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FEB 27 2012

PUBLIC SERVICE COMMISSION

February 24, 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 Communications' Post Hearing Brief in Support of Motion to Dismiss Petition*. 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: Zachary Pelham
J.G. Harrington
Mike Kilgore

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 24th day of February, 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. *Missouri Valley Communications' Post Hearing Brief in Support of Motion to Dismiss Petition*
2. *Affidavit of Mailing.*

That said envelopes were addressed to the following persons at their known addresses as follows:

Patrick W. Durick
Zachary E. Pelham
Pearce & Durick
P.O. Box 400
Bismarck, ND 58502-0400

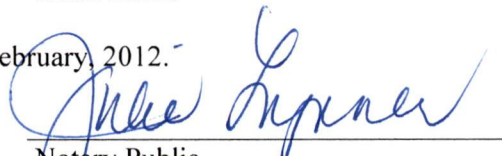
J.G. Harrington
Dow Lohnes, PLLC
1200 New Hampshire Avenue, NW
Suite 800
Washington, DC 20036

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



Kristi Bailie

Subscribed and sworn to before me this 24 day of February, 2012.



Notary Public
For the state of North Dakota

JULIE LYNNER
Notary Public
State of North Dakota
My Commission Expires Oct. 14, 2017

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Midcontinent Communications, a)	
South Dakota Partnership,)	
)	Case No. PU-11-697
Petitioner,)	
vs.)	
)	Missouri Valley Communications’
Missouri Valley Communications, Inc.,)	Post Hearing Brief In Support of
)	Motion to Dismiss Petition
Respondent.)	

Midcontinent requested a facilities based interconnection agreement with Missouri Valley for the Williston, North Dakota exchange in November, 2007. 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)(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. Midcontinent commenced an action in federal district court for judicial review of the Commission’s decision. The federal court action commenced by Midcontinent was dismissed by U.S. District Court Judge Daniel Hovland, who granted Missouri Valley’s motion for summary judgment and affirmed the Commission’s decision.

On June 14, 2011, Midcontinent again requested interconnection between Missouri Valley and Midcontinent in Williston, ND for the purpose of exchanging local telecommunications traffic in the Williston exchange. Missouri Valley again declined Midcontinent’s request and on November 14, 2011, Midcontinent filed a petition for the Commission to arbitrate its request citing § 251(a), as if the case were different from the earlier Case No. PU-08-61 under § 251(f)(1).

On November 21, 2011, Missouri Valley moved for dismissal of Midcontinent’s petition, on two separate, and independent 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 for interconnection in Missouri Valley's Williston exchange is not terminated."

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(a) to provide a facilities based direct interconnection with Midcontinent for the purpose of exchanging local telecommunications traffic in the Williston exchange.

The parties filed briefs and presented oral argument on February 10, and during oral argument the Commission requested additional briefs about Act § 251(a) and about the scope of the Commission's authority, among other issues.

ARGUMENT

Midcontinent's 2011 request and petition seeks a rematch of its defeat fairly suffered in 2008, an extra inning or 5th quarter in which it wants the Commission to change the outcome of Case No. PU-08-61 where Midcontinent was denied its requested interconnection for the purpose of exchanging traffic in the Williston exchange. In 2011 Midcontinent seeks the same kind of interconnection for the same purpose as in 2008, claiming Act § 251(a) is different from § 251(f)(1). It matters not that a different theory is alleged in 2011. It matters less, because the record in case PU-08-61 clearly shows that Midcontinent's § 251(a) theory was in its 2008 playbook. Under res judicata principles, Midcontinent is barred from relitigating its request for facilities based direct interconnection for the purpose of exchanging local telecommunications traffic in the Williston exchange. Res judicata is a legal principle that applies to decisions of administrative agencies. The "circumspect" exception mentioned in WSI cases is not well defined, but the cases indicate an agency's decision can be revisited and modified where the agency is both a party and an adjudicator of claims against the state agency and where new facts support a new decision. Where an agency such as the PSC is an adjudicator of claims between parties, its

decisions are not subject to a rematch where one of the parties seeks to change the outcome of the agency's decision that was affirmed on judicial review.

If Midcontinent's 2011 petition under § 251(a) is not barred under *res judicata*, it should be dismissed because the goal of its petition is not authorized under that section.

