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VIA EMAIL TO PATTY.VANGERPEN@STATE.SD.US

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:

Attached for filing in the above matter, please find the Response of Alliance Communications Cooperative, Inc. to Midcontinent's Motion to Compel Discovery and Affidavit of Don Snyders.

Thank you for your assistance. If you have any questions, please do not hesitate to contact me.

Sincerely,

CUTLER & DONAHOE, LLP



Meredith A. Moore
For the Firm

MAM/cmc
Attachments

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

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

DOCKET No. TC 08-105

**RESPONSE OF ALLIANCE
COMMUNICATIONS COOPERATIVE,
INC. TO MIDCONTINENT'S MOTION
TO COMPEL DISCOVERY**

COMES NOW Alliance Communications Cooperative, Inc. ("Alliance") and hereby submits this response to Midcontinent's Motion to Compel Discovery in the above-referenced docket. South Dakota Telecommunications Association ("SDTA") joins in this response with respect to those arguments related to the interpretation of 47 U.S.C. § 251(f)(1)(c).

BACKGROUND

This matter is currently before the Commission on Midcontinent's 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"). A decision on this Application necessarily encompasses a determination as to whether Alliance is entitled to those protections afforded to a rural telephone company by the rural exemption contained in 47 U.S.C. § 251(f)(1)(C). On September 23, 2008, in conjunction with its Application, Midcontinent served discovery requests upon Alliance. Midcontinent requested information from Alliance about its current business plan with respect to Alliance's current and potential offering of video programming services in its exchanges. Alliance objected to the whole of Midcontinent's discovery requests and served its objections on October 16, 2008. On December 8, Midcontinent filed a Motion to Compel Alliance's discovery responses. In light of the outstanding Motion to Compel, the Commission has indicated its intentions to undertake an analysis of the issues presented by Midcontinent's Motion to Compel before making a

determination as to how to proceed with the various forms of relief requested by both Midcontinent and Alliance.

AUTHORITY AND ANALYSIS

The initial and determinate inquiry before this Commission remains the same: Is the rural exemption language contained in 47 U.S.C. § 251(f)(1)(C) waived only upon a showing that the rural telephone company is currently offering video programming services or also in the event that the rural telephone company intends to offer video programming services at some point in the future? Therefore, the question before this Commission is one of statutory interpretation.

Midcontinent takes the position that discovery is necessary before this Commission can make a ruling regarding the rural exemption. Midcontinent further takes the position that the rural exemption is waived not only by the actual provisioning of video programming, but also through a company's intentions to do so in the future. Midcontinent submits that the discovery requests served upon Alliance are necessary for determining whether Alliance is entitled to assert the protections afforded it by the rural exemption. The parties disagree on both the interpretation to be given to 47 U.S.C. § 251(f)(1)(C) and whether discovery is necessary for the interpretation of the statutory provision.

1. The Nature of the Discovery Sought By Midcontinent is Overly Broad, Not Narrowly Tailored to the Issue Before This Commission, and Ultimately Unnecessary.

Midcontinent seeks, by way of written interrogatories and request for production, the following information:

Interrogatories

1. Attached as Exhibit A is a printout of an article from the Garretson Weekly entitled "fiber to Home Project Underway." State whether the article correctly describes that which transpired at the meeting. If you

disagree, identify your disagreement and state your recollection of what occurred.

2. Is a fiber to the home project underway in various communities in the Alliance Communications Service area? Please state those areas that are completed and the anticipated build-out of any other areas.
3. 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.
4. Is the 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.
5. Does Alliance have on order any equipment capable of being used for the provision of video programming? If so, identify the equipment, expected delivery date and expected in-service date.

Request for Production

1. Please produce copies of all documents consulted in answering the foregoing interrogatories and copies of all documents representing transactions relevant to the foregoing interrogatories.

