

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
NORTHWESTERN DIVISION**

Missouri Valley Communications, Inc.,)	
)	ORDER DENYING PLAINTIFF'S
Plaintiff,)	MOTION FOR SUMMARY
)	JUDGMENT AND GRANTING
vs.)	DEFENDANT MIDCONTINENT
)	COMMUNICATION'S AND NORTH
North Dakota Public Service Commission;)	DAKOTA PUBLIC SERVICE
Kevin Cramer, Bonny Fetch, and Brian Kalk,)	COMMISSION'S MOTIONS FOR
in their official capacities as Commissioners of)	SUMMARY JUDGMENT
the North Dakota Public Service Commission;)	
and Midcontinent Communications, a South)	Case No. 4:12-cv-091
Dakota Partnership,)	
)	
Defendants.)	

Before the Court is the Plaintiff's motion for summary judgment filed on October 17, 2012. See Docket No. 16. Also before the Court are Defendant North Dakota Public Service Commission's motion for summary judgment filed on November 26, 2012, and Defendant Midcontinent Communications' motion for summary judgment filed on November 27, 2012. See Docket Nos. 21 and 24. The North Dakota Public Service Commission filed a response to the plaintiff's motion on November 26, 2012. See Docket Nos. 22 and 28. On November 27, 2012, Midcontinent Communications filed a response to the plaintiff's motion. See Docket Nos. 25 and 26. On December 17, 2012, the Plaintiff filed a "Consolidated Reply Brief in Support of its Motion for Summary Judgment and Brief Opposing Defendants' Summary Judgment Motions." See Docket Nos. 30 and 31. Midcontinent Communications filed a reply brief on January 3, 2013. See Docket No. 32. For the reasons set forth below, the Court denies the Plaintiff's motions for summary judgment, grants Defendant Midcontinent Communications' motion for

summary judgment, and grants Defendant North Dakota Public Service Commission's motion for summary judgment.

I. BACKGROUND

This is an action under 47 U.S.C. § 252(e)(6) for judicial review of an order of the North Dakota Public Service Commission approving an arbitrated interconnection agreement between Missouri Valley Communications, Inc. and Midcontinent Communications. This is the second time the parties have litigated the underlying issue of whether Missouri Valley Communications is obliged by the Federal Telecommunications Act to interconnect with Midcontinent Communications for the purpose of exchanging local telecommunications traffic in Williston, North Dakota.

The plaintiff, Missouri Valley Communications, Inc., is a North Dakota corporation with its principal place of business in Scobey, Montana. Missouri Valley Communications is a rural incumbent local exchange carrier (ILEC) controlling the legacy telephone network for the Williston, North Dakota, exchange. The defendant, North Dakota Public Service Commission (PSC), is a governmental body organized under the laws of North Dakota. When this lawsuit was filed, the commissioners of the PSC included Defendants Kevin Cramer, Bonny Fetch, and Brian Kalk, who were residents of North Dakota. The PSC is the regulatory agency with jurisdiction over telecommunications services in North Dakota. Midcontinent Communications (Midcontinent), is a South Dakota partnership with its principal place of business in Sioux Falls, South Dakota. Midcontinent is a competitive local exchange carrier (CLEC) authorized to

provide service throughout North Dakota under a certificate of public convenience and necessity granted by the PSC.

In November 2007, Midcontinent requested facilities-based interconnection with Missouri Valley Communications under 47 U.S.C. § 251(c) for the Williston, North Dakota, exchange. Missouri Valley Communications denied the request, relying on the rural exemption status under 47 U.S.C. § 251(f)(1)(a). On February 8, 2008, Midcontinent commenced a proceeding before the PSC seeking a determination that Missouri Valley Communications had waived its rural exemption status or, in the alternative, that Missouri Valley's rural exemption status should be terminated. An administrative hearing was held before the PSC on July 9-10, 2008. On October 8, 2008, the PSC issued an order denying Midcontinent's request for the termination of Missouri Valley's rural exemption status. See Docket No. 17-1, p. 12. In April 2009, Midcontinent commenced an action in federal court for judicial review of the PSC's order allowing the rural exemption status to remain.¹ This Court dismissed Midcontinent's action, effectively affirming the PSC's decision and order. See Docket No. 19.

