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U.S. District Court

District of North Dakota

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United States District Court
District of North Dakota

Missouri Valley Communications, Inc.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No: 4:12-cv-00091
	)	
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	)	

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO MISSOURI VALLEY COMMUNICATIONS MOTION FOR SUMMARY JUDGMENT

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	)	
and	)	
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Midcontinent Communications, a South Dakota Partnership	)	

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO MISSOURI VALLEY COMMUNICATIONS MOTION FOR SUMMARY JUDGMENT

I. Introduction

This matter comes before the Court as an appeal from the North Dakota Public Service Commission (the "North Dakota PSC") pursuant to Section 252(e)(6) of the Communications Act of 1934, as amended, (the "Communications Act"). 47 U.S.C. § 252(e)(6). Missouri Valley Communications, Inc. ("Missouri Valley") is appealing a decision by the North Dakota PSC in an arbitration between Missouri Valley and Midcontinent Communications ("Midcontinent") for an interconnection agreement that permits Midcontinent to provide a competitive alternative for telephone service in the Williston exchange in northwest North Dakota by exchanging traffic with Missouri Valley. This memorandum of law and opposition is submitted in support of

Midcontinent's motion for summary judgment, which is being filed concurrently, and in response to Missouri Valley's October 26 motion for summary judgment.

Missouri Valley has not sought review of any of the decisions made in the arbitration about the terms and conditions of the interconnection agreement. It does not dispute any of the factual findings or legal conclusions in the arbitrator's decision or the North Dakota PSC's approval of that decision. Instead, Missouri Valley argues that it should not be required to interconnect with Midcontinent at all.

Missouri Valley makes two claims in support of its motion – that the kind of interconnection that Midcontinent requested is available only under Section 251(c)(2) of the Communications Act, which is subject to an exemption for rural carriers like Missouri Valley; and that Midcontinent's 2008 effort to have that exemption lifted precludes any new efforts to obtain interconnection from Missouri Valley. Missouri Valley's first argument contradicts the plain language of the Communications Act and specific FCC interpretations of the relevant provisions of that statute, which are entitled to deference from this court. Missouri Valley's second argument ignores significant differences between the underlying issues in 2008 and today and, equally important, changes in the facts that supported the North Dakota PSC's 2008 decision. Consequently, Missouri Valley's motion for summary judgment should be denied and Midcontinent's motion for summary judgment should be granted.

II. Summary of Argument

A. Interconnection under Section 251(a)

Midcontinent's request for interconnection was made properly under Section 251(a) of the Communications Act. Section 251(a) is the general interconnection provision of the Communications Act, intended to apply when Section 251(c)(2) does

not, and allows for both direct and indirect interconnection between any two carriers for any kind of telecommunications traffic. While Section 251(c)(2) is limited to interconnection for the purpose of exchanging local traffic, that limitation has no impact on the scope of Section 251(a) interconnection. These interpretations are the plain meaning of Section 251(a) and Section 251(c)(2), and are the same as the FCC's interpretations of these provisions, which are entitled to deference.

Midcontinent's request fell under Section 251(a) because it did not include many of the elements of Section 251(c)(2) interconnection, including a demand for interconnection at any technically feasible point, interconnection using facilities of Midcontinent's choice or favorable pricing terms available under Section 251(c)(2) but not under Section 251(a). These differences between Section 251(a) interconnection and Section 252(c)(2) interconnection are not mere technicalities, but have substantive and economic impacts on both Midcontinent and Missouri Valley.

Midcontinent's interconnection request was not subject to the rural exemption because it was made under Section 251(a). The rural exemption expressly is limited to Section 251(c) and does not affect Section 251(a) interconnection, as has been affirmed repeatedly by the FCC. In enacting the rural exemption, Congress did not intend to create a general exemption from competition for rural telephone companies, but only to protect them from the greater obligations of Section 251(c). Missouri Valley's claim that direct interconnection must be treated as Section 251(c) interconnection and therefore fall under the rural exemption is inconsistent with the inclusion of direct interconnection in Section 251(a) and, in any event, is inapposite because Missouri Valley never offered to provide indirect interconnection in the proceeding below.

B. *Res Judicata*

Res judicata did not bar Midcontinent from pursuing its Section 251(a) interconnection request because the claims today and in the 2008 rural exemption proceeding were distinct, because facts that were central to the 2008 decision have changed and because claim preclusion is not properly applied to interconnection requests.

The 2008 rural exemption proceeding and the 2012 arbitration considered separate and distinct legal and factual issues. The 2008 proceeding addressed the three criteria for determining whether a rural exemption should be lifted, while the 2012 arbitration was limited to terms and conditions of the interconnection agreement between the parties and there was almost no overlap between the issues in the two proceedings. This means that the legal conclusions and findings of fact in the 2008 proceeding have no connection to the legal conclusions and findings of fact in the arbitration proceeding. If there is no overlap of issues between two proceedings, claim preclusion cannot apply. There also was no opportunity or need to address Midcontinent's right to Section 251(a) interconnection in 2008 because Section 251(a) interconnection is available as of right and is not subject to the rural exemption.

In addition, Midcontinent introduced evidence in the 2012 arbitration proceeding that demonstrated that facts there were central to the North Dakota PSC's decision in 2008 have changed, evidence that was not challenged by Missouri Valley. The changes concern Missouri Valley's ability to serve customers in its territories and modifications to the FCC's universal service and intercarrier compensation rules that significantly affect the universal service support available to Missouri Valley when a competitor enters the market. Under North Dakota law, if two proceedings depend on different facts, claim preclusion does not apply.

Finally, claim preclusion is not properly applied to requests for interconnection under Section 251. Interconnection rights under Section 251 are continuing in nature, and can be asserted at any time. The Communications Act does not contemplate any limits on when interconnection rights can be asserted or bar a party that has asserted its rights once from doing so again at a time of its choosing. While *res judicata* may apply to specific issues in an arbitration proceeding, it does not apply to the underlying right to seek interconnection.

III. Standard of Review

Several different standards of review govern this case, depending on the specific issues being considered.

First, the FCC's determinations concerning the Communications Act are subject to the *Chevron* rule. *Chevron U.S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Under *Chevron,* if the statute is unambiguous, no deference is given to the FCC's interpretation. However, if the statute is ambiguous and the FCC's interpretation is reasonable, the court must defer to the FCC's interpretation. *National Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005) (deferring to FCC's statutory interpretation despite contrary prior interpretation by federal Court of Appeals), *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 396 (1999) (deferring to FCC interpretation of Section 252(i) of Communications Act); *Missouri Mun. League v. FCC*, 299 F.3d 949, 952 (8th Cir. 2002) (FCC determinations reviewed under two-step process set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)); *Iowa Utilities Bd. v. FCC*, 219 F. 3d 744, 748-49 (8th Cir. 2000) (same); *Iowa Utilities Bd. v. FCC*, 120 F.3d 753, 793 (8th Cir. 1997) (same). In addition, review of FCC interpretations of its own rules is extremely

deferential. *Talk America, Inc. v. Michigan Bell,* ___ U.S. ____, 131 S.Ct. 2254, 1163 (2011) (deferring to FCC interpretation of rules implementing Section 251).

