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E-FILING

Ms. Patricia Van Gerpen  
Executive Director  
South Dakota Public Utilities Commission  
State Capitol Building  
500 East Capitol Avenue  
Pierre, SD 57501-5070

Re: Docket No. TC08-105  
In the Matter of the Application of Midcontinent Communications  
to Provide Local Exchange Service in a Rural Service Area  
Our File No. 280.30

Dear Ms. Van Gerpen:

Enclosed for filing in Docket No. TC08-105 is Alliance Communications Cooperative's  
Response to Midcontinent's Motion to Find Rural Exemption Waived.

If you have any questions, please feel free to contact me at your convenience at (605)  
335-4950. Thank you for your assistance in this matter.

Sincerely,

CUTLER & DONAHOE, LLP

  
Ryan J. Taylor  
For the Firm

RJT:dah  
Attachment

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

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**IN THE MATTER OF THE  
APPLICATION OF MIDCONTINENT  
COMMUNICATIONS TO PROVIDE  
LOCAL EXCAHNGE SERVICE IN A  
RURAL SERVICE AREA**

**DOCKET No. TC 08-105**

**ALLIANCE COMMUNICATIONS  
COOPERATIVE'S RESPONSE TO  
MIDCONTINENT'S MOTION TO FIND  
RURAL EXEMPTION WAIVED**

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COMES NOW Alliance Communications Cooperative, Inc. ("Alliance") and hereby submits its response to the Motion to Find Rural Exemption Waived as submitted by Midcontinent Communications ("Midcontinent") in the above-referenced docket.

**BACKGROUND**

On August 14, 2008, Midcontinent submitted an application to the South Dakota Public Utilities Commission (the "Commission") seeking authority to provide local exchange service in two of Alliance's study Areas, Crooks and Baltic (the "Application"). Through the service and filing of this Application, Midcontinent also requested that Alliance enter into negotiations with Midcontinent for the purpose of developing an interconnection agreement. Midcontinent's Application and Request for Negotiations presupposed that Alliance was not entitled to assert the rural exemption contained in 47 U.S.C. § 251(f)(1). As such, on August 25, 2008, Alliance filed with this Commission a Petition for Intervention and a Petition for Exemption Pursuant to 47 U.S.C. § 251(f). On September 23, 2008, Midcontinent served discovery requests upon Alliance. Midcontinent requested information from Alliance about its current business plans. Midcontinent thereafter served the instant motion to have the rural exemption waived on October 9, 2008.

## AUTHORITY AND ANALYSIS

### 1. **The rural exemption precludes Midcontinent from seeking interconnection pursuant to 47 U.S.C. § 251(c)(1).**

As has been described in numerous administrative and court decisions, Sections 251 and 252 of the Telecommunications Act of 1934, as amended (the “Act”), impose certain obligations upon the party requesting interconnection and the party receiving such a request. Section 251 of the Act essentially creates a “three-tiered hierarchy of escalating obligations based on the type of carrier involved.” Total Tecomms. Servs., Inc. & Atlas Tel. Co., Inc. v. AT&T Corp., FCC 01-84, File No. E-97-003, Memorandum Opinion & Order at ¶25. Section 251(a)(1) requires telecommunications carriers to “interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers.” 47 U.S.C. § 251(a)(1). Section 251(b) requires local exchange carriers to provide certain services, which include resale, number portability, dialing parity, access to rights-of-way, and reciprocal compensation. See 47 C.F.R. § 251(b)(1) – (5). Section 251(c) imposes the greatest level of obligation and requires “incumbent local exchange carriers” to negotiate the terms of interconnection upon receipt of a valid request, to interconnect their networks with those of the requesting carrier, and to provide certain services, which include unbundled access, resale, change notices and collocation. See 47 U.S.C. § 251(c)(1) – (6). Section 252 of the Act further defines how the obligations imposed by Section 251 must be met.

There are instances, however, where the Act does not require a party receiving an interconnection request to negotiate for such interconnection. Section 251(f)(1) is one of those instances. Section 251(f)(1)(A) of The Telecommunications Act of 1934, as amended, provides in relevant part:

- (1) Exemption for certain rural telephone companies

(A) Exemption

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 (under subparagraph (B)) that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof).

47 U.S.C. § 251(f)(1)(A). Under the terms of this Section, a carrier which is a rural telephone carrier<sup>1</sup> has no duty to negotiate an interconnection with the requesting party until the appropriate administrative body determines that it is not entitled to the protections of the rural exemption. See Coserv Ltd. Liabl. Corp. v. Southwestern Bell Tel. Co., 350 F.3d 482, 487 (5th Cir. 2003) (noting that “[a]n ILEC is clearly free to refuse to negotiate any issues other than those it has a duty to negotiate under the Act when a CLEC requests negotiation pursuant to §§ 251 and 252.”).

The Act does provide for a limitation on a carrier’s ability to assert the rural exemption in instances of providing cable services. If an incumbent is already providing cable, the exemption set forth above does not apply. Specifically, 47 U.S.C. § 251(f)(1)(C) provides:

(C) Limitation on exemption

The exemption provided by this paragraph shall not apply with respect to a request under subsection (c) of this section, from a cable operator providing video programming, and seeking to provide any telecommunications service, in the area in which the rural telephone company provides video programming. The limitation contained in this subparagraph shall not apply to a rural telephone company that is providing video programming on February 8, 1996.

It is in this provision that the crux of the issue in this proceeding lies.

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<sup>1</sup> A rural exchange carrier is defined by 47 U.S.C. § 153(37).