Alliance responded to each of Midcontinent's discovery requests with the following objections:

Alliance objects to this Interrogatory to the extent that this Discovery has been served prematurely and Alliance has no obligation to respond to the same until such time as it has been affirmatively determined by the South Dakota Public Utilities Commission that Alliance is not entitled to assert the rural exemption as contained in 47 U.S.C. § 251(f)(1). Alliance further objects to this Interrogatory to the extent that it seeks confidential and proprietary information which is neither relevant nor reasonably calculated to lead to the discovery of admissible and/or relevant evidence in this proceeding.

Alliance acknowledges that as a general rule, discovery is to be freely had. See SDCL

§ 15-6-26(b) (providing “[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action[.]” However, the law also specifies those circumstances in which discovery should not be had. This case presents such a circumstance.

Alliance strongly disagrees with Midcontinent’s contention that “each and every request is relevant to the question of whether Alliance has in fact waived the protections of the rural exemption by offering video programming services.” See Midcontinent’s Motion to Compel Discovery at p. 1. 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 Opinion, Case 1:06-cv-00065-SS (2006). Similarly, the rural exemption should protect its holder from unnecessary discovery and other legal action aimed at discovering the rural company’s business plan.

- A. The plain meaning of 47 U.S.C. § 251(f)(1)(C) provides that the rural exemption is waived only when the rural company is currently providing video programming, thereby making Midcontinent’s discovery requests premature and unnecessary.**

Based upon a review of South Dakota state and federal caselaw, the question of whether a rural carrier’s intent to offer a service in the future is sufficient to justify a waiver of a long-standing protection is one of first impression. In support of its Motion to Compel, Midcontinent cites to the case of In re: GCC License Corporation, 2001 S.D. 32, 623 N.W.2d 474. However, that case is wholly distinguishable from the facts currently at hand.

In the case cited by Midcontinent, GCC License Corporation (“GCC License”) filed a Petition with this Commission for designation as an eligible telecommunications carrier (“ETC”) pursuant to 47 U.S.C. § 241(e). Section 214(e) provides:

(1) Eligible telecommunications carriers

A common carrier designated as an eligible telecommunications carrier under paragraph (2), (3), or (6) shall be eligible to receive universal service support in accordance with section 254 of this title and shall, throughout the service area for which the designation is received - -

(A) offer the services that are supported by Federal universal service support mechanisms under section 254(c) of this title, either using its own facilities or a combination of its own facilities and resale of another carrier's services (including the services offered by another eligible telecommunications carrier); and

(B) advertise the availability of such services and the charges therefor using media of general distribution.

In its application, GCC License asserted that it provided or was capable of providing all of the federally required services within its mobile cellular offering area. This Commission, however, denied GCC License's request. Specifically, the Commission concluded that a carrier must actually be "offering or providing" all of the enumerated services at the time of its application and that it "cannot grant a company ETC status based on intentions to serve." In Re GCC License Corporation, 2001 S.D. 32 at ¶10, 623 N.W.2d at 479.

GCC License thereafter filed an appeal with the circuit court which reversed the Commission's denial of ETC designation. The case was then appealed to the South Dakota Supreme Court. The appeal centered on the interpretation of the requirements of Section 241(e) and whether an applicant for ETC designation must be providing or offering all universal support services *at the time* it seeks ETC designation. The South Dakota Supreme Court concluded that the provisions of Section 214(e) were ambiguous and therefore looked to the intent of the law. The Supreme Court found that its purpose was, and is, to encourage entry into markets of multiple providers in order to foster competition. Id. at ¶12, 623 N.W.2d at 480. The Supreme Court further stated: "If common carriers must provide or offer all the universal services

throughout the area at the time they seek designation, an onerous, perhaps overwhelming, burden would confront them.” Id. at ¶15.

In the instance of GCC License, this Commission was tasked with the responsibility of determining whether to grant an application for receipt of a particular designation. In the instant case, this Commission is tasked with the responsibility of determining whether it should terminate a statutorily afforded protection. The considerations and consequences of granting a right versus terminating one are wholly different. In its ruling in the GCC License Corporation case, the Supreme Court relied upon the purpose and goal Congress intended in enacting Section 214(e) and the Telecommunications Act itself. The interpretation of Section 214(e) and the Act as a whole stands in stark contrast to the very narrow and specific goal and purpose of Section 251(f). While the Act and Section 214(e) seek to further competition, Section 251(f) seeks to protect rural telephone companies from undue competitive burdens.

