

II. Missouri Valley's rural exemption from interconnection is not waived.

The duty of interconnection, the rural exemption from interconnection, and a process for termination of the rural exemption are all provided by statute, §§ 251(c)(2), 251(f)(1)(A) and 251(f)(1)(B). A specific waiver of the rural exemption by a rural telephone company providing video programming is likewise provided in the Act. § 251(f)(1)(C). In this appeal, Midcontinent proposes its own waiver theory, a non-statutory, ad hoc bypass to evade the statutory exemption provided by §251(f)(1)(A) and the process provided by § 251(f)(1)(B). Missouri Valley responded to the theory in its July 31 memorandum. Midcontinent's October 5 memorandum (pp. 5-13) presents no new arguments that require reply.

Midcontinent cannot credibly claim the PSC failed to consider its waiver theories. In a September 9 "working session" following the evidentiary hearing, Commission staff member Patrick Fahn presented the Commission with Midcontinent and Missouri Valley's positions regarding the waiver issues. PSC brief opposing Midcontinent summary judgment at 3. The "[c]urrent status of rural exemption" is the first issue in Mr. Fahn's spreadsheet of issues for Commission consideration. *Id.* at 8.

One aspect of Missouri Valley's response bears repeating. There is not a scintilla of evidence in the record of the PSC Inquiry (the record that Midcontinent recognizes is the only evidence to be considered by the court) to support Midcontinent's claim that Missouri Valley waived its statutory exemption from interconnection. The absence of evidence is conceded by Midcontinent. *Id.*, p. 8, n. 4. (Missouri Valley does not "complain" about that situation. But it does criticize Midcontinent's bootstrapping its waiver argument by referring to a resale agreement as an interconnection agreement.) There is no cause to speculate about what the PSC might have decided about the waiver theory if Midcontinent had requested under NDCC § 28-32-24 that the PSC take notice of other cases or if other cases had been some other way revisited by the PSC at Midcontinent's behest. The evidentiary record is what it is. No evidence was offered and no evidence that was received is cited by Midcontinent in support of its

arguments that Missouri Valley intentionally waived an important statutory right.

On judicial review, as a matter of law under the Act, and on the factual record before the court on summary judgment motions, Missouri Valley has not lost its §251(f)(1)(A) exemption from §251(c)(2) interconnection duties via Midcontinent's waiver theories.

III. Midcontinent's complaint about the *Rural Exemption Order* should be dismissed.

Midcontinent argues about competition as though Midcontinent and Missouri Valley were not in direct competition for landline customers in the Williston exchange. They are. Through the existing resale agreement between Midcontinent and Missouri Valley, Midcontinent served 1,575 of the 8,806 access lines in Williston as of April 2008. Hanson pre-filed testimony at p. 7, ll. 6-7.

Competition is not what this case is about. There is no doubt that interconnection is one way the Act of 1996 facilitates competition, but Congress did not impose either competition or interconnection as a one-size-fits-all policy.

"In the Act, Congress sought both to promote competition and to protect rural telephone companies as evidenced by the Congressional debates. . . . There can be no doubt that it is an economic burden on an ILEC to provide what Congress has directed it to provide to new competitors in 251(b) or 251(c). Because the small and rural ILECs, while they may be entrenched in their markets, have less of a financial capacity than larger and more urban ILECs to meet such a request, the Congress declared that their statutorily granted exemption should continue unless the state commission found all three pre-requisites for terminating the exemption....." Iowa v FCC at 761.

"The plain meaning of the statute requires the party making the request to prove that the request meets the three prerequisites to justify the termination of the otherwise continuing rural exemption." Id. at 762.

Since passage of the Act, the PSC has had a hilltop view of the changing, competitive

telecommunications landscape in North Dakota. During the PSC hearing, the Bismarck/Mandan market offered the PSC a telling picture of whether Williston consumers might enjoy some benefit of removing Missouri Valley's rural exemption, and permitting Midcontinent to move the competition platform from a resale arrangement to physical interconnection.

