



UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NORTH DAKOTA

|   |   |                         |
|---|---|-------------------------|
| MIDCONTINENT COMMUNICATIONS,                  | ) |                         |
| A SOUTH DAKOTA PARTNERSHIP,                   | ) |                         |
|   | ) | MOTION TO               |
| Plaintiff,                                    | ) | DISMISS UNDER RULES     |
|   | ) | 12 (b) and 56 OF THE    |
| v.  | ) | FEDERAL RULES OF        |
|   | ) | CIVIL PROCEDURE         |
| NORTH DAKOTA PUBLIC SERVICE                   | ) |                         |
| COMMISSION, KEVIN CRAMER,                     | ) | Civ. A. No. 1:09-CV-017 |
| TONY CLARK, AND BRIAN KALK,                   | ) |                         |
| in their official capacities as Commissioners | ) |                         |
| of the North Dakota Public Service Commission | ) |                         |
|   | ) |                         |
| and   | ) |                         |
|   | ) |                         |
| MISSOURI VALLEY COMMUNICATIONS, INC.,         | ) |                         |
|   | ) |                         |
| Defendants.                                   | ) |                         |

Defendant, North Dakota Public Service Commission, by and through its attorney, Annette Bendish, moves the court, under Rule 12(b) and Rule 56 of the Federal Rules of Civil Procedure for an order dismissing the Plaintiff's claim against Defendant Public Service Commission. This motion is based on lack of jurisdiction and the Plaintiff's failure to state a claim upon which relief can be granted.

Dated this 11<sup>th</sup> day of June, 2009.

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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NORTH DAKOTA

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|   |   |                         |
|---|---|-------------------------|
| MIDCONTINENT COMMUNICATIONS,                  | ) |                         |
| A SOUTH DAKOTA PARTNERSHIP,                   | ) |                         |
|   | ) | MEMORANDUM IN           |
| Plaintiff,                                    | ) | SUPPORT OF MOTION       |
|   | ) | TO DISMISS UNDER        |
| v.  | ) | RULES 12(b) and 56      |
|   | ) | OF THE FEDERAL          |
| NORTH DAKOTA PUBLIC SERVICE                   | ) | RULES OF CIVIL          |
| COMMISSION, KEVIN CRAMER,                     | ) | PROCEDURE and           |
| TONY CLARK, AND BRIAN KALK,                   | ) | RESPONSE TO             |
| in their official capacities as Commissioners | ) | MISSOURI VALLEY'S       |
| of the North Dakota Public Service Commission | ) | MOTION TO DISMISS       |
|   | ) |                         |
| and   | ) |                         |
|   | ) |                         |
| MISSOURI VALLEY COMMUNICATIONS, INC.,         | ) | Civ. A. No. 1:09-CV-017 |
|   | ) |                         |
| Defendants.                                   | ) |                         |

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Defendant Public Service Commission (Commission) moves to dismiss the Plaintiff Midcontinent Communication's (Midcontinent) Complaint for failure to state a claim upon which relief can be granted and because this court lacks subject matter jurisdiction.

The Commission agrees with and supports the Motion to Dismiss Under Rules 12(B) and 56 of the Federal Rules of Civil Procedure for Lack of Jurisdiction and for Failure to State a Claim Upon Which Relief Can be Granted by Defendant Missouri Valley Communications, Inc. (Missouri Valley). The Commission joins in and raises the same arguments presented by Missouri Valley in its Memorandum in Support of Motion to Dismiss Under Rules 12(B) and 56 of the Federal Rules of Civil Procedure for Lack of Jurisdiction and for Failure to State a Claim Upon Which Relief Can be Granted and presents the additional arguments below.

The Plaintiff's claim cannot be granted because the claim is precluded by prior adjudication. The claims asserted by Midcontinent in its Complaint have already been litigated in a proceeding before the North Dakota Public Service Commission that has not been appealed. Plaintiff's claims are therefore barred by *res judicata*. By bringing this Complaint in Federal District Court, the Plaintiff is attempting to circumvent the state appeal process. If Midcontinent desired to appeal the decision of the Commission an appropriate action could have been brought in state district court. Midcontinent's Complaint is an attempt to re-litigate this matter in Federal District Court.

Finally, 47 U.S.C. § 251 does not raise a Federal question and cannot be enforced by original jurisdiction of this Court.

