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JAN 03 2012

PUBLIC SERVICE COMMISSION

January 3, 2012

Darrell Nitschke
Executive Director
North Dakota Public Service Commission
State Capitol
600 E Blvd
Bismarck, ND 58505

**RE: Midcontinent Communications/Missouri Valley Communications, Inc.
ND PSC Case PU-11-697**

Dear Mr. Nitschke:

Enclosed for filing are an original and seven copies of Missouri Valley's Reply Brief in Support of Motion to Dismiss Petition for Arbitration. This document is also being transmitted electronically to your office.

If you have any questions regarding the same, please do not hesitate to contact me.

Very truly yours,

David J. Hogue

DJH/klb

Enclosures

cc: Patrick W. Durick
Mike Kilgore

18 PU-11-697 Filed: 1/3/2012 Pages: 10
Reply Brief

STATE OF NORTH DAKOTA

PUBLIC SERVICE COMMISSION

Midcontinent Communications, a)
South Dakota Partnership,)
Petitioner,)
vs.)
Missouri Valley Communications, Inc.,)
Respondent.)

Case No. PU-11-697

STATE OF NORTH DAKOTA)
COUNTY OF WARD)

AFFIDAVIT OF MAILING

Kristi Bailie being first duly sworn, deposes and states:

That she is a citizen of the United States of America, of legal age and is not a party to nor interested in the above entitled action; that on the 3rd day of January, 2012, this Affiant deposited in the mailing department of the United States Post Office at Minot, North Dakota, a sealed envelope with postage thereon duly prepaid, containing a true and correct copy of the following documents in this action:

- 1. Reply Brief in Support of Motion to Dismiss Petition for Arbitration; and
2. Affidavit of Mailing.

That said envelopes were addressed to the following persons at their known addresses by certified mail, restricted delivery, return receipt requested as follows:

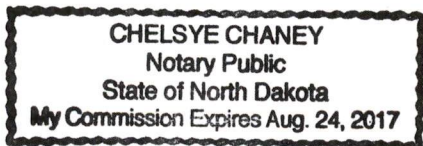
Patrick W. Durick
Pearce & Durick
Attorneys at Law
P.O. Box 400
Bismarck, ND 58502-0400

The above documents were duly mailed in accordance with the provisions of the North Dakota Rules of Civil Procedure.

Kristi Bailie (signature)

Subscribed and sworn to before me this 3rd day of January, 2012.

Chelsye Chaney (signature)
Notary Public
For the state of North Dakota
08/24/2017



STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Midcontinent Communications, a)	
South Dakota Partnership,)	
)	Case No. PU-11-697
Petitioner,)	
vs.)	Reply Brief in Support of
)	Motion to Dismiss
Missouri Valley Communications, Inc.,)	Petition for Arbitration
)	
Respondent.)	

On June 14, 2011, Midcontinent requested direct interconnection with Missouri Valley for the purpose of exchanging local telecommunications traffic in the Williston exchange and on November 14 filed a petition for arbitration of its request. On November 21 Missouri Valley filed a motion to dismiss the petition. The motion raises issues of law that are not issues open to arbitration under Act § 252(b) and NDCC § 49-21-01.7. The two grounds of the motion to dismiss the petition are both based on Missouri Valley’s status as a rural telephone company exempt under §251(f)(1)(A).

1. Res judicata bars Midcontinent from relitigating in 2011 its request for direct interconnection for the purpose of exchanging local telecommunications traffic in the 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

2. 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 direct interconnection for the purpose of exchanging local telecommunications traffic in Missouri Valley’s Williston exchange. Missouri Valley is

not obliged under Act § 251(a) to interconnect directly for the purpose of exchanging local telecommunications traffic in the Williston exchange and neither direct interconnection nor exchange of local telecommunications traffic may be compelled under § 252(b).

1. Midcontinent is barred from relitigating its request for interconnection.

Midcontinent's reply brief does not address the essence of res judicata, that its 2011 petition is barred because it seeks to alter the outcome of the 2008 proceeding, both pursuing the same objective, facilities based interconnection for the purpose of exchanging local telecommunications 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. The findings in the Rural Exemption Order included ¶10, "Midcontinent has specifically requested facilities-based interconnection with local number portability."