In the case at hand, Alliance is not applying for or asserting that it is anything other than a rural telephone company. Rather, Alliance is relying on Section 251(f) for protection already afforded to it as a rural telephone company. Most significantly, and as noted by the South Dakota Supreme Court, the grant of ETC designation is not a guarantee of receipt of universal service support. Id. at ¶17. Conversely, once the rural exemption under Section 251(f)(1)(C) is deemed waived or terminated, there is no way to restore that right and Alliance is obligated to negotiate with Midcontinent for the development of an interconnection agreement.

Unlike Section 214(e), the language of 47 U.S.C. § 251(f)(1)(C) which limits the scope of the rural interconnection exemption is clear. It is specifically stated therein that the “exemption provided by this paragraph [the rural exemption] shall not apply . . . in the area in which the rural telephone company **provides** video programming. *Emphasis added.* Use of the word “provides” within this statute can, in fairness, in the context of dealing with the termination of an existing

legal right, have only one meaning. It means that the rural telephone company must in fact be providing video programming services before its rural interconnection exemption can be deemed waived. See 47 U.S.C. § 251(f)(1)(C).¹ 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. The interconnection exemption established in the federal statutes for rural carriers is intended to have some practical effect with respect to interconnection obligations and maintaining this practical effect and preserving the ability of rural carriers to effectively assert their interconnection exemption rights, requires that there be some level of certainty with respect to when the exemption exists and when it doesn't. The word "provides" is intended to convey this certainty and clearly means that the interconnection exemption is waived only at the time that the rural carrier actually begins providing video programming to its subscribers. The South Dakota Supreme Court has repeatedly ruled that "[w]ords and phrases in a statute must be given their plain meaning and effect. When the language in a statute is clear, certain and unambiguous, there is no reason for construction, and the Court's only function is to declare the meaning of the statute as clearly expressed." Martinmaas v. Engelmann, 2000 S.D. 85, ¶49, 612 N.W.2d 600, 611; see also De Smet Ins. Co. of South Dakota v. Gibson, 1996 S.D. 102, ¶7, 552 N.W.2d 98, 100 (citations omitted) (holding that: "[w]here possible, congressional intent should be gleaned from the plain text of the statute."). Evidence that the word "provides" used in

¹ Section 251(f)(1)(C) provides:

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.

Section 251(f)(1)(C) should be given a literal interpretation is also found in the last sentence of that Section which states that “[t]he limitation contained in this subparagraph shall not apply to a rural telephone company that is **providing** video programming on the date of enactment of the Telecommunications Act of 1996.” *Emphasis added.* Clearly, there would be no basis to argue that carriers merely planning or intending on offering video programming in 1996 at the time the 1996 Act was passed could not later assert rural interconnection exemption rights. The word “providing” used in this last sentence of Section 251(f)(1)(C), obviously, references an actual provision of video programming services, not merely intentions or plans to do so. The word “provides” which is at issue in this case and exists in the prior sentence of Section 251(f)(1)(C) should be interpreted in the same way and be given the same meaning and effect.

If the rural exemption is waived only when a party is currently providing cable, discovery is not only inappropriate, but unnecessary, because the answer to the question of whether Alliance is currently providing cable in the Baltic and Crooks exchanges is “no”. See generally Affidavit of Don Snyders. Alliance understands, however, that this Commission must have some facts before it in order to determine whether the rural exemption remains in effect. In the interest of allowing this Commission to fully assess Midcontinent’s request to deem the rural exemption waived or to seek termination of the same, Alliance has submitted with this Response an Affidavit from its general manager, Don Snyders. See generally Affidavit of Don Snyders (“Aff. Snyders”). As set forth in the Snyders’ Affidavit, Alliance is not currently providing cable in its exchanges of Baltic and Crooks. Id. at ¶3. Alliance is currently upgrading its cable and plant facilities in several of its exchanges and those facilities will be capable of offering video programming. Id. at ¶4. Alliance is likely to offer video programming in the future. Id. at ¶5. At this time, however, no date certain has been set for the offering of video programming services to the subscribers in the Crooks and Baltic area. Id. Under these circumstances, the

rural exemption therefore remains intact and Alliance's objections to Midcontinent's discovery requests are wholly appropriate as discovery should not be had.

