

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

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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. )

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PSC Case No. PU-11-697 )

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Case No. 4:12-CV-091

**CONSOLIDATED  
DEFENDANT NORTH  
DAKOTA PUBLIC SERVICE  
COMMISSION'S REPLY  
MEMORANDUM AND  
MEMORANDUM IN SUPPORT  
OF MOTION TO DISMISS  
MISSOURI VALLEY'S  
COMPLAINT**

Respectfully submitted this 26th day of November, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on November 26th, 2012, the above-captioned document **CONSOLIDATED DEFENDANT NORTH DAKOTA PUBLIC SERVICE COMMISSION'S REPLY MEMORANDUM AND MEMORANDUM IN SUPPORT OF MOTION TO DISMISS MISSOURI VALLEY'S COMPLAINT** 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

## **I. INTRODUCTION AND STATEMENT OF UNDISPUTED MATERIAL FACTS**

The 1996 Telecommunications Act significantly revised the Communications Act of 1934, for the purpose of providing greater competition and reducing regulation in the hope of acquiring lower prices and higher quality for consumers, as well as deployment and availability of new telecommunications technology throughout our nation.

Act § 251 was promulgated to define interconnection obligations for carriers, setting forth a three part hierarchy of interconnection duties (codified at Act § 251(a), Act § 251(b), and Act § 251(c)). Act § 251(f) allows incumbent carriers to avoid Act § 251(c) interconnection duties (rural exempt carriers). There are no such exemptions for Act § 251(a) nor Act § 251(b) interconnection requests. Act § 252 provides for mandatory arbitration to resolve disputes between incumbent and competitive carriers, to be enforced by the applicable agency charged with telecommunication regulation by its respective state government.

Missouri Valley Communications, Inc. (Missouri Valley) is an incumbent, rural exempt carrier, controlling the legacy telephone network for the Williston, North Dakota exchange. Midcontinent Communications, Inc. (Midcontinent) is a competitive carrier.

In 2011 the Federal Communications Commission (FCC) promulgated a Declaratory Ruling, clarifying contradictory determinations by several regulatory bodies concerning incumbent exempt carrier obligations and their duty to submit to Act § 251(a) interconnection requests and Act § 252(a) compulsory arbitration petitions from competitive carriers (notwithstanding whether the incumbent carrier possessed a rural exemption). The FCC agreed with the competitive carriers.

In November 2007 Midcontinent requested facilities based interconnection for the Williston, North Dakota exchange, pursuant to Act § 251(c). Missouri Valley denied the request, relying on its Act § 251 (f)(1)(a) rural exemption status from Act § 251(c).

On February 8, 2008 Midcontinent filed with the Commission its Notice of Bona Fide Request for Services and Interconnection and Petition to Find Rural Exemption Waived. Specifically Midcontinent requested that the Commission determine that Missouri Valley has waived its rural exemption or, in the alternative, that the Commission conduct an inquiry under the provisions of Act § 251 (f)(1)(a) for the purpose of determining whether to terminate Missouri Valley's rural exemption from providing its services as requested by Midcontinent (Case No. PU-08-61).

On July 9, 2008 the matter proceeded to a formal hearing on the merits in order to determine Midcontinent's February 8, 2008 petition. On October 8, 2008 the Commission denied Midcontinent's February 8, 2008 petition for termination of Missouri Valley's rural exemption, which was affirmed by the United States District Court, Case No. 1:09-CV-017.

On June 14, 2011, Midcontinent requested facilities-based interconnection for the Williston, North Dakota exchange from Missouri Valley (interconnection request), for the purpose of exchanging local traffic under 47 U.S.C. § 251(a) of the Federal Communications Act of 1934 (Act), Act § 252(b) and reciprocal compensation and number portability under Act § 251(b) (Case No. PU-08-61).

On July 6, 2011 Missouri Valley declined Midcontinent's request, asserting that it was exempt pursuant to the rural exemption (Act § 251(f)(1)(a)).

On November 14, 2011, Midcontinent filed with the Commission a Petition for (mandatory) arbitration, pursuant to Act § 252(b).

On November 21, 2011, Missouri Valley filed with the Commission a Motion to Dismiss Midcontinent's Petition for Arbitration, advocating that: Direct Interconnection under Act § 251(a) does not include the exchange of telecommunications traffic; Act § 251(a) compulsory arbitration is inapplicable to rural exempt carriers; and that res judicata precludes Midcontinent from filing their November 14, 2011 petition, as it is relitigation of Case No. PU-08-61; United States District Court, Case No. 1:09-CV-017.