In June 2011, Midcontinent again requested facilities-based interconnection from Missouri Valley Communications for the purpose of exchanging local telecommunications traffic in the Williston exchange. Missouri Valley Communications denied the request. On November 14, 2011, Midcontinent petitioned the PSC to arbitrate its request and compel Missouri Valley Communications to interconnect with Midcontinent, citing 47 U.S.C. §§ 251(a) and 252(b), and a recent Federal Communications Commission (FCC) Declaratory Ruling. See Docket No. 17-3.

¹A more in-depth background of the first cause of action and the Telecommunications Act of 1996 can be found at Midcontinent Commc'ns v. N.D. Pub. Serv. Comm'n, No. 1:09-cv-17, 2009 WL 3722898 (D.N.D. Nov. 3, 2009).

Missouri Valley Communications moved to dismiss Midcontinent's petition for arbitration. A hearing was held regarding the motion, and on March 21, 2012, the PSC denied Missouri Valley's motion to dismiss. See Docket No. 17-4.

An evidentiary hearing was held before the PSC on April 4-5, 2012, during which the parties presented witnesses and relevant exhibits. The parties submitted post-hearing briefs, along with a proposed interconnection agreement. On April 27, 2012, an arbitrator's decision was issued, constituting a resolution of the issues submitted for arbitration. On June 27, 2012, the PSC approved an interconnection agreement filed by Midcontinent pursuant to the arbitrator's decision compelling a direct interconnection. See Docket No. 17-5. Missouri Valley Communications has now commenced this action in federal court for judicial review of the PSC's action under 47 U.S.C. § 252(e)(6), arguing the PSC's decision does not meet the requirements of 47 U.S.C. § 251, and in particular, Section 251(f). See Docket No. 1.

II. STANDARD OF REVIEW

A. AGENCY DECISION

When reviewing an agency's order, the district court applies the same standard of review as does the appellate court. Iowa Telecomms. Servs., Inc. v. Iowa Utils. Bd., 563 F.3d 743, 748 (8th Cir. 2009) (citing WWC License, L.L.C. v. Boyle, 459 F.3d 880, 889 (8th Cir. 2006)). The district court owes "no deference to the Commission's interpretations of federal law," and the review is *de novo*. WWC License, L.L.C., 459 F.3d at 889-90. "Recognizing the state commission's 'superior technical expertise,' however, 'we review its factual determinations under the arbitrary and capricious standard.'" Qwest Corp. v. Boyle, 589 F.3d 985, 991 (8th Cir. 2009)

(quoting Ace Tel. Ass'n v. Koppendraye, 432 F.3d 876, 878 (8th Cir. 2005)). Mixed questions of law and fact are determined under the arbitrary and capricious standard as well. WWC License, L.L.C., 459 F.3d at 889. “The scope of review under the arbitrary and capricious standard is ‘narrow’; the standard does not permit ‘a court . . . to substitute its judgment for that of the agency.’” Qwest Corp., 589 F.3d at 991 (quoting Connect Commc'ns Corp. v. Sw. Bell Tel., L.P., 467 F.3d 703, 711 (8th Cir. 2006)). This standard is essentially the same as the substantial evidence standard. Ace Tel. Ass'n, 432 F.3d at 880. “As long as the [Commission’s] factual findings are supported by substantial evidence in the record as a whole, [the Court] will uphold those findings and the reasonable inferences that the [Commission] drew from them.” Id.

