BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE PETITION OF WEST RIVER COOPERATIVE TELEPHONE COMPANY FOR SUSPENSION OR MODIFICATION OF 47 U.S.C. § 251(B)(2) OF THE COMMUNICATIONS ACT OF 1934 AS AMENDED	**))))))**	**<u>AMENDED</u> FINAL DECISION AND ORDER; NOTICE OF ENTRY** **TC04-061**

PROCEDURAL HISTORY

On March 17, 2004, West River Cooperative Telephone Company (West River or Petitioner) filed a petition (Petition) pursuant to 47 U.S.C. Section 251(f)(2) and SDCL 49-31-80 seeking suspension or modification of its requirement to implement local number portability (LNP) pursuant to Section 251(b)(2) of the Telecommunications Act of 1996. From February 12 to April 23, 2004, twenty other rural local exchange carriers filed similar petitions seeking the same relief (two of these later-filed petitions, TC04-077 and TC04-085, were subsequently settled) (excluding settling petitioners, collectively, Petitioners). On April 19, 2004, the Commission issued an order granting West River's request for interim suspension of its obligation to implement LNP pending final decision pursuant to 47 U.S.C. Section 251(f)(2) of the Telecommunications Act of 1996 and SDCL 49-31-80 and granting intervention to WWC License LLC d/b/a CellularOne (WWC), Midcontinent Communications and the South Dakota Telecommunications Association (SDTA).

On May 4, 2004, the Commission issued an Order for and Notice of Procedural Schedule and Hearing and of Intent to Take Judicial Notice. On June 16, 2004, the Commission issued a Supplemental Order for and Notice of Hearing establishing the schedule for presentation of general and company-specific testimony in this and the other LNP dockets. On June 21-July 1, 2004, a hearing was held on this matter and the other dockets in which Petitioners seek to suspend their obligations to implement LNP. The company-specific hearing on this matter was held on June 23, 2004. On July 13, 2004, the Commission issued an Order Establishing Briefing and Decision Schedule setting this matter for oral argument and decision on August 31, 2004. On August 31, 2004, the Commission heard oral arguments from the parties in this and the other LNP dockets. Following oral argument, the Commission voted unanimously to suspend Petitioners' obligations to implement intermodal local number portability pursuant to 47 U.S.C. §251(b)(2) and SDCL 49-31-81. A majority of the Commission voted to suspend Petitioners' intermodal LNP obligations until December 31, 2005. Commissioner Burg dissented from this portion of the decision, indicating that he supported an indefinite suspension of intermodal LNP obligations for all Petitioners requesting suspension of LNP obligations. The Commission voted unanimously to defer decision regarding intramodal number portability requirements without specifying whether the deferral applied to all LNP dockets or just those in which Midcontinent Communications had intervened and objected to suspending intramodal LNP requirements. On September 4, 2004, the Commission issued an order temporarily suspending all LNP requirements for all petitioners until September 30, 2004, in order to provide sufficient time for the finalization of the findings of fact and conclusions of law and to render a final decision regarding intramodal LNP. On September 22, 2004, the Commission voted unanimously to suspend intramodal LNP obligations for all Petitioners until December 31, 2005, with special conditions for those dockets in which Midcontinent remains an intervening party.

Having considered the evidence of record and applicable law, the Commission makes the following Findings of Fact, Conclusions of Law and Final Decision and Order:

FINDINGS OF FACT

"TR" refers to the Transcript of Proceedings of the hearing held on June 21-July 1, 2004, in this docket and the other LNP suspension dockets. References will be to TR and page number(s).

1. West River filed the Petition on March 17, 2004. On March 18, 2004, the Commission electronically transmitted notice of the filing and the intervention deadline of April 2, 2004, to interested individuals and entities. Midcontinent filed to intervene on March 24, 2004, WWC filed to intervene on March 30, 2004, and SDTA filed to intervene on March 31, 2004. On April 19, 2004, the Commission issued an order granting intervention to WWC, Midcontinent and SDTA. On May 25, 2004, Midcontinent filed a motion to withdraw its intervention. Midcontinent did not participate in the West River company-specific hearing. The Commission finds that Midcontinent's Motion to Withdraw Intervention should be granted.

2. By its May 4, 2004 Order for and Notice of Procedural Schedule and Hearing and of Intent to Take Judicial Notice and June 16, 2004 Supplemental Order for and Notice of Hearing, this matter was duly noticed for hearing on June 21-July 1, 2004, with the company-specific hearing on this matter to be held on June 23, 2004. The hearing was held as scheduled.

3. On September 4, 2004, the Commission issued an Order Temporarily Suspending Local Number Portability Obligations suspending West River's LNP obligations until September 30, 2004, in order to provide sufficient time for the finalization of the findings of fact and conclusions of law and to render a final decision regarding intramodal LNP.

