STATE OF NORTH DAKOTA

PUBLIC SERVICE COMMISSION

Case No. PU-11-543

Midcontinent Communications, a South Dakota Partnership,

Petitioner

v.

Missouri Valley Communications, Inc.,

Respondent

MOTION TO DISMISS PETITION FOR ARBITRATION AND BRIEF IN SUPPORT OF MOTION

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Midcontinent Communications, a South Dakota Partnership,	)	
	)	Case No. PU-11-543
Petitioner,	)	
vs.	)	
	)	**Motion to Dismiss**
Missouri Valley Communications, Inc.,	)	**Petition for Arbitration**
	)	**and**
Respondent.	)	**Brief in Support of Motion**

Missouri Valley Communications, Inc. moves to dismiss Midcontinent Communications' November 14, 2011 petition for arbitration of its request for interconnection with Missouri Valley for the purpose of exchanging local telecommunications traffic in the Williston exchange, on two grounds, both based on Missouri Valley's status as a rural telephone company exempt from duties of interconnection under the Communications Act.

1. Res judicata bars Midcontinent from relitigating in 2011 its request for interconnection in Missouri Valley's Williston exchange after litigation in 2008 in which the Commission ordered "The rural exemption under 47 USC §251(f)(1)(A) for interconnection in Missouri Valley's Williston exchange is not terminated." Order, PSC Case No. PU-08-61. The Commission's Order was affirmed in Midcontinent's action in Federal District Court for judicial review of the Order.

2. Midcontinent's 2011 petition for arbitration requests action from the North Dakota Public Service Commission that is not authorized under the Communications Act or related provisions of the North Dakota Century Code. Missouri Valley is not obliged under Act § 251 to interconnect with Midcontinent and interconnection may not be compelled under § 252(b) for the purpose of exchanging local telecommunications traffic in the Williston exchange.

Missouri Valley is exempt from § 251(c)(2) interconnection duties, under § 251(f)(1)(A). There is a statutory procedure, § 251(f)(1)(B), for a CLEC to obtain § 251(c)(2) interconnection with an exempt rural ILEC. There is no statutory procedure other than § 251(f)(1)(B) for Midcontinent to obtain interconnection in Missouri Valley's Williston exchange. Section 252(b) does not authorize the Commission to compel interconnection where there is no duty of interconnection. Where there is no duty to interconnect because of the exemption there is nothing to arbitrate. Arbitration is not authorized as a procedure for Midcontinent to obtain interconnection with Missouri Valley for the purpose of exchanging local telecommunications traffic in the Williston exchange.

This motion to dismiss raises issues of law that are not issues open to arbitration under Act § 251(b) and NDCC § 49-21-01.7.

The Parties

Midcontinent is a South Dakota general partnership registered with the Commission to provide local exchange telecommunications services. Midcontinent is a competitive local exchange company (CLEC) and is a reseller of telecommunications service in the Williston exchange. Midcontinent has a certificate of public convenience and necessity to provide facilities based competitive local exchange telecommunications services throughout North Dakota, subject to the rights of rural telephone companies under 47 U.S.C. § 251(f). (Orders, Cases No. PU-04-546 and PU-04-638.)

Missouri Valley is a North Dakota corporation authorized by the Commission under a certificate of public convenience and necessity to provide local exchange telecommunications services in the Williston North Dakota exchange. Missouri Valley is an incumbent local

exchange carrier (ILEC) and a rural telephone company. Missouri Valley offers the services that are supported by federal universal service support mechanisms and is designated as an eligible telecommunications carrier in the Williston exchange area. (Orders, Cases No. PU-2779-02-451 and 452.)

Preliminary Statement

On June 14, 2011, Midcontinent requested interconnection between Missouri Valley and Midcontinent in Williston, ND for the purpose of exchanging local telecommunications traffic in the Williston exchange. (Exhibit 1)

On July 6, 2011, Missouri Valley declined Midcontinent's request. Missouri Valley explained that it relied on its rural exemption under § 251(f)(1)(A) of the Act, exemption from the duty of interconnection under § 251(c)(2) that would oblige Missouri Valley if it were not exempt under § 251(f)(1)(A), and on the Commission's Order in Case No. PU-08-61. (Exhibit 2, herein the "Rural Exemption Order")

On July 12, 2011, Midcontinent sent another letter to Missouri Valley about the request for interconnection. (Exhibit 3)

On August 8, 2011, Midcontinent requested (by-e-mail) that the Commission mediate Midcontinent's request. With the assistance of mediator Steven Storslee, Midcontinent and Missouri Valley participated in mediation on September 26, 2011. The mediation did not lead to a resolution of Midcontinent's request for interconnection.

On November 14, 2011, Midcontinent filed a petition for the Commission to arbitrate its request and compel Missouri Valley to interconnect with Midcontinent, citing *§§ 251(a) and* 252(b) of the Act. (2011 Petition).

The 2011 Petition is not the first time Midcontinent petitioned the Commission to require Missouri Valley to interconnect with Midcontinent for the purpose of exchanging local telecommunications traffic in Williston. In November, 2007 Midcontinent requested facilities based interconnection for the Williston, North Dakota exchange. Missouri Valley denied the request, relying on its rural exemption under § 251(f)(1)(A). In 2008 Midcontinent requested the Commission to conduct an inquiry under § 251(f)(1)(A) and (B) for the purpose of determining whether to terminate Missouri Valley's rural exemption from providing the interconnection requested by Midcontinent. (Exhibit 4) After a hearing the Commission ordered "The rural exemption under 47 USC §251(f)(1)(A) for interconnection in Missouri Valley's Williston exchange is not terminated." Rural Exemption Order, Case No. PU-08-61. Exhibit 2.

In 2009, Midcontinent commenced an action in Federal District Court for judicial review of the Commission's Order in Case No. PU-08-61. The Court dismissed Midcontinent's action, effectively affirming the Commission's decision and order. Order, United States District Court, DND, Case No. 1:09-cv-017, Apr. 15, 2010. (Exhibit 5)

Interconnection Duties under the Telecommunications Act

In 1996, Congress enacted the Telecommunications Act of 1996, amending the 1934 Communications Act and codified as 47 U.S.C. §§ 151 et. seq. (Sometimes referred to herein as the "Act" or the "federal act," as defined by N.D.C.C. § 49-21-01(5).) The amended Act includes provisions to develop competition in local telecommunications service by requiring interconnections and includes provisions to exempt rural telephone companies from some interconnection duties.

Under the Act, certain duties are imposed on all "telecommunications carriers" (Act § 153(44)) including "local exchange carriers" (LECs). "The term 'local exchange carrier' means any person that is engaged in the provision of telephone exchange service or exchange access." Act § 153(26). "The term 'telephone exchange service' means (A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service." Act § 153(47).

("Exchange access" is the service that local exchange carriers provide to interexchange carriers/long distance companies in order that long distance calls can be originated by a subscriber in one local exchange and terminated at the location of a subscriber in a distant local exchange. Act § 153(16). Exchange access is not involved in this case.)

