

**UNITED STATES DISTRICT COURT
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.)

Case No.: 1:09-cv-017

CONSOLIDATED OPPOSITION TO MOTIONS TO DISMISS

MIDCONTINENT COMMUNICATIONS

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I. INTRODUCTION

The Defendants' motions to dismiss for lack of subject matter jurisdiction should be denied. A federal district court has subject matter jurisdiction to determine whether an order issued by a state agency conflicts with federal law. Specifically here, this Court has jurisdiction to determine whether an order by the North Dakota Public Service Commission ("NDPSC") conflicts with the provisions of the Telecommunications Act of 1996, Pub. L.A. No. 104-104, 110 Stat. 56 (1996) (the "1996 Act"), and the complaint properly states that claim.¹

Furthermore, state law principles of res judicata have no application here because Plaintiff Midcontinent is seeking legal review of an agency decision, not a new trial or a new hearing on the same body of facts adjudicated in another forum. The administrative, factual record is complete; no discovery is necessary. Moreover, state law principles of res judicata cannot impede district court review of state agency interpretations of federal law.

Missouri Valley is an incumbent telecommunications service provider with a federal statutory duty to provide interconnection to competitive telecommunications providers like Midcontinent, so that competitors can provide full services and fairly compete for customers. This case arose because Missouri Valley refused to grant Midcontinent facilities-based interconnection as required by Section 251(c) of the Communications Act. Missouri Valley relied on an exemption created by Section 251(f) of the Communications Act, which limits the interconnection obligations of certain rural telephone providers. Midcontinent challenged Missouri Valley's refusal to interconnect, asking the NDPSC to determine that Missouri Valley

¹ The portions of the 1996 Act relevant to Midcontinent's claim are codified as part of Title II of the federal Communications Act of 1934, as amended. See 47 U.S.C. §§ 201-276 (the "Communications Act"). For convenience, these statutes will be referred to as provisions of the 1996 Act, but cited as codified in the Communications Act.

did not qualify for the exemption under Section 251(f). The NDPSC denied Midcontinent's petition in the Rural Exemption Order. This case seeks review of whether the NDPSC correctly interpreted and applied the 1996 Act in the Rural Exemption Order and raises related federal claims against Missouri Valley.

Defendants move to dismiss, arguing that this Court lacks the authority to "retry" the case, but Midcontinent does not seek a retrial. Midcontinent is asking the Court to determine whether the Rural Exemption Order correctly applied federal law based on the established administrative record. Defendants argue the Court lacks subject matter jurisdiction to make that determination and that res judicata bars retrial of Midcontinent's claims. These arguments are wrong as a matter of law.

The jurisdictional issue in this case is controlled by the Supreme Court's decision in Verizon Md. Inc. v. Pub. Serv. Comm'n of Maryland, 535 U.S. 635, 641-44 (2002) ("Verizon Maryland") and the Eighth Circuit's decision in Iowa Network Servs, Inc. v. Qwest Corp., 363 F.3d 683, 685-86 (8th Cir. 2004) ("Iowa Network Services"), which held that federal courts have subject matter jurisdiction to review state commission interpretations of the 1996 Act. Defendants' res judicata argument is foreclosed by the Eight Circuit decision in Rural Iowa Indep. Tel. v. Iowa Utils. Bd., 362 F.3d 1027 (8th Cir. 2004) ("RIIT"), which held that the 1996 Act abrogates the res judicata defense to the extent it would interfere with federal court review. In fact, the only courts to consider challenges to state commission rural exemption determinations under Section 251(f) have found that they have subject matter jurisdiction over those claims. Defendants cite no cases to the contrary.

II. BACKGROUND AND STATEMENT OF MATERIAL FACTS

A. Interconnection Under the 1996 Act

Before Congress enacted the 1996 Act, nearly all local telephone service in each market was offered by monopoly providers and regulated exclusively by state utilities agencies like the NDPSC. See AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 371 (1999) (“Iowa Utilities Board”). The 1996 Act amended the Communications Act to create a new federal regime that closely regulates local telephone competition and broadly assumes federal jurisdiction over local telephone service; this “fundamentally restructure[d] local telephone markets,” prohibited states from “enforce[ing] laws that impede competition,” and assigned to the former monopoly service providers – dubbed incumbent local exchange carriers (“ILECs”) – “a host of duties intended to facilitate market entry” by competitive local exchange carriers (“CLECs”). Id.; 47 U.S.C. §§ 153(26) (defining “local exchange carrier”), 251(h) (defining “incumbent local exchange carrier”).

ILECs typically own and control ubiquitous telecommunications networks that reach every residence in a local telephone market, enabling the completion of telephone calls to each customer location. See Iowa Utilities Board, 525 U.S. at 726. Without the ability to interconnect with the ILEC’s network in a community, a CLEC could not offer competitive telephone services, because it would not be able to connect a customer’s calls with all other telephone users. See Promotion of Competitive Networks in Local Telecommunications Markets, Notice of Proposed Rulemaking and Notice of Inquiry and Third Further Notice of Proposed Rulemaking, 14 F.C.C.R. 12673, 12685 ¶¶ 20-22 (2002). Accordingly, one of the fundamental duties assigned to ILECs is the duty to interconnect their networks with competitors, consistent with the requirements of Sections 251 and 252 of the Communications Act. See Iowa Network Services, 363 F.3d at 685-86.