4. The Federal Communications Act of 1934 as amended by the Telecommunications Act of 1996, 47 U.S.C. chapter 5 (the "Act") requires local exchange carriers "to provide, to the extent technically feasible, number portability in accordance with the requirements prescribed by the [Federal Communications] Commission." 47 U.S.C. § 251(b)(2). In *Matter of Telephone Number Portability*, CC Docket 95-116, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, FCC 03-284 (November 10, 2003) (the "*Intermodal Order*"), the Federal Communications Commission (FCC) required local exchange carriers that are located outside of the top 100 metropolitan statistical areas to provide LNP and to port numbers to wireless carriers. Pursuant to this order, local exchange carriers were required to provide LNP by the later of May 24, 2004, or six months after the date that the local exchange carrier received a bona fide request.

5. 47 U.S.C. §153(30) defines "number portability" as follows:

> The term "number portability" means the ability of users of telecommunications services to retain, at the same location, existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another.

In the *Intramodal Order*, ¶¶ 25 and 28, the FCC addressed the question of "at the same location" as follows:

> [W]e find that . . . LECs must port numbers to wireless carriers where the requesting carrier's coverage area overlaps the geographic location of the rate center to which the number is assigned. . . . We conclude that porting from a wireline to a wireless carrier that does not have a point of interconnection or

numbering resources in the same rate center does not, in and of itself, constitute location portability, because the rating of calls to the ported number stays the same.

The term "intramodal number portability" as it applies to the Petition refers to the ability to port a number from a wireline carrier, such as Petitioner, to another wireline carrier. The term "intermodal number portability" as it applies to the Petition refers to the ability to port a number from a wireline carrier, such as Petitioner, to a wireless carrier. The Petition seeks suspension of both intermodal and intramodal number portability obligations. No wireline carrier other than Petitioner remains a party to this docket.

6. The determinations that the Commission must make before suspending or modifying an RLEC's obligation to provide LNP to requesting carriers are set forth in SDCL 49-31-80 which reads as follows:

> Consistent with 47 U.S.C. § 251(f)(2) as of January 1, 1998, the commission may grant a suspension or modification of any of the interconnection or other requirements set forth in 47 U.S.C. §§ 251(b) and 251(c), as of January 1, 1998, to any local exchange carrier which serves fewer than two percent of the nation's subscriber lines installed in the aggregate nationwide. Any such carrier shall petition the commission for the suspension or modification. The commission shall grant the petition to the extent that, and for such duration as, the commission determines that the requested suspension or modification is consistent with the public interest, convenience, and necessity and is necessary:
>
> (1) To avoid a significant adverse economic impact on users of telecommunications services generally;
>
> (2) To avoid imposing a requirement that is unduly economically burdensome; or
>
> (3) To avoid imposing a requirement that is technically infeasible.
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> The commission may suspend enforcement of the requirement or requirements identified in the petition pending final action on the requested suspension or modification.

The language and substance of SDCL 49-31-80 and 47 U.S.C. § 251(f)(2) are essentially the same.

7. By its Order for and Notice of Procedural Schedule and Hearing and of Intent to Take Judicial Notice issued on May 4, 2004, the Commission gave the following notice of intent to take judicial notice:

> The Commission hereby gives notice pursuant to SDCL 1-26-19(3) that it intends to take judicial notice of the fact that Petitioner is a local exchange carrier with fewer than 2 percent of the nation's subscriber lines installed in the aggregate nationwide. Any party objecting to this taking of judicial notice shall serve notice of such objection on the Commission and the parties prior to the hearing.

No party to the docket served notice of objection or otherwise noted any objection to this taking of judicial notice. Accordingly, the Commission takes judicial notice of the fact and finds that West River is a local exchange carrier with fewer that 2 percent of the nation's subscriber lines installed in the aggregate nationwide pursuant to SDCL 49-31-80 and 47 U.S.C. §251(f)(2).

8. West River is a rural local exchange carrier (RLEC) that provides local exchange and exchange access services to 3,763 access lines. West River Ex 1 at 1; 47 U.S.C. §153(37).

9. Two wireless carriers have made bona fide requests for LNP from West River. West River Ex 1 at 3. No wireline carrier has made a bona fide request for LNP. West River Ex 1 at 3.

10. Under SDCL 49-31-80, the Commission is required to determine the extent to which the requested suspension or modification is consistent with the public interest, convenience and necessity and whether the suspension or modification is necessary to avoid at least one of the three adverse effects set forth in subdivisions (1), (2) and (3) of the statute.