There are two kinds of LECs, incumbent local exchange carriers (ILECs) and competitive local exchange carriers (CLECs). Section 251(h)(1) defines ILECs as LECs that provided local telephone exchange service before enactment of the 1996 amendments. CLEC is a common acronym for "competitive local exchange carrier (or company)", a term not defined in federal statutes or regulations. It is defined in North Dakota's Administrative Code. "'Competitive local exchange company' means any telecommunications company providing local exchange service, other than an incumbent local exchange carrier...." ND Admin. Code § 69-09-05-00.1.1. ILECs are sub-categorized between ILECS that are and are not "rural telephone companies." Act § 153 (37). CLECs and rural ILECs are also sub-categorized between those that do and do

not provide video programming. § 251(f)(1)(C).

Missouri Valley and Midcontinent are both LECs. Midcontinent is a CLEC that provides video programming. Missouri Valley is an ILEC and is also a rural telephone company that does not provide video programming.

Act § 251 provides a graduated set of interconnection requirements. Section 251(a) sets forth general duties applicable to all telecommunications carriers, not only LECs, including the duty "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers." 47 CFR § 51.5 defines "interconnection" as the linking of two networks for the mutual exchange of traffic.

Under § 251(c) ILECs are subject to additional duties including CLEC/ILEC interconnection, "The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network - (A) for the transmission and routing of telephone exchange service and exchange access...." §251(c)(2). Under § 251(c)(1) an ILEC and a CLEC that requests interconnection are obliged to negotiate in good faith in accordance with § 252 the particular terms and conditions of interconnection agreements.

The Rural Exemption from Interconnection Duties

Section 251(f)(1)(A) (the "rural exemption") provides "EXEMPTION - Subsection (c) of this section shall not apply to a rural telephone company until . . . (i) a CLEC makes a bona fide request for interconnection and (ii) the State commission determines under § 251(f)(1)(B) procedures and standards that the exemption should be terminated. ILECs that are rural telephone companies are exempt from all duties under §251(c), including the §251(c)(2) duty to

interconnect with CLECs for the transmission and routing of telephone exchange service."

The exemption does not apply with respect to a CLEC/ILEC interconnection request from a cable operator providing video programming that seeks interconnection with a rural telephone company that provides video programming. § 251(f)(1)(C)."Midcontinent is a cable operator, but Missouri Valley is not, so the exemption remains in effect unless it is terminated under Section 251(f)(1)(B)." Rural Exemption Order, ¶ 11.

Midcontinent's 2011 petition and Missouri Valley's motion to dismiss involve all these principles and provisions of the Act, principally the § 251(a) and (c)(2) interconnection duties, the arbitration provisions of § 252(b) relied on by Midcontinent, and the rural exemption provisions of § 251(f)(1)(A) and (B).

Missouri Valley also relies on the 2008 Rural Exemption Order where the Commission ordered "The rural exemption under 47 USC §251(f)(1)(A) for interconnection in Missouri Valley's Williston exchange is not terminated." (PSC Case No. PU-08-61) and on the Federal Court Order (DND, Case No. 1:09-cv-017, Apr. 15, 2010) that affirmed the Commission's decision and order. Exhibits 2 and 5. Res judicata bars Midcontinent from relitigating its request for interconnection in Missouri Valley's Williston exchange.

Procedure and Jurisdiction

Procedures for the Commission to address a CLEC's request for interconnection are provided by a combination of federal and state law. The federal act provides for administration of Act §§ 251 and 252 by "State commissions" (Act § 153(41)) but does not directly delegate jurisdiction to the Commission because the Commission is a state agency that receives its jurisdiction only from the North Dakota Legislature. NDCC § 49-21-01.7, subsections 8, 9 and

11 empower the Commission to administer the provisions of Act sections §§ 251 and 252 that are involved in this case. The power is exercised under the Administrative Agencies Practices Act, NDCC Ch. 28-32 and the North Dakota Administrative Code. The Administrative Code includes provisions specific to arbitration proceedings under § 252 of the federal act, ND Admin. Code Ch. 69-02-10.

When a CLEC requests § 251(c)(2) CLEC/ILEC interconnection with a non-rural non-exempt ILEC, the Act provides for a State commission to mediate or arbitrate particular terms and conditions of an interconnection, under § 252(b). However achieved, by voluntary negotiation, mediation or arbitration, an interconnection agreement made in the absence of an exemption must be submitted to a State commission for approval. § 252(a), (b), (c) and (e).

Where a CLEC requests § 251(c)(2) CLEC/ILEC interconnection with a rural ILEC that is exempt under § 251(f)(1)(A), § 251(f)(1)(B) provides a procedure for the CLEC to request the State commission to terminate the rural ILEC's exemption from § 251(c)(2) interconnection. A rural ILEC's exemption from the § 251(c)(2) interconnection duty is in effect unless and until the State commission determines under statutory standards and procedures that the exemption should be terminated. If a rural ILEC's exemption is terminated under § 251(f)(1)(B), the State commission shall establish an implementation schedule for compliance with the request for interconnection.

§ 251(f)(1)(B) provides the only statutory procedure for Midcontinent, a CLEC, to obtain a § 251(c)(2) CLEC/ILEC interconnection with Missouri Valley, a rural ILEC exempt under § 251(f)(1)(A).

The issues

Missouri Valley understands Midcontinent asserts its June 14, 2011 request for interconnection is made under Act § 251(a), not under § 251(c), and asserts Missouri Valley's rural exemption under § 251(f)(1)(A) does not apply to § 251(a). Exhibits 1, 3, and 2011 Petition.

Missouri Valley asserts § 251(a) does not include a duty of direct interconnection for the exchange of telecommunications traffic.

Missouri Valley asserts Midcontinent's request for an interconnection is a request for CLEC/ILEC interconnection under § 251(c)(2), interconnection that Missouri Valley is exempt from providing under § 251 (f)(1)(A), the "rural exemption."

Midcontinent requested a "direct interconnection ...in the Williston exchange ... for the purpose of exchanging local telecommunications traffic." Midcontinent's request/letter of June 14, 2011, Exhibit 1. The words that Midcontinent used to describe its requested interconnection are equivalent to the words of § 251(c)(2): "interconnection with the local exchange carrier's network--(A) for the transmission and routing of telephone exchange service." Therefore, Missouri Valley declined Midcontinent's request, relying on the rural exemption from § 251(c)(2) CLEC/ILEC interconnection.

Midcontinent describes the issue raised in exhibit A of its 2011 Petition for arbitration. Midcontinent seeks a "facilities based interconnection 'for the purpose of exchanging local traffic' under Section 251(a) of the Communications Act. . . ." Midcontinent petition at 2, quoting its June 14, 2011 letter request for interconnection. Midcontinent's statement of the issue is incomplete. The foundation of Midcontinent's petition for arbitration is its June 14 letter (Exhibit 1) that "constitutes a formal request for interconnection under Sections 251 (a), 251(b)

and 252 of the Communications Act..." "for the purpose of exchanging local telecommunications traffic..." in the Williston exchange. The complete statement of the issue is whether Missouri Valley is obligated under Act § 251(a) to interconnect with Midcontinent for the purpose of exchanging local telecommunications traffic in the Williston exchange. That is not the only issue. Midcontinent's 2011 Petition also raises the issue whether its request for interconnection is an authorized subject of arbitration under Act § 252(b).