Midcontinent seeks interconnection and the exchange of local traffic. Under § 251(a), Missouri Valley and Midcontinent are obliged to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers. Under § 251(a), the interconnection obligation may be performed by direct or indirect interconnection. Midcontinent has acknowledged that it and Missouri Valley are indirectly interconnected. Section 251(a) imposes obligations of interconnection in the alternative – direct or indirect. Section 251(a) creates obligations; it does not create rights. Section 251(a) imposes an obligation to interconnect, an obligation performed by the indirect interconnection between Midcontinent and Missouri Valley. Section 251(a) does not create rights that one telecommunications company is entitled to direct interconnection with another when they are indirectly interconnected. Missouri Valley is in compliance with its interconnection obligation vis-à-vis Midcontinent. Section 251(a) does not impose an obligation to exchange traffic.

Midcontinent denies this plain words understanding of § 251(a). Midcontinent asserts § 251(a) imposes on Missouri Valley the additional obligations of direct interconnection and the exchange of local telecommunications traffic, an assertion contradicted by other parts of section 251 and contradicted by the FCC Ruling and by a specific precedent, the Atlas case. Midcontinent offers nothing in support of its arguments other than repetition and a distorted reading of the FCC's May 2011 Ruling. The dispositive argument against repetition is: To repeat a false argument does not render it true.

The essence of the FCC Ruling was to “clarify” (the FCC's word) that rural telephone companies' obligations under § 251(a) are not included in the rural exemption (§ 251(f)(1)(A)) from § 251(c) obligations – a point that seems clear from the plain words of the statute and not in need of clarification but for the misguided actions of some rural telephone companies in other states, stonewalling compliance with § 251(a) interconnection duties. The FCC Ruling also “clarified” that § 252(b)

arbitration procedures are available to enforce rural telephone companies' obligations under § 251 (a). The FCC Ruling did not "clarify" § 251(a) as including obligations of direct interconnection for the exchange of local telecommunications traffic. The FCC Ruling does not support Midcontinent's argument that § 251(a)'s obligation of direct or indirect interconnection should be interpreted to include an obligation of direct interconnection and exchange of local telecommunications traffic. The Ruling does not support that expansion of § 251(a). If that were what Congress intended, Congress would have said so.

What the Act provides in other parts of section 251, §§ 251(c) and 251 (f) – and what the FCC Ruling says about those other sections - also contradict Midcontinent's assertion that § 251(a) includes an obligation of direct interconnection for the exchange of local traffic.

Section 251(c)(2) imposes on incumbent local exchange carriers the duty to provide facilities based interconnection with competitive local exchange carriers for the exchange of local telecommunications traffic, subject to the provision of § 251(f)(1)(A) that rural telephone companies are exempt from those obligations unless and until the exemption were terminated under § 251(f)(1)(B). These sections say in combination how Midcontinent might obtain the direct interconnection for the exchange of local traffic that it seeks under § 251(a) – as in Case No. PU-08-61. If Midcontinent is right in its assertion that any ILEC, rural or non-rural, is obliged under § 251(a) to provide facilities based direct interconnection for the exchange of local telecommunications traffic with a CLEC, then what explains the provisions of §§ 251(c) and 251(f)? The explanation is Midcontinent is wrong, and the error is easily demonstrated.

The plain words of § 251(a) do not include a duty for any ILEC, rural or non-rural, to provide facilities based direct interconnection with a CLEC for the exchange of local telecommunications traffic. There is such a duty under § 251(c)(2) that applies to rural telephone companies only under § 251(f)(1)(B). There must be a purpose for the difference between the language of § 251(a) on one hand and §§ 251(c)(2) and 251(f) on the other. The reason is articulated in the FCC Ruling, a statutory purpose to create a three-tiered hierarchy of obligations:

“Section 251(a) imposes relatively limited obligations on all telecommunications carriers; section 251(b) imposes moderate duties on local exchange carriers; and section 251(c) imposes more rigorous obligations on incumbent LECs.” FCC Ruling, ¶ 17, n. 57

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.