On March 21, 2012 the Commission denied Missouri Valley's Motion to Dismiss. An interconnection agreement was filed with the Commission on May 29, 2012, which the Commission formally accepted on June 27, 2012. Missouri Valley appealed the Commission's March 21, 2012 and June 27, 2012 decisions to this Court on July 11, 2012. Count 1 alleges that the Commission's March 21, 2012 and June 27, 2012 Orders do not meet the requirements of 47 USC § 251. Count 2 alleges that Midcontinent's November 24, 2011 Petition for arbitration, pursuant to Act § 252(b), is barred by Res Judicata.

## **II. Legal Background**

"Until the 1990's, local phone service was thought to be a natural monopoly." *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 371 (1999). "States typically granted an exclusive franchise in each local service area to a local exchange carrier (LEC), which owned, among other things, the local loops (wires connecting telephones to switches), the switches (equipment directing calls to their destinations), and the transport trunks (wires carrying calls between switches) that constitute a local exchange network." *Id.*

“Technological advances, however ... made competition among multiple providers of local service seem possible, and Congress ... ended the longstanding regime of state-sanctioned monopolies” via the Telecommunications Act of 1996 (Act). *Id.* “The ... [Act] fundamentally restructure[d] local telephone markets.” *Id.* States ... [were prohibited from enforcing] laws that impede competition, and incumbent LECs are [now] subject to a host of duties intended to facilitate market entry.” *Id.* Foremost among these duties is the LECs obligation ... to share its network with competitors.” *Id.*

“Section 251 provides a graduated set of interconnection requirements and other obligations designed to foster competition in telecommunications markets, particularly local markets.” *Section 251(a) Declaratory Ruling*, 26 FCC Rcd at 8267 (Declaratory Ruling). “The nature and scope of these obligations vary depending on the type of service provider involved.” *Id.* at 2. “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.” *Id.*

“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).” *Id.*

“Section 251(c) sets for 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.” *Id.* “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.” *Id.* at 3.

“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 determined that the request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 [Universal Service].” *Id.* “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.**” *Id.* (emphasis added). “In 1997, the Commission addressed the scope of the rural exemption in the context of section 251(b)’s number portability obligations.” *Id.* The Commission found that because section 251(f)(1) does not exempt rural LEC’s from the requirements of section 251(b), rural LECs remain subject to the section 251(b) number portability obligations even if they also are subject to section 251(f)(1)’s rural exemption.” *Id.*

“Section 252 directs state commissions to mediate and arbitrate interconnection disputes involving an incumbent LEC, as well as to review interconnection agreements arrived at by negotiation and arbitration.” *Id.* “The Commission has declined to adopt rules advising the state commissions on how to conduct mediations and arbitrations,

and has stated that the states are in a better position to develop mediation and arbitration rules that support the objectives of the 1996 Act.” *Id.* Under section 252(a), when an incumbent LEC receives a request for interconnection, services, or network elements pursuant to section 251, and enters into voluntary negotiations, the incumbent LEC may negotiate without regard to the standards set forth in sections 251(b) and (c).” *Id.* “Any party voluntarily negotiating such an interconnection agreement may ask a state commission to mediate any differences.” *Id.* “Additionally, section 252(b) sets forth a mandatory arbitration scheme for interconnection disputes.” *Id.* at 4.

“On July 15, 2010, CRC and TWC filed a petition with the Commission seeking preemption of a May 5, 2008 Order (*Maine PUC Order*) issued by the Maine PUC”. *Id.* “In that Order, the Maine PUC held that rural incumbent LECs have no obligation to negotiate in good faith under sections 251(a) and (b) of the Act and, until the rural exemption in section 251(f)(1) is lifted, there is . . . nothing to arbitrate” under section 252.” *Id.* “In reaching this conclusion, the Maine PUC found that the statutory source of an incumbent LEC’s obligation to negotiate an interconnection agreement with competitive carriers is section 251(c)(1), and that rural LECs were exempt from this provision pursuant to section 251(f)(1).” *Id.* at 5. “The Maine PUC acknowledged that a rural incumbent LEC is not exempt from the obligations set forth in § 251(a) and § 251(b), but concluded that it did not have authority to directly enforce the requirements of those provisions because its arbitration authority presumes a duty on the part of an ILEC to engage in good faith negotiations regarding the terms of such an agreement in the first instance.” *Id.* “CRC and TWC asked the Commission to direct the Maine PUC to compel the rural LECs to negotiate pursuant to sections 251(a) and

