

United States District Court
District of North Dakota

Midcontinent Communications,)	
A South Dakota Partnership,)	
)	
Plaintiff,)	DEFENDANT MISSOURI VALLEY'S
vs.)	REPLY MEMORANDUM IN
)	SUPPORT OF MOTION TO DISMISS
)	RULE 12(b)
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)	Case No: 1:09-cv-00017-DLH-CSM
)	
)	
Missouri Valley Communications, Inc.,)	
Defendants.)	

GROUND FOR MOTION

Missouri Valley Communications, Inc. ("Missouri Valley") moved to dismiss this action for the plaintiff's failure to state a claim upon which relief can be granted and because the court lacks subject matter jurisdiction. The inter-related grounds for the motion were:

1. Relief cannot be granted because the claim is precluded by prior adjudication. The plaintiff, Midcontinent Communications ("Midcontinent") has previously litigated the claims asserted in the complaint. Redundant litigation is barred by the principle of *res judicata*.

2. The statute under which Midcontinent filed its complaint, 47 U.S.C. § 251, does not enact rights or duties to be enforced by exercise of the original jurisdiction of federal district courts under 28 U.S.C. § 1331.

3. The claim made and the relief sought by the complaint is an appeal to the district court to reverse action taken by the North Dakota Public Service Commission. The original jurisdiction of federal district courts under 28 U.S.C. §1331 does not include appellate jurisdiction to review action of state agencies.

The alternative grounds of the motion to dismiss are related by a single concept. The complaint is an untenable collateral attack on action taken by the North Dakota Public Service Commission on Midcontinent's proceeding against Missouri Valley asserting rights under 47 U.S.C. § 251. Midcontinent did not appeal the PSC's decision. The matter is concluded. Midcontinent cannot revive its claim in federal district court

ARGUMENT

1. Midcontinent's abandonment of a claim for a retrial or new trial renders *res judicata* issues moot.

Missouri Valley argued in its initial memorandum supporting the motion to dismiss that Midcontinent's claim is precluded by prior adjudication in the North Dakota Public Service Commission.

In its opposition to the motion to dismiss, Midcontinent described the nature of its action, that it is seeking legal review of an agency's action, not a new trial or a new hearing. "Midcontinent does not seek a retrial." "Midcontinent seeks legal review of the Rural Exemption Order, not a new trial of the facts in this matter. The administrative record developed before the NDPSC is the factual record in this case, and it provides ample basis to evaluate Midcontinent's claims and grant the requested relief." Midcontinent's seeking federal court review of a state agency decision interpreting

federal law is comparable to seeking appellate court review of a trial court decision. Midcontinent “is not requesting a new hearing on the facts in a new forum. It merely seeks federal court review of matters of federal law.” Midcontinent Consolidated Opposition to Dismiss, pp. 1, 2, 17 and 25.

Midcontinent’s abandonment of a claim for a retrial or new trial renders *res judicata* issues moot. Missouri Valley agrees that *res judicata* principles do not apply where Midcontinent does not seek to relitigate the facts in this matter. Midcontinent’s definition of the nature of its action brings into clear focus the second and third grounds of the motion to dismiss. Midcontinent has identified the claim made and the relief sought by its complaint: an appeal to the federal district court to reverse action taken by the North Dakota Public Service Commission.

- 2. The statute under which Midcontinent filed its complaint, 47 U.S.C. § 251, does not enact rights or duties to be enforced by exercise of the original jurisdiction of federal district courts under 28 U.S.C. § 1331.**
- 3. The claim made and the relief sought by the complaint is an appeal to the district court to reverse action taken by the North Dakota Public Service Commission. The original jurisdiction of federal district courts under 28 U.S.C. §1331 does not include appellate jurisdiction to review action of state agencies.**

The complete arguments in Missouri Valley’s initial memorandum are not repeated here. The essential point is the Telecommunications Act of 1996 created new jurisdiction for federal district courts’ review of State Commissions’ actions under the Act, but that new jurisdiction does not include jurisdiction to review determinations made by State commissions under § 251(f)(1)(B). Further, state commissions’ proceedings

under § 251(f)(1)(B) of the Act do not present a federal question under 28 U.S.C. § 1331.

It is a truism that federal district courts, despite the scope of their jurisdiction, are courts of limited jurisdiction. Jurisdiction is conferred by acts of Congress. There are many examples of jurisdiction conferred in particular kinds of cases, none more pertinent than Telecommunications Act §252(e)(6). “Federal question” jurisdiction might be found under 28 U.S.C. § 1331, but not every assertion of rights under federal law (such as Midcontinent’s assertion of rights under §251) invokes district courts’ federal question jurisdiction.

Midcontinent’s assertion that federal district courts’ original jurisdiction does include jurisdiction to review determinations under § 251(f)(1)(B) evades the unique quality of the “rural exemption” under § 251(f)(1). In Midcontinent’s view, the exemption “merely delays application of Section 252 (c) to rural ILECs....” (Midcontinent Opposition, p. 5.) The exemption is more than a procedural delay, it is a “broad protection Congress granted to small and rural telephone companies.” Iowa Utilities Board v Federal Communications Commission, 219 F.3d 744, at 761 (8th Cir. 2000) (Iowa v FCC). That broad protection exempts rural telephone companies from revolutionary changes wrought by the 1996 Act. Likewise, the revolutionary expansion of federal district courts’ jurisdiction under the Act does not go so far as to include jurisdiction to review determinations made by State commissions under § 251(f)(1)(B).