Specifically, ILECs must fulfill the exacting requirements of Section 251(c), which assigns them the following duties: (1) to negotiate interconnection agreements in good faith; (2) to provide interconnection at any technically feasible point; (3) to provide network elements on an unbundled basis; (4) to provide services at wholesale rates for resale; (5) to provide competitors notice of network changes; and (6) to allow competitors to collocate their facilities on the incumbent carrier's premises. See 47 U.S.C. §§ 251(c). ILECs must negotiate interconnection agreements with CLECs under a comprehensive framework outlined in Section 252, see 47 U.S.C. § 252(a)-(c), and they must provide the services specified by Section 251(c) on just, reasonable, and nondiscriminatory rates under Section 252(d). See 47 U.S.C. § 252(d). Ultimately, all interconnection agreements must be submitted to and approved by the relevant state commission to become effective.²

Congress recognized that ILECs serving rural areas might sometimes face special economic challenges when they have smaller and more dispersed populations that might justify delaying application of Section 251(c). See Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services, Report and Order, 12 F.C.C.R. 15668, 15712 ¶ 77 (1997). Accordingly, the 1996 Act created an exemption from the Section 251(c) requirements for certain qualified rural telephone companies.³ This "rural exemption" was not intended to insulate rural ILECs from competition. See Implementation of the Local Competition Provisions in the

² See 47 U.S.C. § 252(e). The obligations placed on ILECs are in addition to the requirements placed on all LECs, which include the duty to interconnect under Section 251(a), 47 U.S.C. § 251(a), and the duty to provide the carrier services enumerated in Section 251(b). See 47 U.S.C. § 251(b); see also Wireless World, L.L.C. v. Virginia Islands Public Services Commission, 2005 U.S. Dist. LEXIS 15061 *8-9 (D. V.I. July 15, 2005) ("Wireless World").

³ See 47 U.S.C. §§ 251(f). It is undisputed that Missouri Valley meets the statutory criteria for a rural telephone company as defined by the Communications Act. See 47 U.S.C. § 153(37).

Telecommunications Act of 1996, Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, First Report and Order, 11 F.C.C.R. 15,499, 16,118 (1996) (the “LCO”). Rather, the exemption merely delays application of Section 251(c) to rural ILECs until (1) a competitor provides the rural carrier with a bona fide request for interconnection, services, or network elements; and (2) a state commission determines that the requested interconnection would not be unduly economically burdensome, is technically feasible, and is consistent with the universal service provisions of 47 U.S.C. § 254. See 47 U.S.C. § 251(f)(1)(A). Upon a CLEC’s bona fide request for interconnection, Section 251(f)(1)(B) requires the state commission to conduct an inquiry and terminate the rural exemption if it finds the elements of Section 251(f)(1)(A) are met. See 47 U.S.C. § 251(f)(1)(B).

B. The Roles of State Commissions and Federal Courts Under the 1996 Act

In addition to fundamentally altering the structure of local telephone markets, the 1996 Act radically changed the role of state utility commissions like the NDPSC, which previously had exercised nearly complete regulatory control over local telephone service. See Iowa Network Services, 363 F.3d at 686 (“The 1996 Act also thrust the federal government into the local telephone market regulatory arena, which had previously been the exclusive domain of the states.”) (citation omitted). Whereas previously questions regarding local telephone competition were decided by state agencies enforcing state law, the 1996 Act required local markets to “be opened to competition according to standards established by federal law.” MCI Telecomm. Corp. v. Bell Atl. Pa., 271 F.3d 491, 497 (3d Cir. 2001). This meant the federal courts undertook a key role in the process. See Ill. Bell Tel. Co. v. Worldcom Techs., Inc., 179 F.3d 566, 568 (7th Cir. 1999) (“Through the [1996 Act] Congress has opened the door to competing local exchange carriers and has inserted . . . the federal courts into the previously state-regulated monopoly.”).

Shortly after passage of the 1996 Act, the Supreme Court recognized that this change in state commission responsibilities means that state commission decisions interpreting the 1996 Act reviewable by the federal courts. The Court specifically stated that “Congress, by extending the Communications Act into local competition, has removed a significant area from the states’ exclusive control,” Iowa Utilities Board, 525 U.S. at 381 n.8, and that “there is no doubt . . . that if the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel.” Id. at 378 n.6.

Subsequent Supreme Court and Eighth Circuit cases have concluded that state commission decisions interpreting and enforcing the 1996 Act are subject to federal court review pursuant to federal question jurisdiction under 28 U.S.C. § 1331. See Verizon Maryland, 535 U.S. at 641-44; Iowa Network Services, 363 F.3d at 690-694. The 1996 Act specifically confers jurisdiction on the federal courts to review state commission decisions approving or rejecting interconnection agreements. 47 U.S.C. § 252(e). And, as the Supreme Court in Verizon Maryland made clear, the federal courts’ jurisdiction is not limited to cases described in Section 252(e); federal question jurisdiction under Section 1331 extends to any state commission interpretations and applications of the 1996 Act. 535 U.S. at 641-644. The Eighth Circuit has applied this principle in two cases that arose from state commission interpretations and applications of Section 251(b)(5) of the 1996 Act. See RITT, 362 F.3d at 1030; Iowa Network Services, 363 F.3d at 692. These cases hold that when state commissions like the NDPS conduct proceedings pursuant to the 1996 Act, they are acting pursuant to federal law, and their determinations are subject to review by federal courts for compliance with federal law. See Id.

C. The Proceeding Below

This case arises from a dispute between Midcontinent, a CLEC seeking to provide facilities-based competitive telephone services to consumers in the Williston, North Dakota local

telephone exchange, and Missouri Valley, the ILEC for the Williston community. See Compl. ¶¶ 11, 13. Midcontinent made a bona fide request for facilities-based interconnection with Missouri Valley, but Missouri Valley denied Midcontinent's request, claiming the rural exemption under Section 251(f). See id. ¶¶ 38, 40.

