

**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)	

REPLY OF MIDCONTINENT COMMUNICATIONS

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REPLY OF MIDCONTINENT COMMUNICATIONS

I. Introduction

Midcontinent Communications (“Midcontinent”) hereby submits its reply to the Consolidated Reply Brief in Support of Motion for Summary Judgment and Brief Opposing Defendants’ Summary Judgment Motion (“Missouri Valley Opposition”) filed by Missouri Valley Communications (“Missouri Valley”).

The Missouri Valley Opposition demonstrates that this appeal is now almost entirely about the Federal Communications Commission (“FCC”) decision in its *Section 251(a) Order*. CRC Communications and Time Warner Cable, Inc., *Declaratory Ruling*, 26 FCC Rcd 8259, 8267 (2011) (footnotes omitted) (the “*Section 251(a) Order*”), which Missouri Valley claims was wrongly decided. Missouri Valley’s primary argument is

that the North Dakota Public Service Commission (“North Dakota PSC”) erred by following the precedent set by the *Section 251(a) Order*.¹

As shown below, Missouri Valley’s attacks on the *Section 251(a) Order* are misplaced, and therefore the North Dakota PSC’s order must be affirmed. Not only is the *Section 251(a) Order* a final, unappealable order, but the FCC’s interpretation of Section 251(a) is consistent with the plain meaning of the statute and would be entitled to *Chevron* deference even if Section 251(a) were ambiguous. Consequently, the motions of Midcontinent and the North Dakota PSC for summary judgment should be granted and Missouri Valley’s motion for summary judgment should be denied.

II. Any Evaluation of the *Section 251(a) Order* Must Use the *Chevron* Framework.

Missouri Valley makes the surprising claim that the FCC failed to engage in the analysis called for under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Missouri Valley Opposition at 4. *Chevron* is not a mechanism for FCC analysis of statutory provisions, but instead is a tool used by the courts in their review of expert agency determinations. *See Chevron*, 467 U.S. at 842-3. Moreover, even while quoting Midcontinent’s answer and summary judgment brief, Missouri Valley fails to recognize the import of the statement that the *Section 251(a) Order* is “final, unappealable and binding.” Missouri Valley Opposition at 1, *quoting* Midcontinent Answer at 6. Missouri Valley argues, instead, that the *Section 251(a) Order* is “merely a non-binding precedent . . . subject to *de novo* judicial evaluation in this case.” Missouri

¹ *See* Missouri Valley Opposition at 1-2. Missouri Valley does not address its *res judicata* argument at all. That argument is without merit for the reasons described in Midcontinent’s initial brief. *See* Midcontinent Memorandum of Law in Support of Motion for Summary Judgment and Opposition to Missouri Valley Communications Motion for Summary Judgment, Nov. 27, 2012 at 25-33 (“Midcontinent Brief”).

Valley Opposition at 1-2. This statement is incorrect, both because the finality of the FCC decision renders it unreviewable and because the FCC would be entitled to deference under *Chevron* if the *Section 251(a) Order* were subject to review.

A. The *Section 251(a) Order* Is Final and Unreviewable.

The finality of the *Section 251(a) Order* precludes collateral review of the type that Missouri Valley requests. Under the Hobbs Act, all review of FCC decisions is via direct review at the Court of Appeals, which has “exclusive jurisdiction . . . to determine the validity” of FCC orders. 28 U.S.C. § 2342(1). Consistent with this statutory language, the Eighth Circuit has concluded repeatedly that no attacks on FCC decisions can be made outside of the direct appeal process. *See Vonage Holdings Corp. v. Minnesota PUC*, 394 F.3d 568, 569 (8th Cir. 2004) (holding that “[n]o collateral attacks on” an FCC declaratory ruling “are permitted”), *United States v. Any and All Radio Station Transmission Equipment*, 207 F.3d 458, 463 (8th Cir. 2000) (holding that the Hobbs Act precluded a District Court from considering a claim that FCC regulations violated the Constitution). *Vonage Holdings* is particularly relevant because, like this case, it involved review of a state regulatory commission’s actions and the court concluded that the FCC’s decision on the same topic had preclusive effect.