251(b) of the Act, and direct the Maine PUC to commence arbitration should negotiations prove unsuccessful.” *Id.*

“A number of other state commissions that have considered similar issues have reached varying conclusions.” *Id.* “For example, the New Hampshire Public Utilities Commission, the Vermont Public Service Board, and the Illinois Commerce Commission found that the rural exemption did not affect the incumbent LEC’s obligation to provide interconnection under section 251(a) and (b).” *Id.* at 6. “The Public Utilities Commission of Texas, the North Carolina Utilities Commission, and the Maine PUC found that incumbent LECs that qualified for a rural exemption under section 251(f)(1) were relieved of the obligation to negotiate in good faith.” *Id.*

In light of the “varying conclusions” articulated above, on May 26, 2011 the Federal Communications Commission issued their Declaratory Ruling, “clarify[ing] that LECs are obligated to fulfill all of the duties set forth in sections 251(a) and (b) of the Act, including the duty to interconnect and exchange traffic, even if the LEC has a rural exemption from the obligations set forth in section 251(c).” *Id.* at 1.

### **III. Argument**

#### **A. Legal Standard**

“Summary Judgment is proper where there are no genuine issues of material facts and the moving party is entitled to judgment as a matter of law.” *UnitedHealth Group Inc. v. Wilmington Trust Co.*, 548 F.3d 1124, 1127 (8<sup>th</sup> Cir. 2008). This Court’s review of the Commission’s determination is done so “de novo”<sup>1</sup>, as the issues for

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<sup>1</sup> “An appeal in which the appellate court uses the trial court’s [or, in this instance, the [Commission’s] record but reviews the evidence and law without deference to the ...

analysis are solely questions of law. *WWC License, L.L.C. v. Boyle*, 459 F.3d 880, 889 (8<sup>th</sup> Cir. 2005). The Federal Communication Commission’s (FCC) determinations in its Declaratory Ruling must be provided “deference .... [as] Congress expressly charged the [the Agency] with the duty to promulgate regulations to interpret and carry out the Act.” *Id.* at 890. The North Dakota Supreme Court has likewise extended such “deference” to the North Dakota Public Service Commission. (“However, we give some deference to a reasonable interpretation of a statute by the agency responsible for enforcing it, and give appreciable deference to agency expertise if the subject matter is highly technical”). *Consolidated Telephone Co-op v. Western Wireless Corp.*, 637 N.W.2d 699, 702 (N.D. 2001).

“[I]f a provision of the Act is vague ... [the Court is] inclined to interpret the provision in a manner that promotes competition”. *WWC License, L.L.C. v. Boyle*, 459 F.3d 880, 889 (8<sup>th</sup> Cir. 2005). “It is undisputed that Congress passed the Act with the intention of eliminating monopolies and fostering competition.” *Id.* ... “[T]his general intent should guide ... [the Court’s] consideration of competing interpretations of the Act.” *Id.* “If a cost is imposed on a competitor, it becomes a barrier to entry and rewards the company who previously benefitted from monopoly protection.” *Id.* “Because Congress passed the Act with a clear intent to foster competition ... [the Court should be] more inclined to interpret a vague provision in a manner that reduces barriers to entry.” *Id.*

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[Commission’s] rulings.” *Black’s Law Dictionary* 94 (Bryan A. Garner ed., 7<sup>th</sup> ed., West 1999).

## B. The Defendants' are entitled to Summary Judgment

- i. **Missouri Valley's rural exemption status does not preclude them from their general duty to interconnect with Midcontinent, pursuant to Act § 251(a), or to submit to compulsory arbitration under Act § 252 for same.**

Missouri Valley's position is in direct contradiction to the Declaratory Ruling. "We clarify that LECs are obligated to fulfill all of the duties set forth in sections 251(a) and (b) of the Act, including the duty to interconnect and exchange traffic, **even if the LEC has a rural exemption from the obligations set forth in section 251(c).**" *Section 251(a) Declaratory Ruling*, 26 FCC Rcd at 8267, at 1 (emphasis added). "We also clarify that the rural incumbent LECs' obligations under sections 251(a) and (b) can be implemented through the state commission arbitration ... provisions in section 252 of the Act." *Id.* (emphasis added).

