

Hamre, John G.

From: Hamre, John G.
Sent: Tuesday, February 14, 2012 11:50 AM
To: Hamre, John G.
Subject: FW: PU-11-697
Attachments: 9 Feb 2012 Res judicata proposed order.docx; 9 Feb 2012 251a + 251b order to dismiss.docx

From: David Hogue [mailto:dhogue@srt.com]
Sent: Thursday, February 09, 2012 7:13 PM
To: Gruman, Mark E.; 'Zachary E. Pelham'; JHarrington@dowlohn.com; 'Patrick W. Durick'
Cc: Jeffcoat-Sacco, Illona
Subject: RE: PU-11-697

Dear Mr. Gruman:

Missouri Valley hereby submits two separate proposed orders with the respect to the pending motion of Missouri Valley. The first proposal grants Missouri Valley's motion to dismiss based on the legal principle of *res judicata*. The second proposed order grants Missouri Valley's motion to dismiss based on the argument Midcontinent Communications is not entitled to physical interconnection for the exchange of local traffic without first applying to terminate Missouri Valley's rural exemption. Missouri Valley submits two proposals because granting the motion on one basis might well make ruling on the other issue moot.

The orders are sent in Microsoft Word with hard copies to follow. Thank you for your consideration.

26 **PU-11-697** Filed: 2/9/2012 Pages: 30
Proposed Order res judicata and proposed Order rural exemption

STATE OF NORTH DAKOTA

PUBLIC SERVICE COMMISSION

Midcontinent Communications, a)	
South Dakota Partnership,)	
)	Case No. PU-11-697
Petitioner,)	
vs.)	
)	
)	Order of Dismissal of
Missouri Valley Communications, Inc.,)	Petition for Arbitration
)	
Respondent.)	

Preliminary Statement

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

On July 6, 2011, Missouri Valley declined Midcontinent's request.

On November 14, 2011, Midcontinent filed a petition for the Commission to arbitrate its request, citing §§ 251(a) and 252(b) of the Act.

On November 21, 2011, Missouri Valley moved for dismissal of Midcontinent's petition, and a brief on two grounds:

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.

On December 21, 2011, Midcontinent filed a brief in opposition to Missouri Valley's motion to dismiss.

On January 3, 2012, Missouri Valley filed a reply brief.

On February 10, 2012, the Commission heard oral arguments on the motion.

Interconnection Duties under the Telecommunications Act

Under 47 U.S.C. §§ 151 et. seq. (The "Act" or the "federal act," as defined by N.D.C.C. § 49-21-01(5).) Act, certain duties are imposed on all "telecommunications carriers" including "local exchange carriers" (LECs). There are two kinds of LECs, incumbent local exchange carriers (ILECs) and competitive local exchange carriers (CLECs). 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).

§ 251 provides a graduated set of interconnection requirements. § 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

§ 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).

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.)

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.

Midcontinent and Missouri Valley have a negotiated resale agreement with number portability under § 251(b)(2). Midcontinent's and Missouri Valley's facilities and equipment are interconnected indirectly, an alternate to direct interconnection under § 251(a).

In November, 2007 Midcontinent requested a facilities based interconnection agreement with Missouri Valley 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. 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." Order, Case No. PU-08-61. (The "Rural Exemption Order").

The Issues

A party that petitions the Commission for arbitration must identify the issues. The respondent may present additional issues. § 252(b)(2)(A) and (b)(3); N.D. Admin. Code § 69-02-10-05 and -07.

Midcontinent described nine issues raised in its petition for arbitration:

General Terms and Conditions

Terms and Conditions for Interconnection and Number Portability

Technical Interconnection Requirements
Point of Interconnection

Reciprocal Compensation

Number Portability

Compensation for Non-local Traffic

Date of Interconnection

Transition from Current Resale Arrangements

Missouri Valley asserts Midcontinent's statement of the issues is incomplete. Missouri Valley asserts the complete statement includes the issue 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.

