

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

MISSOURI VALLEY COMMUNICATIONS, INC.)

Plaintiff,)

v.)

NORTH DAKOTA PUBLIC SERVICE)
COMMISSION and KEVIN CRAMER,)
BONNY FETCH, AND BRIAN KALK,)
In their official capacities as Commissioners)
of the North Dakota Public Service Commission)

and)

MIDCONTINENT COMMUNICATIONS,)
A South Dakota Partnership,)

Defendants.)

Case No. 4:12-CV-091

**DEFENDANT'S ANSWER
TO PLAINTIFF'S
COMPLAINT**

Defendant North Dakota Public Service Commission and Kevin Cramer, Bonny Fetch, and Brian Kalk, In their official capacities as Commissioners of The North Dakota Public Service Commission, states the following in response to Plaintiff's Complaint filed on July 9, 2012. Each response corresponds to the same numbered paragraph of Plaintiff's Complaint.

1. The allegations contained in Paragraph 1 consist of Plaintiff's characterization of their case, to which no response is required. To the extent a response may be required, Defendant denies that the Plaintiff is entitled to any relief in this case.

2. Defendant admits to the allegations in paragraph 2, in that Missouri Valley Communications, Inc. (Missouri Valley) and Midcontinent Communications (Midcontinent) are telecommunication companies as defined in the Communications Act, 47 USC § 151 et. seq. (The “Act”).

3. Concerning the allegations contained in Paragraph 3, Defendant admits that on November 14, 2011, Midcontinent filed a petition with the North Dakota Public Service Commission (“Commission”) seeking arbitration. Defendant adds that Midcontinent also cited Chapter 69-02-10 of the North Dakota Administrative Code, contemporaneous with § 252, when filing its petition for arbitration with the Commission. As to the remaining allegation in Paragraph 3, Defendant denies.

4. Defendant admits to the allegation in paragraph 4.

5. Defendant denies any allegations in paragraph 5 which conflict with the Commission’s March 21, 2012 Findings of Fact, Conclusions of Law, and Order.

6. Defendant denies any allegations in paragraph 6 which conflict with the Commission’s June 27, 2012 Order on Interconnection Agreement.

7. Defendant denies any allegations in paragraph 7 which conflict with Midcontinent’s Petition for Arbitration.

8. Defendant denies any allegations in paragraph 8 which conflict with Midcontinent’s Petition for Arbitration, Midcontinent’s letter requesting interconnection with Missouri Valley, and the Commission’s March 21, 2012 Findings of Fact, Conclusions of law, and Order.

9. The allegation contained in paragraph 9 consists of a legal conclusion, to which no response is required. To the extent any further response may be required, it is the

Defendant's position that § 251(a) does include interconnection for the exchange of local telecommunications traffic. On that basis the Defendant denies.

10. The allegation contained in paragraph 10 consists of a legal conclusion, to which no response is required. To the extent any further response may be required, it is the Defendant's position that its determinations in Case No. PU-11-697 do meet all of the requirements of § 251. On that basis the Defendant denies.

11. The allegation contained in paragraph 11 consists of a legal conclusion, to which no response is required. To the extent any further response may be required, it is the Defendant's position that Midcontinent's 2011 petition for arbitration under § 252 of the Act, and request for interconnection for exchanging traffic under § 251(a), are authorized under the Communications Act. On that basis the Defendant denies.

12. The allegation contained in paragraph 12 consists of a legal conclusion, to which no response is required. To the extent any further response may be required, it is the Defendant's position that Missouri Valley is obliged under § 251(a) to interconnect with Midcontinent for the purpose of exchanging local telecommunications traffic in the Williston exchange. On that basis the Defendant denies.

13. The allegation contained in paragraph 13 consists of a legal conclusion, to which no response is required. To the extent any further response is required, it is the Defendant's position that arbitration under § 252 is authorized as a procedure for Midcontinent to obtain § 251(a) interconnection with Missouri Valley for the purpose of exchanging local telecommunications traffic in the Williston exchange. On that basis the Defendant denies.

14. The allegation contained in paragraph 14 consists of a legal conclusion, to which no response is required. To the extent any further response is required, the Defendant denies any allegations which conflict with the Commission's prior legal arguments.

15. The allegation contained in paragraph 15 consists of a legal conclusion, to which no response is required. To the extent any further response is required, as stated in paragraph 14 of its Answer above, it is the Defendant's position that the *Petition of CRC Communications of Maine, Inc. and Time Warner Cable for Preemption Pursuant to Section 253 of the Communications Act, as Amended, Declaratory Ruling*, 26 FCC Rcd 8259 (Declaratory Ruling) did clarify the duties of Missouri Valley as it relates to interconnection and submission to arbitration under the Act. On that basis the Defendant denies.

16. The allegation contained in paragraph 16 consists of a legal conclusion, to which no response is required. To the extent any further response is required, it is the Defendant's position that the Declaratory Ruling clarified Missouri Valley's duty to interconnect with Midcontinent for the purpose of exchanging local telecommunications traffic. On that basis the Defendant denies.