Second, in appeals of arbitration decisions, district courts apply the same standards of review used in appellate reviews of trial court decisions. Under those standards, district courts review state commission interpretations of Sections 251 and 252 on a *de novo* basis. *See, e.g., Qwest Corp. v. Boyle,* 589 F.3d 985, 991 99th Cir. 2009), *Ace Tel. Ass'n v. Kuppendrayer,* 432 F.3d 876, 878 (8th Cir. 2005). When, as in this case, a state commission follows the guidance provided in one or more FCC decisions, the FCC's guidance is subject to the more deferential *Chevron* review.

Finally, the North Dakota PSC's interpretation of North Dakota law, in this case the law concerning *res judicata,* is entitled to deference in light of the North Dakota PSC's expertise in interpreting North Dakota law. *See, e.g., Global NAPs, Inc. v. Verizon New England, Inc.,* 454 F.3d 91, 96 (2d Cir. 2006) ("[W]e review the Board's decision as congruent with state law under the arbitrary-and-capricious standard."), *Southwestern Bell Tel. Co. v, Public Util. Comm'n of Texas,* 208 F.3d 475, 482 (5th Cir. 2000), reviewing state agency's "state law determinations . . . under the more deferential arbitrary-and-capricious standard"), *Southwestern Bell Tel. Co. v. Brooks Fiber Commnc'ns of Oklahoma, Inc.,* 235 F.3d 493, 498 (10th Cir. 2000) (reviewing all state law determinations made a state agency under arbitrary and capricious standard); *see also P.R. Tel. Co. v. Telecomms Regulatory Bd.,* 189 F.3d 1, 13-15 (1st Cir. 1999) (holding that Section 252(e)(6) does not confer jurisdiction on federal courts to review compliance of state agencies with state law). Further, in cases involving claims of *res judicata,* administrative agencies are given additional discretion under North Dakota law in light of

their role in ensuring that regulations are administered in light of the public interest. *Landrum v. Workforce Safety and Insurance,* 2011 ND 108, ¶¶ 12-13, 798 N.W.2d 669 (N.D. 2011).

IV. Legal and Factual Background

A. The Interconnection and Arbitration Provisions of the Communications Act

The Telecommunications Act of 1996 (the "1996 Act") amended the Communications Act to facilitate the development of local telephone competition. When it was considering the 1996 Act, Congress recognized that there were two significant barriers to local telephone competition – state laws that limited or prohibited competition with incumbent local telephone companies and the inability of competitive local telephone companies to obtain interconnection on reasonable terms and conditions so that they could exchange traffic with incumbent carriers. Section 253 of the Communications Act, which prohibits nearly all limitations on local telephone competition, addressed the first issue. 47 U.S.C. § 253. Congress addressed the second issue with Section 251, governing the terms of interconnection and related matters, and Section 252, which creates a framework for negotiating, arbitrating and approving the agreements between carriers that implement Section 251. 47 U.S.C. §§ 251, 252.

Section 251 adopts a series of graduated obligations for telecommunications carriers. The most significant obligations apply to the former monopoly local telephone companies, known as incumbent local exchange carriers or ILECs. Among other things, Section 251(c) requires ILECs to negotiate interconnection agreements in good faith, 47 U.S.C. § 251(c)(1), and to provide interconnection with other carriers:

> (A) for the transmission and routing of telephone exchange service and exchange access;

> (B) at any technically feasible point within the carrier's network;
>
> (C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and
>
> (D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title.

47 U.S.C. § 251(c)(2). While Section 251(c) applies to ILECs in general, there is an exception for rural ILECs like Missouri Valley. A rural ILEC is subject to Section 251(c) only if it provides video service (and then only as to the competing cable operator) or if a competitor demonstrates to a state commission like the North Dakota PSC that specific requirements are met. 47 U.S.C. § 251(f)(1).

All local exchange carriers – that is, all companies that provide local landline telephone service – are subject to the requirements of Section 251(b). Section 251(b) requires local exchange carriers to provide reciprocal compensation for the exchange of traffic, to offer telephone number portability and dialing parity, to provide access to rights of way and to permit resale of their services. 47 U.S.C. § 251(b). There is no automatic exemption from Section 251(b) for rural ILECs.[1]

Finally, all telecommunications carriers, including all local exchange carriers, "have the duty . . . to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers" under Section 251(a).[2] There are no exceptions to this duty. As the FCC explained in its initial order implementing the 1996 Act: "Unlike

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[1] Under certain circumstances, small carriers can obtain suspensions of the requirements of Section 251(b). *See* 47 U.S.C. § 251(f)(2). No such suspension applies to Missouri Valley.

[2] 47 U.S.C. § 251(a). Indirect interconnection is interconnection that involves an intermediary between the two interconnecting carriers. The most common form of indirect interconnection is for two competitive local carriers to send their traffic to each other via the facilities of an incumbent LEC.

section 251(c), which applies to incumbent LECs, section 251(a) interconnection applies to all telecommunications carriers including those with no market power."[3] A wide range of carriers, including competitive local exchange carriers and wireless providers, can interconnect with each other and with rural ILECs to exchange local and long distance traffic under Section 251(a).

In 2011, in response to a petition for declaratory ruling, the FCC analyzed the obligations of rural ILECs under Sections 251(a) and 252. That analysis confirmed that there are no exceptions to Section 251(a):

> 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).

CRC Communications and Time Warner Cable, Inc., *Declaratory Ruling,* 26 FCC Rcd 8259, 8267 (2011) (footnotes omitted) (the *"Section 251(a) Order"*). The order noted both that this interpretation "flows directly from the language of section 251 itself," *id.,* and that it was consistent with several earlier FCC decisions, including a 2007 order on interconnection and a 2001 order on number portability. *Id.* at 8262, 8267 n. 50, *citing* Telephone Number Portability, *First Memorandum Opinion and Order on Reconsideration,* 12 FCC Rcd 7236, 7305 (1997), Time Warner Cable Request for Declaratory Ruling that Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale

[3] Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, *First Report and Order,* 15 FCC Rcd 15499, 15991 (1996) (the *"Local Competition Order"*).