But the theoretical benefits of increased competition hypothesized in Midcontinent's legal briefs and espoused by Midcontinent's expert witnesses could not be reconciled with Midcontinent's actual business practices in North Dakota markets. The evidence about whether changing the competition platform from resale to physical interconnection actually benefitted consumers was uncontroverted: there was no benefit. Midcontinent has physical interconnection with the ILEC Qwest in the Bismarck market. There was no difference between the services and prices offered by Midcontinent in a resale community like Williston and the services and prices offered by Midcontinent in a physical interconnection community like Bismarck. E.g., tran. 80-81, Hanson.

This case is about Midcontinent's request for interconnection under §251 (c). Section 251(f)(1)(A) provides exemption from interconnection: "Subsection (c) of this section shall not apply to a rural telephone company" The PSC Inquiry was "for the purpose of determining whether to terminate the exemption under subparagraph (A)." §251 (f)(1)(B). This court action is for the purpose of reviewing the PSC'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." (REO p. 10).

Judicial review is accomplished under a deferential standard.

"We review the Commission's factual determinations and mixed questions of law and fact under a deferential standard, affirming unless the Commission's decision is arbitrary and capricious. Qwest Corp. v. Koppendraye, 436 F.3d 859, 863 (8th Cir.2006). We owe no deference to the Commission's interpretations of federal law, however, and our review of the agreement for compliance with the Act is de novo." VWC License, L.L.C.

v Boyle, 459 F.3d 880,890 (8th Cir. 2006).

Deference is a conventional judicial principle. Trial judges do not overrule juries. Appellate judges do not second guess trial judges' decisions on issues of fact. Deference, the term that describes judges' approach in review of administrative agencies' decisions, is a corollary of the same principle, reinforced by recognition of the "superior technical expertise of state commissions." WWC License, 459 F. 3d at 895; Qwest v Koppendrayer, 436 F.3d at 863; Ace Telephone Association v Koppendrayer, 432 F.3d 876, 878 (8th Cir. 2005).

Midcontinent's two memoranda do not acknowledge the standard of review. Disregarding judicial deference for the Commission's decision, Midcontinent urges the court to overrule the Commission's determination on issues of fact, to decide this case as if the court were inclined or empowered to make or to change the determination Congress assigned to State Commissions under §251(f)(1)(B). (Midcontinent's October 5 mem., pp 14-25.)

Midcontinent seeks a declaratory ruling, "specifically" that the court declare "[t]he evidence demonstrates that the requested Section 251(c) interconnection would not cause Missouri Valley to suffer an undue economic burden and would not adversely effect [sic] its ability to provide universal service under 47 U.S.C. § 251(f)(1)." (Midcontinent's July 31 mem., p. 39.) This is Midcontinent's straightforward request that the court reevaluate the evidence, adopt Midcontinent's opinion evidence as proof, and overrule the PSC's determination that Midcontinent failed to prove what it needed to prove to justify the termination of Missouri Valley's rural exemption from interconnection. Midcontinent's position is contradicted by the controlling precedents, WWC License, 459 F.3d 880, Qwest v Koppendrayer, 436 F.3d 859, Ace Telephone, 432 F.3d 876, and Qwest Corp. v Minnesota Public Utilities Commission. 427 F.3d 1061 (8th Cir. 2005). This court recently acknowledged the appropriate standard of review in Arnegard v Farm Service Agency, Civ. No. 4-08-cv-83, 2009 WL---, (D.N.D. 2009).

The standard of review of judicial deference to a State commission's determination is illustrated in WWC License, Ace Telephone and the 2006 Qwest cases. (The 2005 Qwest case

involved only questions of law.) The 2006 Qwest case is particularly illustrative. Like the Minnesota Public Utility Commission in the Qwest case, the was not arbitrary or capricious in its determination based on the evidence presented, was not arbitrary or capricious in finding one party's evidence more or less persuasive than the other's.

The Commission's determination was influenced not only by the persuasive quality of the parties' evidence; it was also affected by consideration that one party bore the burden of proof. The Commission articulated the consequences of its findings (*REO*, ¶¶ 13-33 & 36-42):

"From the foregoing Findings of Fact, the Commission now makes its:

"Conclusions of Law

"2. Midcontinent failed to prove that the request of Midcontinent to Missouri Valley for interconnection in the Williston exchange is not unduly economically burdensome.

