

**United States District Court  
District of North Dakota**

Missouri Valley Communications, Inc.,	)
	)
Plaintiff,	)
vs.	)
	)
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.	)

**Missouri Valley’s Consolidated  
Reply Brief in Support of its  
Motion for Summary Judgment  
and Brief Opposing Defendants’  
Summary Judgment Motions**

Case No: 4:12-cv-00091

David J. Hogue (#04486)  
**Pringle & Herigstad P.C.**  
2525 Elk Drive  
P.O. Box 1000  
Minot, ND 58702-1000  
(701) 852.0381  
[dhogue@srt.com](mailto:dhogue@srt.com)

**TABLE OF AUTHORITIES**

<b>CASES</b>	<b>PAGE NO.</b>
<i>Chevron U.S.A. v. NRDC</i> , 467 U.S. 837(1984) .....	passim
<i>Iowa Telecommunications Services Inc. v Iowa Utilities Board</i> 563 F.3d 743 (8 <sup>th</sup> Cir 2000) .....	7
<i>Iowa Utilities Board v Federal Communications Commission</i> , 219 F.3d 744 (8 <sup>th</sup> Cir. 2000).....	5, 6, 7
 <b>STATUTES</b>	
47 USC § 151.....	1
47 USC § 251(a).....	passim
47 USC § 251(c) .....	passim
47 USC § 251(f).....	passim
47 USC § 252.....	passim
47 USC § 252 (e)(6).....	1, 6

All parties have moved for summary judgment. Judgment may be entered as a matter of law in this action under 47 U.S.C. §252(e)(6) for judicial review of action of the North Dakota Public Service Commission under the Telecommunications Act, 47 U.S.C. §§ 151 et. seq. The core issue of law is whether Missouri Valley is obliged under § 251(a) to interconnect with Midcontinent for the exchange of local telecommunications traffic in the Williston, North Dakota exchange.

Missouri Valley's principal brief in support of its motion argues that neither Act § 251(a) nor the FCC's 2011 declaratory ruling (the "Ruling," *Appendix C*) obliges a rural telephone company to interconnect with a CLEC for the exchange of local traffic. Alternatively, if the Ruling were interpreted as obligating rural telephone companies to provide local exchange interconnection, the Ruling is not a controlling precedent because it contradicts Act § 251. The PSC's Interconnection Order is based on its interpretation of the Ruling. *PSC 2012 Order* ¶ 25, *Appendix D, Exhibit 1, Dkt 35*; *Interconnection Order* ¶ 3, *Appendix E, Exhibit 1, Dkt 82*. (Appendices referred to in this brief are attachments to Missouri Valley's principal brief.)

Midcontinent and the PSC both argue not only the Interconnection Order is supported by the Ruling, they also assert an affirmative defense that the Ruling is conclusive in this action for judicial review of the Interconnection Order. *Midcontinent answer*, ¶ XXII; *PSC answer, unnumbered affirmative defense*. The defense is summarized by Midcontinent's answer ¶ I: "This order, however, is final, unappealable, and binding."

According to the PSC's and Midcontinent's theory, even if the FCC's Ruling was erroneous, despite being erroneous the Ruling has some special "binding" status for its errors to be perpetuated in this case, maybe others. The Ruling may be final, unappealable and binding as to the parties to that case (*res judicata*), but the Ruling is merely a non-binding precedent

(“guidance” according to the FCC, *Ruling* ¶¶ 1, 2 & 28, *Appendix C*), subject to *de novo* judicial evaluation in this case. The Ruling was erroneous and is not binding in this action for judicial review of the Interconnection Order.

Midcontinent’s and the PSC’s claim that the Ruling is binding is based on *Chevron* deference to agencies’ statutory interpretations. See *Midcontinent’s Nov. 27, 2012 brief at pp. 5, 18 & 23*. See also *PSC’s November 26, 2012 brief at p.10*. They present a mistaken version of *Chevron*.

Courts’ deference is not blind acquiescence to an agency’s interpretation. There is a two step test.