Under Federal Rule of Civil Procedure 12(d) the motion to dismiss must be treated as one for summary judgment under Federal Rule of Civil Procedure 56.

### **STATEMENT OF MATERIAL FACTS**

The Commission cites within this statement of material facts documents filed by Plaintiff Midcontinent and by Defendant Missouri Valley. After each statement of material fact the Commission has included a reference to numbered paragraphs of the complaint, to the parties' submissions in the prior proceeding, exhibits DM1, DM2, DM3, DM4 and DM6., and to the *Rural Exemption Order* (abbreviated *REO*), exhibit DM5 in accordance with Local Rule 7.1(A)(2). These references are underlined.

On November 14, 2007, Midcontinent requested an interconnection and interconnection agreement with Missouri Valley Communications for the Williston exchange, invoking the procedures under Act § 251(f)(B). Complaint, ¶ 39; REO, p. 1.

On February 8, 2008, Midcontinent filed with the Commission Midcontinent's Notice of Bona Fide Request for Services and Interconnection and Petition to Find Rural Exemption Waived. Midcontinent requested that the Commission determine that Missouri Valley had waived its rural exemption, or in the alternative that the Commission conduct an inquiry 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. Complaint, ¶ 41; REO, p. 1.

On July 9 and 10, 2008, the Commission conducted a hearing in the matter. Complaint, ¶ 44; REO, p. 2. Following the hearing, Midcontinent and Missouri Valley submitted briefs and proposed findings of fact, conclusions of law, and order. Exhibits DM1 and DM2 as to Midcontinent and DM3 and DM4 as to Missouri Valley.

On October 8, 2008, the Commission issued its Findings of Fact, Conclusions of Law and Order in the case it named Midcontinent Communications/Missouri Valley Communications, Inc. Rural Exemption Investigation; The rural exemption investigation was consolidated during the administrative hearing with a related suspension application case filed by Missouri Valley. These cases were docketed as Commission Case No. PU-08-61 and Case No. PU-08-176.

The Commission concluded that the Commission had jurisdiction over the parties and the subject matter. REO, p. 10. The Commission further concluded that Midcontinent failed to prove that the request of Midcontinent to Missouri Valley for interconnection in the Williston exchange is not unduly economically burdensome and 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. REO, p. 10.

Finally, the Commission concluded that the issue of technical feasibility was 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. REO, p. 10.

The Commission ordered that the rural exemption under 47 U.S.C. § 251(f)(1)(A) for interconnection in Missouri Valley's Williston exchange is not terminated.

REO, p. 10. This meant that the suspension application was moot. REO ¶ 45, exhibit DM5.

On November 4, 2008, Midcontinent filed with the Commission a Petition for Reconsideration or, in the Alternative, Rehearing, Exhibit DM 6. The Commission voted to reject Midcontinent's petition for rehearing on December 3, 2008. Exhibit DM 7.

Midcontinent had the opportunity to appeal within 30 days after the denial of its petition for reconsideration. N.D. Cent. Code § 28-32-42(1). Midcontinent did not appeal the decision of the Commission within that time.

The Telecommunications Act of 1934 as amended by the Telecommunications Act of 1996 as it pertains to this proceeding is outlined in Missouri Valley's Memorandum in Support of Motion to Dismiss; to avoid redundancy that history will not be repeated here.

### **ARGUMENT**

**The claim is precluded by prior adjudication. The claims asserted by Plaintiff, Midcontinent, in its Complaint have already been litigated. Plaintiff's claims are therefore barred by *res judicata*.**

Rule 8 of the Federal Rules of Civil Procedure requires a plaintiff's complaint to plainly state a claim. Midcontinent's claim is, plainly, the same claim as what was litigated before the North Dakota Public Service Commission, that Missouri Valley's exemption from interconnection should be terminated. A claim that has been litigated once cannot be relitigated.

Res judicata means a matter already judged. In a case of res judicata, a matter cannot be raised again, either in the same court, or a different court. Parties are estopped from litigating determinations on issues made in prior actions.

The essence of the doctrine of res judicata is that a final judgment on the merits bars further claims by the same parties or their privies based on the same cause of action. Costner v. URS Consultants, Inc., 153 F.3d 667, 673 (8th Cir. 1998). A claim will be held to be precluded by a prior lawsuit when: (1) the first suit resulted in a final judgment on the merits; (2) the first suit was based upon proper jurisdiction; (3) both suits involve the same parties; and (4) both suits are based upon the same claims or causes of action. Id.