B. SUMMARY JUDGMENT

Summary judgment is appropriate when the evidence, viewed in a light most favorable to the non-moving party, indicates no genuine issues of material fact exist and, therefore, the moving party is entitled to judgment as a matter of law. Davison v. City of Minneapolis, Minn., 490 F.3d 648, 654 (8th Cir. 2007); see Fed. R. Civ. P. 56(a). Summary judgment is not appropriate if there are factual disputes that may affect the outcome of the case under the applicable substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). An issue of material fact is genuine if the evidence would allow a reasonable jury to return a verdict for the non-moving party. Id.

The Court must inquire whether the evidence presents sufficient disagreement to require the submission of the case to a jury or if it is so one-sided that one party must prevail as a matter of law. Diesel Mach., Inc. v. B.R. Lee Indus., Inc., 418 F.3d 820, 832 (8th Cir. 2005). The moving party bears the burden of demonstrating an absence of a genuine issue of material fact. Simpson

v. Des Moines Water Works, 425 F.3d 538, 541 (8th Cir. 2005), *abrogated on other grounds by Torgerson v. City of Rochester*, 643 F.3d 1031 (8th Cir. 2011). The non-moving party may not rely merely on allegations or denials in its own pleading; rather, its response must set out specific facts showing a genuine issue for trial. Fed. R. Civ. P. 56(c)(1). The court must consider the substantive standard of proof when ruling on a motion for summary judgment. Anderson, 477 U.S. at 252.

III. LEGAL DISCUSSION

A. THE TELECOMMUNICATIONS ACT OF 1996

In 1996, Congress enacted the Telecommunications Act of 1996, in part to develop competition in local telecommunications service by requiring interconnections between providers. 47 U.S.C. § 151 *et seq.* Under the Act, certain duties are imposed on all “telecommunications carriers,” including “local exchange carriers.” “The term ‘local exchange carrier’ [LEC] means any person that is engaged in the provision of telephone exchange service or exchange access.” 47 U.S.C. § 153(32). Under the Telecommunications Act, Missouri Valley Communications is an incumbent local exchange carrier and Midcontinent is a competitive local exchange carrier. An incumbent local exchange carrier (ILEC) is an LEC that provided local telephone exchange service before the enactment of the 1996 amendments. See 47 U.S.C. § 251(h). “A Competitive Local Exchange Carrier is any local exchange carrier . . . that is not an incumbent local exchange carrier.” 47 C.F.R. § 51.903(a).

All telecommunications carriers must “interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers.” 47 U.S.C. § 251(a)(1). In a recent

Declaratory Ruling, the FCC clarified “that LECs are obligated to fulfill all of the duties set forth in sections 251(a) and (b) of the Act, including the duty to interconnect and exchange traffic, even if the LEC has a rural exemption from the obligations set forth in section 251(c).” 26 FCC Rcd. 8259, 8259 (2011). One additional duty imposed on a local exchange carrier is that it must offer its services to competitors for resale and not impose unreasonable or discriminatory conditions or limitations. 47 U.S.C. § 251(b)(1). An incumbent local exchange carrier has several obligations in addition to the duties imposed on all local exchange carriers. See 47 U.S.C. § 251(c).

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 of 1996. The exemption states, in part:

Subsection (c) of this section shall not apply to a rural telephone company until (i) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines . . . that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title

47 U.S.C. § 251(f)(1)(A). It is undisputed that Missouri Valley Communications is a rural telephone company as defined under the Telecommunications Act and applicable FCC rules. See 47 U.S.C. § 251(f) and 47 U.S.C. § 153(44). This Court previously affirmed the PSC’s decision allowing Missouri Valley Communications the right to retain its rural exemption status under 47 U.S.C. § 251(f). See Docket No. 19.