Midcontinent relies on Verizon Maryland v Public Service Commission of Maryland, 535 U.S. 635 (2002) and the Iowa Cases, (Rural Iowa Independent Telephone Association v Iowa Utilities Board 362 F. 3d 1027 (8th Cir. 2004); Iowa

Network Services v Qwest Corp., 363 F. 3d 683 (8th Cir. 2004) (Iowa Network I); Iowa Network Services v Qwest Corp., 466 F. 3d 1091 (8th Cir. 2006) (Iowa Network II); Rural Iowa Independent Telephone Association v Iowa Utilities Board, 476 F. 3d 572 (8th Cir. 2007)), as supporting its burden to sustain its claim of federal court jurisdiction. All of these cases were also cited by Missouri Valley in its initial memorandum. The parties read these cases differently. Midcontinent promotes an expansive reading of the courts' opinions. Missouri Valley emphasizes that none of those cases involved a claim (like Midcontinent's) under §§ 251 (c) and (f) or a defense (like Missouri Valley's) under § 251 (f). Nothing in § 251 "reads like the conferral of a private right of action..." like § 252. Verizon, 535 U.S. at 664. 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 jurisdiction acting as appellate courts to review determinations made by State commissions under § 251(f).

Midcontinent also relies on Consolidated Communications of Fort Bend Co. v. Pub. Util. Com. of Texas, 497 F.Supp. 2d 836 (W.D.Tex. 2007) to support its position regarding subject matter jurisdiction. While Consolidated does have bearing on the standard of review federal courts should employ to review certain decisions of a state public utility commission under the Act, that issue is not before this Court within this motion to dismiss for lack of subject matter jurisdiction. Subject matter jurisdiction was not raised by the litigants in Consolidated. Indeed, the Consolidated Court noted, "the sole issue in this case is whether Sprint is a telecommunications carrier . . ." and thus

entitled to make a bona fide request for interconnection from the rural telephone company. Consolidated at 842. There simply was no “jurisdictional analysis” in Consolidated as Midcontinent states at page 15 of its memorandum.

Midcontinent’s claim of “diversity jurisdiction” for money damages “in addition to its federal question jurisdiction” (Midcontinent Opposition p. 21) is not an additional claim. It is another way to seek appellate review and reversal of the Commission’s decision. Midcontinent’s claim for money damages (Complaint ¶ 65) asserts that Missouri Valley was not entitled to rely on its exemption from interconnection under § 251(f)(1)(A). The exemption continues until terminated by action of the Commission § 251(f)(1)(B); Iowa v FCC, 219 F.3d at 762. Midcontinent’s exemption from interconnection was not terminated because Midcontinent failed to carry its burden of proof in the Commission’s proceeding under §251(f)(1)(B) *Rural Exemption Order*, Exhibit DM5, p.10. Lacking jurisdiction to review and maybe to reverse the Commission’s decision, there is no jurisdictional basis for Midcontinent’s diversity claim for money damages. The claim for money damages and assertion of diversity jurisdiction may also be viewed as an indication of the frivolity of the assertion of federal question jurisdiction. See Verizon, 535 U.S. at 642-43.

CONCLUSION

Midcontinent’s Opposition (p. 25) criticizes Missouri Valley’s criticism of Midcontinent’s “forum shopping,” but forum shopping is not denied. After its petition for rehearing to the NDPSC was rejected, Midcontinent had an opportunity (now lost) to appeal the PSC’s decision to North Dakota’s state district court, or next to the North

Dakota Supreme Court under NDCC §§ 28-32-42 and -49 , and finally to the United States Supreme Court under 28 USC § 1257 . The NDPSC is obliged to follow and did follow the federal Telecommunications Act in its *Rural Exemption Order*. North Dakota's district courts and Supreme Court are also bound to follow the Act as they would consider Midcontinent's appeal, under the Supremacy Clause of the United States Constitution. That is - or was - Midcontinent's adequate opportunity for a federal court review of the determination the Commission made under §251(f)(1)(B). Now with ordinary rights to appeal expired, Midcontinent declares it wants a "federal court review" of the North Dakota Public Service Commission's decision, beginning with the federal district court.

"Midcontinent bears the burden of demonstrating that this Court has jurisdiction over its claims." (Midcontinent Opposition, p. 12.) The "broad protection" of the rural exemption under §251(f)(1)(A) considered with and compared to specific provisions in the Act empowering federal district courts to "bring to heel" State commissions, provisions that do not include appellate jurisdiction to review determinations made by State commissions under §251(f)(1)(B), point to a conclusion that Midcontinent has not sustained its burden to establish jurisdiction for federal district court review of the North Dakota Public Service Commission's determination that "The rural exemption under 47 U.S.C. § 251(f)(1)(A) for interconnection in Missouri Valley's Williston exchange is not terminated." *Rural Exemption Order*, Exhibit DM5, page 10. Accordingly, Midcontinent's complaint should be dismissed.

Dated this 31st day of July, 2009.

PRINGLE & HERIGSTAD, P.C.

By: /s/ David J. Hogue

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