Telecommunications Services to VoIP Providers, *Memorandum Opinion and Order,* 22 FCC Rcd 3513 (Wireline Comp. Bur. 2007) (the *"Time Warner Order"*). Both of those orders held that rural ILECs are not exempt from interconnection under Section 251(a).

The *FCC Section 251(a) Order* also addressed the question of how competitive carriers could enforce their interconnection rights under Section 251(a). It concluded that those carriers could obtain interconnection agreements through the negotiation and arbitration process under Section 252. *Id.* at 8269. The *FCC Section 251(a) Order* was not appealed and is now a final order of the FCC.

B. The Parties

Midcontinent is a competitive local exchange carrier authorized to provide service throughout North Dakota under a certificate of public convenience and necessity granted to it by the North Dakota PSC. Midcontinent provides local telephone service using its own facilities to customers across nearly its entire North Dakota footprint. Williston, the area served by Missouri Valley, has been one of the few exceptions.

In Williston, Midcontinent has provided local telephone service by reselling Missouri Valley's service because it had not obtained interconnection with Missouri Valley for the exchange of local telecommunications traffic.[4] That arrangement initially

[4] Missouri Valley claims that the two companies interconnect indirectly. Missouri Valley Brief at 3. While Missouri Valley made that claim repeatedly below, it never explained how the parties were interconnected and there is no agreement between the parties for the exchange of local traffic via indirect interconnection. *See* Findings of Fact, Conclusions of Law and Order, Doc. No. 34 (Mar. 21, 2012) ("Order on Motion to Dismiss") at 2. (This and all other documents in the record below were filed with the Court by the North Dakota PSC on August 22, 2012 as part of Document 9-2, and were assigned document numbers by the North Dakota PSC in that filing. References to documents included in that filing will indicate the document number for the Court's reference.) Thus, even if it were possible for Midcontinent to send traffic to Missouri Valley (or vice versa) via some indirect connection, there was no contractual authorization to do so. While resale allows

was acceptable. In the time leading up to Midcontinent's interconnection request, however, Missouri Valley's service became increasingly unreliable. As Midcontinent described in its filings before the North Dakota PSC, Midcontinent "found that Missouri Valley no longer can install service in a timely fashion; that Missouri Valley often takes much longer to respond to service requests than Midcontinent would take in its other markets; and that in some cases Missouri Valley is unable to provide service at all in areas where Midcontinent has cable facilities and could provide facilities-based service if interconnection were in place."[5]

Missouri Valley is a rural ILEC that operates in the Williston exchange in northwest North Dakota. It is owned by the Nemont Telephone Cooperative, and operated as a for-profit subsidiary of the cooperative. Missouri Valley provides local telephone service and, through other affiliates of Nemont, its customers also may obtain long distance service, high speed Internet service and wireless service. Missouri Valley is interconnected with wireless carriers and other ILECs, but is not interconnected with any competitive local carrier other than Midcontinent.

The North Dakota PSC is the regulatory agency with jurisdiction over telecommunications services in North Dakota.

Midcontinent to sell Missouri Valley services, resale does not involve any connection between the companies' networks.

[5] Midcontinent Petition for Arbitration, Doc. No. 1 (Nov. 14, 2011), at 2 ("Petition for Arbitration"); *see also* Testimony of W. Thomas Simmons, Doc. No. 38 (Mar. 28, 2012) at 8-13 (the "Simmons Testimony") (describing unavailability of service from Missouri Valley, difficulties in obtaining installation, and high level of service outages on Missouri Valley facilities in Williston). Missouri Valley did not dispute any of these facts in the proceeding below.

C. Proceedings Below

The proceeding before the North Dakota PSC began when Midcontinent filed a petition for arbitration on November 14, 2011. Petition for Arbitration. This petition was filed after Midcontinent requested interconnection under Section 251(a) from Missouri Valley on June 14, 2011, Petition for Arbitration, Exhibit B (the "Interconnection Request"), and following an unsuccessful effort to mediate between Midcontinent and Missouri Valley under the mediation provisions of Section 252. 47 U.S.C. § 252(a)(2). As required by Section 252(b)(1), the petition described the open issues between Midcontinent and Missouri Valley and the positions of the parties as Midcontinent understood them.[6] On December 8, 2011, Missouri Valley filed its response to Midcontinent's petition for arbitration. Missouri Valley's Response to Midcontinent's Petition for Arbitration Statement of Issues, Doc. No. 4 (Dec. 8, 2011).

Midcontinent's petition was based on the terms of its Interconnection Request and a subsequent letter to Missouri Valley that provided a further explanation of that request, sent on July 12, 2011. Interconnection Request; Letter from Nancy Vogel, Midcontinent, to Mike Kilgore, Missouri Valley (Jul. 12, 2011) (the "July Letter"), attached as Exhibit 1 to Opposition to Motion to Dismiss, Doc. No. 9 (Dec. 21, 2011). Midcontinent's initial request and the July Letter both stated that the request was made under Section 251(a), as did the petition for arbitration. The Interconnection Request proposed interconnection at "a mutually-agreed point" between Midcontinent's facilities and Missouri Valley's local telephone switch or "at any other location in the Williston exchange where Missouri

[6] 47 U.S.C. § 252(b)(1). As noted above, Missouri Valley did not engage in negotiations with Midcontinent because Missouri Valley is not subject to the obligation to negotiate interconnection arrangements in good faith under Section 251(c)(1) of the Communications Act. Midcontinent, as a result, was unable to provide significant information on Missouri Valley's positions. Petition for Arbitration at 7.

Valley interconnects with other carriers, if such a location would be more convenient for Missouri Valley." Interconnection Request at 1. Midcontinent offered to interconnect using standard electrical facilities or optical fiber, at Missouri Valley's option. The July Letter further clarified Midcontinent's request, noting that "Midcontinent's suggestion of interconnection at a meet point was simply a proposal, and Midcontinent is and remains open to other interconnection arrangements" and repeated Midcontinent's earlier invitation to "Missouri Valley to propose 'an alternative location' and to make 'an alternative proposal' if it did not wish to agree to any of Midcontinent's suggestions." July Letter at 1. Neither the Interconnection Request nor the July Letter demanded interconnection at a particular point, using a particular technology or on particular terms and conditions.