After Midcontinent failed in 2008 for 47 U.S.C. § 251(c) interconnection and termination of Missouri Valley’s rural exemption status under 47 U.S.C. § 251(f)(1)(B), Midcontinent again requested interconnection in 2011 “for the purpose of exchanging local telecommunications

traffic” with Missouri Valley Communications in the Williston exchange under 47 U.S.C. § 251(a). See Docket No. 17-7, p. 3. After Missouri Valley Communications again denied the interconnection agreement, Midcontinent petitioned for arbitration under 47 U.S.C. § 252(b). After a denial of a motion to dismiss the petition for arbitration filed by Missouri Valley Communications, an interconnection agreement was adopted in arbitration and subsequently approved by the PSC. See Docket No. 17-5. After the unsatisfactory arbitration agreement and PSC action, Missouri Valley Communications brought a claim in federal district court, and ultimately filed a motion for summary judgment. See Docket Nos. 1 and 16; see also 47 U.S.C. § 252(e)(6) (providing an aggrieved party the right to bring an action in an appropriate federal court to analyze a state commission determination).

Missouri Valley Communications essentially asserts two claims in support of the motion for summary judgment. First, that the kind of interconnection requested by Midcontinent is available only under 47 U.S.C. § 251(c) and, as such, the interconnection cannot be granted under 47 U.S.C. § 251(a). Missouri Valley Communications argues the PSC erroneously followed a Declaratory Ruling issued by the FCC because the ruling does not support Midcontinent’s request for interconnection under 47 U.S.C. § 251(a). Second, Missouri Valley Communications contends that Midcontinent’s 2008 effort to have the rural exemption status lifted precludes any new efforts to obtain interconnection from Missouri Valley Communications under *res judicata* principles.

1) **INTERCONNECTION UNDER 47 U.S.C. § 251(a) VERSUS 47 U.S.C. § 251(c)**

Missouri Valley Communications argues that 47 U.S.C. § 251(a) does not include a duty of direct interconnection for the exchange of local telecommunications traffic. Missouri Valley Communications further asserts the interconnection requested by Midcontinent in 2011 under 47 U.S.C. § 251(a) is actually a request for CLEC/ILEC interconnection under Section 251(c)(2), of which Missouri Valley Communications is exempt under 47 U.S.C. § 251(f)(1)(A), the rural exemption. All parties agree that Missouri Valley Communications is bound by the terms of 47 U.S.C. § 251(a) as the general interconnection provision of the Telecommunications Act. Specifically, Missouri Valley Communications has the duty “to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers.” 47 U.S.C. § 251(a)(1). The issue becomes whether Midcontinent’s request for interconnection “for the purpose of exchanging local telecommunications traffic in the Williston exchange” was appropriately analyzed under 47 U.S.C. § 251(a), or whether it was a request under 47 U.S.C. § 251(c).

However, if Midcontinent’s request for interconnection was appropriate under 47 U.S.C. § 251(a), Missouri Valley Communications argues the exchange of local telecommunications traffic is an ILEC’s obligation under the specific terms of 47 U.S.C. § 251(c), not a duty under the general terms of 47 U.S.C. § 251(a). Missouri Valley Communications contends that neither 47 U.S.C. § 251(a) nor the recent FCC 2011 Declaratory Ruling oblige them to interconnect with Midcontinent for the purpose of exchanging local telecommunications traffic. Missouri Valley Communications asserts the PSC’s opinion misconstrued the FCC’s Ruling and, as such, conflicts with the plain terms of the Telecommunications Act and the rural exemption.

In 2011, the FCC clarified the relationship between the 47 U.S.C. § 251 and 47 U.S.C. § 252 obligations in situations where the rural exemption applies. The analysis confirmed there are no exceptions for rural ILECs under 47 U.S.C. § 251(a). Again, Missouri Valley Communications asserts the request by Midcontinent is actually a request for interconnection under 47 U.S.C. § 251(c), not 47 U.S.C. § 251(a) as alleged. While not analyzing the distinction in great detail, the PSC rejected this discrepancy and expressly found that all carriers have a basic duty to interconnect under 47 U.S.C. § 251(a) while complying with the requirements under 47 U.S.C. § 251(b). See Docket No. 17-5, p. 4. This decision is consistent with the FCC's determination "that LECs are obligated to fulfill all of the duties set forth in section 251(a) and (b) of the Act, including the duty to interconnect and exchange traffic, even if the LEC has a rural exemption from the obligations set forth in section 251(c)." 26 FCC Rcd. at 8259 (emphasis added). The FCC ruling specifically included the duty to exchange traffic under 47 U.S.C. § 251 (a) and (b) and not simply the requirement to interconnect. The Court finds that there is substantial evidence in the record to uphold and affirm the PSC's decision analyzing Midcontinent's interconnection request under 47 U.S.C. §§ 251(a) and (b).