Midcontinent's June 14, 2011 letter states: "In connection with the exchange of traffic and interconnection Midcontinent will also require number portability. It is our understanding that Missouri Valley already has implemented number portability...." Exhibit 1. It is true that Missouri Valley has implemented number portability. Number portability, a LEC duty under § 251(b)(2) is not an issue under the 2011 Petition. Midcontinent and Missouri Valley have a negotiated resale agreement with number portability under § 251(b)(2). Order, Case No. PU-04-638; see also Simmons testimony at 9 in Case No. PU-08-61. In addition to the resale agreement, Midcontinent's and Missouri Valley's facilities and equipment are interconnected indirectly, an alternate to direct interconnection under § 251(a).

The parties' positions are based on differing legal interpretations of interconnection duties and procedures under §§ 251 and 252 of the Act. Whereas negotiations and arbitrations under Act §§ 251 and 252 address "the particular terms and conditions of agreements to fulfill [interconnection] duties..." (§ 251(c)(1)), the point in conflict arising from Midcontinent's request for interconnection is a legal issue, whether Missouri Valley has a duty under Act § 251(a) to interconnect with Midcontinent for the purpose of exchanging local telecommunications traffic in the Williston exchange and whether interconnection may be compelled under § 252(b). These issues of law have no middle ground amenable to negotiation

or mediation or arbitration. These are matters of law that are not subject to arbitration under Act § 252(b) and NDCC § 49-21-01.7.

Midcontinent asserts Act § 252(b) and NDCC § 49-21-01.7 authorize the Commission to compel Missouri Valley to comply with Midcontinent's June 14, 2011 request for interconnection for the exchange of local telecommunications traffic in Missouri Valley's Williston exchange.

Midcontinent's business motivations for seeking interconnection, explained at pages 2-4 of its petition, are not issues for arbitration. Midcontinent's petition refers to delays in service connections as one reason for its arbitration request. Midcontinent's petition acknowledges it is a Missouri Valley customer, purchasing local telecommunications services at wholesale for resale to Midcontinent's cable TV customers. Timing of service connections under the existing resale agreement is not an issue in an arbitration proceeding for a new interconnection agreement, as indicated by its absence from Midcontinent's attachment A. Missouri Valley is in full compliance with its obligations to Midcontinent under the resale agreement. If Midcontinent has any complaints about the quality of service provided by Missouri Valley or if it believes it does not receive the same quality of service as Missouri Valley provides to its retail customers, it may file a complaint under NDCC §§ 49-21-07, 10.2 and 10.3. Missouri Valley cannot discriminate in favor of Midcontinent. As indicated by the record in case No. PU-08-61, Missouri Valley has responsibilities throughout the Williston exchange area including areas where Midcontinent chooses not to install its cable TV facilities.

Missouri Valley asserts the arbitration provisions under Act § 252(b) and NDCC § 49-21-01.7 do not authorize CLEC/ILEC interconnection to be compelled because Missouri Valley's § 251(f)(1)(A) rural exemption from § 251(c)(2) interconnection has not been terminated. Under §

251(f)(1)(A), Missouri Valley's rural exemption from § 251(c)(2) CLEC/ILEC interconnection is in effect "until" the State Commission were to determine under § 251(f)(1)(B) procedures that the exemption should be terminated. There is no statutory procedure other than § 251(f)(1)(B) for Midcontinent to obtain CLEC/ILEC interconnection with Missouri Valley.

All the more, arbitration under § 252(b) is not an available procedure for Midcontinent to obtain CLEC/ILEC interconnection in Missouri Valley's Williston exchange because Midcontinent's request for interconnection was denied in prior § 251(f)(1)(B) proceedings between the parties. The 2008 Rural Exemption Order bars Midcontinent from relitigating in 2011 its request for CLEC/ILEC interconnection with Missouri Valley for the purpose of exchanging local telecommunications traffic in the Williston exchange, under res judicata.

Argument

1. Midcontinent is barred from relitigating its request for CLEC/ILEC interconnection with Missouri Valley

Under res judicata principles, Midcontinent is barred from relitigating in 2011 its previous request for CLEC/ILEC interconnection with Missouri Valley for the purpose of exchanging local telecommunications traffic in the Williston exchange.

In November 2007, Midcontinent requested "a facilities based interconnection agreement with number portability for the Williston, North Dakota exchange" and in 2008 commenced proceedings under § 251(f)(1)(A) and (B) seeking termination of Missouri Valley's rural exemption from CLEC/ILEC § 251(c)(2) interconnection duties. Exhibit 4. The outcome was the Commission's Rural Exemption Order that "The rural exemption under 47 USC §251(f)(1)(A) for interconnection in Missouri Valley's Williston exchange is not terminated."

Order, Case No. PU-08-61, Exhibit 2. The request for interconnection in 2008 is substantially identical to the request made in 2011, its June 14 letter that "constitutes a formal request for interconnection under Sections 251 (a), 251(b) and 252 of the Communications Act..." "for the purpose of exchanging local telecommunications traffic..." in the Williston exchange. Exhibit 1.

Res judicata, also known as claim preclusion or collateral estoppel, is a basic principle governing civil litigation. A claim once litigated cannot be relitigated. The principle's rationale has two basic points. Parties to concluded litigation should be able to continue in their lives and enterprises, secure that past judgments will not be undone by repetitious litigation. Courts and agencies should be able to attend to resolution of current cases, free of burdens imposed by repetitious litigation, past cases being relitigated by losers. A disappointed litigant might appeal a decision, but after appeal rights have either expired or were exercised and the decision affirmed, the losing party's loss is final. No rematch after a defeat fairly suffered. Astoria Federal Savings and Loan Association v Solimino, 501 US 104, at 107,111 S.Ct. 2116 (1991).

> "Res judicata, or claim preclusion, prevents relitigation of claims that were raised, or could have been raised, in prior actions between the same parties or their privies. Thus, res judicata means a valid, existing final judgment from a court of competent jurisdiction is conclusive with regard to claims raised, or those that could have been raised and determined, as to [the] parties and their privies in all other actions. Res judicata applies even if subsequent claims are based upon a different legal theory.
>
> 'Under res judicata principles, it is inappropriate to rehash issues which were tried or could have been tried by the court in prior proceedings.' Res judicata or claim preclusion 'bars courts from relitigating claims in order to promote finality of judgments, which

increases certainty, avoids multiple litigation, wasteful delay and expense, and ultimately conserves judicial resources.' ....

"'[R]es judicata applies even though the subsequent claims may be based upon a different legal theory.' 'It matters not that the substantive issues were not directly decided in the prior action; the key is that they were capable of being, and should have been, raised as part of the [prior] proceeding.'" Missouri Breaks v Burns, 2010 ND 221, [¶¶ 10, 11], 791 NW2d 33, (2010) (citations omitted).

The common law doctrine of res judicata applies to decisions made by administrative agencies under both United States Supreme Court and North Dakota Supreme Court precedents. Legislatures may modify the application of res judicata to agencies' decisions. Administrative res judicata is presumed in the absence of a legislative intent to the contrary.

"We have long favored application of the common law doctrines of collateral estoppel (as to issues) and *res judicata* (as to claims) to those determinations of administrative bodies that have attained finality.

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....

Thus, where a common law principle is well established, as are the rules of preclusion, the courts may take it as a given that Congress has legislated with an expectation that the principle will apply except when a statutory purpose to the contrary is evident." Astoria, 501 US at 107-108. (Citations omitted.)