“When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.” *Chevron U.S.A. v. NRDC*, 467 U.S. 837, 842–843 (1984).

The *Chevron* precedent does not confer on any agency in the fourth branch of government the power to declare its self unclear about congressional intent and to thereby confer upon itself a power of bureaucratic policymaking free of judicial oversight. Whether a statute is ambiguous is a question of law. Under *Chevron*, the judiciary - not the agency - determines whether the statute is ambiguous and needing the agency to form an interpretation that might

merit deference. If the statute is not ambiguous there is no deference to the agency's interpretation. The unambiguously expressed intent of Congress prevails.

The FCC declared "The purpose of this ruling is to clarify statutory rights under section 251 of the Communications Act of 1934, as amended (the Act), in light of apparently conflicting determinations in several states." *Ruling ¶ 1, Appendix C*. The FCC explained its purpose: "Therefore, to further the Commission's goals in promoting facilities-based competition, we take this opportunity to clarify the relationship between the section 251(a) and (b) obligations and the section 251(f)(1) rural exemption." (*Ruling ¶ 14, Appendix C*). The FCC's declared purpose of the Ruling was not resolve ambiguity or to clarify congressional intent. The FCC slanted its interpretation of § 251 "to further the Commission's goals."

Section 251 is not ambiguous on its face. Where the court sees no patent ambiguity in § 251, a history of "apparently conflicting determinations in several states" is an insufficient foundation for the FCC to usurp the power to further its goals and to undermine the rural exemption clearly intended and enacted by Congress. Likewise, Midcontinent's ex post facto effort to manufacture ambiguity (and attribute that to Missouri Valley) does not support its reliance on *Chevron*. *Midcontinent brief at 18*. Indeed, Midcontinent seems to rely on its version of the "plain meaning" of § 251(a) more than on its alternative argument, *Chevron* deference for the Ruling. *Id. at 15 - 18*. Missouri Valley also relies on its version of the plain meaning of § 251(a). The court will resolve that disagreement under the plain meaning principle of statutory interpretation, without reference to *Chevron* deference, because the Ruling was the FCC's version of the plain meaning of § 251(a), an erroneous interpretation not formulated to resolve ambiguity in § 251. *Chevron* does not support the Ruling.

The FCC's interpretation of § 251 bypassed the critical and always first step of the two step *Chevron* test. The FCC did not opine any part of § 251 was ambiguous - not the general duty of interconnection under subsection (a), not the additional duties under subsections (b) and (c), and not the rural exemption under subsection (f). The FCC thought its interpretation of the relationship among § 251's subsections "flows directly from the language of section 251 itself." *Ruling* ¶ 15, *Appendix C*. That is half-true as to the statement "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." *Id.* But the Ruling is devoid of any explanation of how the FCC found a requirement to exchange local traffic mandated by § 251(a). *Ruling* ¶ 2, *Appendix C*. The whole truth is the plain words of § 251(a) require all telephone companies to interconnect but do not oblige any telephone company to exchange local telecommunications traffic. Interconnection for the exchange of local traffic is required under § 251(c) but rural telephone companies are exempt from that obligation under § 251(f)(1)(A). There is no ambiguity, no lack of clarity in § 251.

Midcontinent argues that the interconnection obligation under § 251(a) includes the obligation to exchange local traffic. See *Midcontinent brief at pp. 15-18*. Midcontinent acknowledges there are other qualities of interconnection, such as arrangements for interexchange carriers to be interconnected with local exchange carriers so that calls originated in one exchange area can be connected in another area or arrangements for wireless carriers to be interconnected with local landline carriers, and it wants ILEC/CLEC local exchange interconnection to be read into § 251(a). Midcontinent's argument about the breadth of §251(a) might have some credence if that subsection stood alone. It does not. There is no need for implication to find an obligation for local exchange interconnection. Midcontinent never comes

to grips with the fact that the special quality of interconnection it seeks - to exchange local traffic with an incumbent local exchange carrier in a defined local exchange area - is the subject of a separate subsection. Interconnection “for the transmission and routing of telephone exchange service” is an ILEC’s obligation under the specific terms of §251(c), not an implied obligation under §251(a). The plain words of § 251(a) do not include the duty to exchange local traffic. Section 251(c) is the only basis of an ILEC’s obligation to interconnect with a CLEC to exchange local traffic.