Missouri Valley asserts Midcontinent's petition also raises the issue whether its request for interconnection is an authorized subject of arbitration under Act § 252(b).

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

Missouri Valley asserts the arbitration provisions under § 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.

Midcontinent asserts its request is made under § 251(a) and arbitration is available

under § 252(b) and a Federal Communications Commission Declaratory Ruling, 26 FCC Rcd. 8267.

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...." Midcontinent and Missouri Valley have a negotiated resale agreement with number portability under § 251(b)(2). Order, Case No. PU-04-638. Number portability, a LEC duty under § 251(b)(2) is not an issue under the Midcontinent's petition.

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)), issues arising from Midcontinent's petition for arbitration of its request for interconnection and Missouri Valley's motion to dismiss Midcontinent's petition are legal issues, 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).

Missouri Valley has also raised the issue whether 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.

Procedure and Jurisdiction

The Commission has jurisdiction over the parties and the subject matter of this proceeding.

The federal act provides for administration of Act §§ 251 and 252 by "State commissions" (Act § 153(41)). NDCC § 49-21-01.7, subsections 8, 9 and 11 empowers 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 for arbitration proceedings under § 252 of the federal act. ND Admin. Code Ch. 69-02-10.

If the Commission grants Missouri Valley's motion to dismiss on either ground, the other becomes moot. The Commission does not consider either ground of the motion for dismissal in complete ignorance of the other ground. The two grounds are somewhat intertwined, particularly regarding the question whether § 251(a) includes a duty of interconnection for the purpose of exchanging local telecommunications traffic. The Commission has considered the arguments on the motion to dismiss and has concluded Midcontinent's Petition should be dismissed. Each ground is a sufficient basis for dismissal, independent of the other. The Commission must decide which of the two sufficient independent reasons is the dominant reason for dismissal, rendering the other moot.

If the Commission were to base dismissal of Midcontinent's petition because § 251(a) does not include a duty of interconnection for the purpose of exchanging local telecommunications traffic or because § 252(b) does not empower the Commission to compel interconnection where there is no statutory duty of interconnection, that action would be the equivalent of relitigating Case No. PU-08-61, in violation of the res judicata doctrine. Considering that a principal purpose of the res judicata doctrine is the avoidance of repetitious litigation, the Commission addresses Missouri Valley's claim that res judicata bars Midcontinent's 2011 Petition as the dominant reason for dismissal.

Missouri Valley's Res Judicata Claim

In November, 2007 Midcontinent requested a facilities based interconnection agreement with Missouri Valley 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. 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." Order, Case No. PU-08-61. (The "Rural Exemption Order").

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.

"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).

Res judicata applies to decisions made by North Dakota's administrative agencies.

“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.’ 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.

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.”

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. Baier, supra.

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.

1. The Commission's jurisdiction is not in doubt. Act § 251(f)(1)(A) and (B), and NDCC § 49-21-01.7(11). The 2008 Rural Exemption Order is a final order in an administrative adjudicative proceeding. § NDCC 28-32-21 and 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. 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 first action was finally decided by an agency and by a court of competent jurisdiction.

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

3. Missouri Valley asserts Midcontinent's petition raises an issue actually litigated or which should have been litigated in Case No. PU-08-61, whether Missouri Valley has a duty under § 251(a) to interconnect with Midcontinent for the exchange of local telecommunications traffic in the Williston exchange.

The FCC Ruling in May of 2011 did not create new duties affecting rural ILECs or new procedures for their enforcement. §§ 251(a) and 252(b) of the Act have not been amended between 2008 and 2011. No new regulations affecting either section were issued or old ones amended by the Ruling. 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) theory was considered in other States' commissions' proceedings and in some federal court actions before Midcontinent commenced proceedings in 2008. See Ruling ¶¶ 8, 10 and 18. The record in the first action in 2008 shows Midcontinent specifically addressed a potential alternative claim for interconnection under § 251(a). Midcontinent's August 1, 2008 brief in case No. PU-08-61, footnote 29, page 14, the text at

pages 5-7 of its November 4, 2008 Petition for Reconsideration of the Rural Exemption Order and Midcontinent's October 9, 2009 brief in its federal court action, pp. 15 and 16, all presented arguments that § 251(a) affected issues under § 251(f)(1)(B). Midcontinent had the opportunity to make a claim for interconnection under §§ 251(a) in its 2008 action to obtain interconnection with Missouri Valley in Williston, and it exercised that opportunity.