Missouri Valley filed a motion to dismiss the petition for arbitration on November 21, 2011, which was denied by a written order on March 21, 2012. Motion to Dismiss Petition for Arbitration and Brief in Support of Motion, Case No. Doc. No. 2 (Nov. 21, 2011), Order on Motion to Dismiss. Following an arbitration hearing on April 4 and 5, 2012, and briefs, the arbitrator issued a recommended decision on April 27, 2012. Recommended Decision, Doc. No. 62 (Apr. 27, 2012) (the "Recommended Decision"). Midcontinent and Missouri Valley submitted an interconnection agreement to the North Dakota PSC that conformed to the arbitrator's decision on May 29, 2012. Letter from Z. Pelham, counsel to Midcontinent and from D. Hogue, counsel to Missouri Valley, to Darrell Nitschke, Executive Director, North Dakota PSC, Doc. No. 65 (May 29, 2012) (the "Interconnection Agreement Submission Letter"). After reviewing comments on the agreement, the North Dakota PSC approved the agreement on June 27, 2012. Order on

Interconnection Agreement, Case No. Doc. No. 82 (Jun 27, 2012). The agreement remains in effect.

Midcontinent and Missouri Valley also were parties to a previous proceeding before the North Dakota PSC. In that proceeding, Midcontinent sought to lift Missouri Valley's rural exemption. In a rural exemption proceeding, a state commission "shall terminate the exemption if the request is not unduly economically burdensome, is technically feasible, and is consistent with [the universal service provisions of the Communications Act]." 47 U.S.C. § 251(f)(1). If a state commission determines that the rural exemption should be lifted, it then establishes a schedule to implement the competitive carrier's Section 251(c) interconnection request. *Id.* In that proceeding, the North Dakota PSC determined that Midcontinent had not shown that Section 251(c) interconnection would not be unduly economically burdensome or that that would be consistent with universal service requirements. *Rural Exemption Order* at 10. Midcontinent appealed that decision to this Court, which affirmed the North Dakota PSC's holding. Midcontinent Communications v. North Dakota Public Service Commission, *Order,* Case No. 1:09-cv-017 (D.N.D., Apr. 15, 2010).

Neither the North Dakota PSC proceeding nor this Court's review of the 2008 North Dakota PSC decision considered or addressed Section 251(a) interconnection or the specific terms and conditions of interconnection. Those proceedings were confined to analysis of the specific requirements for lifting a rural exemption under Section 251(f)(1).

V. Argument

A. The North Dakota PSC Acted Properly in Adopting the Interconnection Agreement.

1. Midcontinent Is Entitled to Interconnection with Missouri Valley to Exchange Local Traffic Under Section 251(a) of the Communications Act.

Missouri Valley's central claim is that direct interconnection under Section 251(a) is not available for the exchange of local traffic. This claim is contradicted by the plain meaning of the statutory language and by more than 15 years of precedent at the FCC and elsewhere.

First, and most important, there is no limitation in Section 251(a) that would prevent a carrier from requesting direct interconnection or from exchanging local traffic. This is plain from the text of Section 251(a):

> Each telecommunications carrier has the duty –
>
> (1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers[.]

47 U.S.C. § 251(a). This obligation applies, as the text states, to all telecommunications carriers, including competitive local carriers, long distance carriers, wireless providers and rural ILECs like Missouri Valley, and to interconnection for all purposes, including the exchange of local traffic. The FCC has affirmed this conclusion repeatedly, starting with its very first rulemaking on the local competition provisions of the Communications Act and including, most recently, the *Section 251(a) Order*. *See Section 251(a) Order,* 26 FCC Rcd at 8267; *Local Competition Order,* 11 FCC Rcd at 15991 (holding that "section 251(a) interconnection applies to all telecommunications carriers including those with no market power").

Missouri Valley argues that the broad language of Section 251(a) should be ignored because, it claims, Section 251(c)(2) is the only provision of Section 251 that

specifically addresses local traffic. Missouri Valley Brief at 10-11. This argument ignores the text of Section 251(a), the structure of Section 251 as a whole and the purposes of Section 251(c)(2).

Initially, the text of Section 251(a) cannot be read the way that Missouri Valley wants it to be read. Missouri Valley's theory depends on a reading that splits interconnection into local and non-local components, but there is nothing in Section 251(a) that suggests such a dichotomy. Rather, it describes a blanket obligation to interconnect. Further, Section 251(a) covers all carriers, including competitive local carriers and wireless providers that are not subject to Section 251(c) and therefore would not otherwise have any obligation to interconnect for the exchange of local traffic; Missouri Valley's interpretation would leave no avenue for ensuring that local traffic could be exchanged between non-ILECs.

At the same time, Missouri Valley's interpretation also is inconsistent with the broader structure of Section 251, which creates a hierarchy of obligations that range from the general and generic to the targeted and specific. As the FCC has held, for this reason Section 251(a) is intended to sweep in all carriers and all forms of interconnection. *Local Competition Order,* 11 FCC Rcd at 15991. This analysis is consistent with both the text of the statute and with the legislative history, which described Section 251 as "a new model for interconnection" and says that "Section 251(a) imposes a general duty to interconnect directly or indirectly between all telecommunications carriers[.]" H.R. Rep. 104-458, 104th Cong., 2d sess., 121 (1996) (the "1996 Act Conference Report").

Further, Missouri Valley's invocation of the reference to local traffic in Section 251(c)(2) misses the point. That language was intended to prevent long distance carriers

from obtaining 251(c)(2) interconnection, and has nothing to do with what interconnection might be available under Section 251(a). Absent this limitation, long distance carriers could obtain interconnection on terms that would be much more favorable than those generally made available to them today. Thus, as the FCC explained in the *Local Competition Order,* "[a] telecommunications carrier seeking interconnection only for interexchange [long distance] services is not within the scope of this statutory language because it is not seeking interconnection for the purpose of providing telephone exchange service." *Local Competition Order,* 15 FCC Rcd at 15598. While this means that long distance carriers cannot rely on Section 251(c)(2), it has no impact on the scope of the interconnection that is available under Section 251(a).

Similarly, Missouri Valley's citation of the Court of Appeals decision in *AT&T Corp. v. Atlas* is inapposite. Missouri Valley Brief at 13, *citing AT&T Corp. v. Atlas,* 317 F.3d 227, 234 (D.C. Cir. 2003). *Atlas* does not involve whether direct interconnection is permitted under Section 251(a) or whether Section 251(a) interconnection can be used to exchange local traffic, but only the question of whether one carrier can be required to send specific traffic to another carrier when the receiving carrier is attempting to impose unlawful and unreasonable terms and conditions, facts that are not present in this case. More important, the underlying FCC decision makes it evident that the FCC did not hold that carriers are not required to exchange traffic, but only that the exchange of traffic is governed by different provisions of the Communications Act than interconnection.[7]

[7] The FCC's order in *Atlas* relied on the *Local Competition Order,* which ruled that compensation for traffic exchanged via interconnection obtained under Section 251(c)(2) was governed by Section 251(b), not by Section 251(c)(2). *Local Competition Order,* 11 FCC Rcd at 15590. The essence of the FCC decision in the *Local Competition Order* was that carriers must pay separate charges for physical interconnection and for the

Indeed, Midcontinent specifically asked in its request for interconnection to set compensation rates for the exchange of traffic under the relevant provision, Section 251(b), and Missouri Valley has not contested the applicability of that provision to the parties in this case.