The common law doctrine of res judicata applies to decisions made by North Dakota's administrative agencies as well.

"The doctrine generally provides that [an agency's] issuance of a final order after a formal adjudicative hearing bars [the agency] 'from later raising issues in new proceedings which could have been resolved in the prior formal adjudicative proceeding that had become final.' The doctrine is applied more 'circumspectly' than judicial res judicata, considering '(1) the subject matter decided by the administrative agency, (2) the purpose of the administrative proceeding, and (3) the reasons for the later proceeding.' Administrative res judicata must be applied in light of N.D.C.C. § 65-05-04, which grants WSI continuing jurisdiction to review an award of benefits, and provides that WSI 'at any time, on its own motion or on application, may review the award, and in accordance with the facts found on such review, may end, diminish, or increase the compensation previously awarded.' Landrum v Workforce Safety and Insurance, 2011 ND 108, ¶¶ 12-13 798 N.W.2d 669 (ND 2011)(citations omitted); Baier v. North Dakota Workers Compensation Bureau , 2000 ND 78, ¶ 22, 609 N.W.2d 722 (agency's right to consider award to injured worker at "any time" does not preclude application of res judicata to prevent agency from relitigating same issue).

Administrative res judicata is not only a common law doctrine, res judicata also applies to the Commission's decisions as a matter of statutory law. NDCC § 49-05-08 provides: "In all collateral actions or proceedings, the orders and decisions of the commission which have become final shall be conclusive."

Under NDCC § 49-05-08 and common law res judicata, the 2008 Rural Exemption Order is conclusive, precluding relitigation of Midcontinent's request for interconnection in the Williston exchange. NDCC § 49-05-09 is similar to NDCC § 65-05-04 affecting the WSI agency. NDCC § 49-05-09 authorizes the Commission to rescind, alter or amend any decision made by

it. Although the Commission has some discretionary authority under N.D.C.C. § 49-05-09 to review previous decisions, that statutory authority does not mean the Commission can or must relitigate issues that were or should have been decided in a prior formal adjudicative proceeding. The statute conferring authority on the Commission to review previous decisions does not entitle Midcontinent to request or demand the Commission to exercise that authority to relitigate issues that Midcontinent should have raised in the 2008 formal adjudicative hearing. Baier, supra.

These recent decisions of the United States and North Dakota Supreme Courts show that res judicata applies in both jurisdictions to the Commission's decisions under the federal act. Nothing in the Act or in North Dakota's statutes provides or implies that the Commission's decisions under the Act should not have res judicata effect to preclude relitigation. Under state and federal law common law and North Dakota statutes, res judicata bars Midcontinent from raising issues in its 2011 Petition that were or could have been resolved in 2008 in Case No. PU-08-61.

A litigant's claim is barred by res judicata if four "elements" connect the first and second actions.

1. A final decision on the merits in the first action by a court or agency of competent jurisdiction;

2. The second action involves the same parties, or their privies, as the first;

3. The second action raises an issue actually litigated or which should have been litigated in the first action;

4. An identity of the causes of action.

Where all four elements are present, res judicata applies to prevent relitigation of claims made or that could have been made in the first action. Missouri Breaks, supra, ¶ 12.

All these elements are present, connecting the first action, Case PU-08-61, and the second action, Case No. PU-11-543, so that the 2011 Petition is barred.

1. The first action was finally decided by an agency and by a court of competent jurisdiction. The Commission's jurisdiction is not in doubt. Act § 251(f)(1)(A) and (B), and NDCC § 49-21-01.7 subd. 11. Exhibit 5 shows the Rural Exemption Order's finality in an administrative adjudicative proceeding. § NDCC 28-32-21, 28-32-39. Midcontinent did not exercise its statutory right under NDCC § 28-32-42 to appeal the Rural Exemption Order for judicial review in North Dakota's courts. Instead, Midcontinent commenced an action in federal district court for judicial review of the Rural Exemption Order. The federal court's jurisdiction is not in doubt.

If finality can be made more final, that happened to the Rural Exemption Order in the first action. Midcontinent's federal court action was dismissed, affirming the PSC's Order. Exhibit 5. Midcontinent did not exercise its federal statutory right to appeal to a higher federal court, so the Federal District Court's Order is final. The Rural Exemption Order is not "only" an agency decision. The Commission's Order in the first action case has acquired and is reinforced by judicial res judicata.

2. The parties in both actions are the same, Midcontinent Communications as petitioner and Missouri Valley Communications, Inc. as respondent.

3. The second action in 2011 raises an issue actually litigated or which could have been litigated in the first action in 2008, whether Missouri Valley has a duty under Act § 251(a) to interconnect with Midcontinent for the exchange of local telecommunications traffic in the Williston exchange.

4. The claims are identical in both actions. In both actions Midcontinent's claimed rights under § 251 of the Act, rights to interconnection with Missouri Valley in the Williston exchange for the exchange of local traffic.

Midcontinent describes the issue raised in the second action in its 2011 Petition. Midcontinent's statement of the issue is partially accurate, but incomplete. The foundation of Midcontinent's petition for arbitration is its June 14 letter that "constitutes a formal request for interconnection under Sections 251 (a), 251(b) and 252 of the Communications Act..." "for the purpose of exchanging local telecommunications traffic..." in the Williston exchange. Exhibit 1. The complete statement of the issue raised in the second action is whether Missouri Valley is obligated under Act § 251(a) to interconnect with Midcontinent for the purpose of exchanging local telecommunications traffic in the Williston exchange. This issue raised in the second action is a legal theory that Midcontinent could have and should have raised in the first action.

The foundation of the first action was Midcontinent's November 14, 2007 request for facilities based interconnection for the Williston, North Dakota exchange. Missouri Valley declined the request, relying on the rural exemption under Act § 251(f)(1)(A). Midcontinent commenced proceedings under Act § 251(f)(A) and (B) in 2008, asserting two alternative theories: that the Commission should find that Missouri Valley had waived its rural exemption from interconnection or that the Commission should terminate Missouri Valley's exemption from interconnection. Exhibit 4.

Midcontinent had another alternative theory available in 2008. Midcontinent could have claimed that its November 14, 2007 request served not only as the foundation of proceedings under § 251(f)(1)(A) and (B), it might also have asserted in 2008 – as it does now in 2011 – that its letter requesting interconnection "constitutes a formal request for interconnection under §§

251(a), 251(b) and 252 of the Communications Act...." Exhibit 1. Midcontinent made no claim under § 251(a) in the 2008 first action when it was an available claim.

> "'[R]es judicata applies even though the subsequent claims may be based upon a different legal theory.' 'It matters not that the substantive issues were not directly decided in the prior action; the key is that they were capable of being, and should have been, raised as part of the [prior] proceeding.'" Missouri Breaks v Burns, 2010 ND 221, [¶ 11], 791 NW2d 33 (2010).

Protests from Midcontinent are predictable. Midcontinent might argue about the key point – that its 2011 claim under § 251(a) was capable of being raised in the prior proceeding. Midcontinent might protest its § 251(a) claim could not have been raised in 2008, it could be raised only after the FCC's 2011 Declaratory Ruling, FCC 11-83 (herein Ruling) that clarified the availability of arbitration procedures under § 252(b) to enforce rural ILECs' duties under § 251(a).