11. There was essentially no disagreement by any of the experts who testified on behalf of Petitioners that LNP is technically feasible. TR 175, 997. The testimony of Petitioners' witnesses to the effect that LNP was not technically feasible was based upon the present absence of the necessary switch upgrades and direct trunk connections with requesting carriers conforming to existing interconnection agreements. We find that this does not establish technical infeasibility, although the Commission recognizes that Petitioner would require a period of time to install and implement the necessary technology. The switch upgrade and interconnection facilities assumed by Petitioners' witnesses to establish their transport costs demonstrate that LNP is technically feasible. According to several of the Petitioners' manager witnesses, LNP is technically feasible. Bryan Roth, manager for McCook, agreed that LNP was technically feasible. TR. at 829. Pamela Harrington, general manger of Roberts County and West River, stated that LNP is technically feasible with the proper upgrades. TR. at 1049. Dennis Law, West River and Golden West's manager, stated that his companies are technically able to connect to the Qwest tandem. TR. at 791-792. It is technically feasible for each of the Petitioners to implement LNP. It would take action on Petitioners' parts and would cost Petitioners money in varying levels to implement LNP, but the technology and network facilities exist for it to be implemented. The decisions in each of Petitioners' cases must therefore turn upon the two economic standards and the public interest determination.

12. The Commission finds that granting a suspension of West River's local number portability obligations under 47 U.S.C. §251(b)(2) until December 31, 2005, is consistent with the public interest, convenience and necessity. The Commission further finds that at the present time, granting a suspension to West River is necessary to avoid a significant adverse economic impact on West River's users of telecommunications services generally and to avoid imposing a requirement that is unduly economically burdensome on West River. These findings are based upon the specific findings set forth below.

13. In a June 18 letter to the President of the National Association of Regulatory Utility Commissioners (NARUC), the Chairman of the FCC, Michael Powell, recognized the potential burden of LNP implementation on small businesses, particularly rural local exchange carriers, and encouraged state commissions to exercise their authority under 47 U.S.C. §251(f)(2) to grant the requested relief if the State Commissions deem it appropriate. TR 566-568; Venture Ex 4. Chairman Powell directed "State Commissions to consider the burdens on small businesses in addressing those waiver requests and to grant the requested relief if the State Commissions deem

it appropriate." Venture Ex 4.

14. At least part of the determination of whether a suspension of a Petitioner's LNP requirements is consistent with the public interest, convenience and necessity involves weighing the costs to the LEC and/or its users against the benefits to be derived from the incurrence of such costs. *Order Granting Suspension, Applications Nos. C-3096, et seq.*, Nebraska Public Service Commission (July 20, 2004). As discussed in detail below, the Commission finds that at this time, the benefits to consumers from LNP in the rural areas served by Petitioners simply have not been sufficiently demonstrated to outweigh the burden that imposing LNP implementation at this time will place on Petitioners and the rural citizens who rely on Petitioners for essential, provider-of-last-resort telephone service.

15. Another factor that we find is highly relevant to our determination of whether the granting of the requested suspension at this time is in the public interest involves the significant level of uncertainty that currently exists concerning (i) the appropriate technical solution for transport of calls to ported numbers in rural areas, (ii) the respective responsibilities, and attendant costs, of providing transport for calls to ported numbers outside the local calling area of Petitioners, (iii) the routing and rating of calls to ported numbers, (iv) the porting interval, (v) the demand for number porting, particularly in the areas where signal coverage is spotty or non-existent and (vi) the extent to which the presence of LNP is a marginal factor in the consumer's purchasing decision for alternative services such as wireless service. Suspending Petitioners' LNP obligations until December 31, 2005, will enable the unresolved issues concerning transport, routing and rating and porting interval to be addressed in the proceedings pending before the FCC, and will provide a period of time for (vii) the Petitioners and intervenors to continue to investigate, negotiate and hopefully resolve many of the interconnection, transport and routing and rating issues between them, (viii) wireless carriers to continue their build-outs of facilities to provide more extensive and reliable signal coverage throughout Petitioners' service territories and (ix) for the accumulation of data concerning the deployment of LNP in other areas and concerning the benefits of LNP -- particularly whether demand for LNP in fact materializes and is in fact demonstrated to be of material significance in the consumer's purchasing decision for alternative services.

16. A final factor that we believe is appropriate to consider in any public interest decision involving rural local exchange carriers is reflected in one of the central policy objectives of the Act and SDCL Chapter 49-31 - the duty to provide and preserve universal service. 47 U.S.C. §§ 214(e) and 254; SDCL 49-31-76 and 49-31-78 through 49-31-81. Petitioners, all of whom are the incumbent local exchange carriers and eligible telecommunications carriers under the Act, shoulder the responsibility for providing essential telecommunications to all persons within their service territories as carriers of last resort.

17. The record demonstrates that the costs to West River to implement number portability will be significant. These costs fall into three general categories: switch upgrade, transport and recurring operational costs. The evidence addressing West River's costs of implementing LNP was both conflicting. West River's cost witness projected the non-recurring cost for West River to implement LNP to be $114,650 excluding transport and $275,650 including transport. He estimated the recurring monthly costs for West River to be $2,186 excluding transport and $28,086 including transport. West River's cost witness projected that these costs would translate into an LNP cost of $1.40 per line per month excluding transport and $10.15 including transport. WWC Ex 9. WWC's cost witness projected a non-recurring cost of $99,450 excluding transport and $99,850 including transport. WWC's projected recurring monthly costs for West River at $2,066 excluding

transport and $2,661 including transport. WWC projected these costs would translate into an LNP cost of $1.31 per line per month excluding transport and $1.50 including transport. WWC Ex 9.