And, of course, the purpose of interconnection is not simply to have two networks touch each other, but to ensure that they can exchange traffic. If there were any doubt of that fact, the FCC has made it clear repeatedly, including in the 2007 *Time Warner Order,* which held that "[b]ecause the [Communications] Act does not differentiate between retail and wholesale services when defining 'telecommunications carrier' or 'telecommunications service,' we clarify that telecommunications carriers are entitled to interconnect and exchange traffic with incumbent LECs pursuant to section 251(a) and (b) of the Act for the purpose of providing wholesale telecommunications services." *Time Warner Order,* 22 FCC Rcd at 3517.

All of this analysis shows that the plain meaning of Section 251(a) is consistent with the interpretation adopted by both the North Dakota PSC and the FCC. However, even if the plain meaning were not evident, Missouri Valley's argument amounts, at most, to a claim that the statute is ambiguous because it is claiming that the duty of all carriers to "interconnect" is narrower than what the plain text says. In that context, however, the FCC's interpretation still would prevail because that interpretation is entitled to Chevron deference, and Missouri Valley's argument would fail on that independent basis. Indeed, as the Supreme Court explained in *Iowa Utilities Board,* "[t]he FCC's interpretation is not only reasonable, it is the most readily apparent." *AT&T*

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traffic they send to interconnected carriers for termination. That point is not in dispute here.

v. Iowa Utilities Bd., 525 U.S. at 396 (overturning Court of Appeals holding that FCC misinterpreted provision of 1996 Act).

2. Midcontinent's Interconnection Request Properly Was Treated as a Section 251(a) Request.

The second broad theme of Missouri Valley's complaint is that Midcontinent's June 2011 interconnection request was not actually a request under Section 251(a), but was an attempt to make a Section 251(c)(2) interconnection request in disguise. This theory is inconsistent with both the facts and the law.

Initially, the Interconnection Request was quite clear on the question of what kind of interconnection was requested: "[T]his letter constitutes a formal request for interconnection under Sections 251(a), 251(b) and 252 of the Communications Act[.]" Interconnection Request at 2. This point was reiterated in the July 14 letter and in the Petition for Arbitration. July 14 Letter at 1, Petition for Arbitration at 2.

The specific terms of Midcontinent's request also are consistent with Section 251(a) and not with Section 251(c)(2). Section 251(c)(2) interconnection encompasses a very specific set of requirements. These requirements are set out in Section 251(c)(2), which provides that carriers subject to that provision must offer interconnection for the exchange of local traffic at any technically feasible point, at least equal in quality to what is provided to the carrier itself and other parties and at rates that are set using the methodology described in Section 252(d)(1) of the Communications Act. 47 U.S.C. § 251(c)(2). A request for interconnection that does not ask for all of these elements is not a Section 252(c)(2) request.

Of all of the elements of Section 251(c)(2) interconnection, the only one requested by Midcontinent was interconnection for the exchange of local traffic.

Midcontinent did not demand interconnection at any technically feasible point; it offered to interconnect at a point of Missouri Valley's choosing. Midcontinent did not ask for a specific technical form of interconnection or a certain level of service quality; it offered to interconnect using technical arrangements chosen by Missouri Valley. Midcontinent did not request pricing consistent with Section 252(d)(1); in fact, it did not request any particular pricing for interconnection. Interconnection Request at 1; July Letter at 1-2. Moreover, Midcontinent specifically invited Missouri Valley to make its own proposals in both the Interconnection Request and the July Letter. *See, e.g.,* July Letter at 1 (". . . Midcontinent's suggestion of interconnection at a meet point was simply a proposal, and Midcontinent is and remains open to other interconnection arrangements."). Thus, Midcontinent's request did not fit within the narrow framework of Section 251(c)(2).

By not invoking Section 251(c)(2), Midcontinent gave up important rights. Under the FCC's rules implementing Section 251(c)(2), for instance, Midcontinent was entitled to highly-favorable pricing for interconnection. *See* 47 C.F.R. § 51.503. Midcontinent also put itself at risk of having to agree to interconnection at a point that was not convenient to Midcontinent's network, rather than a point of Midcontinent's choosing, which could have added significant expense to implementing the ultimate interconnection arrangements.[8] At the same time, Midcontinent's adoption of Section 251(a) interconnection saved costs for Missouri Valley, which was not required to conduct the expensive cost studies that would be required to determine its rates for Section 251(c)(2) interconnection. *See* 47 C.F.R. § 51505(e). Moreover, Missouri Valley could have

[8] This is not a hypothetical issue. In the end, Midcontinent obtained interconnection at Missouri Valley's switch, the most convenient location for Missouri Valley, rather than at a more convenient location for Midcontinent. Interconnection Agreement Submission Letter, Attachment at Attachment 1, p.3.

sought to require Midcontinent to interconnect indirectly, since indirect interconnection is permitted under Section 251(a), although Missouri Valley did not choose to do so.[9]

In this context, Missouri Valley's argument that Midcontinent's request for direct interconnection necessarily is a Section 251(c)(2) request cannot be supported. As shown above, Midcontinent's request lacked most of the elements of a Section 251(c)(2) request. Equally important, the one element of a Section 251(c)(2) request that was part of Midcontinent's request also is encompassed by Section 251(a), which expressly contemplates requests for direct interconnection. 47 U.S.C. § 251(a)(1). Since the request was consistent with Section 251(a) but did not have all of the elements of Section 251(c)(2), it was a Section 251(a) request.[10] Thus, contrary to Missouri Valley's claim that under Midcontinent's theory "§ 251(a) would be sufficient to require any interconnection a CLEC might request," Missouri Valley Brief at 15, a Section 251(a) request greatly limits a competitive carrier's ability to ensure that it obtains interconnection on the terms and conditions it wants.

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[9] Missouri Valley's decision not to propose indirect interconnection also vitiates its claim that Midcontinent was seeking Section 251(c)(2) interconnection for another, independent reason. The basic theory underlying Missouri Valley's claim is that Midcontinent was demanding direct interconnection, but Missouri Valley never put that theory to the test by offering anything else, even after Midcontinent specifically agreed in its briefs on the Missouri Valley motion to dismiss that Missouri Valley was free to make such a proposal. *See, e.g.,* Midcontinent Post-Hearing Brief in Opposition to Motion to Dismiss, Doc. No. 30 (Feb. 24, 2012) at 5 n.11. Missouri Valley is not entitled to any remedy from this court for its failure to ask for something that was available to it in the proceeding below.