Midcontinent initiated a proceeding before the NDPSC by providing notification pursuant to Section 251(f)(1)(B) that it had made a bona fide request for facilities-based interconnection and by requesting a determination that the rural exemption did not bar Midcontinent's request. Rural Exemption Order at 1. Midcontinent argued that Missouri Valley could not rely on the rural exemption for two reasons. First, Missouri Valley had waived any right to rely on the rural exemption both (1) by promising the NDPSC (when Missouri Valley first acquired the Williston exchange) that Missouri Valley would continue performing the existing interconnection agreements of its predecessor, Citizens Communications (which included a full, facilities-based interconnection agreement with Midcontinent); and (2) by entering into a subsequent, NDPSC-approved resale interconnection agreement pursuant to Section 251(c)(4) of the 1996 Act (which contradicted Missouri Valley's assertion of exemption from the 1996 Act's requirements). See Compl. ¶¶ 42, 46-47.

Second, Midcontinent argued and demonstrated that, even apart from Missouri Valley's waiver of any right to rely on the rural exemption, the exemption must be terminated because Midcontinent satisfied each factor in Section 251(f)(1)(A), i.e., the requested interconnection (1) was not unduly economically burdensome; (2) was technically feasible; and (3) was consistent with the universal service requirements of Section 254. See id. ¶¶ 48-51

In the NDPSC proceeding, Midcontinent raised several issues that required the NDPSC to interpret federal law. First, Midcontinent's waiver argument required the NDPSC to

determine whether Section 251(f)(1) permitted Missouri Valley to engage in selective waivers of its rural exemption – claiming it in some cases while not in others. See Compl. ¶¶ 47-48, 73. The statutory language of Section 251(f)(1) does not authorize selective waivers, and the NDPSC was required to determine whether selective waivers were permissible under that federal statute. 47 U.S.C. § 251(f)(1).

Second, Midcontinent raised the issue of the appropriate standard for satisfying the statutory requirements that Midcontinent’s requested interconnection was “not unduly economically burdensome.” See Compl. ¶ 50. Midcontinent argued that this required the NDPSC to find that Missouri Valley would incur economic costs over and above those that would be caused by facilities-based competitive market entry under Sections 251(a) and (b), with which Missouri Valley already is required to comply, regardless of the rural exemption. See id. ¶ 56. Midcontinent’s argument required the NDPSC to construe the meaning of the statutory language “unduly economically burdensome.”

Third, Midcontinent argued, consistent with the Eight Circuit’s decision in Iowa Utilities Board v. Federal Communication Commission, 219 F.3d 744 (8th Cir. 2000), that the “unduly economically burdensome” standard required the NDPSC to consider Missouri Valley’s overall financial condition, including an examination of the relationship between Missouri Valley and its Montana-based parent company, Nemont Communications (“Nemont”). See Compl. ¶ 57. The record shows that Nemont had structured its relationship with Missouri Valley to place a disproportionate share of the operating and financial costs of serving the Williston exchange on Missouri Valley while shifting revenues to Nemont and other Nemont subsidiaries. See id. Midcontinent claimed that a review of Missouri Valley’s financial condition would demonstrate

that the requested interconnection was not “unduly economically burdensome” as intended in the federal statute. See id.

Fourth, Midcontinent argued that to satisfy the Section 254 “universal service” standards referenced in Section 251(f)(1)(A), Midcontinent need only show that interconnection would not cause a net negative impact on Missouri Valley’s ability to satisfy its existing universal service requirements and that speculation about potential future requirements is inappropriate. See Compl. ¶¶ 58, 75. Midcontinent argued the NDPSC was required under federal law to consider evidence of positive impact on universal service that would be realized if the rural exemption were lifted and Midcontinent were allowed to enter the market. See Compl. ¶ 52. Midcontinent argued that its request satisfied that federal standard. See id. ¶¶ 52, 58, 75.

Fifth, Midcontinent argued that the NDPSC’s “unduly economically burdensome” and universal service analyses must incorporate Missouri Valley’s eligibility for federal “safety valve” funding pursuant to the rules of the Federal Communications Commission (the “FCC”). See Compl. ¶¶ 51, 58; see also 47 C.F.R. § 54.305. Missouri Valley’s eligibility for funding from the universal service fund that would offset substantially any economic impact on Missouri Valley’s universal service activities is a relevant factor under federal law. See Compl. ¶ 75.

Missouri Valley did not contest that Midcontinent had made a bona fide request for interconnection or that the requested interconnection was “technically feasible,” so those requirements were established. Rural Exemption Order ¶¶ 9, 34-35. Missouri Valley opposed Midcontinent’s request, however, arguing that interconnection was unduly economically burdensome and would interfere with Missouri Valley’s universal service activities under Section 254. See, e.g., id. at ¶¶ 13, 20, 24, 38-39. Missouri Valley denied it had waived its rural exemption; argued that the economic burden analysis should be restricted to Missouri Valley.

without considering its relationship to Nemont; claimed interconnection would interfere with Missouri Valley's satisfaction of future potential universal service commitments; and argued the company was ineligible for safety-valve funding under 47 C.F.R. § 54.305. See id. Missouri Valley also made a formal request that, should the NDPSC find that its rural exemption was no longer warranted, the NDPSC should suspend Missouri Valley's Section 251 obligations pursuant to a separate section of the 1996 Act, Section 251(f)(2). See Rural Exemption Order at 2; see also 47 U.S.C. § 251(f)(2).

The NDPSC held hearings and received full briefing on the issues. See Rural Exemption Order at 2. On October 8, 2008, the NDPSC denied Midcontinent's request for relief in the Rural Exemption Order. See id. The Rural Exemption Order acknowledges that the proceeding was conducted pursuant to federal law, and three of the seven issues designated for hearing contained verbatim recitations of the Section 251(f)(1)(A) standards, and other issues also implicated federal law. See id. at 1, 2. The Rural Exemption Order mentioned, but did not discuss or expressly consider or resolve, Midcontinent's claim that Missouri Valley had waived any right to rely on the rural exemption. See id. at 1.