2) ARBITRATION UNDER 47 U.S.C. § 252

After Missouri Valley Communications denied Midcontinent's request for interconnection in 2011, Midcontinent filed a petition for arbitration with the PSC. Missouri Valley Communications filed a motion to dismiss the request for arbitration. In the motion to dismiss, Missouri Valley Communications argues the petition for interconnection is barred by *res judicata* in light of the PSC's 2008 decision, the Federal Telecommunications Act, and the implementing

provisions of North Dakota law which do not permit arbitration for the purpose of interconnection under 47 U.S.C. § 251(a). See Docket No. 17-4. Missouri Valley Communications also interpreted the rural exemption as providing an exception to the arbitration proceedings under 47 U.S.C. § 252. The PSC rejected Missouri Valley's arguments, and denied the motion to dismiss the arbitration petition based on the FCC's declaratory ruling from May 2011.

The reasoning employed by the PSC is again followed here in accordance with the Court's finding that interconnection was appropriately requested under 47 U.S.C. § 251(a). Specifically, the recent FCC ruling clarified "that requests made to incumbent LECs for interconnection and services pursuant to sections 251(a) and (b) are subject to state commission arbitration as set forth in section 252, and that section 251(f)(1) does not exempt rural incumbent LECs from the compulsory arbitration process established in that provision." 26 FCC Rcd. at 8269 (emphasis added). The FCC's Declaratory Ruling in 2011 clearly establishes the applicability of arbitration proceedings for interconnection issues under 47 U.S.C. §§ 251(a) and (b), even if a party is subject to the rural exemption. Missouri Valley Communications and Midcontinent properly participated in arbitration proceedings under 47 U.S.C. § 252, contrary to Missouri Valley's arguments. The PSC then had the task of reviewing the approved arbitration agreement.

3) THE PUBLIC SERVICE COMMISSION ORDER

a) REVIEWABILITY

Missouri Valley Communications contends that 47 U.S.C. § 251(a) does not oblige a rural telephone company to interconnect with a CLEC for the exchange of local telecommunications traffic, which is supported by the May 2011 FCC Ruling the PSC mistakenly applied in its order.

Missouri Valley Communications argues the FCC's 2011 ruling does not support Midcontinent's petition to obtain CLEC/ILEC interconnection with Missouri Valley Communications under 47 U.S.C. § 251(a). Further, Missouri Valley Communications contends that if the ruling were interpreted as obliging a rural telephone company to interconnect with a CLEC to exchange local traffic, the ruling is invalid.

In Midcontinent's reply brief, the argument is made that the Declaratory Ruling issued by the FCC in May 2011, is final and unreviewable. Essentially, Midcontinent argues that Missouri Valley Communications is asking the Court to find fault with the PSC order because the arguments are in direct contradiction of the FCC's Declaratory Ruling. Midcontinent contends the order cannot be challenged because the finality of the 47 U.S.C. § 251(a) order precludes collateral review of the type Missouri Valley Communications is requesting. See Docket No. 32, p. 14. While Missouri Valley Communications does appear to take issue with the FCC's Declaratory Ruling, it is not for this Court to determine the validity of the FCC Declaratory Ruling. It does not appear to be Missouri Valley's intent to actually challenge the Declaratory Ruling itself as Midcontinent suggests, but instead to challenge the PSC's interpretation of that ruling. It is the intention of the Court to review the PSC's decision in accordance with the FCC ruling, giving deference to the experience of the state agency. Therefore, the finality and unreviewability of the FCC order is a non-issue, and the Court will review only the PSC order under the narrow standards established above.