[10] Missouri Valley argues that Midcontinent's request for interconnection "to exchange local telecommunications traffic" means that the request falls under Section 251(c)(2). Missouri Valley Brief at 13. As discussed above, this argument misinterprets the FCC's case law on Section 251(c)(2) interconnection. *See supra* pages 15-17. Moreover, even if Missouri Valley's claim that interconnection and traffic exchange are separate obligations were correct, then asking for interconnection to exchange local traffic would have no impact on whether the interconnection was subject to Section 251(a) or Section 251(c)(2).

3. Midcontinent's Request Was Not Subject to the Rural Exemption.

Missouri Valley has argued repeatedly that Midcontinent's request should be subject to the rural exemption. Missouri Valley has misconceived the rural exemption as a broad shield against any competition, when in fact it is a limited protection against the additional burdens of Section 251(c).

Section 251(f)(1), which establishes the rural exemption, is quite specific: "Subsection (c) of this section shall not apply to a rural telephone company" until the rural exemption is lifted. 47 U.S.C. § 251(f)(1). In other words, the rural exemption covers Section 251(c) and nothing else. There is no indication in the text of the statute or the legislative history that Congress intended anything else. *See* 1996 Act Conference Report at 122.

The FCC adopted the same conclusion in the *Section 251(a) Order.* In that order, the FCC explained that:

> 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.
>
> To interpret section 251(f)(1) otherwise would undercut sections 251(a) and (b) and significantly impede compliance with these provisions by rural LECs until termination of the section 251(f)(1) exemption by a state commission. In particular, if section 251(f)(1) were construed to exempt rural LECs from their section 251(a) and (b) duties, unless and until a state commission has terminated the rural exemption, a competing carrier could not avail itself of the rights to interconnection and other services that must be provided under sections 251(a) and (b), which could have a detrimental impact on the ability of rural Americans to benefit from competition, innovation, and investment in communications networks and services. We find that such an interpretation would be contrary to Congress's mandate that all telecommunications carriers interconnect directly or indirectly with other telecommunications carriers. Moreover, that section 251(f)(1) makes no mention of the section 251(a) and 251(b) obligations, including the duty to provide dialing parity and establish reciprocal compensation

> arrangements, is compelling evidence that Congress did not intend to exempt rural LECs from upholding their section 251(a) and 251(b) obligations.

Section 251(a) Order, 26 FCC Rcd at 8267-8 (footnotes and paragraph numbering omitted). This analysis is unequivocal and entirely consistent with the statute, and is entitled to deference given the FCC's role as the expert agency interpreting the Communications Act.

Missouri Valley attempts to subvert the plain meaning of the statute and the FCC's authoritative interpretation. The essence of Missouri Valley's argument is that Section 251(f)(1) should be construed to cover any interconnection that looks like it would be within the scope of Section 251(c) (that is, any direct interconnection) or that might have a similar economic impact. Missouri Valley Brief at 15-16. This argument is unavailing. First, and most important, it is inconsistent with the statute, which does not contemplate or permit expanding the exemption to cover anything other than Section 251(c), and with the FCC's *Section 251(a) Order,* which is entitled to deference under *Chevron.* 47 U.S.C. §251(f)(1).

Second, despite Missouri Valley's claims that Congress wanted to exempt rural carriers from any economic burdens associated with competition, Missouri Valley Brief at 15-16, there is no indication that Congress wanted to do anything more than protect rural carriers from the specific obligations contained in Section 251(c). There is nothing in the legislative history for Section 251 that supports this claim, and the preamble to the 1996 Act specifically states that the intent of the statute is to promote competition. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, preamble. Equally significant, Congress enacted Section 253, which prevents states from prohibiting

competition, even in rural areas.[11] If Congress had meant to protect rural carriers from competition, it would have adopted a more comprehensive exemption.[12]

Third, Missouri Valley's economic argument is wrong because there are significant economic differences between Section 251(c)(2) and Section 251(a) interconnection. As noted above, Section 251(a) interconnection can be at a point chosen by the carrier providing interconnection, which is economically beneficial to that carrier and potentially imposes additional costs on the requesting carrier. Missouri Valley took advantage of that opportunity in proposing the point of interconnection with Midcontinent. In addition, Section 251(a) interconnection is not subject to the pricing standards of Section 251(d), so a carrier that interconnects under Section 251(a) can seek higher prices for the interconnection it receives and need not justify its pricing with an expensive cost study. That difference had a specific impact in this proceeding, as the arbitrator chose pricing that was higher than called for under Section 251(d), and which therefore was more advantageous to Missouri Valley than the pricing available under Section 251(c)(2). Recommended Decision at 8-12.

Finally, and as described above, Missouri Valley's complaint about being forced to accept direct interconnection is inappropriate because Missouri Valley had the opportunity to seek indirect interconnection and chose not to pursue that approach. Thus,

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[11] 47 U.S.C. § 253. Section 253 contains some protections for rural carriers, but does not permit a state to bar competition if a competitive carrier is willing to meet certain conditions, and a state is not required to impose those conditions even if a rural carrier asks for them.

[12] For that matter, there is no evidence of record in this proceeding that Missouri Valley would suffer any economic harm from competition, and significant evidence of record that shows that the FCC's recent universal service and intercarrier compensation reforms will cushion any revenue loss caused by competition in Missouri Valley's market. *See* Direct Testimony of Timothy Gates, Doc. No. 38 (Mar. 28, 2012) at 51- 64.

the specific claim that Missouri Valley makes – that "technical distinctions" between the direct interconnection requested by Midcontinent and Section 251(c)(2) interconnection are insignificant – is simply a result of Missouri Valley's choices in the arbitration proceeding, not a consequence of the interpretation of Section 251(a) by the North Dakota PSC. It does not provide any basis to ignore the plain meaning of Section 251(f)(1) or to try to apply an exemption that covers only Section 251(c) to any other part of the statute.

B. The Results of the 2008 Rural Exemption Proceeding Have No Impact on Midcontinent's Ability to Pursue Section 251(a) Interconnection.

Missouri Valley's second main argument is that Midcontinent's petition for arbitration was barred by the doctrine of claim preclusion in light of the North Dakota PSC's 2008 decision on Midcontinent's request to lift Missouri Valley's rural exemption. Missouri Valley Brief at 23-32. Missouri Valley has misconceived the nature of the two proceedings and the requirements of the law.