Principal parts of the Ruling are quoted:

“4. *Section 251 Duties.* Section 251 provides a graduated set of interconnection requirements and other obligations designed to foster competition in telecommunications markets, particularly local markets. The nature and scope of these obligations vary depending on the type of service provider involved. Section 251(a) sets forth general duties applicable to all telecommunications carriers, including the duty “to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers.” Section 251(b) sets forth additional duties for LECs pertaining to resale of services, number portability, dialing parity, access to rights-of-way, and reciprocal compensation – the duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications (*i.e.*, arrangements for exchange of traffic terminating on another carrier’s network). Section 251(c) sets forth the most detailed obligations, which apply to *incumbent* LECs, the group of local telephone companies that, prior to the 1996 Act, generally had been subject to little or no competition. These section 251(c) obligations include: the duty to “negotiate in good faith in accordance with section 252 the particular terms and conditions of agreements” to fulfill the section 251(b) and (c) requirements; additional direct, physical interconnection obligations; requirements to unbundle network elements; the duty to allow resale of telecommunications services at wholesale rates; requirements to provide notice of network changes; and a requirement to allow collocation of equipment.

“5. *The Rural Exemption.* Section 251(f)(1), known as the rural exemption, states that section 251(c) “shall not apply to a rural telephone company” until the rural telephone company, or rural LEC, has received a bona fide “request for interconnection, services, or network elements,” and the relevant state commission determines that the request is not unduly economically burdensome, is technically feasible, and is consistent with section 254. The Commission has stated that Congress intended exemption from the section 251(c) requirements to be the exception rather than the rule, and to apply only to the extent, and for the period of time, that policy considerations justify such exemption...”

....

“14.Therefore, to further the Commission’s goals in promoting facilities-based competition, we take this opportunity to clarify the relationship between the section 251(a) and (b) obligations and the section 251(f)(1) rural exemption. Consistent with Commission precedent, we reaffirm that all telecommunications carriers, including rural carriers covered by section 251(f)(1), have a basic duty to interconnect their networks under section 251(a) and that all LECs, including rural LECs covered by section 251(f)(1), have the obligation to comply with the requirements set forth in section 251(b). We also clarify that a rural carrier’s exemption under section 251(f)(1) offers

an exemption only from the requirements of section 251(c) and does not impact its obligations under sections 251(a) or (b).

....

“15. This interpretation flows directly from the language of section 251 itself. As explained above, section 251(a), which applies to “[e]ach telecommunications carrier,” imposes a basic duty “to interconnect directly or indirectly” with other telecommunications carriers. Section 251(b) provides that all LECs must provide certain services designed to foster competition for local telecommunications services, including the obligation to provide number portability and dialing parity, as well as establish reciprocal compensation arrangements. Section 251(f)(1) states that section 251(c) “shall not apply to a rural telephone company” until certain requirements have been met. By its terms, section 251(f)(1) does not grant an exemption from the requirements of sections 251(a) or (b). Because sections 251(a) and (b) are separate statutory mandates from section 251(c), the requirements of sections 251(a) and (b) apply to a rural LEC even if it is covered by the section 251(f)(1) exemption.

....

“17. We recognize that section 251(c)(1) imposes on incumbent LECs and requesting carriers the duty to negotiate in good faith to fulfill the requirements of section 251(b). The rural exemption therefore relieves covered rural telephone companies from the obligation under 251(c)(1) to “negotiate in good faith” the particular terms and conditions of agreements to fulfill their obligations under section 251(b). However, the obligation to fulfill the requirements set forth in sections 251(a) and (b) does not arise from, or depend upon, the section 251(c)(1) duty to negotiate in good faith. If it did, the three-tiered hierarchy of section 251 would collapse, leaving non-exempt incumbent LECs as the only carriers subject to any duties under section 251.⁵⁷

⁵⁷ Section 251(a) imposes relatively limited obligations on all telecommunications carriers; section 251(b) imposes moderate duties on local exchange carriers; and section 251(c) imposes more rigorous obligations on incumbent LECs.

....

The plain words of § 251, explained by the FCC as installing a statutory hierarchy of duties, includes direct interconnection for the exchange of local telecommunications traffic in § 251(c) and excludes that rigorous obligation from the limited obligation of § 251(a) that refers “solely to the physical linking of two networks, and *not* to the exchange of traffic between networks.’ ... 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.” AT&T Corp. v Atlas, 317 F.3d 227 (D.C. Cir. 2003).

