

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA**

IN THE MATTER OF THE APPLICATION OF)	ORDER DENYING MOTION
MIDCONTINENT COMMUNICATIONS FOR)	TO COMPEL DISCOVERY
APPROVAL TO PROVIDE LOCAL EXCHANGE)	
SERVICE IN A RURAL SERVICE AREA)	TC08-105

On August 14, 2008, the Public Utilities Commission (Commission) received an Application from Midcontinent Communications (Midcontinent) for authority to provide local exchange service in a rural service area.

On August 21, 2008, the Commission electronically transmitted notice of the filing and the intervention deadline of September 5, 2008, to interested individuals and entities. Alliance Communications Cooperative, Inc. (Alliance) filed to intervene on August 25, 2008. South Dakota Telecommunications Association (SDTA) filed to intervene on September 5, 2008. On September 22, 2008, the Commission received Midcontinent's Reply and Opposition to the SDTA Petition to Intervene. At its regularly scheduled meeting of September 23, 2008, the Commission granted intervention to Alliance and deferred the Petition to Intervene of SDTA. On October 6, 2008, the Commission received a letter response to Midcontinent's Reply and Opposition to the SDTA Petition to Intervene from SDTA.

At a regularly scheduled meeting of October 7, 2008, the Commission considered SDTA's Petition to Intervene. Midcontinent stated that it would not object to the intervention of SDTA, subject to certain restrictions that had been agreed to by Midcontinent and SDTA. Alliance also stated that it would not object to the intervention of SDTA. The restrictions are that SDTA will not participate in or be compelled to produce discovery but will receive copies of all discovery except confidential material. Confidential material will be provided only in special circumstances to be decided by the parties on an ad hoc basis. SDTA will follow Alliance counsel in argument and examination of witnesses, will not have its own witness or witnesses at the hearing, will not cross-examine Alliance witnesses and cross-examination of Midcontinent witnesses will not be duplicative of matters already addressed by Alliance counsel. SDTA may attend and participate in all hearings and motions on procedural and substantive matters, with witness examination, argument and briefing restricted to issues that affect the interests of the SDTA membership as a whole. The acceptance of these restrictions by SDTA may not be interpreted as any concession by SDTA concerning the challenge by Midcontinent of SDTA's interest in these proceedings or legal basis to request intervention in the proceeding. With these restrictions, the Commission voted to grant intervention to SDTA.

On October 9, 2008, the Commission received Midcontinent's Supplemental Notice of Application to Provide Local Exchange Service and Request for Interconnection and Midcontinent's Motion to Find Rural Exemption Waived. On October 16, 2008, the Commission received Alliance's Response to Midcontinent's Motion to Find Rural Exemption Waived. On November 20, 2008, the Commission received Midcontinent's Amended Motion to Find Rural Exemption Waived or to Terminate Rural Exemption under 47 USC § 251(f)(1)(B). On December 2, 2008, the Commission received a Joint Response of Alliance and SDTA to Midcontinent's Amended Motion to Find Rural Exemption Waived or to Terminate Rural Exemption under 47 USC § 251(f)(1)(B). On December 8, 2008, the Commission received Midcontinent's Motion to Compel Discovery. On December 17, 2008, the Commission received a Response of Alliance to Midcontinent's Motion to Compel Discovery and an Affidavit of Don Snyders.

At its regularly scheduled meeting of December 30, 2008, the Commission considered Midcontinent's Motion to Compel Discovery. The Commission has jurisdiction in this matter pursuant to SDCL chapters 1-26 and 49-31, specifically 49-31-79, 49-31-80 and 49-31-81. Section 251(f)(1)(C) provides that the rural exemption does not apply "in the area in which the rural telephone company provides video programming." In its discovery motion Midcontinent argued that "in this case, the required showing is not that the incumbent carrier is actually providing the service, but that it is capable of doing so or that capability and the intent to do so is imminent. The discovery requests target facts relevant to this issue." Alliance and SDTA argued that section 251(f)(1)(C) "means that the rural telephone company must in fact be providing video programming services before its rural interconnection exemption can be deemed waived. To interpret the relevant provision otherwise and come to the conclusion that the rural interconnection exemption may disappear merely on future plans or intentions is nonsensical." (citations omitted.) In his affidavit, Don Snyders, the General Manager of Alliance, stated that Alliance does not currently offer video programming in its Crooks and Baltic exchanges. He further stated that Alliance will likely offer video services in those exchanges in the future but it has not set a date certain by which it will offer the services. At the meeting, Midcontinent's attorney stated that, for the purposes of the discovery motion, Midcontinent would agree that Alliance is not currently offering video services in the Crooks and Baltic exchanges. Commission Staff recommended granting the Motion to Compel.

After listening to the arguments of the parties, the Commission voted unanimously to deny Midcontinent's Motion to Compel Discovery. Section 251(f)(1)(C) very clearly provides that the rural exemption does not apply "in the area in which the rural telephone company *provides* video programming." (emphasis added.) Thus, the Commission finds that discovery is not relevant to determine whether Alliance is capable of providing the service or that it may do so in the future in order to determine whether the limitation on the rural exemption as set forth in section 251(f)(1)(C) applies. It is therefore

ORDERED, that Midcontinent's Motion to Compel Discovery is hereby denied.

Dated at Pierre, South Dakota, this 13th day of January, 2009.

CERTIFICATE OF SERVICE	
The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, electronically.	
By:	<u>Aldine Kalbo</u>
Date:	<u>1/13/09</u>
(OFFICIAL SEAL)	

BY ORDER OF THE COMMISSION:

Dustin M. Johnson
DUSTIN M. JOHNSON, Chairman

Steve Kolbeck
STEVE KOLBECK, Commissioner

Gary Hanson
GARY HANSON, Commissioner