"3. Midcontinent failed to prove 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. This is not a matter of "semantics." (Midcontinent's October 5 mem., p. 16.) The Commission analyzed the evidence and discreetly followed burden of proof principles. The central issue in the PSC Inquiry was the factual question of whether Midcontinent's requested interconnection is "not unduly economically burdensome." §251(f)(1)(B).

"Economically burdensome" is undisputed considered as an issue of fact or as an issue of law.

"There can be no doubt that it is an economic burden on an ILEC to provide what Congress has directed it to provide to new competitors in §251(b) or §251(c)." Iowa v FCC, at 761

"Not unduly" connotes differentiating economic burdens that are undue from burdens that are not undue. State commissions' determinations under §251(f)(1)(B) are made on a "case-by-case basis." 47 CFR 51.401. The plain meaning of "case-by-case" is cases are uniquely different on their facts. Whether the undoubted economic burden of a requested interconnection is "not unduly economically burdensome" is an issue of fact in each case, an issue on which the

requesting party bears the burden of proof.

In the case of Midcontinent's request for an interconnection with Missouri Valley, Midcontinent's principal witness testified (Gates, PIX M3 p. 38):

".... Based on our analysis of the potential impact of Midcontinent's facilities-based entry in Williston, however, the impact is certainly not unduly economically burdensome.

"Q. WOULD YOU AGREE THAT INDIVIDUALS MAY INTERPRET THIS STANDARD DIFFERENTLY?" (Bold type in the original pre-filed written testimony.)

"A. Yes, and ultimately it is the Commission's interpretation that will rule the day."

Midcontinent's opinion witness's articulate testimony in agreement with its lawyer's leading question acknowledge that the issue whether Midcontinent's requested interconnection would be not unduly economically burdensome is an issue of fact to be determined by the Commission.

Judicial review of the Commission's determination on this central issue is subject to the deferential standard, deference for the Commission's determination based on the evidence presented that Midcontinent failed to carry its burden of proof, deference for the Commission's determination that was guided by the opinion of the court in Iowa v FCC, the controlling precedent that explained the statutory exemption from interconnection is a broad protection Congress granted to rural telephone companies. *REO* ¶¶ 13-33 & 36-42.

Despite the precedents and the deferential standard of review and despite its own scripted testimony ("...ultimately it is the Commission's interpretation that will rule the day."), Midcontinent persists in its efforts to persuade the court to overrule the Commission's determination that Midcontinent failed to prove what it needed to prove to justify the termination of Missouri Valley's exemption from interconnection.

Missouri Valley has already argued in its August 31 memorandum that is not what

federal district courts do when reviewing State Commissions' determinations under the Act under the applicable standard of review. Missouri Valley has already argued that the Commission's analysis of Midcontinent's evidence and arguments show it was not arbitrary or capricious in concluding that Midcontinent failed to prove what it needed to prove to justify the termination of Missouri Valley's exemption from interconnection. (*REO Findings*, ¶¶ 13-33 & 36-42, and Order, p. 10.) In addition, but only pretending for the purposes of argument as if a reviewing court were a "super board," Missouri Valley refers the court to all the arguments in the PSC Inquiry, not only Midcontinent's arguments but also Missouri Valley's arguments (PIR 32 and 34) that show how utterly Midcontinent failed to prove what it needed to prove to justify the termination of Missouri Valley's exemption from interconnection. The PSC's determination that Midcontinent failed to prove what it needed to prove would not be reversed even if such action were within the applicable standard of review.

For example, Midcontinent presented no factual evidence on the economic issues. Midcontinent's only evidence on the central economic issue on which it had the burden of proof was Gates' opinion testimony that Midcontinent's requested interconnection is "not unduly economically burdensome." (PIX M3 pp. 5, 32 & 37.) Gates did not testify about facts to support his opinion. Gate's opinion was not based on factual evidence introduced through any other witness. Gates claimed support for his opinion by relying on Lundquist's opinion as if that other opinion were a fact. Gates' unsupported opinion testimony was the only evidence offered by Midcontinent to carry its burden of proof on the central economic issue. It is fair comment to describe Midcontinent's opinion evidence as intended to undermine Missouri Valley's evidence, as if Missouri Valley had the burden of proof. Midcontinent had the burden of proof. The Commission was not persuaded. (*REO Findings*, ¶¶ 13 through 33.) This is Midcontinent's evidence that it requests the court to reevaluate and to elevate as persuasive to carry a burden of proof, paying no deference to the Commission's determination.