At oral argument, Midcontinent suggested the FCC's words quoted by the Atlas court should be confined to the facts of the case where Atlas schemed to rip off AT&T via § 251(a) misses the principle that equally applies to Midcontinent's scheme to cram the exchange of local traffic into § 251(a). No telecommunications company is obliged under § 251(a) to exchange traffic. It is not necessary to brand Midcontinent's requested interconnection as a sham comparable to the Atlas artifice. The moral quality of Midcontinent's petition matters not. All that matters is to follow the words of the statute. Missouri Valley's limited interconnection obligation under § 251(a) does not include the rigorous obligation of facilities based direct interconnection for the purpose of exchanging local telecommunications traffic. Midcontinent's proposed interconnection agreement undermines its arguments about the meaning of § 251(a). Under ND Admin. Rules 69-02-10-05 and -06, Midcontinent's proposed interconnection agreement is relevant documentation that should have been provided coincident with its petition for arbitration on November 14, 2011. Of course it proposed facilities based interconnection for the exchange of local telecommunications traffic. But it is particularly interesting that Midcontinent's proposed interconnection agreement eschewed practices such as rate arbitrage and traffic misrepresentation. See Midcontinent's proposed interconnection agreement, attachment 3, sections 1.3 and 3.5. The same principle must be applied to Midcontinent's petition. Even if honestly believed, it is a misrepresentation of § 251(a) for Midcontinent to propose to the Commission that exchange of local telecommunications traffic is included in the limited interconnection obligations of § 251(a).

It doesn't take a Philadelphia lawyer or one from Squaw Gap to discern that Midcontinent's gaining a facilities based direct interconnection for the purpose of exchanging telecommunications traffic in Williston would not only alter the outcome of Case No. PU-08-61, such an outcome of this case No. PU-11-697 would circumvent the rural exemption under § 251(f)(1)(A) and procedures under § 251(f)(1)(B). Such an outcome could be achieved only by a "cramped reading" of § 251(a) and the FCC Ruling which "allows the rural incumbent LEC to retain its exemption from the more rigorous section 251(c)(2) obligations...." FCC Ruling ¶ 25. It is no accident that the FCC's declaration that the Ruling

“...preserves the protections that Congress intended for the rural LECs” (Id.) uses familiar words. See Iowa Utilities Board v Federal Communications Commission, 219 F.3d 744, (8th Cir. 2000) where the court vacated rules that impermissibly weakened the rural exemption and “the broad protection Congress granted to rural telephone companies” under § 251(f)(1)(A). The federal act provides for administration of § 251 by State commissions. NDCC § 49-21-01.7, subsections 8, 9 and 11 empower the Commission to administer the provisions of Act that are involved in this case. "The Public Service Commission has only such powers as have been conferred upon it by the Legislature. It can neither initiate public policies of its own nor act in a field which the legislature has not authorized it to enter." Grafton v. Otter Tail Power Co., 86 N.W.2d 197 (N.D. 1957) (Court Syllabus No. 6.) See also Cass County Electric Cooperative, Inc. v. Northern States Power Co., 518 N.W.2d 216, 219 (N.D. 1994) and Capital Electric Cooperative, Inc. v Public Service Commission, 534 N.W. 2d 587 (N.D. 1995) The Commission is not empowered to initiate policies or to change policies; it administers legislated policies, including the “the broad protection Congress granted to rural telephone companies” under § 251(f)(1)(A).

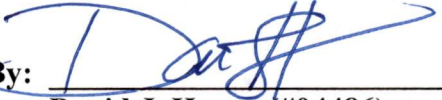
SUMMARY AND CONCLUSION

Midcontinent is barred from pursuing a facilities based direct interconnection for the purpose of exchanging local telecommunications traffic under res judicata principles. Even if Midcontinent’s request is not barred, Missouri Valley is not obliged under § 251(a) to provide facilities based direct interconnection for the purpose of exchanging local traffic. Each ground of Missouri Valley’s motion to dismiss is separately sufficient for dismissal of Midcontinent’s petition.

There is no statutory procedure other than § 251(f)(1)(B) for Midcontinent to seek a facilities based direct interconnection for the purpose of exchanging local telecommunications traffic in the Williston exchange. Midco might not be barred from bringing another case under §251(f)(1)(B) sometime in the future. Missouri Valley’s limited interconnection obligation under § 251(a) does not include the rigorous obligation of facilities based direct interconnection for the purpose of exchanging local telecommunications traffic.

Dated this 24 day of February, 2012.

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