b) STATE COMMISSION EXPERTISE

The FCC clearly recognized the intent of Congress to establish a role for state commissions to arbitrate and approve interconnection agreements. See Docket No. 17-3, p 14. “As a result, state commissions have built up significant expertise in adjudicating interconnection disputes under sections 251(a) and (b).” Id. The FCC believes “that a uniform, national policy concerning the scope of the rural exemption is necessary to promote local competition, prevent conflicting interpretations of carriers’ statutory obligations under the Act, and eliminate a potential barrier to broadband investment.” 26 FCC Rcd. at 8266 (internal citations omitted). The FCC’s Declaratory Ruling stresses the importance of conformity among the courts, and especially in giving great weight to opinions by state commissions.

In this case, the PSC found the interconnection agreement issued by the arbitrator to be satisfactory. 47 U.S.C. § 252(e) directs the state commission to review “any interconnection agreement adopted by negotiation or arbitration,” and grants the state commission authority to reject any interconnection agreement “if it finds the agreement does not meet the requirements of § 251, including the regulations prescribed by the Commission pursuant to section 251, or the standards set forth in subsection (d) [of section 252].” See Docket No. 17-5, p. 5. Therefore, 47 U.S.C. § 252(e) gives the PSC the authority to reject the arbitrated agreement between Midcontinent and Missouri Valley Communications if the PSC felt the requirements of 47 U.S.C. § 251 were not met. When reviewing the PSC’s determination to grant interconnection under 47 U.S.C. § 251(a), the arbitrary and capricious standard does not allow the Court to substitute its judgment for that of the PSC. See Qwest Corp., 589 F.3d at 991. As long as the Court finds

substantial evidence in the record allowing interconnection for the exchange of local telecommunications traffic, the PSC's factual findings will be upheld.

c) **EXCHANGE OF LOCAL TELECOMMUNICATIONS TRAFFIC UNDER 47 U.S.C. § 251(a)**

Missouri Valley Communications contends that interconnection pursuant to 47 U.S.C. § 251(a) allows only for a physical linkage of two networks, but does not allow for the exchange of traffic under 47 U.S.C. § 251(a) as granted by the PSC. The PSC looked to the FCC's Declaratory Ruling for guidance, which is the purpose of such rulings. In the original application, Midcontinent requested interconnection "for the purpose of exchanging local telecommunications traffic." "The local traffic would be exchanged under the terms of Section 251(b)(5), which governs reciprocal compensation for local traffic." See Docket No. 17-7, p. 3. 47 U.S.C. § 251(b)(5) establishes that all local exchange carriers have the duty to "establish reciprocal compensation arrangements for the transport and termination of telecommunications." The PSC then looked to the FCC's Declaratory Ruling for interpretation of the interconnection request.

The FCC clarified "that LECs are obligated to fulfill all of the duties set forth in sections 251(a) and (b) of the Act, including the duty to interconnect and exchange traffic, even if the LEC has a rural exemption from the obligations set forth in section 251(c)." 26 FCC Rcd. at 8259. Obligations associated with 47 U.S.C. §251(a) are not addressed in isolation. Id. at 8270. "The obligations of section 251(b) are not self-effectuating." Id. "Rather, they are implemented in agreements that may implicate the interconnection obligations set forth in section 251(a) in a way not raised by section 251(a) in isolation." Id.

Read together, as the FCC has suggested a state commission should do, 47 U.S.C. §§ 251(a) and (b) establish “that LECs are obligated to fulfill all the duties set forth in sections 251(a) and (b) of the Act, including the duty to interconnect and exchange traffic, even if the LEC has a rural exemption from the obligations set forth in section 251(c).” 26 FCC Rcd. at 8259. The FCC determined that requests for interconnection under 47 U.S.C. § 251 provide for the interconnection and mutual exchange of traffic between two providers under 47 U.S.C. §§ 251(a) & (b)(5). The PSC followed the reasoning issued by the FCC for determining the interconnection and exchange of traffic between Missouri Valley Communications and Midcontinent.