18. The major reason for the differences in projected costs was transport. A second divergence related to switch related investment costs, but this was much less severe. Transport costs comprised a significant portion of the costs to implement LNP as estimated by all Petitioners including West River. Transport costs as estimated by WWC were very significantly lower. West River proposed a transport method using a DS1 (T1) circuit installed between each West River exchange to each wireless carrier that is licensed to provide service in West River's territory that does not already have a direct trunk into the exchange. TR at 52, 158, 480; West River Ex 3 at 13-14.

19. By contrast, WWC's routing method was based on converting the existing one-way, incoming trunk from the Qwest tandem, used to deliver Qwest traffic to West River's customers via West River's host switch, into a two-way trunk and using Qwest as a transit carrier. According to WWC's witness, this routing method would result in a very substantially lower estimated initial non-recurring cost outlay - $161,000 as calculated by West River's witness vs. $400 as estimated by WWC's witness and a significantly lower estimated monthly recurring cost for transport for West River - $25,900 per month as calculated by West River's witness vs. $595 per month as calculated by WWC's witness. WWC Ex 9.

20. The basis for the routing methodology proposed by West River's cost witness was:

> . . . First, routing of local calls to a point of interconnection located within the RLEC exchange is consistent with the terms of the Interconnection Agreement entered into between Western Wireless and RLECs.
>
> Second, RLECs do not route local traffic to a point of interconnection outside of its local exchange or service area. Requiring RLECs to route traffic to a point of interconnection outside of its exchange or service area would add the responsibility of a LEC from providing local exchange service and exchange access to providing interexchange service as well. TR 994.

21. In the *Intramodal Order*, the FCC stated in ¶ 1:

> [W]e clarify that nothing in the Commission's rules limits porting between wireline and wireless carriers to require the wireless carrier to have a physical point of interconnection or numbering resources in the rate center where the number is assigned. . . . In addition, . . . we clarify that wireline carriers may not require wireless carriers to enter into interconnection agreements as a precondition to porting between the carriers.

22. The FCC left open the unanswered questions presented by this holding with respect to how carriers are to handle routing and transport of calls to ported numbers in the absence of points of interconnection between the LEC and the wireless carrier. The FCC stated as follows with respect to this issue in Footnote 75 to ¶ 28 and in ¶ 40 of the *Intramodal Order*:

> [75]As noted in paras. 39-40 below, there is a dispute as to which carrier is responsible for transport costs when the routing point for the wireless carrier's

> switch is located outside the wireline local calling area in which the number is rated. See Sprint Petition for Declaratory Ruling. The existence of this dispute over transport costs does not, however, provide a reason to delay or limit the availability of porting from wireline to wireless carriers.
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> We make no determination, however, with respect to the routing of ported numbers, because the requirements of our LNP rules do not vary depending on how calls to the number will be routed after the port occurs. Moreover, as CTIA notes, the rating and routing issues raised by the rural wireline carriers have been raised in the context of non-ported numbers and are before the Commission in other proceedings. Therefore, without prejudging the outcome of any other proceeding, we decline to address these issues at this time as they relate to intermodal LNP.

The FCC is considering this issue in a pending docket. *See In the Matter of Sprint Corp. Petition for Declaratory Ruling Regarding the Routing and Rating of Traffic by ILECs*, CC-Docket 01-92, Petition of Sprint, May 9, 2002.

23. WWC produced evidence through its cost witness, Mr. Williams, that its suggested transport method of adding a bi-directional capability to the trunk currently carrying Qwest traffic into West River's switch from the Qwest tandem in Sioux Falls was technically feasible and was proposed as a transport mechanism, subject to resolution of transport rate issues with Qwest, by certain ILEC members of the Minnesota Independent Coalition before the Minnesota PUC in *Matter of the Petition by the Minnesota Independent Coalition for Suspension or Modification of Local Number Portability Obligations Pursuant to 47 U.S.C. §251(f)(2)*, Docket No. P-et al/M-04-707. TR 579-582, 587-589; WWC Ex 6. A temporary suspension of LNP obligations was ultimately granted by the Minnesota PUC in this docket on July 8, 2004. As of the decision date, however, the transport pricing issues between the petitioning MIC members and Qwest had still not been resolved, and in its Order Granting Suspension, the MPUC was required to provide a 90 day period for negotiation after which the matter would come back to the commission for arbitration.