Congress included § 251(c) in the Act for a reason. Section 251(c) is not redundant, as Midcontinent suggests when it argues that § 251(a) includes an obligation to exchange local traffic. Quite the contrary, § 251(c) is the Act’s mandate that ILECs open their local markets to competition from CLECs such as Midcontinent, as explained in its brief at pp. 7-8. Interconnection for the exchange of local traffic is required under § 251(c) but rural telephone companies are exempt from that obligation under § 251(f)(1)(A). ILECs that are rural telephone companies are not obliged to interconnect for the exchange of local traffic unless and until the exemption is terminated under § 251(f)(1)(B). There is no ambiguity, no lack of clarity in § 251.

The FCC did regard § 252 as ambiguous about arbitration as a means to force local exchange interconnection on rural telephone companies. *Ruling ¶ 18, Appendix C*. Not so as to § 251 and the hierarchy of interconnection duties. It surpasses strange that resolution of a perceived ambiguity about procedure under § 252 would result in the avoidance of an unambiguous substantive provision of § 251, the rural exemption from local interconnection. It should be the other way around. Because § 251 subsections (a) and (c) and (f) are clear about the rural exemption from interconnection for the exchange of local traffic, that clarity should be the guide to resolving any question about ambiguity under § 252.

The *Chevron* doctrine was mentioned once in the Ruling, at *footnote 65*, but not as supporting the FCC's interpretation of § 251. As noted, the FCC thought its interpretation of the relationship among § 251's subsections "flows directly from the language of section 251 itself." *Ruling ¶ 15, Appendix C*. Likewise, the FCC's conflation of §§ 251 and 252 was claimed to be based on "the statutory text itself" (*Ruling ¶ 20, Appendix C*), despite its remark about § 252's ambiguity.

The FCC noted §§ 251 and 252 do not address the issue whether arbitration can be invoked to force local exchange interconnection on rural telephone companies. *Ruling ¶ 18, Appendix C*. That is not ambiguity and it is not congressional silence. Congress spoke in § 251. Congress created a graduated set of interconnection obligations and the rural exemption from local exchange interconnection, and Congress created the procedure for the exemption to be terminated under specific standards in § 251(f)(1)(B). Had the FCC not misinterpreted §251(a) as "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)" (*Ruling ¶ 2, Appendix C*), there would be no question about § 252 processes. Section 251 is clear and it is complete. There is no statutory gap needing to be filled by the FCC's stilted interpretation that arbitration proceedings under § 252 can be invoked to impose local exchange interconnection on rural telephone companies. "Under the first prong of *Chevron*" the Ruling violates the plain language of the statute. *Iowa Utilities Board v Federal Communications Commission, 219 F.3d 744, at 759 (8<sup>th</sup> Cir. 2000)*.

Section 251 is neither ambiguous nor silent. Congress has directly spoken to the precise question at issue. The intent of Congress is clear. The plain words of § 251(a) require all telephone companies to interconnect but do not oblige any telephone company to exchange local

telecommunications traffic. Interconnection for the exchange of local traffic is required under § 251(c) but rural telephone companies are exempt from that obligation under § 251(f)(1)(A). The rigorous obligation to interconnect “for the transmission and routing of telephone exchange service and exchange access...,” is imposed by the specific terms of § 251(c)(2) (subject to the rural exemption) and is not included in the general duties of § 251(a). This graduated set of interconnection obligations under § 251 is described by the FCC. *Ruling ¶ 4 and footnote 57, Appendix C*. Likewise, in the *Federal Court Order, Appendix B (pp. 4-8)*, this Court recognized interconnection duties under § 251(c)(2) are duties additional to general duties under § 251(a) and that rural telephone companies are exempt from interconnection duties under § 251(c)(2).