Thus, the sole mechanism for Missouri Valley to challenge the *Section 251(a) Order* would have been an appeal of that decision to the Court of Appeals. Missouri Valley did not take that step or seek reconsideration of the FCC decision, even though the periods for both reconsideration and appeal were open at the time that Midcontinent made its interconnection request and even though Midcontinent specifically cited the

Section 251(a) Order in the request.² Having failed to seek timely review in the appropriate forum, Missouri Valley is not entitled to contest the validity of the *Section 251(a) Order* today before a different court.

This is not, as Missouri Valley suggests, a *res judicata* claim. Missouri Valley Opposition at 1-2. Rather, it is a matter of jurisdiction. The Hobbs Act, by specifying the sole means for review of FCC decisions, eliminates any other path for challenging those decisions. Since, as Missouri Valley concedes, the North Dakota PSC followed the precedent set in the *Section 251(a) Order*, there is nothing for this court to review.

B. Any Permissible Review Would Be Conducted Under *Chevron*.

Even if the *Section 251(a) Order* were subject to review, that review would have to be conducted under the *Chevron* standard. As described in the Midcontinent Brief, any review of an agency's interpretation of the substantive terms of its basic statute must be made via a two-part test. First, if the statute is unambiguous, the court gives the agency no deference and applies the unambiguous meaning of the statutory language. If, however, the statute is ambiguous, then the court must defer to the agency's interpretation unless that interpretation is unreasonable. *Chevron*, 467 U.S. 837; *see also* Midcontinent Brief at 5 (citing consistent Supreme Court and Eighth Circuit cases). Even the cases cited by Missouri Valley adopt this approach. *Iowa Telecommunications Services, Inc. v. Iowa Utilities Bd.*, 563 F.3d 743, 748 (8th Cir. 2009) ("We owe deference to the FCC's interpretation of the Act because the FCC is charged with the

² Midcontinent Petition for Arbitration, Doc. No. 1 (Nov. 14, 2011), Exhibit B at 2 (describing requirements of *Section 251(a) Order*). The *Section 251(a) Order* was released on May 25, 2011. Under the FCC's rules, petitions for reconsideration could have been filed until June 24, 2011, ten days after the request for interconnection. 47 C.F.R. § 1.106(f) (setting deadline for petitions for reconsideration). Petitions for review of the *Section 251(a) Order* could have been filed until July 22, 2011, 60 days after the order was released. 28 U.S.C. § 2344.

duty to promulgate regulations to interpret and carry out the Act.”), *Iowa Utilities Bd. v. FCC*, 219 F. 3d 744, 748-49 (8th Cir. 2000).

Chevron is a tool for courts reviewing agency decisions; contrary to Missouri Valley’s suggestion, the FCC had no obligation to employ a *Chevron* analysis. Missouri Valley Opposition at 4. The FCC’s sole obligation is to interpret the statute in light of the statutory language and Congressional intent. As shown below, the FCC’s interpretation is correct.

III. The FCC’s Interpretation Is Consistent with the Plain Meaning of Section 251(a) and with the Communications Act as a Whole.

As established in the Midcontinent Brief, Section 251(a) unambiguously entitles all carriers to direct or indirect interconnection with all other carriers for any type of telecommunications. Midcontinent Brief at 15-19. Missouri Valley’s interpretation is inconsistent with both the language of Section 251(a) and the structure of the statute as a whole.

First, the language of Section 251(a) is direct and unambiguous:

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). There are no exceptions to this obligation for any type of carrier or any type of traffic. This should end the inquiry.

Missouri Valley argues that there is an implicit exception to this obligation for interconnection with incumbent local exchange carriers, and that incumbent local exchange interconnection is separately governed by Section 251(c)(2), even though Section 251(a) contains no exceptions. Missouri Valley Opposition at 5. However, this kind of interpolation of additional terms into statutory language is highly disfavored, as even the cases that Missouri Valley cites demonstrate. *See, e.g., Iowa Utilities Bd. v.*

FCC, 219 F. 3d at 761 (8th Cir. 2000) (criticizing FCC for adding conditions to rural exemption). Further, Missouri Valley's interpretation is counter to the legislative history of the Telecommunications Act of 1996 (the "1996 Act"), which describes Section 251(a) as imposing "a general duty" on "all telecommunications carriers," without any limitations. H.R. Rep. 104-458, 104th Cong., 2d sess., 121 (1996).