24. Mr. Williams's belief that the Minnesota Qwest tandem solution was available to Petitioners was based upon his prior experience with Qwest's provisioning of services, his review of Qwest's Statement of Generally Available Terms and Conditions (SGAT) and tariffs. TR 552. Mr. Williams further testified:

> "There are Interconnection Agreements available today in South Dakota that can be opted into within a matter of days, and Western Wireless has such an agreement. That agreement calls for transit at three-tenths of a cent, and there's nothing to prevent any carrier from opting into that agreement. TR 734.

Based upon this, Mr. Williams testified that he estimated the cost to Petitioners of transport provided by Qwest to be .3 cents per minute. TR 552, 734.

25. WWC's witness also testified, however, that he had not in fact discussed this proposal with Qwest. TR 932. Furthermore, WWC did not make reference to the specific tariff or SGAT provisions or rate schedules upon which he based these conclusions, and the Commission has been unable to determine from a review of the Qwest tariffs and SGAT alone whether WWC's proposed transport mechanism would in fact be available to West River for the purpose of transporting calls to ported numbers outside the local exchange area as local calls or, if so, what the actual pricing and terms of such service would be.

26. With respect to the existing Type 2 Wireless Interconnection Agreement between U S West Communications, Inc. and WWC License, L.L.C. for the State of South Dakota, it is not obvious that West River would be able to opt into the agreement. The agreement is a comprehensive wireless to wireline interconnection agreement specifically designed for the situation where one party is a wireless carrier. In *Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Second Report and Order, FCC04-164 (rel. July 13, 2004), the FCC took away the right of carriers to opt into only selected terms of Section 251 interconnection agreements, stating in ¶ 1:

> In this Order, we adopt a different rule in place of the current pick-and-choose rule. Specifically, we adopt an "all-or-nothing rule" that requires a requesting carrier seeking to avail itself of terms in an interconnection agreement to adopt the agreement in its entirety, taking all rates, terms, and conditions from the adopted agreement.

We accordingly do not find that West River could necessarily simply opt into WWC's interconnection agreement with Qwest either in its entirety or as to only one particular provision.

27. WWC stated at the hearing that WWC would pay for transport on an interim basis, until the final FCC decision on transport, provided the Qwest tandem-based routing method was used. TR. at 939. The Commission finds, however, that this temporary commitment could leave West River with the burden of paying the costs of transport outside of its service area in the future, that there is no certainty at this time as to what those costs would be and that West River would then have been compelled to incur the substantial switch upgrade and other non-transport costs of LNP implementation.

28. Lastly, as to this issue of transport, we note the testimony of Mr. Bullock, cost witness for several of Petitioners, who stated:

> In telephone toll traffic there's a considerable track record of interexchange carriers providing toll service, and I think it's safe to assume that the bugs have been worked out of the interfaces that are required between local exchange access service providers such as the local exchange companies we're talking about here today and interexchange carriers such as AT&T and Sprint that reliably pass information back and forth to enable the proper routing and rating of calls and the proper rating and identity of the calling party.
>
> In terms of the exchange of local traffic through an intermediate tandem service provider, I'm not so sure that's a safe assumption to make. TR 879-880.

29. Other factors that influenced the differences between West River's and WWC's estimates of the cost of LNP implementation primarily involved differences in administrative cost assumptions. WWC 9.

30. Although there was evidence in the record that Petitioners could include at least some costs of implementing LNP in the Petitioners' applications for universal service support funds from the Universal Service Administration Company, TR 954, the FCC, in two recent orders and the Federal-State Joint Board on Universal Service have recently recognized the increasing cost of providing universal service support in a competitive environment and recognized the propriety of

both the FCC and state commissions considering the impact on the universal service fund in their public interest determinations. *Federal-State Joint Board on Universal Service, Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier for the State of Virginia*, CC Docket No. 96-45, Memorandum Opinion and Order, FCC 03-338, ¶ 4 (rel. Jan. 22, 2004) ("*Virginia Cellular Order")*; *Federal-State Joint Board on Universal Service, Highland Cellular, Inc. Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia*, CC Docket No. 96-45, Memorandum Opinion and Order, FCC 04-37, ¶ 4 (rel. April 12, 2004); *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Recommended Decision, FCC 04J-1 (re. February 27, 2004).

31. We find that implementing LNP at this time could cost West River or its users as much as $1.40 per line per month excluding transport and that the costs of transport, if ultimately held to be West River's responsibility, could raise that monthly cost substantially higher. WWC Ex 9.

32. West River's customer base includes many elderly people for whom an added charge is a burden. West River Ex 1 at 5. West River serves parts of two counties that are consistently among the 10 lowest income counties in the nation. TR 439.

33. All Petitioners, WWC and SDTA presented evidence of demand for LNP or the lack thereof. Demand for LNP has relevance both to the costs to be incurred by Petitioners to provide LNP and to the benefit side of a cost-benefit analysis for both the public interest and adverse economic effect analyses. In the case of many of the Petitioners, differences in estimated ports produced differences in recurring costs.

