications, Inc.
PO Box 600
61 Hwy 13 S
Scobey, MT 59263-0600

Dear Mr. Kilgore:

I am writing on behalf of Midcontinent Communications ("Midcontinent"), and in accordance with Sections 251(a), 251(b) and 252 of the federal Communications Act of 1934, as amended, 47 U.S.C. §§ 251(a) (b), 252, to request interconnection between Missouri Valley Communications (doing business as Nemont) and Midcontinent in Williston, ND.

Section 251(a) requires all telecommunications carriers to provide direct or indirect interconnection to all other telecommunications carriers, and Section 251(b) imposes other obligations related to reciprocal compensation, number portability and other interconnection-related issues. These obligations apply regardless of whether a carrier is subject to the Section 251(f)(1) rural exemption.

Midcontinent makes this request, in part, because we have determined that we are unable to provide our customers the level of service they expect under the current resale arrangements, both as a matter of the quality of service received and our ability to respond to customer inquiries and complaints. For instance, while Midcontinent's goal is to respond to all customer requests for service within one business day, in recent months it has been our experience that it can take three business days or more for Missouri Valley to respond to a service request from Midcontinent.

Midcontinent proposes that the parties interconnect at Williston using two-way direct interconnection between Missouri Valley's Williston End Office Switch (WLSTNDBCDSO) and the Midcontinent head end, with a point of interconnection at a mutually-agreed meet point between the two locations. Midcontinent is willing to interconnect using either electrical facilities (at a DS1 or DS3 level) or via optical facilities. Midcontinent also is willing to interconnect at any other location in the Williston exchange where Missouri Valley interconnects with other carriers, if such a location would be more convenient for Missouri Valley.

Over Fifty Years of Service

Mr. Mike Kilgore
June 14, 2011
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The interconnection will be for the purpose of exchanging local telecommunications traffic. The local traffic would be exchanged under the terms of Section 251(b)(5), which governs reciprocal compensation for local traffic. Midcontinent proposes that the parties exchange local traffic using bill and keep, which we understand is the same compensation methodology used by Missouri Valley when it exchanges traffic with wireless providers. Midcontinent proposes that the parties continue to exchange intrastate toll traffic under the same arrangements they use today.

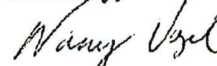
In connection with the exchange of traffic and interconnection, Midcontinent also will require number portability. It is our understanding that Missouri Valley already has implemented number portability, so please provide us with information on your procedures for port requests. Midcontinent anticipates that the parties would follow the procedures and practices set forth in their resale agreement for transfer of customers, directory listings and other related matters.

In accordance with the Federal Communications Commission's May 25, 2011 *Declaratory Ruling* concerning Section 251(a) and (b) interconnection, this letter constitutes a formal request for interconnection under Sections 251(a), 251(b) and 252 of the Communications Act, and begins the period for negotiation and arbitration under Section 252.¹ If Midcontinent and Missouri Valley are unable to reach an agreement prior to the close of the period to initiate arbitration under Section 252, Midcontinent intends to seek arbitration for a final agreement on these matters.

Please inform me by June 30, 2011 if Missouri Valley will agree to interconnect at the location described above or if it prefers an alternative location. A response by this date will assist Midcontinent in planning our deployment of fiber facilities to serve the Williston area. Also please inform me if Missouri Valley accepts the financial terms described above or has an alternative proposal. If you have any questions about Midcontinent's technical proposal, please contact me at (605) 357-5485 or email nancy_vogel@mimi.net.

Thank you for your attention to this matter.

Sincerely,



Nancy Vogel
Director of Revenue Assurance

¹ See Petition of CRC Communications of Maine, Inc. and Time Warner Cable Inc. for Preemption Pursuant to Section 253 of the Communications Act, as Amended, *Declaratory Ruling*, WC Docket No. 10-143, GN Docket No. 09-51, CC Docket No. 01-92 (rel. May 25, 2011), ¶¶ 18-24.