The Findings of Fact, Conclusions of Law, and Order issued by the Commission on October 8, 2008 was a final and appealable order. Any party before an administrative agency that is aggrieved by the final order of the agency, within fifteen days after notice has been given, may file a petition for reconsideration with the agency. N.D. Cent. Code §28-32-40(1). The administrative agency may deny the petition for reconsideration or may grant the petition on such terms as it may prescribe. N.D. Cent. Code §28-32-40(4). Any party to any proceeding heard by an administrative agency, may appeal from the order within thirty days after notice of the order has been given.

N.D. Cent. Code §28-32-42(1). If a reconsideration has been requested as provided in North Dakota Century Code section 28-32-40, the party may appeal within thirty days after notice of the final determination upon reconsideration has been given. Id. If an agency does not dispose of a petition for reconsideration within thirty days after the filing of the petition, the agency is deemed to have made a final determination upon which an appeal may be taken. Id. Midcontinent did not appeal the Commission's Order nor the denial of the petition for reconsideration.

It is clear that the Commission had jurisdiction to preside over the matters brought before it in Case No. PU-08-61 and Case No. PU-08-176. See 47 U.S.C. §251(f)(1)(B) and N.D. Cent. Code §49-31-01.7.

It is also clear that in this case the parties are the same as the prior case before the Commission. The REO addressed all of the arguments raised by the parties in their pleadings and at hearing in the case before the Commission. The elements of rural exemption and the waiver of rural exemption were addressed in the proceeding before the Commission.

Lastly, both this suit and the matters before the Commission in Case No. PU-08-61 and Case No. PU-08-176 are based on the same claims. In the Complaint in this case Midcontinent states that the Federal District Court should make the determination it first asked the Commission to make, that Missouri Valley's exemption from interconnection should be terminated. The Commission determined that the rural exemption under 47 U.S.C. § 251(f)(1)(A) for interconnection in Missouri Valley's Williston exchange is not terminated and therefore Midcontinent's second claim is barred by *res judicata*.

Defendant Missouri Valley correctly sites in its Memorandum in Support of Motion to Dismiss that United States Supreme Court precedents establish that state agencies' decisions are a proper basis to apply *res judicata* to bar redundant litigation in federal courts. Where a federal court action follows a state administrative action that was not judicially reviewed, administrative estoppel is presumed in the absence of a legislative intent to the contrary. Defendant Missouri Valley cites the Astoria Federal Savings and Loan Association v Solimino case, 501 US 104, 107-08 (1991) for this proposition. The Astoria decision states that when an "administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose." Id.

The Telecommunications act of 1934 as amended by the Telecommunications Act of 1996 does not contain any Congressional intent that the rules of preclusion should not apply to a state commission's determination under 47 USC 251(f). The Act does provide that the determination as to whether a rural telephone company's exemption from interconnection shall be terminated is to be made by state commissions alone. Nothing in 47 USC § 251 provides or assumes the possibility of federal courts consideration these issues after state agencies have made a decision on these issues.

**47 U.S.C. § 251 does not raise a Federal question and cannot be enforced by original jurisdiction of this Court.**

It is well-established that federal courts are courts of limited jurisdiction. Unlike state courts, federal courts have no “inherent” or “general” subject matter jurisdiction. Federal courts can only adjudicate those cases which the Constitution and Congress authorizes them to adjudicate. Those types of cases generally involve diversity of citizenship or a federal question.

Count I of Midcontinent’s Complaint alleges a violation of 47 U.S.C. § 251. Count II of Midcontinent’s Complaint simply repeats Count I and requests declaratory judgment. Paragraph 8 of the complaint asserts jurisdiction under 28 U.S.C. § 1331 “because this is a civil action arising under federal law.” Diversity jurisdiction is also pleaded, under 28 U.S.C. § 1332.

Midcontinent’s Complaint claims a right to interconnection under section 251 of the Act, a right Midcontinent asserts is enforceable by action in federal district court. Midcontinent asserts that the Federal Court should assert jurisdiction to administer section 251(f) as if it were a state regulatory agency, a jurisdiction that the Act did not assign to courts but instead assigned to states’ regulatory commissions.