The NDPSC considered the federal statute and determined that Midcontinent's requested interconnection would be unduly economically burdensome on Missouri Valley. See id. ¶¶ 13-33. The NDPSC rejected Midcontinent's statutory interpretation of the federal standard, holding that the statute required evidence only that Missouri Valley's "efficiency in offering . . . services" would be damaged and future facilities investment thereby impaired. See id. ¶ 30. The NDPSC held that the unduly economically burdensome standard did not require it to consider Missouri Valley's economic condition in light of its unique relationship with Nemont, but

instead required only an examination of Missouri Valley's separate finances as Missouri Valley reported them. See id. ¶ 31.

The NDPSC also concluded that lifting the rural exemption would be inconsistent with the universal service policies set out in Section 254 of the 1996 Act, finding that the requested interconnection would result in revenue losses that would impair Missouri Valley's ability to meet potential future universal service requirements, which the NDPSC found sufficient under Section 254. See id. ¶ 39-40. Finally, the NDPSC concluded that Missouri Valley was ineligible for safety valve funding under 47 C.F.R. § 54.305. See id. ¶ 40.

On November 4, 2008, Midcontinent filed a petition for reconsideration or rehearing, arguing that the Rural Exemption Order misinterpreted federal law. The NDPSC rejected Midcontinent's Petition on December 3, 2008 without a written order.

E. Midcontinent's Claims

Midcontinent raises two separate claims for relief. First, it seeks declaratory relief that the Rural Exemption Order violates federal law and is unenforceable; it also seeks an injunction prohibiting the NDPSC from enforcing the Rural Exemption Order and Missouri Valley from seeking its enforcement. Complaint ¶¶ 74-77, 80, 81-85, Prayer for Relief ¶ 1-4. This claim also seeks injunctive relief requiring Missouri Valley to negotiate an interconnection agreement in good faith under Sections 251 and 252 of the Communications Act. Complaint, Prayer for Relief ¶ 4.

Second, Midcontinent claims that Missouri Valley's attempt to enforce its rural exemption through the NDPSC despite its waiver of any right to rely on that exemption constitutes a violation of Section 251, which renders Missouri Valley liable for damages pursuant to 47 U.S.C. §§ 206 and 207. Complaint ¶¶ 68-71, 78-79, Prayer for Relief at ¶ 5.

III. ARGUMENT

A. The Court Has Subject Matter Jurisdiction over Midcontinent's Claims.

This Court has subject matter jurisdiction over Midcontinent's claims as a matter of federal question jurisdiction.⁴ The Court also has jurisdiction over the separate claims against Missouri Valley for violations of 47 U.S.C. § 251, pursuant to 47 U.S.C. §§ 206, 207, and 251, as well as 28 U.S.C. §§ 1331 and 1332.

1. Legal Standard.

Midcontinent bears the burden of demonstrating that this Court has jurisdiction over its claims. Jones v. Gale, 470 F.3d 1261, 1265 (8th Cir. 2006) (citing Hoekel v. Plumbing Planning Corp., 20 F.3d 839, 840 (8th Cir. 1994) (per curiam)). In making the jurisdictional determination, the Court "accepts all of the factual allegations in [the] complaint as true," and may consider facts outside the pleadings, if necessary, to resolve the issue. See Deuser v. Vecera, 139 F.3d 1190, 1191 (8th Cir. 1998). Moreover, the Complaint should "be construed broadly and liberally, in conformity with the general principle set forth in Rule 8(f)." See Wright & Miller, Federal Practice and Procedure § 1350 (3d ed. 2004); Kottschade v. City of Rochester, 2002 WL 91641 (D. Minn. Jan. 22, 2002), aff'd, 319 F.3d 1038 (8th Cir. 2003).

⁴ See 28 U.S.C. § 1331. Defendants move to dismiss on both subject matter jurisdiction and res judicata grounds under FRCP Rule 12(b)(6). When a Rule 12(b)(6) motion includes lack of subject matter jurisdiction, that portion of the motion is properly construed as a Rule 12(b)(1) motion, and subject matter jurisdiction should be resolved before the Court considers any other asserted grounds for dismissal. See Wright & Miller, Federal Practice and Procedure § 1350 (3d ed. 2004) (citing, inter alia, Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1998); Bell v. Hood, 327 U.S. 678 (1946); Walz v. U.S., 2002 WL 523880 at *2 n.3 (D. Minn. March 22, 2002)). Accordingly, Midcontinent addresses the Defendants' subject matter jurisdiction arguments first and its res judicata arguments thereafter.

2. **The Court Has Federal Question Jurisdiction To Review the NDPSC's Decision.**

The question of subject matter jurisdiction in this case is controlled by the Supreme Court's decision in Verizon Maryland. In Verizon Maryland, the Supreme Court held that 28 U.S.C. § 1331 standing alone provides the district courts with subject matter jurisdiction over challenges to state commission interpretations of the 1996 Act. Verizon argued that a Maryland Public Service Commission ("MPSC") decision interpreting Section 251(b)(5) of the 1996 Act conflicted with the text of the 1996 Act and FCC decisions interpreting it. Verizon sought a declaratory judgment that the MPSC's order was unlawful and an injunction prohibiting its enforcement.

Defendants argued that the district court lacked subject matter jurisdiction because the 1996 Act created a private right of action in federal district court only for cases challenging state commission approvals or rejections of interconnection agreements under Section 252(e)(6). Verizon responded that Section 252(e)(6) authorized federal court claims for any "determination" made by a state commission under Section 251 or 252 of the Act. Verizon also argued that even if Section 252(e)(6) could not be so broadly construed, 28 U.S.C. § 1331 standing alone was sufficient to authorize suits to enforce the provisions of the 1996 Act because nothing in that legislation suggested Congress intended to limit federal court jurisdiction over claims arising under the 1996 Act.