The essence of the predicted protest is: the idea of requesting interconnection for the purpose of exchanging local telecommunications traffic and claiming the request is made under § 251(a) instead of under § 251(c)(2) and invoking arbitration proceedings under § 252(b) to litigate the request is an idea did not occur to Midcontinent in 2008; the idea is a new theory inspired by the Ruling, an idea that Midcontinent could not conceive in 2008.

The § 251(a) + § 252(b) idea is not a new creation given birth by the FCC Ruling in May of 2011. The FCC did not create new duties affecting rural ILECs or new procedures for their enforcement. Sections 251(a) and 252(b) of the Act have not been amended from 2008 to 2011. No new regulations affecting either section were issued or old ones amended by the Ruling. The 2011 Ruling was an order declaring rights of parties to on-going litigation in other states,

explained in an opinion that clarified statutory procedures and provided guidance regarding the scope of sections §§ 251 and 252. See Ruling ¶¶ 1, 2 and 28. The Ruling may be a precedent for future cases where there are issues about the interaction of §§ 251 and 252, but the Ruling does not justify or authorize relitigation of past finalized cases.

The § 251(a) + § 252(b) idea occurred to CRC Communications and Time-Warner in their endeavors to obtain interconnections with rural ILECs in Maine dating back to 2008, before the July 2008 hearing in Case No. PU-08-61. See Ruling ¶ 8. The § 251(a) + § 252(b) idea was alive and active in other States' commissions' proceedings and in some federal court actions before Midcontinent commenced proceedings in 2008. See Ruling ¶¶ 10 and 18 and notes 33 and 63.

Midcontinent had the opportunity to make a claim for interconnection under §§ 251(a) and 252(b) in its 2008 action to obtain interconnection with Missouri Valley in Williston. The record in the first action in 2008 shows Midcontinent was not inattentive to § 251(a). Midcontinent specifically addressed a potential alternative claim for interconnection under § 251(a). See Midcontinent's August 1, 2008 brief in case No. PU-08-61, footnote 29, page 14. See also the text at pages 5-7 of its November 4, 2008 Petition for Reconsideration of the Rural Exemption Order in Case No. PU-08-61 and Midcontinent's October 9, 2009 brief in its federal court action, pp. 15-16, where Midcontinent repeated arguments that § 251(a) affected issues under § 251(f)(1)(B). Midcontinent did not pursue the § 251(a) claim in 2008 with the same zeal as did CRC and TWC in the Maine cases, but Midcontinent certainly had the opportunity to assert a claim under § 251(a) in its first action seeking interconnection in Williston. It is not credible in 2011 that Midcontinent could not have made the § 251(a) claim in 2008.

Midcontinent's July 12, 2011 letter (Exhibit 3) explaining its June 24 request asserts that the first action "addressed only the rural exemption" from § 251(c) interconnection and is "not relevant" to the second action where Midcontinent seeks interconnection under § 251(a). That posturing is Midcontinent's way of denying that Midcontinent could have asserted a claim for interconnection under § 251(a) as another alternative theory in support of its request for interconnection in 2008, each theory independent of the other two. Midcontinent could have argued three theories in 2008.

1. Waiver of the rural exemption under § 251(f)(1)(A).

2. Terminate Missouri Valley's rural exemption under § 251(f)(1)(A) and (B) because interconnection is not unduly economically burdensome.

3. Compel interconnection under § 251(a) because that is a duty under the Act without regard to Missouri Valley's rural exemption or issues under § 251(f)(1)(B).

Midcontinent asserted two theories in 2008. Midcontinent, not Missouri Valley or the Commission, limited Case No. PU-08-61 to "address only the rural exemption." Midcontinent did not assert the § 251(a) theory that was as much available to it as it was to CRC and TWC in the Maine cases. Issues under § 251(f)(1)(B) might or might not be relevant to an alternative claim under § 251(a), but Midcontinent seems to miss the truly relevant point. The truly relevant point is that Midcontinent did not make the § 251(a) claim that was available to it in 2008. The § 251(a) claim could have been made in 2008, was not made, and is barred from being resurrected in 2011.

The third element is the heart of res judicata, subjecting litigants to a use it or lose it discipline. It matters not why issues belatedly asserted in the second action were not raised in the first. Issues that could have been raised in the first action but were not used are lost.

Element 3 of the res judicata doctrine is similar to "waiver" concepts argued by Midcontinent in Case No. PU-08-61. Midcontinent had the opportunity to assert a claim under § 251(a) in Case No. PU-08-61, did not make that claim, and it is barred from relitigation in 2011.

Had Midcontinent claimed in 2008 that Missouri Valley was obliged under § 251(a) to interconnect for the purpose of exchanging of local telecommunications traffic, the claim would have been resisted by Missouri Valley, litigated and argued with the same energy as the parties actually expended on the two issues that Midcontinent raised in the first action. Missouri Valley would have asserted in 2008 that the claim under § 251(a) lacks merit for the same reasons it asserts in 2011 under the second ground for dismissal of Midcontinent's 2011 Petition. But whether or not Midcontinent's 2011 claim under § 251(a) has merit is irrelevant to the res judicata defense. It matters not. The claim could have been made in 2008, was not made, and is barred from being relitigated in 2011.

Res judicata element 4 is present; the claims are identical in both actions. In both actions Midcontinent's claims rights under § 251 of the Act, rights for interconnection with Missouri Valley for the exchange of local traffic in the Williston exchange.

The first action commenced with Midcontinent's November 7, 2007 letter requesting "a facilities based interconnection agreement" for the Williston exchange." Exhibit 4. Throughout the proceedings, Midcontinent testified and argued about facilities based interconnection. See, e.g. written testimony of its senior vice president Simmons at pp. 3, 5 and 9-11, of its expert witness/advocate Gates at p.11-13, and its entire August 1, 2008 post hearing brief in Case No. PU-08-61. The findings in the Rural Exemption Order included ¶10, "Midcontinent has specifically requested facilities-based interconnection with local number portability." and findings ¶¶ 34 and 35 that interconnection is technically feasible.

In the second action, Midcontinent requested interconnection "for the purpose of exchanging local telecommunications traffic." Midcontinent proposed "that the parties interconnect at Williston using two-way direct interconnection ... using either electrical facilities ... or via optical facilities." (Midcontinent's request/letter of June 14, 2011, Exhibit 1.)

The words of Midcontinent's requests in the first and second actions show the two actions present identical claims for interconnection with Missouri Valley's local exchange network in Williston. Not only are the two claims identical with each other, they are also connected by the words of the Act. Both of Midcontinent's requests for interconnection are the equivalent of a request for § 251(c)(2) "interconnection with the local exchange carrier's network--(A) for the transmission and routing of telephone exchange service."

Midcontinent's 2011 request for interconnection masquerades as a request for interconnection under § 251(a) where it is in reality a request for § 251(c)(2) CLEC/ILEC interconnection. The interconnection requested by Midcontinent in 2011 is not a new claim. The 2011 request uses a few different words to repeat the old claim. The interconnection that Midcontinent requests in 2011 is the same as its 2007 request litigated in 2008. This reality shows it is true not only that the two actions present identical claims (element 4), it is also true that the interconnection that Midcontinent requests in 2011 was actually litigated in 2008 (element 3), litigated for what it was, a request for § 251(c)(2): "interconnection with the local exchange carrier's network--(A) for the transmission and routing of telephone exchange service." It was a claim made in 2008 that cannot be relitigated in 2011.