Midcontinent's petition for interconnection under § 251(a) raises an issue actually litigated or which should have been litigated in Case No. PU-08-61.

4. The claims are identical in both actions. The first action commenced with Midcontinent's November 7, 2007 letter requesting "a facilities based interconnection agreement" for the Williston exchange." The findings in Case No. PU-08-61 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." Midcontinent's 2011 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." In both actions Midcontinent's claimed rights under § 251 of the Act, rights to facilities based interconnection with Missouri Valley in the Williston exchange for the exchange of local telecommunications traffic.

The ultimate issue under a res judicata claim 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. In its second action in 2011, Midcontinent seeks an interconnection, asserting rights under Act § 251; it seeks the interconnection that was denied in the first action in 2008, also under Act § 251. If the Commission were to grant Midcontinent's 2011 petition for interconnection in Missouri Valley's Williston exchange for the purpose of exchanging local telecommunications traffic to be compelled in arbitration under § 252(b), that would 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.”

Res judicata applies to bar Midcontinent’s petition.

The issues whether Missouri Valley has a duty under § 251(a) to interconnect with Midcontinent for the purpose of exchanging local telecommunications traffic in the Williston exchange and whether arbitration under § 252(b) is an authorized procedure for Midcontinent to obtain interconnection with Missouri Valley for the purpose of exchanging local telecommunications traffic in the Williston exchange are moot because res judicata bars Midcontinent’s petition.

ORDER

The Commission Orders:

1. Midcontinent Communication’s petition for arbitration is barred by res judicata and is therefore dismissed.
2. Missouri Valley Communications Inc.’s motion for dismissal of Midcontinent’s petition for arbitration on the grounds that Missouri Valley is not obliged under Act § 251 to interconnect with Midcontinent and interconnection may not be compelled under § 252(b) is moot.

PUBLIC SERVICE COMMISSION

Brian P. Kalk
Commissioner

Tony Clark
Chairman

Kevin Kramer
Commissioner

STATE OF NORTH DAKOTA
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Preliminary Statement

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

On July 6, 2011, Missouri Valley declined Midcontinent's request.

On November 14, 2011, Midcontinent filed a petition for the Commission to arbitrate its request, citing §§ 251(a) and 252(b) of the Act.

On November 21, 2011, Missouri Valley moved for dismissal of Midcontinent's petition, on two grounds:

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.

On December 21, 2011, Midcontinent filed a brief in opposition to Missouri Valley's motion to dismiss.

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On February 10, 2012, the Commission heard oral arguments on the motion.

Interconnection Duties under the Telecommunications Act

Under 47 U.S.C. §§ 151 et. seq. (The "Act" or the "federal act," as defined by N.D.C.C. § 49-21-01(5).) Act, certain duties are imposed on all "telecommunications carriers" including "local exchange carriers" (LECs). There are two kinds of LECs, incumbent local exchange carriers (ILECs) and competitive local exchange carriers (CLECs). 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).

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negotiate in good faith in accordance with § 252 the particular terms and conditions of interconnection agreements.

The Rural Exemption from Interconnection Duties

§ 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.

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The Parties

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an eligible telecommunications carrier in the Williston exchange area. (Orders, Cases No. PU-2779-02-451 and 452.)

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The Issues

A party that petitions the Commission for arbitration must identify the issues. The respondent may present additional issues. § 252(b)(2)(A) and (b)(3); N.D. Admin. Code § 69-02-10-05 and -07.