The Supreme Court agreed with Verizon, holding that "[w]e have no doubt that federal courts have jurisdiction to entertain [Verizon's] suit." See Verizon Maryland, 535 U.S. at 642. The Court found that it did not even need to reach Verizon's argument that Section 252(e)(6) authorizes suits challenging state commission actions other than interconnection agreement decisions because federal question jurisdiction under Section 1331, by itself, was sufficient to

support the Court's jurisdiction over claims arising under the 1996 Act. Id. at 642-43. The Court also rejected the MPSC's claim that the 1996 Act did not create a private right of action. Id. Instead, the Court explained, all that is required for 28 U.S.C. § 1331 to invest the federal courts with jurisdiction over challenges to state commission interpretations is that "the right of the petitioners . . . will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another." See id. at 643 (quoting Steel Co. v. Citizens for Better Environment, 523 U.S. 83, 89 (1998)).

Following Verizon Maryland, the Eighth Circuit stated this rule succinctly in RIIT, holding that "district courts have jurisdiction to determine whether a state administrative agency correctly interprets federal law, in this case the Telecommunications Act and the FCC regulations interpreting the Act." 362 F.3d 1027 (8th Cir. 2004). And, in Iowa Network Services, the Eighth Circuit confirmed its view that "[f]ederal courts have the ultimate power to interpret provisions of the 1996 Act," and that state agency determinations under the 1996 Act are subject to challenge in federal court. 363 F.3d at 692, 693.

These three cases – Verizon Maryland, RIIT and Iowa Network Services – establish this Court's jurisdiction over Midcontinent's complaint and foreclose Defendants' motions to dismiss for lack of subject matter jurisdiction. Missouri Valley fails to cite any contrary authority. In fact, no cases have been found that dismiss a request for federal court review of a state commission's rural exemption determination pursuant to Section 251(f) of the 1996 Act. Although Missouri Valley cites Verizon Maryland and concedes that RIIT and Iowa Network Services "exemplify federal district courts' jurisdiction to review state commission's actions under the 1996 Act, regarding inter-company compensation for interconnections," Missouri Valley Memo. at 18, it fails to provide any reasoned basis on which to distinguish these cases.

In fact, the only two courts that appear to have considered the question here determined that they do have subject matter jurisdiction over such claims. See Consolidated Communications of Fort Bend Co. v. Pub. Util. Com. of Texas, 497 F.Supp.2d 836, 838 (W.D.Tex. 2007); Wireless World, L.L.C. v. Virgin Islands Pub. Serv. Com., 2005 U.S. Dist. LEXIS 15061 *6-7 (D.V.I. July 15, 2005). In each case, the court found subject matter jurisdiction pursuant to 28 U.S.C. § 1331 and Section 252(e)(6) of the Communications Act, which provides for federal court review of state commission “determinations” of issues arising from the Section 252 arbitration process.⁵

These courts’ findings of jurisdiction over Section 251(f) rural exemption determinations based on Section 252(e)(6), reflect that when a state commission declines to lift a rural exemption, the CLEC has no way to force a rural ILEC to negotiate an interconnection agreement and no ability to force arbitration from the state commission. Thus, rural exemption determinations are properly seen as “determinations” under Section 252, within the meaning of Section 252(e)(6). The jurisdictional analysis in Consolidated Communications and Wireless World therefore establishes Section 252(e)(6) as a separate and independent basis for subject matter jurisdiction over Midcontinent’s claims, even though the Supreme Court in Verizon Maryland held that 28 U.S.C. § 1331 alone is sufficient to support jurisdiction.

Defendants nonetheless argue that the Court has no jurisdiction over Midcontinent’s complaint because it fails to allege any conflict between the NDPSC’s decision and federal law. Missouri Valley Memo. at 19; NDPSC Memo. at 9. This is incorrect. The Complaint identifies numerous instances where the Rural Exemption Order violates federal law and, in fact, relies on

⁵ Significantly, both RIIT and Iowa Network Services involved challenges to agency action that did not arise from interconnection arbitrations, and thus could be considered to fall outside the bounds of district court actions specifically authorized by Section 252(e)(6).

such determinations under federal law to justify relief. The Complaint directly poses several questions of federal law, including: (1) whether Section 251(f)(1)(A) permitted the NDPSC to leave Missouri Valley's rural exemption in place despite Missouri Valley's previous waivers of that exemption; (2) whether the NDPSC properly applied the "unduly economically burdensome" determination under federal law; (3) whether the NDPSC properly analyzed whether lifting the rural exemption would negatively impact universal service under Section 254; and (4) whether the NDPSC correctly determined that "safety valve" financing would be unavailable to Missouri Valley under 47 C.F.R. § 54.305. The rights of Midcontinent "will be sustained" if these federal laws "are given one construction and will be defeated if they are given another." Verizon Maryland, 535 U.S. at 643. Each of the alleged conflicts between the Rural Exemption Order, on one hand, and the 1996 Act and the FCC rules, on the other, raises substantial questions of federal law that this Court has jurisdiction to resolve under 28 U.S.C. § 1331.⁶

Defendants' other arguments against federal question jurisdiction already have been rejected, either by Verizon Maryland itself or by other cases cited by Defendants. Defendants first argue that Section 251 does not confer a private right of action. Missouri Valley Memo. at 15-16; NDPSC Memo. at 8. The Supreme Court expressly rejected this argument, holding that to invoke federal court review of state commission action under the 1996 Act, identifying a