Section 251 of the Telecommunications Act of 1943 as amended by the Telecommunications Act of 1996 does not expressly grant a private right of action for competitive local exchange carriers (CLEC) against rural telephone companies. However, Section 251(f) of the Act does expressly grant state commissions the responsibility to determine these issues. Congress’ intent was that the interconnection and exemption provisions of sections 251(c) and 251(f) of the Act be administered by state commissions, not by private actions in federal courts.

Missouri Valley cites Verizon Maryland v Public Service Commission of Maryland, 535 U.S. 635 (2002) in its Memorandum in Support of Motion to Dismiss as confirming federal question jurisdiction in a dispute under section 252 of the Act. Missouri Valley correctly concludes that this decision does not support Midcontinent's assertion of Federal Court jurisdiction under section 251.

Missouri Valley also presents the distinctions between Verizon Maryland involving section 252 and this case involving section 251(f). The Commission agrees with this analysis. The Commission also agrees and asserts that *Midcontinent v. North Dakota's Commission and Missouri Valley* is not a case where the state commission has taken or is alleged to have taken some action under state law that contravenes federal law, like Verizon Maryland. No substantial issue of federal pre-emption of state law is present in Midcontinent's claim. The Commission further agrees with Missouri Valley's argument that Midcontinent's complaint makes no substantial claim that the Federal District Court has jurisdiction because the claimed right to recover under the complaint will be sustained if the Constitution and laws of the United States are given one construction (by a federal district court) and will be defeated if they are given another (by North Dakota's Commission). Midcontinent's complaint does not raise a material or substantial issue of law. Midcontinent complains about the Commission's resolution, findings of fact, conclusions of law and order, but does not present a substantial question of Federal law.

The Commission also agrees with Missouri Valley's assertion in its Memorandum that Verizon Maryland did not abandon the fundamental principle that a federal question does not exist merely on a plaintiff's pleading where it cites some federal statute.

Federal district court jurisdiction is not expressed under section 251 as it is in section 252. Section 252 explicitly states that any party aggrieved by a state commission's determination "under this section" [252] may bring an action in federal district court. Section 252(e)(6). Similar language does not exist in section 251. Where Congress expressly conferred federal jurisdiction in § 252, it cannot be fairly implied that similar jurisdiction was intended where it was not expressed one section removed in the same statute. The only fair implication is Congress did not intend federal district courts to exercise federal question as to issues arising under section 251.

Midcontinent has not met its burden of establishing jurisdiction under 28 U.S.C. § 1331 or § 251 of the Act.

### **CONCLUSION**

The mere assertion of a Federal right does not mean that a party as the right to litigate the claim in United States Federal District Court. A claim may be barred by res judicata or may not raise a Federal question allowing it to be brought in Federal Court. The issue of interconnection under section 251 of the Telecommunications Act is not a Federal question and has already been determined by the Commission. The Order of the Commission was not timely appealed.

For any or all of these reasons, the complaint should be dismissed.

Dated this 11<sup>th</sup> day of June, 2009.

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FOR THE DISTRICT OF NORTH DAKOTA

MIDCONTINENT COMMUNICATIONS,  
A SOUTH DAKOTA PARTNERSHIP,

Plaintiff,

v.

NORTH DAKOTA PUBLIC SERVICE  
COMMISSION, KEVIN CRAMER,  
TONY CLARK, AND BRIAN KALK,  
in their official capacities as Commissioners  
of the North Dakota Public Service Commission

and

MISSOURI VALLEY COMMUNICATIONS, INC.,  
  
Defendants.

CERTIFICATE OF  
SERVICE

Civ. A. No. 1:09-CV-017

I certify that on the 12th day of June, 2009, the following documents:

Notice of Motion  
Motion  
Memorandum in Support of Motion

were filed electronically with the Clerk of Court through ECF, and the ECF will send a Notice of Electronic Filing (NEF) to the following:

John Olson ([olsonpc@midconetwork.com](mailto:olsonpc@midconetwork.com))  
J.G. Harrington ([jharrington@dowlohnes.com](mailto:jharrington@dowlohnes.com))  
David E. Mills ([dmills@dowlohnes.com](mailto:dmills@dowlohnes.com))  
David Hogue ([dhogue@srt.com](mailto:dhogue@srt.com))

I further certify that on the 12th day of June, 2009, a copy of the foregoing documents and the Notice of Electronic Filing will be mailed by first-class mail, postage paid, to the following non-ECF participants: None

/s/ Annette Bendish  
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