As determined above, state commission decisions are given great deference based on their experience in adjudicating interconnection disputes. As the FCC has found state commissions to be the experts in such tasks, it is likely the PSC would have denied the request for interconnection if they felt the request was not properly made as Missouri Valley Communications argues. Specifically, if the PSC had determined the request made by Midcontinent “for the purpose of exchanging local telecommunications traffic in the Williston exchange” should have properly been requested under 47 U.S.C. § 251(c), the PSC had the authority to deny the interconnection agreement. The Court defers to the PSC’s ruling, because the PSC is just the type of state commission with significant expertise the FCC was referencing in the Declaratory Ruling.

The Court finds the PSC’s adoption of the FCC’s Declaratory Ruling allowing interconnection “for the purpose of exchanging local telecommunications traffic in the Williston exchange” was neither arbitrary nor capricious. While rural incumbent local exchange carriers are exempt from the requirements of 47 U.S.C. § 251(c), Section 251(f)(1) does not grant an exemption from the requirements of 47 U.S.C. §§ 251(a) or (b), and when read as a whole,

interconnection under 47 U.S.C. §§ 251(a) and (b) properly allow for exchange of traffic as found by the PSC. The PSC was neither arbitrary nor capricious in its determination based on the evidence presented and its reliance on the FCC's Declaratory ruling.

B. RES JUDICATA

Missouri Valley Communications also contends that Midcontinent's petition for arbitration was barred by the doctrine of claim preclusion, or *res judicata*, in light of the PSC's 2008 decision on Midcontinent's request to lift Missouri Valley's rural exemption status. Midcontinent and the PSC contend that Missouri Valley Communications has misconceived the nature of the two proceedings and the requirements under the law, specifically as to the distinction between 47 U.S.C. §§ 251(a) and (b) and Section 251(c).

The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 because the action arises under a federal question. See Docket No. 1. However, because the relevant prior judgment was a state of North Dakota administrative proceeding, North Dakota's *res judicata* or claim preclusion law should be applied. See Iowa Network Servs., Inc. v. Qwest Corp., 363 F.3d 683, 689 (8th Cir. 2004) (internal citation omitted). *Res judicata*, or claim preclusion, "prohibits the relitigation of claims or issues that were raised or could have been raised in a prior action between the same parties or their privies and which was resolved by final judgment in a court of competent jurisdiction." Hofsommer v. Hofsommer Excavating, Inc., 488 N.W.2d 380, 383 (N.D. 1992) (emphasis added).

Under North Dakota law, there is a four-part test to determine whether claim preclusion applies. A claim will not be precluded unless:

1. A final decision on the merits [was reached] 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; [and]
4. An identity of the causes of action[.]

Missouri Breaks, LLC v. Burns, 2010 ND 221, ¶ 12, 791 N.W.2d 33. The parties agree the first and second prongs of the claim preclusion test are met. See Docket No. 25, p. 29. As a result, the Court need only analyze the third and fourth prongs of the test to determine whether claim preclusion applies.

1) PREVIOUSLY LITIGATED CLAIMS

The intent of the claim preclusion doctrine is to protect the prevailing party against attempts by the losing party to relitigate the same dispute. See Nodland v. Nokota Co., 314 N.W.2d 89, 92 (N.D. 1981). The third prong prevents such relitigation by examining whether the second action raises an issue actually litigated or which should have been litigated in the first action. Missouri Valley Communications contends that Midcontinent's second action raised an issue actually litigated or which could have been litigated in the first lawsuit in 2008 regarding interconnection. Midcontinent argues that because interconnection is a continuing right, *res judicata* cannot preclude the present request for interconnection under 47 U.S.C. § 251(a). The PSC agreed with Midcontinent, finding "interconnection obligations are continuous obligations that do not disappear because of the passage of time or because they were not invoked at a specific moment[,]" thereby determining *res judicata* to be inapplicable. See Docket No. 17-4, p. 8.