It is undisputed that Missouri Valley's rural exemption status under Act § 251(f)(1)(a) prohibits competitive carriers to request from them interconnection under Act § 251(c). The Commission's June 27, 2012 Order on Interconnection Agreement in no way obligates Missouri Valley to comply with any provisions specifically enumerated under Act § 251(c), as so interpreted by the FCC in their May 2011 Declaratory Ruling. Missouri Valley's position requires nothing less. Therefore, Missouri Valley's assertion that Midcontinent's interconnection request under Act § 251(a) is a veiled attempt to circumvent Act § 251(c) and Act § 251(f)(1)(a) is without merit. Acceptance of Missouri Valley's argument would only stifle competition in the Williston exchange, to the detriment of the Williston consumer.

**ii. Missouri Valley's Res Judicata claim is without merit, as Act § 251(a) and Act § 251(c) are distinct, and Act § 251(a) interconnection was not an issue that should have been raised in 1:09-cv-017.**

In light of the parties' prior litigation in Public Service Commission Case No. PU-08-61 (first action), in order for Midcontinent's request for Act § 251(a) interconnection (second action) to be barred by the doctrine of res judicata, the following elements must all be satisfied: "(1) A final decision on the merits in the first action by a court of competent jurisdiction [must have been determined]; (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; [and] (4) An identity of the causes of action." *Missouri Breaks, LLC v. Burns*, 791 N.W.2d 33, 39 (N.D. 2010)<sup>2</sup>. Elements 1 and 2 are not in dispute.

Missouri Valley advocates that Midcontinent's present request for interconnection is identical to the party's previous, 2008 litigation (Case No. PU-08-61; 1:09-cv-017) concerning Act § 251(c) interconnection. Act § 251(a) and Act § 251(c) interconnection are distinct, as evident by the Act, and so recently articulated by the FCC in their May 2011 Declaratory Ruling. ("[S]ection 251(a) ... [is] separate from section 251(c) ... [therefore] section 251(a) and (b) apply to a rural LEC even if it is covered by the section 251(f)(1) exemption." *Section 251(a) Declaratory Ruling*, 26 FCC Rcd at 8267, at 9 (emphasis added)).

The very fact that the FCC was required to promulgate the Declaratory Ruling, in and of itself, argues against any express, or implied, responsibility on Midcontinent's

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<sup>2</sup> Because, in the present matter, the "first action" was a state judgment, the Federal Court must apply North Dakota law as it relates to res judicata. *Iowa Network Services, Inc. v. Qwest Corp.*, 363 F.3d 683, 689 (8<sup>th</sup> Cir. 2004).

part to request Act § 251(a) interconnection in the 2008 litigation. “We ***clarify*** that LECs are obligated to fulfill all of the duties set forth in sections 251(a) and (b) of the Act, including the duty to interconnect and exchange traffic, even if the LEC has a rural exemption from the obligations set forth in section 251(c).” *Id.* at 1 (emphasis added).

It should be also noted that N.D.C.C. § 49-05-09 states that “[t]he commission, at any time, upon due notice to the public utility affected and after opportunity to be heard as provided in the case of complaints, may rescind, alter, or amend any decision made by it.” “Any order rescinding, altering, or amending a prior order or decision, when served upon the public utility affected, shall have the same effect as an original order or decision.” *Id.* Since any decision can be re-evaluated at any time by the Commission, the role of res judicata in these proceedings is moot.

#### **IV. Conclusion**

The 2011 Federal Communications Commission’s unambiguous Declaratory Ruling clarified that rural exempt carriers are subject to both Act § 251(a) interconnection requests and mandatory arbitration under Act § 252. The North Dakota Public Service Commission’s March and June, 2012 Orders are in compliance with the Act. Although the purpose of the rural exemption is to mitigate economic burden to qualifying incumbent carriers, it was not intended to supplant the Act’s primary purpose; that of promoting competition. Affirmation of the Defendants’ motions is in accordance

with the Act, and will ultimately result in benefiting the Williston consumer.

Dated this 26th day of November, 2012.

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