17. The allegation contained in paragraph 17 consists of a legal conclusion, to which no response is required. To the extent the allegations of paragraph 17 conflict with federal law, Defendant denies. Defendant lacks sufficient knowledge of the basis for Missouri Valley's claim concerning Missouri Valley's rural exemption status and its relation to this matter, and therefore denies on that basis. Defendant agrees that Midcontinent sought interconnection with Missouri Valley in 2008 pursuant to 47 U.S.C.

§ 251(c)(2), but denies that Midcontinent's 2011 Interconnection request was pursuant to 47 U.S.C. § 251(c)(2), or was subject to the rural exemption.

18. The allegation contained in paragraph 18 consists of a legal conclusion, to which no response is required. To the extent any further response is required, it is the Defendant's position that Res judicata does not bar Midcontinent from litigating its current request for interconnection from Missouri Valley. On that basis the Defendant denies.

19. Defendant denies any allegations in paragraph 19 which conflict with the April 15, 2010 Order in Case No. 1:09-CV-107.

20. Defendant denies any allegations in paragraph 20 which conflict with the record or filings in Commission Case No. PU-08-61.

21. Defendant admits that an administrative hearing in Case No. PU-08-61 between Missouri Valley and Midcontinent occurred on or about July 9-10, 2008.

22. Defendant denies any allegations in paragraph 22 which conflict with the October 8, 2008 Findings of Fact, Conclusions of Law, and Order in Commission Case No. PU-08-61.

23. Defendant admits that in Commission Case No. PU-08-61, Midcontinent's petition for reconsideration or rehearing was denied, as alleged in paragraph 23.

24. Defendant admits to the allegation in paragraph 24 that Midcontinent filed an action with the federal district court (Case No. 1:09-CV-017) but denies any allegations in paragraph 24 which conflict with the filings in Case No. 1:09-CV-017.

25. Defendant admits to the allegation in paragraph 25 to the extent it relates to Case No. 1:09-CV-017.

26. Defendant admits to the allegation in paragraph 26 to the extent that it does not conflict with the denial of Midcontinent's summary judgment motion in Case No. 1:09-CV-017.

27. The allegation contained in paragraph 27 consists of a legal conclusion, to which no response is required. To the extent any further response is required, it is the Defendant's position that Midcontinent's November 14, 2011 petition for arbitration did not raise an issue litigated or which could have been litigated in PSC Case No. PU-08-61 and Federal District Court case No. 1:09-CV-017, to wit: whether Missouri Valley has a duty under § 251(a) to interconnect with Midcontinent for the exchange of local telecommunications traffic in the Williston exchange. On that basis the Defendant denies.

28. The allegation contained in paragraph 28 consists of a legal conclusion, to which no response is required. To the extent any further response is required, it is the Defendant's position that Res Judicata does not bar Midcontinent from relitigating its request for interconnection in Missouri Valley's Williston exchange after litigation in PSC Case No. PU-08-61 and Federal District Court case No. 1:09-CV-017. Additionally, the Defendant asserts N.D.C.C. § 49-05-09, which empowers the Commission, "upon due notice ... [to] rescind, alter, or amend any decision made by it" On this basis the Defendant denies.

PLAINTIFF'S PRAYER FOR RELIEF:

The allegations contained in the remaining, unnumbered paragraphs of Plaintiff's Complaint constitute a prayer for relief, to which no response is required. To the extent

a further response may be required, Defendant denies that Plaintiff is entitled to any relief whatsoever.

GENERAL DENIAL

To the extent any allegations have not been specifically addressed in the preceding paragraphs, Defendant hereby denies such allegations.

AFFIRMATIVE DEFENSES

Without limiting or waiving any available defenses, Defendant hereby asserts the following affirmative defenses:

Plaintiffs have failed to state a claim upon which relief can be granted.

Midcontinent has complied in every respect with the requirements set forth in 47 U.S.C. § 251 in seeking a facilities based interconnection agreement with Missouri Valley and the North Dakota Public Service Commission's June 27, 2012 Order on Interconnection Agreement confirms Midcontinent complied with all federal and state requirements.

Missouri Valley's appeal is barred because it is seeking review of a final, binding order of the Federal Communications Commission.

Defendant reserves the right to raise additional affirmative defenses in the course of discovery.

REQUEST FOR RELIEF

Defendant respectfully requests the Court to dismiss this action with prejudice, enter judgment in favor of Defendant, and grant any other relief the Court deems just and proper.

Respectfully submitted this 10th day of September, 2012.

By: /s/ Mark Gruman
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CERTIFICATE OF SERVICE

I hereby certify that on September 10, 2012, the above-captioned document **ANSWER** was filed electronically with the Clerk of Court through ECF, and that ECF will send a Notice of Electronic Filing (ECF) to the following:

David Hogue

/s/ Mark Gruman
MARK GRUMAN