⁶ Missouri Valley argues that because the NDPSC may have expressed some of its conclusions in the Rural Exemption Order as factual determinations (e.g. "Midcontinent failed to prove that the request . . . is not unduly economically burdensome"), those determinations are unreviewable. Missouri Valley Memo. at 19. This is wrong. Courts in this Circuit routinely review state commission factual determinations and mixed questions of fact and law in 1996 Act proceedings. WWC License, L.L.C. v. Boyle, 459 F.3d 880, 889-90 (8th Cir. 2006). And, to the extent the Court finds the NDPSC applied the wrong legal standards under Section 251(f), that is an error of law, not of fact.

separate private right of action is unnecessary. Verizon Maryland, 535 U.S. at 642-43. The district court's subject matter jurisdiction is established if a plaintiff alleges that state commission action is in conflict with federal law, which must prevail under the Supremacy Clause. Id.

Missouri Valley's private right of action argument appears to spring from the premise that the Complaint asks this Court to relitigate the request for termination of Missouri Valley's rural exemption as an original matter under Section 251(f). Missouri Valley Memo. at 16, 21. That premise is unsound. 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. No discovery or additional factual submissions will be required (or would be appropriate); just as in Verizon Maryland, the Court need only review whether the Rural Exemption Order is consistent with federal law.

Defendants also argue that federal question jurisdiction does not exist over claims arising under Section 251 because it does not explicitly confer jurisdiction on the federal courts. Missouri Valley Memo at 20; NDPSC Memo. at 8. That analysis is precisely backwards. As the Supreme Court explained, 28 U.S.C. § 1331 is a general grant of federal court jurisdiction, which applies unless a particular federal statute demonstrates congressional intent to strip the federal courts of jurisdiction. Verizon Maryland, 535 U.S. 642-44. There is nothing in Section 251(f) to suggest that Congress intended to eliminate federal court review of state commission decisions under Section 251(f).

Missouri Valley's only attempt to demonstrate that Congress might have had such an intention is its argument that Section 251(f) represents a "comprehensive system of enforcement"

that “negates a private right of action in federal district court.” Missouri Valley Memo. at 16. Missouri Valley claims further that the judicial review procedures established by Section 252(e)(6) implicitly limit federal court jurisdiction over other claims arising under the 1996 Act because if Congress had intended to authorize federal court review of other claims, it would have done so expressly. Missouri Valley Memo at 16-17, 20-21. But the Supreme Court’s decision in Verizon Maryland rejected both of these arguments as well, holding that the adjudicatory procedures established in the 1996 Act do not demonstrate congressional intent to foreclose federal court review of other state commission decisions because in the 1996 Act, “where otherwise applicable jurisdiction was meant to be excluded, it was excluded expressly.” Verizon Maryland, 535 U.S. at 644 (citing 47 U.S.C. 252(e)(4), which strips state courts of jurisdiction over interconnection agreements). Indeed, the Supreme Court held that “none of the provisions of the [1996] Act evince any intent to preclude federal review of a [state] commission determination.” See id.

Defendants seek to distinguish Verizon Maryland by claiming that case applies only to issues that arise under Section 252 of the 1996 Act, not Section 251. Missouri Valley Memo. at 16; NDPSC Memo. at 9. To the contrary, the issue in Verizon Maryland arose from the Maryland Commission’s construction of the reciprocal compensation provisions found in Section 251(b)(5) of the 1996 Act, not from any right contained in Section 252. Verizon Maryland, 535 U.S. at 638, 642. Likewise, the issue under review in the Eighth Circuit in RIIT involved the jurisdictional classification of telecommunications traffic to determine whether the reciprocal compensation requirement in Section 251(b)(5) applied to certain wireless telephone traffic. See RIIT, 476 F.3d at 573-75. Similarly, the Eighth Circuit in Iowa Network Services reviewed a state agency determination regarding the proper application of the Section 251(b)(5) reciprocal

compensation requirement. 363 F.3d at 693. In fact, in both RITT and Iowa Network Services, there was no interconnection agreement between the parties at all. Nothing in the language, facts, or reasoning of any of these cases suggests that federal question jurisdiction to review state commission actions is limited to claims arising under Section 252 of the 1996 Act.

Defendants also argue that the Supreme Court derived its subject matter jurisdiction in Verizon Maryland from Section 252(e)(6). Missouri Valley Memo. at 17-18; NDPSC Memo. at 9. This, too, is wrong. Indeed, the Supreme Court explicitly held that it did not need to determine whether Section 252(e)(6) provided jurisdiction over the Section 251(b)(5) claims raised in that case because it was entirely clear that 28 U.S.C. § 1331 provided jurisdiction. Verizon Maryland, 535 U.S. 641-42 (“Whether the text of Section 252(e)(6) can be so construed [to provide jurisdiction] is a question we need not decide.”). Nonetheless, both Consolidated Communications and Wireless World hold that Section 252(e)(6) does confer jurisdiction over Section 251(f) rural exemption cases.

Defendants’ attempt to distinguish this case from Verizon Maryland by alleging that this case does not raise a “substantial issue of federal preemption of state law” entirely misses the mark. Missouri Valley Memo. at 18; NDPSC Memo. at 9. Verizon Maryland found a conflict between state and federal law because the MPSC (a state actor) misinterpreted Section 251(b)(5) of the 1996 Act. The Courts in Verizon Maryland, RITT, and Iowa Network Services recognized that because federal law now governs local telephone markets, any state commission decision that conflicts with the 1996 Act or the interpretive FCC rules creates a federal question that is appropriate for resolution in the federal courts. Verizon Maryland, 535 U.S. at 643-44; RITT, 362 F.3d at 1030; Iowa Network Services, 363 F.3d at 692-93.