Midcontinent described nine issues raised in its petition for arbitration:

General Terms and Conditions

Terms and Conditions for Interconnection and Number Portability

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Date of Interconnection

Transition from Current Resale Arrangements

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Missouri Valley asserts Midcontinent's petition also raises the issue whether its request for interconnection is an authorized subject of arbitration under Act § 252(b).

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

Missouri Valley asserts the arbitration provisions under § 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.

Midcontinent asserts its request is made under § 251(a) and arbitration is available under § 252(b) and a Federal Communications Commission Declaratory Ruling, 26 FCC Rcd. 8267.

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...." Midcontinent and Missouri Valley have a negotiated resale agreement with number portability under § 251(b)(2). Order, Case No. PU-04-638. Number portability, a LEC duty under § 251(b)(2) is not an issue under the Midcontinent's petition.

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)), issues arising from Midcontinent's petition for arbitration of its request for interconnection and Missouri Valley's motion to dismiss Midcontinent's petition are legal issues, 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).

Missouri Valley has also raised the issue whether 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.

Procedure and Jurisdiction

The Commission has jurisdiction over the parties and the subject matter of this proceeding.

The federal act provides for administration of Act §§ 251 and 252 by "State commissions" (Act § 153(41)). NDCC § 49-21-01.7, subsections 8, 9 and 11 empowers 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 for arbitration proceedings under § 252 of the federal act. ND Admin. Code Ch. 69-02-10.

If the Commission grants Missouri Valley's motion to dismiss on either ground, the other becomes moot. The Commission does not consider either ground of the motion for dismissal in complete ignorance of the other ground. The two grounds are somewhat intertwined, particularly regarding the question whether § 251(a) includes a duty of interconnection for the purpose of exchanging local telecommunications traffic. The Commission has considered the arguments on the motion to dismiss and has concluded Midcontinent's Petition should be dismissed. Each ground is a sufficient basis for dismissal, independent of the other. The Commission must decide which of the two sufficient independent reasons is the dominant reason for dismissal, rendering the other moot.

If the Commission were to base dismissal of Midcontinent's petition under res judicata because Midcontinent had the opportunity to assert its claims § 251(a) and § 252(b) in Case No. PU-08-61, a substantial issue would be undecided. Considering that the North Dakota legislature has specifically empowered the Commission to administer the provisions of Act sections §§ 251 and 252 that are involved in this case, the Commission addresses Midcontinent's claim that 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 that interconnection may be compelled under § 252(b) as the dominant reason for dismissal.

Midcontinent's Petition for Arbitration

Where 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).

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).

Midcontinent's petition requests the Commission to compel CLEC/ILEC interconnection under § 251(a) and § 252(b), despite the Commission's Rural Exemption Order in 2008. Midcontinent cites the FCC's recent Declaratory Ruling, 26 FCC Rcd. 8267, (herein Ruling) in support of its petition. Midcontinent's petition is addressed first by review of statutory provisions and second by review of the Ruling.

Act § 251 provides a graduated set of interconnection requirements. § 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. 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. § 252 provides for voluntary negotiation, mediation and compulsory arbitration to resolve open issues that are unresolved. § 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), including 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.

Under §§ 251:

1. The general duty of interconnection under § 251(a) is distinct from the additional interconnection duties of ILECs under § 251(c)(2).
2. An ILEC that is a rural telephone company is not obliged to interconnect with a CLEC as a non-rural non-exempt ILEC is obliged to interconnect under § 251(c)(2).
3. Where a CLEC requests § 251(c)(2) CLEC/ILEC interconnection with a rural ILEC exempt under § 251(f)(1)(A) the rural ILEC is not obliged to negotiate terms and conditions of an interconnection agreement.
4. Where a CLEC requests § 251(c)(2) CLEC/ILEC interconnection with a rural ILEC exempt under § 251(f)(1)(A) the CLEC may petition the State commission to conduct an inquiry under § 251(f)(1)(B) for the purpose of determining whether to terminate the exemption.

Under § 251(f)(1)(A), rural ILECs are exempt from all duties under § 251(c) including the rigorous § 251(c)(2) CLEC/ILEC interconnection duty that obliges non-rural non-exempt ILECs. There are limitations on the rural exemption

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.