34. West River's manager testified that West River had received no requests for LNP from its customers. West River Ex 1 at 3. West River did not conduct a formal survey. TR 439.

35. Davis, the cost witness for Beresford, Kennebec, Midstate, Roberts County/RC, and Western, used porting estimates when he calculated the cost to implement LNP. However, at the hearing, he stated that his porting numbers should not be taken as "any sort of estimate for demand" and that he did not do any type of empirical analysis. TR. at 1009-10. He just picked a number to "show a relationship between a specific demand level and what the resulting costs would be." TR. at 1009.

36. Steven Watkins, a witness for the Petitioners, stated that NeuStar reported that "95% of wireless ports have been from one wireless carrier to another and only 5% of wireless ports were between wireline and wireless carriers." SDTA Ex 1 at 11. He noted that these numbers were based on wireless to wireline reporting in more urban areas and expected that interest in rural areas would be even less. Id. He stated that in rural areas "the public does not recognize wireless service as an absolute substitute for wireline service" due to reliability and that "demand for wireless service is more for its mobile capability[.]" Id. at 12. He further stated that even for customers who decide to give up their wireline service for wireless generally will try wireless service first and then drop their wireline service. Id. Thus, there would not be a need to port numbers in that case. Id.

37. Bullock, the cost witness for Alliance/Splitrock, Armour/Bridgewater/Union, Faith, Golden West/Vivian/Kadoka, McCook, Sioux Valley, Tri-County, and Valley, stated that he assumed that if LNP were required, the wireless companies would begin an aggressive marketing campaign which may generate some porting activity. TR. at 890. He also assumed that some of the customers would port back to the wireline carrier. Id. He stated that he did not do a scientific

analysis since there is no track record for number porting in rural areas. Id. He also stated that his porting estimates were not based on the number of wireless carriers operating in any particular area. Id. at 891. Bullock's estimated number of ports were higher than DeWitte's and ranged from 0.694% to 3.061% of a company's access lines per year.

38. WWC's witness, Williams, stated that WWC's porting estimates were "based on what we thought we would be able to obtain as a result of both our coverage and our view of what their demographics represented." TR. at 1031. His estimates for ports, based on each company's number of access lines, ranged from a low of 2.743% for Golden West to a high of 3.528% for Brookings. WWC Ex 9, 15, 18, 19. Williams further stated that, for most of the companies, the numbers are close to what WWC would expect in WWC's rural areas, which is approximately 15 percent intermodal porting over a five year period. TR. at 1031. He assumed that WWC would have about 45% of the total estimated ports. TR. at 690. Williams stated that there has not yet been any experience in intermodal porting in rural service areas so far. Id. He went on to state that there is a track record for wireline to wireline portability and that has resulted in an annual migration of 3.5% to 4.5%. Id. at 1033. He also stated that he would not expect wireline to wireless migration to be that high. Id.

39. The demand for porting will likely fall somewhere in between the numbers as forecasted by the Petitioners and those set forth by WWC. WWC's estimates are probably too high based on a number of factors. First, according to Williams' own testimony, wireline to wireline portability on a national basis has only resulted in porting percentages of 3.5% to 4.5%. TR. at 1033. Moreover, a survey regarding wireless porting showed that only 5% of wireless ports nationwide were between wireline and wireless carriers. SDTA Ex 1 at 11. On the other hand, DeWitte's estimates that averaged less than two tenths of one percent appear to be somewhat low. For example, in Kennebec, 12% of the survey respondents stated they would be willing to pay a dollar a month in order to have the ability to port their wireline numbers to their wireless carrier. TR. at 965. In addition, one of the cost witnesses, Bullock, used estimates that ranged from 0.694% to 3.061%.

40. The "benefit" to be derived from LNP for a given company's customers is in part dependent on demand. The uncertainty concerning the number of ports to be expected does interject an additional element of uncertainty into the recurring costs for Petitioners to provide LNP. To the extent that the number of ports increases, however, and thereby increases the costs of providing LNP, this increase in costs due to greater demand could be argued to be balanced, in terms of cost-benefit analysis by the greater benefit to be received by Petitioners' customers.

41. In *Matter of Telephone Number Portability*, CC Docket No. 95-116, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 8352, ¶ 29 (1996) (*First Report and Order*), the FCC found that local number portability was a significant factor limiting a customer's decision to switch telecommunications service providers. In the *Intramodal Order*, the FCC extended this reasoning to intermodal portability. However, the FCC in *Virginia Cellular* and again in *Highland Cellular* recently emphasized that competition *per se* is not a sufficient basis upon which Commissions should base public interest decisions involving rural, high cost service areas. Although WWC presented evidence as to the number of ports it expected to obtain, TR 1033, no empirical evidence was introduced to demonstrate that LNP would materially increase the number of customers subscribing to wireless service within Petitioners' service areas or, stated conversely, that the inability to port landline phone numbers to a wireless phone within Petitioners' service areas is a significant negative factor influencing potential customers for wireless service to forego purchasing WWC's service. Petitioners provided evidence that WWC is successfully competing