Finally, Missouri Valley claims that Midcontinent's claims are "wholly insubstantial and frivolous" and thus barred by Verizon Maryland. Missouri Valley Brief at 21. This argument should be rejected out of hand. Midcontinent has raised substantial issues of federal law, as shown above. These allegations easily satisfy the federal pleading standard and will form the basis for relief in this case.

3. **The Court Has Subject Matter Jurisdiction over Midcontinent's Claims Against Missouri Valley.**

This Court also has subject matter jurisdiction over Midcontinent's direct claims against Missouri Valley for violation of Sections 251 and 252. Section 206 of the Communications Act of 1934, as amended, 47 U.S.C. § 151, et. seq., (the "Communications Act"), provides that common carriers are liable for damages for any act prohibited by the Communications Act. 47 U.S.C. §206. Section 207 allows a party damaged by such violations to bring suit in federal district court. 47 U.S.C. § 207.

Midcontinent claims that Missouri Valley violated Sections 251 and 252 by refusing to provide Midcontinent with facilities-based interconnection pursuant to Section 251 and by relying on a rural exemption that Missouri Valley had knowingly waived. The facts Midcontinent alleges are assumed true for this motion, but even Missouri Valley does not dispute that it has refused interconnection, relying on the rural exemption. Thus, Sections 206 and 207 place the adjudication of Midcontinent's claims squarely within the jurisdictional authority of this Court. These statutes, coupled with the Court's federal question jurisdiction under 28 U.S.C. § 1331, firmly establish this Court's subject matter jurisdiction to adjudicate Midcontinent's direct claims against Missouri Valley.

And while Missouri Valley argues that "Congress intended the interconnection and exemption provisions of §§ 251(c) and 251(f) of the act to be administered by State commissions

not by private actions in federal courts,” see Missouri Valley Memo. at 14, it cites no cases, legislative history or any other source demonstrating that Congress intended to exempt violations of Section 251 or 252 from the federal courts’ jurisdiction under Sections 206 and 207. In any case, Missouri Valley’s argument is foreclosed by the Supreme Court’s ruling that the district court retains its jurisdiction under the Communications Act absent a specific provision of the 1996 Act that divests it of jurisdiction. See Verizon Maryland, 535 U.S. at 644 (“[W]here otherwise applicable jurisdiction was meant to be excluded, it was excluded expressly.”).

Finally, in addition to federal question jurisdiction, this Court has diversity jurisdiction over Midcontinent’s claims against Missouri Valley. See 28 U.S.C. 1332. There is no dispute that Midcontinent is a South Dakota partnership and that its partners reside outside of North Dakota, headquartered in South Dakota, whereas Missouri Valley is a North Dakota Corporation, headquartered in North Dakota.⁷ There also can be no dispute that the amount in controversy exceeds \$75,000, with competitive telephone service to the entire Williston exchange at stake. See Rural Exemption Order ¶ 32 (accepting Missouri Valley’s allegation that it would lose \$3.58 million in revenues if required to permit the requested interconnection); see also Complaint ¶¶ 8, 12-13. Therefore, even if the Complaint were somehow construed as alleging only state law claims against Missouri Valley, this Court would have diversity jurisdiction over those claims.

Missouri Valley does not directly contest diversity jurisdiction. It merely states that diversity jurisdiction would be “duplicative” of the federal question jurisdiction argument. Missouri Valley Memo. at 14. This is illogical. The fact that there are two bases for federal jurisdiction does not undermine the validity of either one.

⁷ See Declaration of Jason E. Rademacher, ¶¶ 4-7, submitted as Attachment 1.

B. Midcontinent's Claims Are Not Barred by the Doctrine of Res Judicata.

1. Legal Standard

Defendants' Rule 12(b)(6) motions to dismiss on res judicata grounds rely on matters outside the pleadings and are properly treated as motions for summary judgment pursuant to Rule 56. Fed. R. Civ. P. 12(d). Summary judgment is appropriate only if the evidence, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. See Lynn v. Deaconess Med. Ctr.-West Campus, 160 F.3d 484, 486 (8th Cir. 1998). In this case, the facts relevant to Defendants' res judicata defense are not in dispute. The law, however, clearly requires denial of the motions because the Eighth Circuit has confirmed that res judicata does not bar federal court review of state commission actions under the local competition provisions of the Communications Act. Iowa Network Services, 363 F.3d at 690 ("Congress intended to supplant the common law principles of claim preclusion when it enacted the 1996 Act.").

2. Res Judicata Does Not Shield the NDPSC from Midcontinent's Claims that the Rural Exemption Order Violates Federal Law.

It should be clear that Midcontinent is not seeking to re-litigate or re-try the facts of this case; it seeks judicial review of the state agency decision as inconsistent with federal law. Accordingly, the doctrine of res judicata, or claim preclusion, has no application here. That alone, is sufficient to reject the defense. Nevertheless, Defendants submit pages of argument seeking to show that res judicata bars Midcontinent's request for review of the Rural Exemption Order. Missouri Valley Memo. at 8-13; NDPSC Memo. at 4-7. Fundamental to Defendants' motion is the presumption that common law principles of res judicata could apply to limit federal court review of state commission determinations under the 1996 Act. This is wrong as a matter of law.

Under Supreme Court and Eight Circuit precedent, when state agencies like the NDPSC apply federal law like 47 U.S.C. 251(f), their decisions lack preclusive effect if Congress intended to provide parties with recourse to the federal courts. Iowa Network Services, 363 F.3d at 690 (citing Univ. of Tenn. v. Elliott, 478 U.S. 788, 794-95 (1986); Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 108, 111 (1991) (“Astoria”). In Iowa Network Services, the court noted that “‘common law doctrines [of res judicata and issue preclusion] . . . are trumped by the Supremacy Clause if the effect of the state court judgment or decree [or administrative ruling] is to restrain the exercise of the United States’ sovereign power by imposing requirements that are contrary to important and established federal policy.’” See 363 F.3d at 690 (quoting Arapahoe County Pub. Airport Auth. v. FAA, 242 F.3d 1213, 1219 (10th Cir. 2001)).