Re-litigation is barred not only by the common law doctrine of administrative res judicata and by the conclusive statutory rule of NDCC § 49-05-08, but also because Midcontinent sought

review of the 2008 Rural Commission Order in federal district court. Because that court issued the more final order in the first action (Exhibit 5), judicial res judicata bars relitigation.

When the four element analysis is completed, the bottom line question is whether the second action might conceivably have any effect to alter the outcome of the first action. If the answer is yes, then res judicata applies. Missouri Breaks, supra. That is obviously the purpose of Midcontinent's 2011 Petition, to alter the outcome of the first action in 2008 where the Commission ordered "The rural exemption under 47 USC § 251(f)(1)(A) for interconnection in Missouri Valley's Williston exchange is not terminated." Rural Exemption Order, Exhibit 2. In its second action in 2011, Midcontinent seeks an interconnection in Missouri Valley's Williston exchange for the purpose of exchanging local telecommunications traffic, asserting rights under Act § 251; it seeks the interconnection that was denied in the first action in 2008, also under Act § 251.

Midcontinent's 2011 Petition seeks a rematch after a defeat fairly suffered in 2008. A more apt case of res judicata is difficult to imagine.

2. Arbitration is not an authorized procedure for Midcontinent to obtain CLEC/ILEC interconnection with Missouri Valley.

Assuming arguendo that Midcontinent's 2011 Petition is not barred by res judicata, arbitration is not an authorized procedure for Midcontinent to obtain interconnection with Missouri Valley for the purpose of exchanging local telecommunications traffic in the Williston exchange.

Midcontinent's 2011 Petition requests the Commission to compel CLEC/ILEC interconnection under § 252(b), despite the Commission's Rural Exemption Order (Exhibit 2) in

2008 "The rural exemption under 47 USC § 251(f)(1)(A) for interconnection in Missouri Valley's Williston exchange is not terminated." Midcontinent apparently believes it has discovered an alternative procedure - the §251(a) + § 252(b) theory - to obtain a CLEC/ILEC interconnection with Missouri Valley for the purpose of exchanging local telecommunications traffic – and it cites the FCC's recent Declaratory Ruling, FCC 11-83 (herein Ruling) in support of its 2011 Petition. Midcontinent's 2011 Petition is addressed first by review of statutory provisions and second by review of the Ruling.

A. Arbitration is not an authorized procedure under the Act for Midcontinent to obtain CLEC/ILEC interconnection with Missouri Valley.

Act § 251 provides a graduated set of interconnection requirements. Section 251(a) sets forth general duties applicable to all telecommunications carriers, not only LECs, including the duty to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers. § 251(b) provides duties affecting only LECs. § 251(b) duties do not include interconnection but may affect terms and conditions of interconnections.

Under § 251(c) ILECs are subject to additional duties including CLEC/ILEC interconnection, "The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network - (A) for the transmission and routing of telephone exchange service and exchange access...." § 251(c)(2).

Under § 251(c)(1) an ILEC and a CLEC that requests interconnection are obliged to negotiate in good faith in accordance with § 252 the particular terms and conditions of interconnection agreements. Section 252 provides for voluntary negotiation, mediation and

compulsory arbitration to resolve open issues that are unresolved. Section 252(b)(4)(B) empowers State commissions to impose "appropriate conditions."

Under § 251(f)(1)(A) (the "rural exemption"), ILECs that are rural telephone companies are exempt from all duties under §251(c). Section 251(f)(1)(A) provides "EXEMPTION - Subsection (c) of this section shall not apply to a rural telephone company until..." (i) a CLEC makes a bona fide request for interconnection and (ii) the State commission determines under § 251(f)(1)(B) procedures and standards that the exemption should be terminated. ILECs that are rural telephone companies are exempt from the §251(c)(2) duty to interconnect with CLECs for the transmission and routing of telephone exchange service and are also exempt from the duty to negotiate terms and conditions of interconnection agreements. The rural exemption from the §251(c)(2) CLEC/ILEC interconnection duty is reinforced by exemption from the duty to negotiate interconnection agreements where a CLEC requests interconnection for the purpose of exchanging local telecommunications traffic.

The rural exemption from CLEC/ILEC interconnection is subject to termination. Under § 251(f)(1)(A) "Subsection (c) of this section shall not apply to a rural telephone company until..." (i) a CLEC makes a bona fide request for interconnection and (ii) the State Commission determines under§ 251(f)(1)(B) procedures that the exemption should be terminated. "Until" a rural telephone company's exemption is terminated under § 251(f)(1)(B) the rural exemption from § 251(c)(2) interconnection is in effect, as a matter of statutory law.

Midcontinent requests a "direct interconnection ... for the purpose of exchanging local telecommunications traffic" with Missouri Valley in Williston. Midcontinent's request/letter of June 14, 2011, Exhibit 1; Midcontinent petition at 7. Midcontinent's claim (Exhibits 1 and 3) that its request is made under § 251(a) and (b) and not under § 251(c) is disingenuous. The

interconnection requested by Midcontinent (Exhibit 1) "for the purpose of exchanging local telecommunications traffic" is really a request for CLEC/ILEC interconnection under § 251(c)(2) "for the transmission and routing of telephone exchange service...." Missouri Valley is exempt from providing § 251(c)(2) CLEC/ILEC interconnection, under § 251 (f)(1)(A), the "rural exemption."

Midcontinent's claim that the interconnection it requests in 2011 is made under § 251(a) and (b) and not under § 251(c) would move CLEC/ILEC interconnection from the § 251(f)(1)(A) rural exemption section to the § 251(a) duty section and transform the rural exemption from interconnection "for the transmission and routing of telephone exchange service...." into a duty. Midcontinent's "cramped reading" of the statute would not merely weaken, it would destroy the rural exemption, "the broad protection Congress granted to rural telephone companies" under § 251(f)(1)(A). Iowa Utilities Board v Federal Communications Commission, 219 F.3d 744, (8th Cir. 2000). To weaken or destroy the rural exemption is Midcontinent's goal, but that goal is contrary to Congressional intent. If Congress had wanted rural telephone companies to be subject to a duty of interconnection for the purpose of exchanging local telecommunications traffic, it could easily have said so. That is not what Congress wanted and not what it said. What Congress wanted and what the statute says is rural telephone companies are not subject to a duty of interconnection for the purpose of exchanging local telecommunications traffic. The plain meaning of the chosen language of §§ 251(a), 251(c)(2) and 251(f)(1)(A) is rural telephone companies are exempt from providing CLEC/ILEC interconnections for the purpose of exchanging local telecommunications traffic. Iowa Utilities Board v Federal Communications Commission, 219 F.3d 744, (8th Cir. 2000).