The exemption does not apply to an interconnection request from a CLEC/cable operator providing video programming that seeks interconnection with a rural telephone company that also 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.

The reference in §251(f)(1)(A) to § 251(c) as subjects of the exemption implies that rural ILECs remain subject to the general duties of § 251(a) and (b).

Midcontinent describes the issue in its 2011 Petition. The foundation of Midcontinent’s petition for arbitration is its June 24 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. So (as argued by Missouri Valley), the corrected statement of the issue raised by Midcontinent’s petition is whether Missouri Valley is obligated under § 251(a) to interconnect with Midcontinent for the purpose of exchanging local telecommunications traffic in the Williston exchange.

Midcontinent requests a “direct interconnection ... for the purpose of exchanging local telecommunications traffic” with Missouri Valley in Williston. Midcontinent’s claim that its request is made under § 251(a) and (b) and not under § 251(c) is meaningless. The interconnection requested by Midcontinent “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 reading of the statute would destroy the rural exemption, "the broad protection Congress granted to rural telephone companies" under § 251(f)(1)(A). 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 said. The statute says 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. Midcontinent's reading of § 251 is impermissible. Iowa Utilities Board v Federal Communications Commission, 219 F.3d 744, (8th Cir. 2000) (Iowa v FCC).

Considered as a request for interconnection under § 251(a) and (b) and not as a §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) (AT&T v Atlas), 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 general duty of interconnection under § 251(a) is distinct from ILECs' additional interconnection duties under § 251(c)(2), the duty from which rural ILECs are exempt under §

251(f)(1)(A) unless and until the exemption were terminated under § 251(f)(1)(B). The statutory language must have some purpose. The general duty of interconnection under § 251(a) does not include a duty that Missouri Valley interconnect with Midcontinent for the exchange of local telecommunications traffic.

CLEC/ILEC interconnection is not a duty under § 251(a) and is never an “open issue” to be resolved by arbitration under § 252(b). 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. Where a CLEC requests CLEC/ILEC interconnection with an exempt rural ILEC there is no open issue to arbitrate under § 252 (b) because there is no duty of interconnection, not under § 251(a) and not under § 251(c)(2) because of § 251(f)(1)(A), the rural exemption. Where a CLEC requests § 251(c)(2) CLEC/ILEC interconnection with a rural ILEC exempt under § 251(f)(1)(A) there is nothing to arbitrate under § 252.

Under § 252(b)(4)(B) State commissions may impose “appropriate conditions” of interconnections where there is a duty of interconnection under § 251(c)(2). § 252(b)(4)(B) does not authorize the Commission to compel interconnection where there is no duty of interconnection.

Midcontinent’s petition does not present any issue for resolution by arbitration. Whether Missouri is obliged to provide the requested interconnection under § 251(a) is a non-issue, under AT&T v Atlas. 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. Whether Missouri Valley is obliged to interconnect with Midcontinent for the exchange of local telecommunications traffic is a non-issue and a closed issue, not an open

issue or an unresolved issue subject to arbitration under § 252(b).

The Commission is not 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 that Missouri Valley's § 251(f)(1)(A) exemption from § 251(c)(2) CLEC/ILEC interconnection should be terminated. See Iowa v FCC, where the court enforced the 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).

This is not the first case where Commission addressed the issue whether § 252(b) arbitration procedures could be invoked in place of § 251(f)(1)(B) procedure. See Midcontinent Communications/North Dakota Telephone Company Rural Exemption Investigation, Case No. PU-05-451. The ND Tel case involved Midcontinent's request for wholesale/resale services under § 251(c)(4). Midcontinent initiated a § 251(f)(1)(B) proceeding for termination of ND Tel's rural exemption from providing that service. ND Tel's exemption from § 251(c)(4) was terminated. After its rural exemption was terminated, the rural ILEC advocated that § 252(b) procedures should apply for implementation of a resale agreement. Midcontinent advocated for the application of § 251(f)(1)(B) procedures. The Commission adopted Midcontinent's position. ND Tel could not remove the § 251(f)(1)(B) proceedings to § 252(b) after its exemption was terminated. Case No. PU-05-451 Order, June 7, 2006, ¶¶ 12-18. "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 as suggested by NDTC, Congress would have said so rather than requiring the state commission to establish an implementation schedule. ... We find that the authority to order an implementation and compliance schedule is inseparable from the termination procedure and is, in fact, wholly contained within Section 251(f)(1) which the Legislature has granted the Commission authority to implement." Id. ¶ 17