Under this standard, as Defendants concede, the only relevant question is whether Congress intended state commission actions to be subject to federal court review. Missouri Valley Memo. at 12-13 (citing Astoria, 501 U.S. at 107-08); NDPSC Memo. at 7. Defendants argue that there is no evidence of congressional intent to permit federal court review of the Rural Exemption Order. That argument ignores the Eighth Circuit’s decision in Iowa Network Services. In that case, the Court specifically addressed the applicability of the res judicata defense to challenges to state commission interpretations of the 1996 Act and determined that “Congress intended to supplant the common law principles of claim preclusion when it enacted the 1996 Act.” 363 F.3d at 690.

Midcontinent’s claims are indistinguishable from those at issue in Iowa Network Services, and the Eighth Circuit’s determination on that point controls the outcome here. In that case, the district court was asked to review the Iowa Utilities Board’s (the “IUB”) disposition of a dispute between Qwest and Iowa Network Services over payment of access charges that had

required the Board to construe Section 251(b)(5) of the Act. Id. at 687-88. Qwest asked the court to review the IUB's decision to determine whether its interpretation of Section 251(b)(5) – and the IUB's decision that depended on it – complied with federal law. The court held that res judicata could not bar federal court review because the IUB's decision “was indisputably interpreting federal law,” and applying res judicata to bar federal court review would frustrate Congress's intent that federal courts have final say over interpretations of the 1996 Act. Id. at 693, 692-93. Although Missouri Valley cites Iowa Network Services, it fails to discuss or distinguish this key holding.

Indeed, rather than seek to distinguish Iowa Network Services, Defendants inexplicably rely on arguments that the Eighth Circuit plainly rejected in that case. Defendants argue that Astoria, 501 U.S. at 107-108, requires dismissal of Midcontinent's claims on res judicata grounds because Congress did not intend the 1996 Act to interfere with the application of that doctrine. Missouri Valley Memo. at 12-13; NDPSC Memo. at 7. But the Eighth Circuit held precisely the opposite, holding that Congress did intend to empower federal courts to review state commission interpretations of the 1996 Act and that “the Astoria rule prevents application of res judicata” to such requests. See Iowa Network Services, 363 F.3d at 690 (emphasis added).

Defendants argue that the only issues the Court will need to resolve in this case concern the NDPSC's application of “the elements of the rural exemption and whether the rural exemption was previously waived by Missouri Valley.” Missouri Valley Memo. at 9; also NDPSC Memo. at 7-8. Defendants fail to recognize, however, that the substantive claims in this case are that the NDPSC answered those questions incorrectly because it improperly interpreted the local competition provisions of the 1996 Act. This raises questions that the Court in Iowa

Network Services made clear the federal courts should answer without regard to prior state commission determinations.

Defendants also argue that Midcontinent is “forum shopping” and does not like the result reached by the NDPSC, and that res judicata applies because the 1996 Act mandates that a determination as to whether an ILEC’s rural exemption “shall be terminated is to be made by state commissions alone.” Missouri Valley Memo. at 11; NDPSC Memo. at 6, 7. It is true that Midcontinent does not “like” the NDPSC’s decision; it is contrary to federal law and hinders fair competition for telephone services in the Williston exchange. That is why Midcontinent is challenging the decision here. However, seeking federal court review of a state agency decision interpreting federal law is not forum shopping any more than seeking appellate review of a trial court decision would be. Again, Midcontinent does not contest the NDPSC’s original jurisdiction over its Section 251(f) claims, and it is not requesting a new hearing on the facts in a new forum.⁸ It merely seeks federal court review of matters of federal law.

The doctrine of res judicata simply has no application here.⁹

⁸ Missouri Valley also implies that perhaps application of res judicata depends upon whether the NDPSC’s “rank or status is [] sufficient or high enough that its determination must be regarded as a res judicata bar in federal court.” Missouri Valley Memo. at 11. This makes no sense. The NDPSC’s jurisdiction to address the congressionally-established rural exemption was created by Congress, which also rendered state agency determinations of federal law subject to federal court review. Iowa Network Services, 363 F.3d 690-92. Review of the Rural Exemption Order is part of the process established by federal law and does not impugn the status or authority of the NDPSC.

⁹ Defendants do not argue that the res judicata defense bars Midcontinent’s Section 251 claims against Missouri Valley, and therefore Midcontinent does not address it substantively here. In any event, Defendants would have the burden of proving such a defense, see Bryson v. Guarantee Reserve Life Ins. Co., 520 F.2d 563 (1975) (citations omitted), so their failure to include it in their motion precludes summary judgment on the issue at this time.

IV. CONCLUSION

For the reasons stated above, Defendants respectfully request that Defendants' motions to dismiss be denied.

Respectfully submitted,

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Its Attorneys

July 24, 2009

UNITED STATES DISTRICT COURT
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

Case No.: 1:09-cv-017

I hereby certify that on July 24, 2009, the following documents:

CONSOLIDATED OPPOSITION TO MOTION TO DISMISS

And

DECLARATION OF JASON E. RADEMACHER

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

David J. Hogue (dhogue@srt.com)
Annette Marie Bendish (abendish@nd.gov)

I further certify that a copy of the foregoing documents will be mailed by first class mail, postage paid, to the following non-ECF participants:

(NONE)

/s/ Tara B. Brandner
Tara B. Brandner