The second action commenced with Midcontinent's June 14, 2011, letter requesting "direct interconnection ... for the purpose of exchanging local telecommunications traffic." Exhibit 1. Midcontinent's petition uses the same words in 2011 that it used in 2007 to describe the requested interconnection. "By letter dated June 14, 2011, Midcontinent requested facilities-based interconnection from Missouri Valley." 2011 Petition, p. 1.

Missouri Valley's res judicata motion meets the tests proposed by Midcontinent (Dec. 21 brief, p.4), whether its claims are "effectively intertwined" and "At base, the issue is whether the petitioner was asking for the same thing in the first proceeding and in the second proceeding." Not only are the two claims effectively intertwined with each other, they are also connected by the words of the Act. Both of Midcontinent's requests for interconnection for the purpose of exchanging local telecommunications traffic in the Williston exchange 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."

The first action sought facilities based interconnection under §§ 251(c) and 251(f). The second action asserts a right to facilities based interconnection under §251(a). Midcontinent "never chose to dispute" a right to interconnection under §251(a) in the first action though there was "discussion." (Dec. 21 brief, footnote 10, p. 5.) It is baffling to consider how Missouri Valley's choosing not to dispute a claim "discussed" but not pursued by Midcontinent saves Midcontinent from being precluded from relitigating its efforts to obtain facilities based interconnection. Whatever is the reason Midcontinent did not assert a right to interconnection under § 251(a) in the 2008 first action when it was an available claim matters not.

“[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).

Midcontinent's 2011 Petition seeks a rematch after a defeat fairly suffered in 2008. Midcontinent's novel theory that "interconnection is a continuing right" and "a carrier can make

an interconnection request at any time” (Midcontinent Dec. 21 brief, p. 6-7), is less than half true, maybe true after missing procedural deadlines but completely untrue as an avoidance of res judicata. Of course Midcontinent can request interconnection at any time, but once it has made a request that is litigated on the merits, the Telecommunications Act does not subject Missouri Valley to repetitious litigation by Midcontinent after its failed effort to obtain facilities based interconnection for the purpose of exchanging local telecommunications traffic in the Williston exchange. “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).

If there is any “continuing right” in play, it is Missouri Valley’s rural exemption from facilities based interconnection for the purpose of exchanging local telecommunications traffic in the Williston exchange, a right and exemption continuing “unless and until” terminated under § 251(f)(1)(B).

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. Midcontinent’s endeavor to create a new case (Dec. 21 brief p. 7-11) to “call into question the continuing accuracy of the Commissions’s 2008 determination” creates two problems – for Midcontinent.

First, none of the pretended new facts has anything to do with issues under the petition for arbitration. An allegation in another proceeding proves nothing except Midcontinent’s propensity for litigation. An arbitration proceeding under § 252(b), unlike a § 251(f)(1)(B) proceeding, does not address the question whether interconnection should be made. An arbitration proceeding under Act §252(b) addresses the terms of interconnection if there is a duty of interconnection. An arbitration order cannot compel arbitration where the statute does not require interconnection. See also §252 (b)(4), limiting issues for arbitration to those specified in

the petition. None of the new facts asserted in Midcontinent's Dec. 21 brief is remotely connected to the issues specified in Exhibit A of Midcontinent's petition.

Second and related to the first problem, the supposed new facts might be related to Midcontinent's endeavors to commence a new proceeding under §251(f)(1)(B). That is not the case Midcontinent has brought to the Commission. Midcontinent's arguments against res judicata concede the second ground of Missouri Valley's motion for dismissal. There are no criteria and there is no statutory procedure other than § 251(f)(1)(B) for Midcontinent to obtain interconnection in Missouri Valley's Williston exchange.

The interconnection that Midcontinent requests in 2011 is the same as its 2007 request litigated in 2008. 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.

2. Arbitration is not an authorized procedure for Midcontinent to obtain CLEC/ILEC interconnection with Missouri Valley, an exempt rural telephone company.