A much more reasonable interpretation of the combination of Section 251(a) and Section 251(c), which is consistent with the language of both provisions and the legislative history, is that Section 251(c) places additional obligations on incumbent local exchange carriers and does not displace any obligations under Section 251(a). This is the interpretation the FCC has adopted consistently since the 1996 Act became law. *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, First Report and Order*, 15 FCC Rcd 15499, 15991 (1996) (describing distinction between Section 251(c) and Section 251(a)) (the "*Local Competition Order*"). In fact, Section 251(c) specifically says that its requirements are "in addition" to the other obligations of incumbent local exchange carriers. 47 U.S.C. § 251(c). Missouri Valley's argument does not account for this language, and in neither of its briefs does Missouri Valley point to any other language in Section 251 that suggests that Section 251(c) creates an exception to Section 251(a).³

Similarly, Missouri Valley's claim that the inclusion of the phrase "for the transmission and routing of telephone exchange service and exchange access" in Section 251(c)(2) creates some exclusive means for interconnection for local traffic is incorrect.

³ Missouri Valley's response also does not address its argument that Midcontinent's interconnection request actually was a Section 251(c) request. In any event, that argument was incorrect. Midcontinent Brief at 19-21.

Missouri Valley Opposition at 4-5. As Midcontinent explained in its initial brief, the FCC has addressed the meaning of this phrase, and concluded that the reason it was included in Section 251(c)(2) was to prevent long distance carriers from obtaining favorable interconnection terms. Midcontinent Brief at 16-17, *citing Local Competition Order*, 15 FCC Rcd at 15598 (1996).

This interpretation also is consistent with the structure and purpose of the 1996 Act as a whole. While Missouri Valley characterizes the FCC's statement in the *Section 251(a) Order* that it was acting on the "Commission's goals in promoting facilities-based competition" as having "slanted its interpretation," the FCC merely was articulating the underlying Congressional goals in enacting the statute. Missouri Valley Opposition at 3. It was Congress itself, not the FCC, that described the statute as "pro-competitive." Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, preamble. Further, Section 253 of the Communications Act, added by the 1996 Act, specifically opens all markets in the United States to local telephone competition. 47 U.S.C. § 253.

The existence of Section 253 also demonstrates that Missouri Valley's claim that Section 251(c) is the "mandate that ILECs open up their local markets to competition" is wrong. Missouri Valley Opposition at 5. That is the purpose of Section 253, which even contains specific language to prevent state regulators from restricting competition in rural markets if competitors are willing to meet specified conditions.⁴ Missouri Valley's claim that treating Section 251(c)(2) as the mechanism for opening markets to competition avoids redundancy in the statute also is wrong because the FCC's interpretation creates

⁴ 47 U.S.C. § 253(f). Notably, the exception that would permit state regulators to limit competition in rural markets does not apply if the incumbent carrier is subject to the rural exemption. Thus, Congress anticipated that there would be competition in areas where incumbents were protected by the exemption.

no redundancy. Missouri Valley Opposition at 5. As described in Midcontinent's initial brief, the differences between Section 251(a) and Section 252(c)(2) interconnection are significant, with both technical and financial consequences and, thus, the two provisions serve different purposes. Midcontinent Brief at 19-21.

Missouri Valley also repeats its claim that Section 251(a) does not address local traffic. Missouri Valley Opposition at 4-5. Again, because Section 251(a) covers all interconnection, it necessarily includes interconnection for the exchange of local traffic. This conclusion is consistent with multiple FCC decisions, including the *Section 251(a) Order* and the *2007 Time Warner Order*, which held 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 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 Telecommunications Services to VoIP Providers, *Memorandum Opinion and Order*, 22 FCC Rcd 3513, 3517 (Wireline Comp. Bur. 2007). Even if Section 251(a) did not cover the exchange of local traffic, however, Missouri Valley would remain subject to the separate obligation under Section 251(b)(5) "to establish reciprocal compensation arrangements for the transport and termination of telecommunications," which includes local traffic. 47 U.S.C. § 251(b)(5).