for customers within Petitioners' service territories without intermodal LNP. TR 312. WWC itself introduced a survey that demonstrated that wireless market penetration would be significant. The survey results were not dependent on LNP. TR 645-646. WWC Ex 11. Brookings's Manager testified that as a result of migration of customers, primarily college students, from landline to totally wireless, Brookings had lost 1,200 access lines over the past 3 years. TR 311. He further testified, "[W]e have pretty fair competition without local number portability. . . . [I]n an environment where competition is being served, the customers are, in fact, migrating as they desire form wireline to wireless." TR 312. Midstate's manager testified that in its CLEC operation in Chamberlain/Oacoma LNP had not been a significant competitive driver in the intramodal arena. Out of Midstate's 787 customers, only 8 were ported numbers. TR 976.

42. There are presently at least three sources of significant uncertainty concerning the obligations and resulting costs to Petitioners and their customers to implement LNP in their rural service areas. These three sources of significant uncertainty are: (i) the pending appeal of the *Intramodal LNP Order* in *United States Telecom Assn. v. FCC*, Cases No. 03-1414 and 03-1443 (D.C. Cir.); (ii) the unresolved apportionment of interconnection and transport obligations of the RLEC and the requesting wireless carrier; and (iii) the porting interval that the RLEC must meet. The latter two of these uncertainties arise from the language in paragraph 1 of the *Intermodal Order* in which the FCC stated:

> [W]e clarify that nothing in the Commission's rules limits porting between wireline and wireless carriers to require that wireless carrier to have a physical point of interconnection or numbering resources in the rate center where the number is assigned. . . . In addition, . . . we clarify that wireline carriers may not require wireless carriers to enter into interconnection agreements as a precondition to porting between the carriers. We also decline to adopt a mandatory porting interval for wireline-to-wireless ports at the present time, but we seek comment on the issue as noted below.

Proceedings are currently pending before the FCC to address these unresolved issues.

43. Given the projected significant costs of providing LNP, the limited demonstrated present demand for LNP, the high percentage of elderly and poor customers Western serves and the uncertainties currently attending LNP implementation and provision in Petitioners' territories, the Commission finds that the cost-benefit equation weighs in favor of suspending West River's LNP obligations for a period of time within which some of the uncertainties might be resolved. West River would benefit from additional certainty which will result from the FCC's acting on issues such as porting intervals and transport and routing issues. After the FCC decisions are issued, Petitioners and the Commission should have a clearer picture of what costs must be incurred to implement LNP. The decisions may result in lower projected costs or higher projected costs, but either way, there should be more certainty. Further, the additional time should result in the ability to more accurately predict demand based on what has occurred in other rural areas. Depending on the demand that is experienced in other rural areas where LNP has been implemented and the more certain cost inputs, it is possible that a further suspension might be justified. On the other hand, if substantial demand or other demonstration of marginal benefit is demonstrated, then the Commission may decide to deny further suspension requests.

44. The Commission accordingly finds that it is consistent with the public interest

convenience and necessity to suspend West River's obligations under 47 U.S.C. §251(b)(2) and SDCL 49-31-81 to provide local number portability to requesting carriers until December 31, 2005.

45. With respect to the additional standards set forth in SDCL 49-31-80 and 47 U.S.C. §251(f)(2), the Commission finds that the first two standards, subdivisions (1) and (2), focus on economic impacts. The first standard is centered on users, i.e. customers. This requires the Commission to make a judgment as to what level of adverse economic impact on customers renders the impact "significant." The judgment of whether an impact is significant is in turn influenced by what benefits flow to the customers from imposition of the impact.

46. The second standard requires the Commission to look at whether implementation of LNP would impose a requirement that is unduly economically burdensome. The statutory language does not specify as to whom the level of burdensomeness is to be assessed. The Commission concludes that this standard should be applied to assess the burdensomeness of the requirement on both the consumer and the company. Since the company is the petitioner, it seems probable that in the absence of language to the contrary, the language refers to the petitioner. Other reasons for treating this criterion as applicable to both company and customers include the uncertainties surrounding how the costs of LNP will be distributed between the company and its consumers and the difficulty, at this point, of determining with any degree of certainty the surcharge amount that could be charged by the company to its customers.

47. Given the significant costs of implementing and providing LNP services in the West River area, the current absence of customer requests for LNP, the apparent low demand for the availability of LNP and the absence of any alternative wireline service in the West River area at this time, the Commission finds that suspending West River's LNP obligations until December 31, 2005, is necessary to avoid a significant adverse economic impact on the users of West River's telecommunications services generally.