After the PSC Inquiry and determination, Midcontinent filed a petition for reconsideration

asking the Commission to change its decision. (Complaint ¶¶ 60 & 61; PIR 48.) That is what Midcontinent is asking the court to do, to change the Commission's decision. The evidence is unchanged but Midcontinent wants a changed decision. "The Court's review is based on the record developed before the NDPSC, and no additional factual development is necessary or appropriate." (Midcontinent's July 31 mem., p.13.) There is no basis in that record for the Court to change the Commission's determination that Midcontinent failed to prove what it needed to prove to justify the termination of Missouri Valley's exemption from interconnection, even if such action were within the standard of review.

The Commission's decision was guided by the opinion in Iowa v FCC. REO ¶¶ 29 & 30. The Commission considered the factors Congress intended it to consider. The Commission did not consider any factors Congress did not intend it to consider. Factors Midcontinent proposes for consideration (such as Missouri Valley's affiliation with Nemont and the FCC's interim "safety valve" program) are not in the scope of Congressional intent under the plain words of the statute or any FCC regulation or court precedent. Despite their self-serving quality, the Commission did not fail to consider these arguments as if they were important aspects of the problems whether interconnection is either "not unduly economically burdensome" or "consistent with Section 254" (regarding universal service). REO ¶¶ 13-33 & 36-42. The Commission's expertise regarding economic factors of telecommunications policy underlies its determination of both the economic burden and universal service aspects of the inquiry under §251(f)(1)(B). REO ¶¶ 30 & 36-42. The Commission's decision does not run counter to the evidence before it. The evidence and the facts found by the Commission are rationally connected to its ultimate decision that Midcontinent failed to prove what it needed to prove on issues where Midcontinent had the burden of proof. Under the deferential standard of review, the court ought not adopt Midcontinent's view and substitute that different view for the judgment of the Commission. See Arnegard v Farm Service Agency, Civ. No. 4-08-cv-83, 2009 WL-----, (D.N.D. 2009).

Midcontinent's endeavors to persuade the court to reevaluate the evidence and to

overrule the Commission's determination should be considered against all the 8th Circuit cases that applied the standard of review. Of all these cases, only one involved a federal district court's decision that the state commission's decision was arbitrary and capricious. That court's decision was reversed and the commission's decision was reinstated by the court of appeals. Ace Telephone, 432 F.3d 876. Midcontinent's request that the court declare what "the evidence demonstrates" is a request that the court ignore controlling precedents about the deferential standard of review.

Midcontinent's arguments show a pattern of shifting positions. First Midcontinent says it does not seek a new trial or a re-trial of issues of fact; Midcontinent seeks judicial review. Then the reviewing court is urged to evaluate the evidence as if it were a trier of disputed issues of fact. First Midcontinent asserts there are no disputed issues of fact on summary judgment proceedings. Then Midcontinent argues its evidence the Commission found unpersuasive in a contested case should be declared sufficient to carry a burden of proof. First Midcontinent offered witnesses' opinion evidence to the Commission. Then those opinions are proffered to the court as if they were answers to legal issues. First Midcontinent presented arguments about issues of fact to the Commission in a failed effort to carry a burden of proof. Then those arguments are presented to the court veiled as issues of law, in an effort to obtain *de novo* review and a changed decision. A defeated litigant's switching positions—alternatively claiming an issue is an issue of fact or an issue of law depending on changing procedural circumstances as a commission's decision is subjected to judicial review—does not dissuade the court from applying the standard of review that includes deference owed to the Commission's decision. WWC License, 459 F.3d at 890.