Under the precedent in Case No. PU-05-451, where a CLEC requests a CLEC/ILEC interconnection with a rural ILEC that is exempt from § 251(c)(2) interconnection, § 251(f)(1)(B) – not §252(b) - provides the procedure for the terms and conditions of an interconnection to be established - if the exemption is terminated.

Missouri Valley is a rural telephone company exempt from the duty of § 251(c)(2) CLEC/ILEC interconnection. Section 252(b)(4)(B) does not authorize the Commission to compel Missouri Valley to interconnect with Midcontinent for the purpose of exchanging local telecommunications traffic in the Williston exchange where there is no duty of interconnection. Because interconnection cannot be compelled, there are no terms and conditions to be arbitrated under § 252(b).

Midcontinent cites the FCC's recent Declaratory Ruling, 26 FCC Rcd. 8267, (herein Ruling) in support of its petition. Missouri Valley cites the Ruling in support of its motion for dismissal. The Ruling does not support Midcontinent's petition.

§ 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.

§§ 251(a) and 252(b) of the Act were not amended by the Ruling. Only Congress has the legal power to do that. The Ruling did not create new duties affecting rural ILECs or new enforcement procedures. No new regulations affecting either §§ 251(a) or 252(b) were issued or old ones amended by the Ruling. The Ruling did not create de facto a new regulation. 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.)

Midcontinent describes its request for interconnection for the purpose of exchanging local telecommunications traffic as a request for interconnection under § 251(a) and (b). Midcontinent's description of its request as made under § 251(a) and (b) does not fit the statutory pattern of § 251. 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 general duty of interconnection under § 251(a) is distinct from ILECs' additional interconnection duties under § 251(c)(2), the duty from which rural ILECs are exempt under § 251(f)(1)(A) unless and until the exemption were terminated under § 251(f)(1)(B). Midcontinent's description of its request as made under § 251(a) and (b) does not fit the statutory pattern of graduated duties as described by the FCC in the Ruling.

The CLEC/ILEC interconnection that Midcontinent requested is a "direct interconnection ...in the Williston exchange ... for the purpose of exchanging local telecommunications traffic." 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."

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 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 cannot be interpreted to support Midcontinent's notion that Missouri Valley, an exempt rural ILEC, can be compelled via § 252(b) arbitration to provide interconnection for the purpose of exchanging local telecommunications traffic. That interpretation of the Ruling argued by Midcontinent is

impermissible, inconsistent with the plain words of §§ 251 and 252, inconsistent with the Iowa v FCC and AT&T v Atlas decisions, and inconsistent with the plain words of the Ruling.

The interconnection that Midcontinent requests in its 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 describes its request as made 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 reading of Act § 251 and of the Ruling are impermissible. Iowa v FCC; AT&T v Atlas.

Missouri Valley is not obliged under § 251(a) to interconnect with Midcontinent for the purpose of exchanging local telecommunications traffic in the Williston exchange, and § 252(b) 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.

ORDER

The Commission Orders:

1. Missouri Valley is not obliged under Act § 251 to interconnect with Midcontinent and interconnection may not be compelled under § 252(b) to interconnect for the purpose of exchanging local telecommunications traffic in the Williston exchange. Midcontinent Communication's petition for arbitration is therefore dismissed.
2. Missouri Valley Communications Inc. motion for dismissal of Midcontinent's petition for arbitration on the grounds that Midcontinent Communication's petition is barred by res judicata is moot.

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