48. Based upon the same findings, the Commission further finds that suspending West River's LNP obligations until December 31, 2005, is necessary to avoid imposing a requirement that is unduly economically burdensome on West River <u>and its/their customers</u>.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction, pursuant to SDCL 49-31-80, 47 U.S.C. § 251(f)(2) and ARSD 20:10:32:39, to hear and decide the Petition and to issue an order suspending or modifying West River's obligations to implement local number portability pursuant to 47 U.S.C. §251(b)(2) and SDCL 49-31-81. The Commission had authority pursuant to SDCL 49-31-80 and 47 U.S.C. §251(f)(2) to issue a suspension of West River's LNP obligations pending final action on West River's requested suspension and to issue a temporary suspension to September 30, 2004.

2. SDCL 49-31-80 and 47 U.S.C. §§251(f)(2) give the Commission authority to grant a suspension or modification of local number portability obligations if the local exchange carrier has fewer than two percent of subscriber lines nationwide and the commission determines that the requested suspension or modification is consistent with the public interest, convenience, and necessity and is necessary:

(1) To avoid a significant adverse economic impact on users of telecommunications services generally;

(2) To avoid imposing a requirement that is unduly economically burdensome; or

(3) To avoid imposing a requirement that is technically infeasible.

The commission may suspend enforcement of the requirement or requirements identified in the petition pending final action on the requested suspension or modification.

3. In *Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 96-325, 11 FCC Rcd 15499 (1996), the FCC adopted the rule codified at 47 U.S.C. §51.405(d), which reads as follows:

> (d) In order to justify a suspension or modification under section 251(f)(2) of the Act, a LEC must offer evidence that the application of section 251(b) or section 251(c) of the Act would be likely to cause undue economic burden beyond the economic burden that is typically associated with efficient competitive entry.

This rule was vacated by the Eighth Circuit Court of Appeals in *Iowa Utils. Bd. v. F.C.C.*, 219 F.3d 744 (8th Cir. 2000). The Commission accordingly concludes that this standard and rule does not bind the Commission's discretion in this case.

4. West River is a local exchange carrier serving fewer than 2 percent of the nation's subscriber lines installed in the aggregate nationwide. West River is accordingly entitled to petition for suspension of its obligations to provide local number portability.

5. The first two standards, subdivisions (1) and (2), focus on economic impacts. The first standard is centered on users, i.e. customers. This requires the Commission to make a judgment as to what level of adverse economic impact on customers renders the impact "significant." The judgment of whether an impact is significant is in turn influenced by what benefits flow to the customers from imposition of the impact.

6. The second standard requires the Commission to look at whether implementation of LNP would impose a requirement that is unduly economically burdensome. The statutory language does not specify as to whom the level of burdensomeness is to be assessed. The Commission concludes that this standard should be applied to assess the burdensomeness of the requirement on both the consumer and the company.

7. Granting a suspension to West River of the requirements to provide local number portability, both intramodal and intermodal, imposed by 47 U.S.C. §251(b)(2), SDCL 49-31-81 and the rules and orders of the FCC is in the public interest.

8. Granting a suspension of West River's intramodal and intermodal LNP obligations until December 31, 2005, is necessary to avoid a significant adverse economic impact on the users of West River's telecommunications services generally.

9. Granting a suspension of West River's intramodal and intermodal LNP obligations until December 31, 2005, is necessary to avoid imposing a requirement that is unduly economically

burdensome on West River <u>and its/their customers</u>.

10. The suspension granted herein does not relieve West River of its obligation to properly route calls to numbers ported between other carriers, including wireless carriers.

11. Midcontinent's Motion to Withdraw Intervention should be granted.

It is therefore

ORDERED, that Midcontinent's Motion to Withdraw Intervention is granted; and it is further

ORDERED, that West River's obligation to implement local number portability, both intramodal and intermodal, imposed by 47 U.S.C. §251(b)(2), SDCL 49-31-81 and the rules and orders of the FCC is hereby suspended pursuant to 47 U.S.C. § 251(f)(2), SDCL 49-31-80 and ARSD 20:10:32:39, until December 30, 2005; and it is further

ORDERED, that should West River desire to continue the suspension following December 31, 2005, the company shall file its petition for suspension on or before October 1, 2005; and it is further

ORDERED, that the suspension granted herein does not relieve West River of its obligation to properly route calls to numbers ported between other carriers, including wireless carriers.

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that this Order was duly entered on the 3rd day of January, 2005. Pursuant to SDCL 1-26-32, this Order will take effect 10 days after the date of receipt or failure to accept delivery of the decision by the parties.

Dated at Pierre, South Dakota, this 3rd day of January, 2005.

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, by facsimile or by first class mail, in properly addressed envelopes, with charges prepaid thereon.

By:____________________________________

Date:__________________________________

(OFFICIAL SEAL)

BY ORDER OF THE COMMISSION:

____
ROBERT K. SAHR, Chairman

____
GARY HANSON, Commissioner

____
JAMES A. BURG, Commissioner