IV. Midcontinent's claim for money damages should be dismissed.

Midcontinent and Missouri Valley each asserts it is entitled to judgment as a matter of law regarding the Commission's determination that Missouri Valley's exemption from interconnection is not terminated. The cross motions for summary judgment differ with respect

to Midcontinent's claim for damages. Midcontinent is not seeking summary judgment on that claim, even though it might have sought a judgment of liability under Rule 56 (d)(2). (Midcontinent's July 31 mem., p. 1, n.1.) Missouri Valley seeks dismissal of Midcontinent's claim for damages as a matter of law.

The Act authorizes an action for damages "In case any common carrier shall do... or omit to do any act, matter or thing in this Act required to be done...." 47 USC § 206. Midcontinent's claim for damages (summarized in complaint ¶¶ 78) is : "As a direct, foreseeable, and proximate result of Missouri Valley's failure to comply with its obligations under Section 251 of the Act, Midcontinent has suffered damages in an amount to be proven at trial."

Midcontinent's claim for damages should be dismissed because nothing in § 251 required any act, matter or thing to be done by Missouri Valley regarding Midcontinent's request for an interconnection. Missouri Valley is a rural telephone company exempt from the interconnection obligations under § 251(c) of the Act. "Subsection (c) of this section shall not apply to a rural telephone company..." § 251(f)(1)(A). The exemption is "continuing" and remains in effect unless and until terminated by the Commission after an inquiry under § 251(f)(1)(B). Iowa Utilities Board v Federal Communications Commission, 219 F.3d 744, at 761-62 (8th Cir. 2000) (Iowa v FCC). "Upon termination of the exemption, the State commission shall establish an implementation schedule..." § 251(f)(1)(B). Absent an inquiry, termination of the exemption, and establishment of an implementation schedule, there are no "obligations under Section 251 of the Act," and there is no private cause of action for damages under § 206.

Midcontinent's argument against dismissal of its claim for damages is dependent on its waiver theory. (Midcontinent's October 5 mem. pp. 25-27.) When Midcontinent requested interconnection on November 14, 2007 (*Rural Exemption Order* p. 1), Missouri Valley's exemption had already been terminated – according to Midcontinent. On that date, Missouri Valley knew or should have known about Midcontinent's waiver theory, the notion that Missouri Valley was not entitled to rely on the statutory exemption under §251(f)(1)(A) even though the

exemption had not been terminated by Commission action under §251(f)(1)(B). Missouri Valley should not only have known of the theory before it was asserted, Missouri Valley should have immediately conceded the validity of the theory in November of 2007. Or, after Midcontinent first asserted waiver in its February 8, 2008 Notice and Petition filed with the Commission (*REO* p.1; PIR 1), then Missouri Valley should have abandoned its statutory exemption under §251(f)(1)(A) rather than relying on its statutory right to a Commission inquiry and determination under §251(f)(1)(B). The waiver theory is valid - according to Midcontinent - and so Missouri Valley is liable to pay money damages because it did not recognize or concede Midcontinent's disingenuous waiver theory. That seems to be the theory of the damage claim.

Sections 206 and 251 do not combine to create a private cause of action in the absence of Commission action under § 251(f)(1)(B) terminating the otherwise continuing exemption under § 251(f)(1)(A), and sections 206 and 251 do not combine with Midcontinent's non-statutory waiver theory to create a private cause of action under the Act.

Summary and Conclusion

In this action for judicial review of the Commission's determination under § 251(f)(1)(B) of the Act, there is no genuine issue of material fact to be tried or re-tried by the court. Under the Telecommunications Act, Rule 56 (c) of the Federal Rules of Civil Procedure, and the deferential standard of review, Missouri Valley is entitled to summary judgment of dismissal as a matter of law. Iowa Utilities Board v Federal Communications Commission, 219 F.3d 744; WWC License, L.L.C. v Boyle, 459 F.3d 880; Qwest Corp. v Koppendrayer, 436 F.3d 859; Ace Telephone Association v Koppendrayer, 432 F.3d 876; Qwest Corp. v Minnesota Public Utilities Commission, 427 F.3d 1061.

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PRINGLE & HERIGSTAD, P.C.

By: /s/ David J. Hogue
David J. Hogue (#04486)
Attorneys for the Defendant
2525 Elk Drive
P.O. Box 1000
Minot, ND 58702-1000
Phone: (701) 852-0381
Fax: (701) 857-1361