Despite the Commission's Rural Exemption Order in 2008, "The rural exemption under 47 USC § 251(f)(1)(A) for interconnection in Missouri Valley's Williston exchange is not terminated," in 2011 Midcontinent asserts an alternative procedure under Act §§ 251(a) and 252(b) to obtain direct interconnection with Missouri Valley for the purpose of exchanging local telecommunications traffic – and it cites the FCC's recent Declaratory Ruling in support of its 2011 Petition. Missouri Valley's analysis in its November 21 brief shows neither the Act nor the Ruling supports Midcontinent's petition to obtain interconnection by arbitration. Arbitration procedures exist only to establish terms of an interconnection where there is a duty to interconnect, not to impose interconnection that is not required by the Act. The FCC Ruling

“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.

Midcontinent’s Dec. 21 brief undermines its position in two ways. First, the effort to distinguish Act §§251(a) and 251(c) supports Missouri Valley’s arguments that ILECs’ duties under the two sections are different, that only § 251(c) includes the duty to interconnect directly for the exchange of local traffic. It is truly nonsensical for Midcontinent to argue the less rigorous duty of direct or indirect interconnection under § 251(a) includes the more rigorous duty not only to interconnect directly but also to exchange local traffic under § 251(c), duties from which Missouri Valley is exempt under § 251(f)(1)(A) unless and until the exemption were terminated under the terms of § 251(f)(1)(B). As the Commission observed in Midcontinent Communications/North Dakota Telephone Company Rural Exemption Investigation, Case No. PU-05-451 at ¶ 17, the statutory language “must have some purpose.” 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, at 4-5. And it bears repeating, the FCC Ruling “allows the rural incumbent LEC to retain its exemption from the more rigorous section 251(c)(2) obligation.” Ruling ¶ 25.

Second, Midcontinent’s footnote 45 on page 16 of its Dec. 21 brief acknowledges that Midcontinent and Missouri Valley are indirectly interconnected, so Missouri Valley is in compliance with its duty of direct or indirect interconnection under § 251(a). Midcontinent requested “direct interconnection ...in the Williston exchange ... for the purpose of exchanging local telecommunications traffic.” Midcontinent’s request/letter of June 14, 2011, Exhibit 1; “By

letter dated June 14, 2011, Midcontinent requested facilities-based interconnection from Missouri Valley.” 2011 Petition, p. 1. Midcontinent has not requested an exchange of local telecommunications traffic via the existing indirect interconnection. Because Midcontinent did not make that alternative request in its initial June 14 letter or in its November 14 petition, it is not relevant under the petition and is not addressed by the motion to dismiss. The only relevance of indirect interconnection is to show Missouri Valley is in full compliance with its duties under § 251(a).

Section 251 (a) 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), rigorous duties from which Missouri Valley is exempt under § 251(f)(1)(A) unless and until the exemption were terminated under § 251(f)(1)(B). There is no statutory procedure other than § 251(f)(1)(B) for a CLEC to obtain interconnection with an exempt rural ILEC for the exchange of local telecommunications traffic.

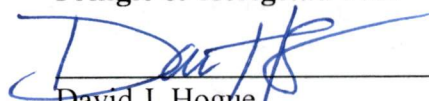
CLEC/ILEC interconnection for the exchange of local telecommunications traffic is not a duty under § 251(a) and is never an open issue to be resolved by arbitration under § 252(b). CLEC/ILEC interconnection is always a non-issue in arbitration. Whether an ILEC is obliged to directly interconnect with a CLEC’s network for the exchange of local telecommunications traffic is a yes or no legal question, not a negotiable issue open to resolution by arbitration. 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. Because of the rural exemption Missouri Valley is not obliged to directly interconnect with Midcontinent for the exchange of local telecommunications traffic in the Williston exchange.

Summary and Conclusion

For all the reasons stated in Missouri Valley's November 21 motion and brief and this reply brief, Midcontinent's 2011 petition for arbitration should be dismissed. Either of the two grounds of the motion is adequate for dismissal. Alternate forms of proposed orders are attached for the Commission to decide which of the two adequate grounds for dismissal is dominant.

Dated this 3rd day of January, 2012.

Pringle & Herigstad P.C.



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