“In recognizing that some incumbent local exchange carriers serving rural areas face special economic and technical challenges due to the smaller and more dispersed populations they serve, Congress included a rural exemption under the Telecommunications Act.” *Id. at 7*.

“If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Chevron, at 843-44*. Section 251 and the intent of Congress are clear. The Ruling is “manifestly contrary to the statute.” *Id. at 844*. The FCC did not construe an ambiguous statute; it blatantly misinterpreted § 251 in its result oriented zeal “to further the Commission’s goals in promoting facilities-based competition” (*Ruling ¶ 14, Appendix C*), undermining the rural exemption enacted by Congress to temper undue economic burdens of competition.

“We owe no deference to an agency’s interpretation that would ‘frustrate the congressional policy underlying a statute.’ (Citation omitted). . . . In the Act, Congress sought both to promote competition and to protect rural telephone companies. . . . [T]he FCC has impermissibly weakened the broad protection Congress granted to small and rural telephone companies.”

*Iowa Utilities Board v Federal Communications Commission*, 219 F.3d 744 at 761.

Under § 251(f)(1)(A), Missouri Valley's rural exemption from § 251(c)(2) local exchange interconnection is in effect "until" the State Commission were to determine under § 251(f)(1)(B) that the exemption should be terminated. Midcontinent's opportunity to obtain an interconnection to compete in the Williston exchange is availed only by the specific provisions and limitations of Act § 251(f)(1)(B), not by the FCC's Ruling.

The PSC believed itself constrained by the FCC's Ruling, but this Court's *de novo* review of the Interconnection Order is not limited by deference to either the PSC's or the FCC's decisions that would thwart Congressional policy enacted by the rural exemption. *Iowa Utilities Board v Federal Communications Commission*, *supra*; *Iowa Telecommunications Services, Inc. v. Iowa Utilities Board*, 563 F.3d 743, 748 (8<sup>th</sup> Cir. 2009). The plain words of the Act and these precedents supersede both the FCC's mistaken guidance and the PSC's misguided reliance on the FCC's Ruling.

The Interconnection Order in PSC case No. PU-11-697 does not "meet the requirements of section 251." *Act § 252(e)(6)*. The Order does not meet the requirement of § 251 that a rural telephone company is not obliged to interconnect unless and until its exemption is terminated under § 251(f)(1)(B). Under § 251(e)(6) the Court should enter an order and declaratory judgment that the North Dakota Public Service Commission's June 27, 2012 Interconnection Order in its Case No. PU-11-69 is invalid and unenforceable as a matter of federal law under §§ 251(a), 251(c), 251(f) and 252 of the Communications Act, and that Missouri Valley is not obliged under the interconnection agreement adopted in arbitration and approved in Case No. PU-11-697.

Dated this 17th day of December, 2012.

/s/ David J. Hogue  
David J. Hogue (#04486)  
***Pringle & Herigstad P.C.***  
Attorneys for Plaintiff  
2525 Elk Drive  
P.O. Box 1000  
Minot, ND 58702-1000  
(701) 852.0381  
[dhogue@srt.com](mailto:dhogue@srt.com)

**United States District Court  
District of North Dakota**

Missouri Valley Communications, Inc.,	)
	)
Plaintiff,	)
vs.	)
	)
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-00091

**CERTIFICATE OF SERVICE**

I hereby certify that on December 17, 2012, the following document:

*Reply Brief in Support of Motion for Summary Judgment and Brief Opposing Defendants' Summary Judgment Motions*

was filed electronically with the Clerk of Court through ECF, and emailed to the following:

*N/A*

I further certify that copy of the foregoing documents will be mailed by first class mail, postage paid, to the following non-ECF participants:

*N/A*

Dated: December 17, 2012

/s/ David J Hogue  
David J. Hogue