Considered as a request for interconnection under § 251(a) and (b) and not as a disguised § 251(c)(2) request, Midcontinent's 2011 request is unavailing because § 251(a) does not include a duty of direct interconnection for the exchange of telecommunications traffic. See AT&T Corp v Atlas, 317 F.3d 227 (D.C. Cir. 2003), where the court affirmed an FCC Order that a telecommunications carrier's § 251(a) "duty to `interconnect' [refers] `solely to the physical linking of two networks, and *not* to the exchange of traffic between networks.'" A carrier's duty of direct or indirect connection is fulfilled by indirect connection. Direct interconnection is not required and the exchange of traffic is not required under § 251(a). The court's opinion emphasized there is no ambiguity about the limits of § 251(a). "As the Commission points out, both the text of § 251(a)(1) and the structure of § 252 strongly indicate that to `interconnect' and to exchange traffic have distinct meanings. Id.

Under AT&T v Atlas, the existing § 251(a) indirect connection between Midcontinent's and Missouri Valley's facilities fulfills Missouri Valley's duties under § 251(a). That section does not include additional duties to provide direct interconnection to exchange local telecommunications traffic in the Williston exchange. Those additional duties are duties under § 251(c)(2), duties from which Midcontinent is exempt under § 251(f)(1)(A) unless and until the exemption were terminated under § 251(f)(1)(B). See also the Order in Midcontinent's federal court action that affirmed the 2008 Rural Exemption Order, where the Court recognized interconnection duties under § 251(c)(2) are duties additional to general duties under § 251(a). Exhibit 5, 4-5; See also Midcontinent Communications/North Dakota Telephone Company Rural Exemption Investigation, Case No. PU-05-451. The statutory language "must have some purpose." Id. ¶ 17.

Midcontinent's request for interconnection expressed willingness to negotiate

interconnection at any location in the Williston exchange (Midcontinent's June 14 and July 12 letters, Exhibits 1 and 3) as if that somehow converted the requested interconnection from non-duty status or exempt status into a duty. Where there is a duty to interconnect, a CLEC and a non-rural non-exempt ILEC might negotiate about the location of the link between their networks. Where Missouri Valley is not obliged to interconnect under either § 251(a) or § 251(c), Midcontinent's gratuitous offer to negotiate the location or any other terms of a requested interconnection with Missouri Valley does not avoid or evade Missouri Valley's rural exemption from interconnection. Where there is no duty to interconnect because of the exemption, there is nothing to negotiate or to arbitrate. Whatever terms Midcontinent might be willing to negotiate, its request is what it is, a request for "interconnection with the local exchange carrier's network--(A) for the transmission and routing of telephone exchange service," the § 251(c)(2) CLEC/ILEC interconnection" from which Missouri Valley is exempt under § 251(f)(1)(A).

CLEC/ILEC interconnection is not a duty under § 251(a) and is never an "open issue" to be resolved by arbitration under § 252(b). CLEC/ILEC interconnection is always a non-issue in arbitration. Whether an ILEC is obliged to provide interconnection with a CLEC's network is a legal question, not an issue for arbitration, and the answer is straightforward. There is either a duty of interconnection under § 251(c)(2) or there is not a duty of interconnection under § 251(f)(1)(A), the rural exemption. Where a CLEC requests interconnection with a rural ILEC for the transmission and routing of telephone exchange service, the rural ILEC is not obliged to provide interconnection. There is no duty of CLEC/ILEC interconnection under § 251(c)(2) because of the § 251(f)(1)(A) rural exemption.

The 2011 Petition is Midcontinent's second effort to obtain CLEC/ILEC interconnection for the exchange of local telecommunications traffic with Missouri Valley in the Williston

exchange. The petition does not present any open issue for resolution by arbitration. Whether Missouri is obliged to provide the requested interconnection under § 251(c)(2) was an issue resolved in the first action Missouri Valley's rural exemption from § 251(c)(2) CLEC/ILEC interconnection duties is a closed issue under § 251(f)(1)(A) and under the 2008 Rural Exemption Order.

At the end of the statutory analysis, it is fair comment say it is simply absurd for Midcontinent to assert that the Commission is empowered under § 252(b)(4)(B) to impose on Missouri Valley an interconnection agreement for the purpose of exchanging local telecommunications traffic. The Commission has that power under § 251(f)(1)(B), a power to be exercised only after the Commission were to find (on Midcontinent's burden of proof) that Missouri Valley's § 251(f)(1)(A) exemption from § 251(c)(2) CLEC/ILEC interconnection should be terminated.

Missouri Valley's position that § 252(b) does not authorize the Commission to compel CLEC/ILEC interconnection where there is no duty of interconnection because of the rural exemption is also supported by Iowa v FCC, where the court enforced the clear Congressional intent that the rural telephone company § 251(f)(1)(A) exemption from CLEC/ILEC interconnection remains in effect unless and until terminated under § 251(f)(1)(B). Missouri Valley's position that § 252(b) does not authorize the Commission to compel interconnection is also supported by AT&T v Atlas, where the court included § 252 in its analysis leading to the conclusion that the § 251(a) duty to interconnect does not include the duty to exchange traffic.

B. The FCC's 2011 Ruling does not support Midcontinent's Petition for arbitration to obtain CLEC/ILEC interconnection with Missouri Valley.

Midcontinent's 2011 Petition requests the Commission to compel CLEC/ILEC interconnection under § 252(b), despite the Commission's Rural Exemption Order (Exhibit 2) in

2008. Midcontinent apparently believes it has discovered an alternative procedure - the §251(a) + § 252(b) theory - to obtain a CLEC/ILEC interconnection with Missouri Valley for the purpose of exchanging local telecommunications traffic – and it cites the FCC's recent Declaratory Ruling, FCC 11-83 (herein Ruling) in support of its 2011 Petition.

Section 252(b) is not an authorized procedure for a CLEC to obtain CLEC/ILEC interconnection with a rural ILEC, not under the Act and not under the Ruling. Missouri Valley's position that arbitration under § 252(b) is not an authorized procedure for Midcontinent to obtain CLEC/ILEC interconnection for the purpose of exchanging local telecommunications traffic in the Williston exchange is supported by the May 2011 FCC Ruling that Midcontinent mistakenly relies on in support of its petition for arbitration.

The Ruling did not "create de facto a new regulation" under the guise of interpretation. Christensen v Harris County, 529 U.S. 576, 588 (2000). As a precedent, the Ruling provides guidance regarding the scope of sections §§ 251 and 252. See Ruling ¶¶ 1, 2, 4, 5, 14, 15, 17, 19, 25 and 28. In formulating its guidance, the FCC made it clear that the Ruling addresses only duties under Act § 251 (a) and (b) as subjects of arbitration under § 252(b) and "allows the rural incumbent LEC to retain its exemption from the more rigorous section 251(c)(2) obligations.... We find that this reading of the statute better preserves the protections that Congress intended for the rural LECs." (Ruling ¶ 25.)

Of course Midcontinent has read the Ruling and recognizes it does not support a petition for arbitration of Midcontinent's request for a § 251(c)(2) interconnection with Missouri Valley's network. So, Midcontinent describes its request as made under § 251(a) and (b). See Midcontinent's letters of June 14 and July 12, 2011, Exhibits 1 and 3 Problem solved? No. Midcontinent's description of its 2011 request for interconnection as made under § 251(a)

disregards the FCC's interpretation of the 251(a) "duty to `interconnect' as referring `solely to the physical linking of two networks, and *not* to the exchange of traffic between networks.'" AT&T v Atlas.