1. Legal Standard

In North Dakota, there is a four-part test to determine whether claim preclusion applies. As the North Dakota Supreme Court explained in *Missouri Breaks, LLC v. Burns,* 2010 ND 221, 791 N.W.2d 33 (2010), there is no claim preclusion unless all of the following factors are present:

1. A final decision on the merits in the first action by a court 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.

Id., ¶ 12, *citing Ungar v. North Dakota State Univ.*, 2006 ND 184, ¶ 10, 721 N.W.2d 16. Most cases focus on the third and fourth elements of this test, and the North Dakota Supreme Court noted that "[u]nder traditional *res judicata* principles, the doctrine is not applicable to issues not considered or decided in the prior proceeding, and the doctrine applies only when the issues in the prior and current proceedings are 'substantially identical.'" *State ex rel. Workforce Safety & Ins. v. JRK Raingutters, LLC,* 2007 ND 80, ¶ 22, *quoting Nodland v. Nokota Co.,* 314 N.W.2d 89, 92 (N.D. 1981). In particular, claim preclusion applies only "[i]f the subsequent claims are based upon the identical factual showing as the claims in the prior proceeding."[13]

In addition, under North Dakota law, claim preclusion "is applied more 'circumspectly'" in administrative proceedings than in judicial proceedings, given the broader public interest obligations of administrative agencies. *Landrum v. Workforce Safety and Insurance,* 2011 ND 108, ¶¶ 12-13, 798 N.W.2d 669 (N.D. 2011). For that reason, the North Dakota Century Code specifically permits the North Dakota PSC to "rescind, alter, or amend any decision made by it," and to do so "at any time." N.D.C.C. § 49-05-09. The narrower scope of administrative *res judicata* in North Dakota recognizes the continuing nature of the obligations that administrative agencies regulate.

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[13] *Littlefield v. Union State Bank,* 50 N.W.2d 881, 884 (N.D. 1993). Missouri Valley's brief relies principally on federal cases to describe the applicable law. While, in general, the federal cases follow similar principles and the result would be the same, the North Dakota PSC properly applied North Dakota law to determine whether Midcontinent's petition for arbitration was subject to claim preclusion, just as it applied its rules of evidence and procedure, because Sections 251 and 252 preempt only those elements of state law that are covered by those statutory provisions and the FCC's rules implementing those provisions. *See generally Southwestern Bell Tel. Co. v. Brooks Fiber Commnc'ns of Oklahoma, Inc.,* 235 F.2d 493, 498 (10th Cir. 2000) (reviewing Section 251 and 252 issues under *de novo* standard, but reviewing all other issues under arbitrary and capricious standard). Thus, the Court's review of the North Dakota PSC's decision on the claim preclusion issue should be under North Dakota law.

The parties agree that the first and second prongs of the test for claim preclusion are met in this case. Midcontinent's analysis will focus on the third and fourth prongs of the test and other factors that demonstrate that claim preclusion does not apply here.

2. Midcontinent's Petition for Arbitration Did Not Raise any Issue that Was or Should Have Been Litigated in the 2008 Action

As described above, the third prong of the claim preclusion test asks whether a claim in a later action was or should have been litigated in the earlier action. The intent of the claim preclusion doctrine is to protect the prevailing party against attempts by the losing party to relitigate the dispute. *See Nodland,* 314 N.W.2d 89, 92 (N.D. 1981) (proceedings must be "substantially identical"). It does not apply, for instance, when the losing party in a contract action sues the winning party to enforce different rights under a separate provision of the same contract.

Here, Midcontinent was seeking to enforce different rights in the second action under a different provision of the Communications Act, in proceedings that involved not only different legal issues but also different factual considerations. The 2008 rural exemption proceeding addressed only the specific issues outlined in Section 251(f)(1): the technical and economic feasibility of providing interconnection and the impact on universal service.[14] All of the factual issues in that proceeding focused on those questions. *Id.* at 5-9.

The 2012 arbitration proceeding addressed a much different set of legal and factual issues. The legal issues were quite limited, and primarily addressed the question

[14] *Rural Exemption Order* at 2. The order also indicates that the North Dakota PSC would have considered other issues, including the schedule for implementing Section 251(c)(2) interconnection, if the order had not concluded that the rural exemption should not be lifted. *Id.*

of what pricing regimes should be applied to set rates in the arbitration, whether the arbitrator should consider economic impacts of interconnection under Section 251(a) and the arbitrator's authority to issue a stay. Recommended Decision at 9, 18-20. The factual questions related to the specific issues described in the petition for arbitration and Missouri Valley's response, including appropriate pricing levels, how quickly customers could be moved from resold service to Midcontinent's facilities, how orders would be processed and other operational questions. *Id.* at 6-18.

This comparison shows that there was essentially no overlap in the legal and factual issues considered in the two proceedings. In essence, the rural exemption proceeding considered the question of whether Missouri Valley would be required to provide interconnection, while the arbitration proceeding considered how to implement interconnection. Indeed, because Missouri Valley could not be subject to Section 251(c)(2) interconnection unless the rural exemption was lifted, the legal and factual issues considered in the 2012 proceeding could not have been considered in 2008.

Missouri Valley ignores all of these distinctions and claims, instead, that the relevant claim for purposes of determining whether claim preclusion applies is Midcontinent's initial request for interconnection in 2007. *See, e.g.,* Missouri Valley Brief at 30. There are multiple reasons why this theory is incorrect.

First, an interconnection request is not a proceeding of any kind. It is a request, and litigation follows that request only under certain circumstances. Most interconnection requests result in negotiated interconnection agreements; some are abandoned without an agreement; and only a small percentage lead to any litigation. If a proceeding does result – an interconnection arbitration or a rural exemption proceeding –

the interconnection request is a predicate fact that establishes the scope of the proceeding. In that way, the two requests in 2007 and 2011 are like separate contracts, each with its own terms. Claim preclusion would not apply in such a circumstance, and does not apply here either.

Second, Missouri Valley's theory appears to presume that Midcontinent needed permission from the North Dakota PSC to obtain Section 251(a) interconnection, just as North Dakota PSC action is required for Midcontinent to have the right to interconnect with Missouri Valley under Section 251(c)(2).[15] However, and as described above, Section 251(a) grants an absolute right to interconnection. Consequently, Midcontinent's right to Section 251(a) interconnection could not have been at issue in 2008. Indeed, a Section 251(f)(1) proceeding specifically is limited to the question of whether Section 251(c) should apply to the rural carrier. 47 U.S.C. § 251(f)(1). In other words, as to Section 251(a) interconnection, there was nothing for the North Dakota PSC to decide in 2008.[16]

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[15] Missouri Valley was, of course, entitled to argue below and to this Court that it was not obligated to interconnect under Section 251(a). However, the possibility that a defendant may make an argument that would have been available to that same party as a defendant in an earlier proceeding does not create a *res judicata* defense against the petitioner.