B. Even if this Commission determines that Alliance's intentions are relevant to a determination of the applicability of the rural exemption, Midcontinent's discovery requests are overly broad and not narrowly tailored to the issue before this Commission.

Even if this Commission were to reach the unreasonable conclusion that the rural interconnection exemption may be waived by a rural telephone company based merely on its intentions or future plans to offer video programming or cable services, the discovery posed by Midcontinent is still inappropriate. Midcontinent asserts that its discovery requests are aimed at determining whether Alliance has in fact engaged in an act or a series of acts which result in a waiver of the rural exemption. However, Midcontinent's discovery is far broader in its scope than what is necessary to answer the question of whether Alliance is currently offering video programming in the Crooks and Baltic changes.

As is evident upon review, Midcontinent's discovery requests are overly broad and seek information which is confidential, proprietary and vital to Alliance's business plan. It is apparent from the wording of the requests, that they are not narrowly tailored to seek information related to the Baltic and Crooks exchanges. See pp. 2-3 above. The discovery clearly references all of Alliance's exchanges and its plans for the entirety of its service territory. Furthermore, the discovery seeks more information than is necessary to determine the issue before this Commission. By way of example, Interrogatories Nos. 3 and 4 seek information related to the specific cable being used by Alliance and its capacity. Revealing such information not only yields details about Alliance's ability to provide video programming, but also provides information about its phone service and internet and the various speed of its services. This information is wholly unnecessary to a determination of whether Alliance is currently providing

cable. While Midcontinent may have a right to inquire whether Alliance has acted in such a manner so as to waive the rural exemption, it does not have a right to go beyond that initial question and learn about the specific details of Alliance's plant facilities or its internal plans. Moreover, Alliance submits that the Snyders' Affidavit is more than sufficient to respond to Midcontinent's inquiries about the services Alliance currently offers.

In the instance that this Commission chooses to grant the Motion to Compel filed by Midcontinent, Alliance submits that the scope of Midcontinent's discovery should be limited significantly so as not to cause any disclosure of confidential information. Specifically, Alliance submits that it should not be compelled to respond to Interrogatories 3, 4 and 5 and Request for Production 1.

CONCLUSION

The ultimate issue before this Commission is whether the rural exemption is waived because of some act or series of acts taken by Alliance or whether it should be terminated following the commencement of that proceeding provided for in A.R.S.D. 20:10:32:38. The rural exemption serves the purpose of protecting companies such as Alliance from unnecessary and costly negotiations and discovery proceedings until such time as this Commission determines whether the rural exemption remains intact. For these reasons, Alliance respectfully requests that this Commission deny Midcontinent's Motion to Compel Discovery. Alliance further requests that this Commission deny Midcontinent's request for an evidentiary hearing on those services offered by Alliance. In the event that this Commission grants Midcontinent's Motion to Compel, Alliance requests that the Commission Order Midcontinent to narrow the scope of its discovery requests so as not to infringe upon confidential and proprietary business planning information.

Dated this 17th day of December, 2008.

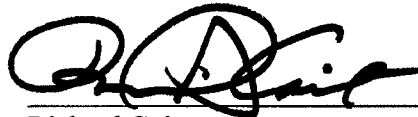
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CERTIFICATE OF SERVICE

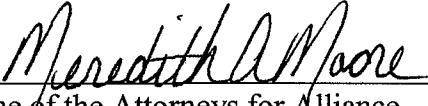
The undersigned hereby certifies that a true and correct copy of the foregoing was served electronically on the 17th day of December, 2008, upon the following:

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