The Court agrees that Midcontinent was seeking to enforce different rights in the second action with different legal issues in question, requiring different factual considerations. The 2008 rural exemption proceeding addressed only the specific issues outlined in 47 U.S.C. § 251(f), while the present claim involves interconnection issues not covered by the rural exemption. In essence, the rural exemption proceeding considered the issue of whether Missouri Valley Communications was required to provide interconnection due to its rural exemption status, while the current proceedings involve how to implement interconnection to exchange traffic. The Court finds, as a matter of law, that the claims now before the Court do not involve issues that were or should have been litigated in the 2008 action.

2) IDENTITY OF THE CAUSES OF ACTION

The final element of *res judicata*- that there be an “identity of the causes of action”- is satisfied if the claims arose out of the same transaction or series of transactions, or whether the claims arose out of the same core operative facts. See Banks v. Int’l Union Elec., Elec., Technical, Salaried & Mach. Workers, 390 F.3d 1049, 1052 (8th Cir. 2004); see also Costner v. URS Consultants, Inc., 153 F.3d 667, 673 (8th Cir. 1998). In this case, the central issue is whether Missouri Valley Communications must interconnect with Midcontinent Communications for the purpose of exchanging local telecommunications traffic in the Williston area. The current complaint alleges that the PSC’s determination did not meet the requirements of 47 U.S.C. § 251. Missouri Valley’s claims against Midcontinent Communications and the PSC in the current action are based entirely on the PSC’s determination for interconnection, while the prior PSC and district court decisions were related to Missouri Valley’s rural exemption status. The Court finds that the

current claims are not integrally related to the subject matter of the previous PSC and district court decisions, and do not arise out of the same transaction or series of transactions or the same core operative facts as the rural exemption proceeding.

The Court finds that *res judicata* does not bar Midcontinent from requesting interconnection with Missouri Valley Communications because the second action does not raise an issue actually litigated or that should have been litigated in the first action, and the identity of the causes of action do not arise out of the same core facts. The Court further finds, as a matter of law, that the PSC's determination that interconnection was appropriate between Missouri Valley Communications and Midcontinent Communications under 47 U.S.C. § 251 is not arbitrary, capricious, an abuse of discretion, or otherwise contrary to law. The Court further finds the PSC's factual findings are supported by substantial evidence in the record as a whole. Missouri Valley Communications bears the burden of proof and there is substantial evidence in the record to support the PSC's decision that Midcontinent's request for interconnection was properly made under 47 U.S.C. §§ 251 (a) and (b), and not under 47 U.S.C. § 251(c). The Court upholds the PSC's grant for interconnection between Midcontinent and Missouri Valley Communications. After carefully reviewing all the evidence and the entire record, no genuine issues of material fact exist and, therefore, summary judgment is appropriate in accordance with the PSC's decision.

IV. CONCLUSION

The Court finds that the PSC's order of June 27, 2012, is not arbitrary, capricious, an abuse of discretion, or otherwise contrary to law. The scope of review in this proceeding is narrow and deference is to be given to the agency's technical expertise. The PSC's factual findings, and the

reasonable inferences to be drawn from such findings, are supported by substantial evidence in the entire record. The FCC's 2011 Declaratory Ruling clarified that rural exempt carriers are subject to both interconnection requests under 47 U.S.C. § 251(a) and mandatory arbitration under 47 U.S.C. § 252. The PSC's orders at issue in this dispute are in compliance with the Telecommunications Act, and will promote competition and benefit consumers in the Williston area. Accordingly, the Court **DENIES** Missouri Valley Communication's motion for summary judgment (Docket No. 16); **GRANTS** the North Dakota Public Service Commission's motion for summary judgment (Docket No. 21); and **GRANTS** Midcontinent Communication's motion for summary judgment (Docket No. 24).

IT IS SO ORDERED.

Dated this 16th day of April, 2013.

/s/ Daniel L. Hovland
Daniel L. Hovland, District Judge
United States District Court