[16] In its order on Missouri Valley's motion to dismiss below, the North Dakota PSC noted that the *Section 251(a) Order* was not adopted until three years after the 2008 *Rural Exemption Order* and that, therefore, Midcontinent reasonably could have concluded in 2008 that Section 251(a) interconnection was not available. Motion to Dismiss Order at 5. This analysis also would support a conclusion that claim preclusion does not apply. Missouri Valley suggests that this conclusion was improper because Midcontinent had not raised the argument. Missouri Valley Brief at 28. Missouri Valley is incorrect, both because the Court can consider any otherwise appropriate argument and because of the North Dakota PSC's obligation to consider *res judicata* claims in the context of the public interest, which gives the North Dakota PSC considerable flexibility in deciding such claims. *Landrum,* 2011 ND 108, ¶¶ 12-13

3. The Facts that Supported the 2008 Decision Changed Over the Three Years that Elapsed Before the Current Proceeding Was Commenced

The final prong of claim preclusion analysis is whether there is an identity of the causes of action; that is, whether the underlying facts are the same. As the court in *Littlefield* held, this prong is met "[i]f the subsequent claims are based upon the identical factual showing as the claims in the prior proceeding." *Littlefield,* 50 N.W.2d at 884. That prong is not met here for at least two different reasons.

Initially, and as described above, the factual showings in the two proceedings diverged enormously, because they did not address the same issues. In 2008, the parties addressed the technical and economic impacts of Section 251(c)(2) interconnection on Missouri Valley, as well as the potential impact on universal service. *Rural Exemption Order* at 4-9. In 2012, the parties addressed specific issues concerning the implementation of interconnection – where and when it would take place and how much it would cost – as well as operational issues after interconnection was implemented, such as how to switch customers from resale to facilities-based Midcontinent service.[17]

Second, and as documented in Midcontinent's petition for arbitration and its testimony, the underlying facts that supported much of the *Rural Exemption Order* no longer were true.[18] Midcontinent provided evidence showing that Missouri Valley no longer was capable of providing service to new customers in a timely fashion; that there were areas of Williston served by Midcontinent but not by Missouri Valley; and that the

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[17] Recommended Decision at 5-18. Some of the testimony addressed potential economic impacts on Missouri Valley, but only in the context of the proper compensation for the exchange of traffic, not in the context of whether interconnection should be permitted at all.

[18] Midcontinent notes that its claims were based on changed facts, not facts that previously were undiscovered.

FCC had made important changes to the rules governing universal service and intercarrier compensation that had a significant effect on the potential impact of competition and interconnection on Missouri Valley. Petition for Arbitration at 2; Simmons Testimony at 8-13. Missouri Valley did not dispute any of these facts, and did not choose to cross-examine Midcontinent's witnesses on these points.

These facts were central to the North Dakota PSC's decision in the *Rural Exemption Order.* The North Dakota PSC specifically concluded that "Missouri Valley complies with the requirement to provide the supported services through the designated service area of the entire Williston exchange to all customers making a reasonable request for service" and that "loss of revenue" would "damage" Missouri Valley's ability to continue to do so. *Rural Exemption Order* at 3, 7. Similarly, the *Rural Exemption Order* relied on conclusions about the impact of the interconnection on universal service in Williston in light of the universal service rules that then were in place. *Id.* at 8-9. Given the changes to these facts, and Missouri Valley's failure to challenge any of those changes, it is impossible to conclude that Midcontinent's subsequent claim is "based upon an identical factual showing." *Littlefield,* 50 N.W.2d at 884.

Missouri Valley does not address this issue at all in its brief, and there is no answer to it. If these facts are relevant to Midcontinent's Petition for Arbitration, then claim preclusion does not apply. If they are not, then it is apparent that the issues in the 2008 proceeding and the current proceeding are not "substantially identical," and claim preclusion does not apply for that reason. *Nodland,* 314 N.W.2d at 92. In either case, there is no valid *res judicata* argument.

4. Claim Preclusion Does Not Prevent a Party from Asserting a Continuing Right

As shown above, Missouri Valley's *res judicata* claim fails because this proceeding did not meet either the third or the fourth prong of the claim preclusion test in North Dakota. Claim preclusion also is not applicable because the interconnection right under Section 251 is a continuing right.

The underlying basis for *res judicata* is that adjudicatory bodies should not revisit issues that arise from a specific incident once those issues have been decided. The key element of that principle is that the parties' rights are fixed as of a certain time, such as the date of the alleged breach of a contract or the date a workplace injury occurred.

Interconnection is not, however, a right based on a specific incident or otherwise fixed in time. Under both Section 251(a) and Section 251(c) of the Communications Act, a carrier can ask for interconnection at any time. It can make a request, withdraw the request and make a new one later. Carriers are permitted to ask for interconnection and go through the arbitration process, then later ask for arbitration again as to a new interconnection request, often on many of the same issues that were litigated in the first arbitration.[19] There is no limit on when interconnection rights may be asserted; rather, the Communications Act simply establishes a schedule for negotiation, mediation and, if necessary, arbitration that applies to each individual interconnection request. 47 U.S.C.

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[19] *See, e.g.,* Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia Corporation Commission regarding Interconnection Disputes with Verizon Virginia, Inc. and for Expedited Arbitration, *Memorandum Opinion and Order,* 17 FCC Rcd 27039, 27087-94 (2002) (addressing proposals to modify terms concerning trunk forecasts). This order also decided many issues that had not been raised in the first round of arbitrations in Virginia, which under Missouri Valley's theory would have been subject to claim preclusion.

§ 252(b). Indeed, under the Communications Act, the interconnection obligation is a fundamental element of each carrier's status as a carrier.

In other words, a single interconnection request or, more relevantly, a single proceeding that results from an interconnection request, does not establish the parties' rights forever. Each interconnection request starts the process anew, and *res judicata* does not prevent any carrier from starting the process at a time of its choosing. While *res judicata* principles could be applied to individual issues that were addressed in an arbitration proceeding or a rural exemption proceeding, they have no applicability to the request itself or to a party's ability to take advantage of its arbitration and interconnection rights where they are available.

VI. Conclusion

For all of these reasons, Midcontinent's Motion for Summary Judgment should be granted and Missouri Valley's Motion for Summary Judgment should be denied.

Dated: November 27, 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 27, 2012, the foregoing document, **Memorandum of Law in Support of Motion for Summary Judgment and Opposition to Missouri Valley Communications Motion for Summary Judgment**, was filed electronically with the Clerk of Court through ECF, and that ECF will send a Notice of Electronic Filing (NEF) to the following:

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