The CLEC/ILEC interconnection that Midcontinent requested is a "direct interconnection ...in the Williston exchange ... for the purpose of exchanging local telecommunications traffic." Midcontinent's request/letter of June 14, 2011, Exhibit 1. Local traffic is referred to 3 more times in Midcontinent's request. See also Petition at 2, and exhibit A of petition.

The words that Midcontinent uses to describe its requested interconnection are equivalent to the words of § 251(c)(2), "interconnection with the local exchange carrier's network--(A) for the transmission and routing of telephone exchange service."

Figures of speech are useful tools of analysis. A wolf wearing a sheepskin coat or Grandma's nightgown is still a wolf. If a thing looks like a duck or smells like a rose, it is what it is. Midcontinent's request is what it is. The interconnection that Midcontinent requests in the 2011 Petition is not a basic or moderate interconnection under § 251(a) and (b) that might be subject to arbitration under § 252(b) and the Ruling. It matters not that Midcontinent's crams its request under § 251(a) and (b); the interconnection it requests is the "rigorous section 251(c)(2) interconnection" that is the subject of the rural exemption under § 251(f)(1)(A), the exemption that is retained under the plain words of the Ruling. Midcontinent's cramped reading of Act § 251 and of the Ruling are impermissible. Iowa v FCC; AT&T v Atlas.

The FCC's Ruling's "approach [that] allows the rural incumbent LEC to retain its exemption from more rigorous section 251(c)(2) interconnection" is consistent with Iowa v FCC where the court vacated rules that impermissibly weakened the rural exemption. The Ruling does not weaken the rural exemption or contradict the Iowa v FCC decision. The Ruling is

precise in emphasizing that rural ILECs are not exempt from § 251(a) and (b) duties, declaring that those duties are enforceable via § 252(b) arbitration proceedings, and equally precise that the Ruling does not weaken rural ILECs' "exemption from more rigorous section 251(c)(2) interconnection." The Ruling does not change the FCC's interpretation of § 251(a) affirmed in AT&T v Atlas that the § 251(a) interconnection duty does not include a duty to exchange traffic.

The Ruling does not enable CLECs to evade rural ILECs' § 251(f)(1)(A) exemption from § 251(c)(2) interconnection duties or to avoid the specific procedures under § 251(f)(1)(B), the only statutory procedure for a CLEC to obtain CLEC/ILEC interconnection with an exempt rural ILEC for the transmission and routing of telephone exchange service.

The Ruling is not a device for Midcontinent to obtain a § 251(c)(2) CLEC/ILEC interconnection with Missouri Valley under § 252(b) procedures. The Ruling did not weaken the rural exemption from the "rigorous section 251(c)(2) interconnection." The Ruling did not create a loophole that allows Midcontinent to avoid, evade, dodge, or otherwise bypass the specific provisions of § 251(f)(1)(A) and (B). The Ruling did not award Midcontinent a rematch where it might undo the outcome of the Commission's Rural Exemption Order in Case No. PU-08-61. Nothing in the Ruling supports Midcontinent's 2011 Petition for Missouri Valley's rural exemption from the "rigorous section 251(c)(2) interconnection" to be wrested away in compulsory arbitration proceedings under § 252(b).

Midcontintent's 2011 Petition should be dismissed, consistent with the conclusive decision in the 2008 Midcontinent/Missouri Valley case No. PU-08-61, consistent with the Midcontinent/North Dakota Telephone precedent, Case No. PU-05-451, consistent with Iowa v FCC and AT&T v Atlas, consistent with Act §§ 251 and 252 and consistent with the FCC's 2011 Ruling.

Summary and Conclusion

Missouri Valley is a rural ILEC serving the Williston, North Dakota exchange. Midcontinent is a CLEC that has, for the second time, requested interconnection with Missouri Valley for the purpose of exchanging local telecommunications traffic in the Williston exchange. Missouri Valley declined the second request, relying on its rural exemption from interconnection that was not terminated the first time Midcontinent requested CLEC/ILEC interconnection. 2008 Rural Exemption Order, Exhibit 2.

The words that Midcontinent uses in 2011 to describe its requested interconnection are equivalent to the words it used when it requested facilities based interconnection in 2007 that resulted in the 2008 Rural Exemption Order that "The rural exemption under 47 USC § 251(f)(1)(A) for interconnection in Missouri Valley's Williston exchange is not terminated." Exhibit 2. Missouri Valley remains exempt under the 2008 Rural Exemption Order. Under res judicata, the 2008 order bars Midcontinent's 2011 Petition and request for interconnection under §§ 251(a) and 252(b) theories that Midcontinent might have asserted but did not assert in Case No. PU-08-61.

The words of Midcontinent's 2007 request, of its 2011 Petition and request and the words of § 251(c)(2) are a trifecta of synonyms, alternate ways of describing CLEC/ILEC interconnection. No matter what verbal maneuvers Midcontinent might practice, the interconnection its request in 2011 is the "rigorous section 251(c)(2) interconnection" "for the transmission and routing of telephone exchange service," the kind of interconnection that Missouri Valley is exempt from providing under § 251(f)(1)(A), under the 2008 Rural Exemption Order and under the FCC's 2011 Ruling.

When it is recognized that Midcontinent's 2011 request only masquerades as a § 251(a)

request where it is in reality a request for § 251(c)(2) CLEC/ILEC interconnection, it follows that the two grounds for dismissal are consistent, each supporting the other. Midcontinent had the opportunity to assert a claim under § 251(a) in its first action in 2008 seeking interconnection in Williston. The interconnection that Midcontinent requests in 2011 was litigated in 2008, litigated for what it was, a request for § 251(c)(2): "interconnection with the local exchange carrier's network--(A) for the transmission and routing of telephone exchange service." It was a claim that could have been made and was made in 2008, a claim that cannot be relitigated in 2011 under *res judicata*.

Midcontinent's habits of litigation in interconnection cases routinely confuse the issues by arguing about competition. See, e.g. Midcontinent's August 1, 2008 post hearing brief in Case No. PU-08-61 that routinely refers to "facilities based competition" in its effort to obtain facilities based interconnection. A rehash might occur in this case.

Midcontinent's description of its 2011 request for interconnection as made under § 251(a) and (b) is futile, because § 251(a) does not include a duty of direct interconnection for the exchange of telecommunications traffic. AT&T v Atlas. There is no statutory procedure other than § 251(f)(1)(B) for a CLEC to obtain CLEC/ILEC interconnection with an exempt rural ILEC. "The language in this Section 251(f)(1)(B) concerning implementation must have some purpose. ... If Congress wanted to require the parties to go through the entire Section 252 process ..., Congress would have said so." Midcontinent Communications/North Dakota Telephone Company Rural Exemption Investigation,. Case No. PU-05-451 Order, June 7, 2006, ¶ 17. Midcontinent's 2011 Petition for arbitration of its request for a "direct interconnection ... for the purpose of exchanging local telecommunications traffic" mistakenly relies on a 2011 Ruling issued by the FCC. The FCC Ruling clarified that arbitration under § 252(b) is an

authorized procedure for a CLEC to obtain § 251(a) interconnection with an exempt rural ILEC. The FCC Ruling "allows the rural incumbent LEC to retain its exemption from more rigorous section 251(c)(2) interconnection."

For all these reasons, Midcontinent's 2011 Petition should be dismissed.

Dated this 21st day of November, 2011.

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