Missouri Valley's new claim that the FCC improperly addressed the interpretation of Section 252 of the Communications Act also is wrong.⁵ As the FCC correctly noted in

⁵ Missouri Valley Opposition at 5-6. Missouri Valley makes this argument for the first time in its final pleading, having failed to raise it at the North Dakota PSC or in its initial brief, and it is not responsive to any argument made by Midcontinent. For that reason,

the *Section 251(a) Order*, there is no basis to conclude that the arbitration requirement of Section 252, which is not mentioned in Section 251(f)(1), is affected at all by the rural exemption. *Section 251(a) Order*, 26 FCC Rcd at 8272; 47 U.S.C. § 251(f)(1). While the obligation to negotiate in good faith under Section 251(c)(1) is covered by the rural exemption, all parties to this proceeding agree that Missouri Valley is not subject to that obligation, and neither Midcontinent nor the North Dakota PSC sought to require any negotiation at all. Moreover, Missouri Valley's argument is based entirely on its erroneous interpretation of Section 251(a). If the correct reading of Section 251(a) is applied, then the FCC's analysis of Section 252 obligations is entirely reasonable and consistent with the statute.

IV. The Most that Missouri Valley Can Argue Is that the Statute Is Ambiguous, and in that Case the FCC Would Be Entitled to *Chevron* Deference.

In the end, Missouri Valley's statutory interpretation argument is that the court should adopt an interpretation that is different from the one that is most apparent upon reading the statute itself. As shown above, Missouri Valley's proposed interpretation is incorrect because it misapprehends or ignores key parts of the statute and the legislative history. Even if Missouri Valley's analysis raised some doubt, however, the FCC would be entitled to *Chevron* deference and its interpretation would prevail.

Chevron is clear about the role of courts in reviewing agency interpretations of ambiguous statutes: So long as the agency's interpretation is reasonable, it must be upheld, even if the court thinks that other interpretations are better or more likely than the

the court should not consider it. See, e.g., *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 36-37 (1952) (“[O]rderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts.”); see also *Paulson v. Paulson*, 2011 ND 159 *9 (N.D. 2011) (It is “fundamentally unfair” to raise an argument in an appeal that could have been raised at the trial court.).

one the agency adopted. This is true even when there is prior precedent to the contrary, and even when that precedent is in the same circuit where the challenge is raised. *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). Eighth Circuit precedent is consistent with this analysis. See, e.g., *Missouri Mun. League v. FCC*, 299 F.3d 949, 952 (8th Cir. 2002) (FCC determinations reviewed under two-step process set forth in *Chevron*), *Iowa Utilities Bd. v. FCC*, 219 F. 3d 744, 748-49 (8th Cir. 2000) (same).

Missouri Valley's argument is, in essence, that the plain language of Section 251(a) must be ignored in favor of a more narrow reading. While this is couched as a plain language argument based on the structure of the statute, Missouri Valley's explanation of why the broad language of Section 251(a) should be ignored also requires ignoring many other elements of the statutory scheme, such as the specific language in Section 251(c) describing its obligations as in addition to those of the rest of Section 251, the legislative history describing Section 251 as imposing "a general duty" and the general market-opening language of Section 253 and the preamble to the 1996 Act.

Against this backdrop, the FCC's decision to read Section 251(a) to mean what it says is evidently reasonable. As the Supreme Court said in upholding the FCC's interpretation of another provision of the 1996 Act, "[t]he FCC's interpretation is not only reasonable, it is the most readily apparent." *AT&T v. Iowa Utilities Bd.*, 525 U.S. 366, 396 (1999). In such a case, *Chevron* deference applies and there is no basis for overturning the FCC's interpretation of Section 251(a).

V. Conclusion

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

Dated: January 3, 2012.

Respectfully submitted,

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I hereby certify that on January 3, 2013, the foregoing document, **Reply of Midcontinent Communications**, 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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