**A. The rural exemption contained in 47 U.S.C. § 252(f)(1)(A) is limited only when the telephone company is already providing cable services.**

In its supplemental interconnection request, Midcontinent states that it has requested interconnection with Alliance pursuant to 47 U.S.C § 251(f)(1)(A). It is clear based upon the nature of Midcontinent's Supplemental Request for Interconnection that it seeks services which Alliance has no obligation to provide if the rural exemption remains intact. Midcontinent has requested interconnection points which include trunk-side interconnection, central office connection and tandem interconnection. Midcontinent has further requested meetpoint collocation at SDN. See Exhibit A, p. 2 of Midcontinent's Motion to Find Rural Exemption Waived. Based upon the nature of the services requested, Midcontinent's request for interconnection clearly falls within the purview of 47 U.S.C. § 251(c) and it is this provision to which the rural exemption applies. Therefore, Alliance has no duty to provide such services if the rural exemption applies. See 47 U.S.C. § 251(f)(a), A.R.S.D. § 20:10:32:37.

Midcontinent admits that Alliance is a rural exchange carrier. However, Midcontinent attempts to avail itself of the rural exemption waiver set forth in Section 251(f)(1)(C) by arguing that Alliance's intent to provide cable service at some indeterminate point in the future effectively waives the exemption. Midcontinent's argument misses the mark. The terms of Sections 251(f)(1)(A) and (C) are clear. The plain language evidences that the limitation on the assertion of the rural exemption acts as a waiver of the exemption *only* when the rural telephone company from which service has been sought *is already* providing cable service. As set forth in its Petition for Exemption, Alliance does not provide cable services in the exchanges in question, namely, Baltic and Crooks. In fact, a simple phone call to Alliance customer service will establish as much. This should therefore end the inquiry as the statute in no way contemplates

that the intentions of the rural telephone company to provide future service acts as a waiver of the rural exemption.

Given the nature of Midcontinent's request, its arguments, and the specific mandates of the Act, this Commission must make an affirmative determination as to whether the exemption applies to Alliance. See 47 U.S.C. § 251(f)(1)(B). Inherent in this determination is the penultimate question of whether Alliance's plan to one day provide cable services to its customers in the areas in question preemptively waives the protections of the rural exemption so as to obligate it to engage in negotiations for the delivery of 47 U.S.C. § 251(c) interconnection services at this time.

Midcontinent has requested that this Commission schedule an evidentiary hearing at which Midcontinent believes it can establish that Alliance is currently providing cable service. At this stage of the proceedings, Midcontinent has already served discovery upon Alliance seeking information directly related to Alliance's current and future business plan and its current plant capabilities.<sup>2</sup> The purpose of the rural exemption is to protect rural telephone companies from "burdensome interconnection requests until the PUC has screened such requests." Sprint Communications Company, L.P. v. Public Utility Commission of Texas et al., Memorandum

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<sup>2</sup> Midcontinent, in its discovery, has requested, among other items, the following information:

As to the fiber optic cable which has been installed or is in the process of being installed state:

- a. The name and address of the manufacturer;
- b. The product identification of the cable, whether by model number or other identifying characteristic; and
- c. The capacity of the cable.

Is that cable identified in the preceding paragraph capable of being used for the provision of video programming? If so, identify:

- a. All internal business plans maintained by Alliance for the build-out and implementation of video programming; and
- b. All representations which have been made to one or more of Alliance's customers concerning build-out and provision of video programming.

Opinion, Case 1:06-cv-00065-SS (2006). As such, Alliance should not be obligated to respond to discovery requests which infringe upon its confidential business plan and provide Midcontinent with an unfair competitive advantage when Midcontinent has done nothing to show that Alliance currently provides cable service. Moreover, an evidentiary hearing at which Alliance would essentially be required to produce significant information regarding its current and future business plans is neither necessary nor appropriate under these circumstances. Instead, the parties should simply be able to argue their positions with regard to the preliminary question of the appropriate interpretation of 47 U.S.C. § 251(f)(1)(C).

**B. A determination of the applicability of the rural exemption is needed to determine Alliance's statutory obligations under the Act and could affect the timeline that is available to complete interconnections negotiations.**

A determination as to whether the rural exemption applies to Alliance is necessary not only to determine Alliance's statutory obligations under the Act, but to also establish clearly when the actual timeline provided under the Act for interconnection negotiations will begin and end. It is apparent from the "Supplemental Notice of Application to Provide Local Exchange Service and Request for Interconnection" that Midcontinent has presented to Alliance a request for interconnection services which does extend to the additional ILEC interconnection obligations set forth in § 251 of the Act. If the Commission determines at this time that Alliance's rural exemption has not been waived and that therefore the current request for interconnection services is invalid, what will the timeline be for the completion of interconnection negotiations? It would be Alliance's position that Midcontinent would have to amend its request so that it would not extend to § 251(c) services and that the applicable timeline established in the Act for interconnection would not commence until that amended request is actually presented.

## CONCLUSION

The resolution of whether Alliance may assert the rural exemption is paramount to the determination of the scope of Alliance's obligations under the Act, if any, and to the applicable timelines for performance of those obligations. Midcontinent seeks to alter the terms of Section 251(f)(1)(A) and (C) by suggesting to this Commission that Alliance's intentions to provide cable service at some point in the future are relevant to the applicability of the rural exemption. The fact that Alliance intends to offer cable service at some point in the future does not waive the protections afforded it under the rural exemption, until such time as cable services are actually offered. Therefore, Alliance renews its request that this Commission determine the applicability of the rural exemption contained in 47 U.S.C. § 251.

Dated this 16th day of October, 2008.

CUTLER & DONAHOE, LLP  
Attorneys at Law

A handwritten signature in black ink, appearing to read "Ryan G. Taylor", is written over a horizontal line. The signature is stylized and includes a large loop at the beginning.

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing was served electronically on the 16th day of October, 2008, upon the following:

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