

DIVIDER

STATE OF NORTH DAKOTA
INFORMATION TECHNOLOGY DEPARTMENT
SFN 2053 (4-2002)

DESCRIPTION

PU-04-237
Midcontinent Communications vs.
Polar Telecom, Inc./HTC Services, Inc.
Complaint
Filed 5/20/2004 Closed 2/10/2005

04



Public Service Commission
State of North Dakota

COMMISSIONERS

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Susan E Wefald
Kevin Cramer

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September 29, 2005

Mr. Allen C. Hoberg, Director
Office of Administrative Hearings
1707 North 9th Street – Lower Level
Bismarck, ND 58501-1882

Re: Midcontinent Communications v. Polar Telecom, Inc./HTC Services, Inc.
PSC Case No. PU-04-237
OAH File No. 20040205

Dear Mr. Hoberg:

In response to your request for confirmation of the destruction or retention of the prehearing conference tape in the above-named case, there has been no further activity in regard to this matter. The prehearing conference tape may be destroyed.

For your convenience, we have enclosed a copy of the Commission's Order issued in this case.

If you have any questions, please contact us.

Sincerely,



William W. Binek
Chief Counsel

Enclosure

**STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION**

**Midcontinent Communications vs.
Polar Telecom, Inc./HTC Services, Inc.
Complaint**

Case No. PU-04-237

ORDER ADOPTING ADMINISTRATIVE LAW JUDGE RECOMMENDATION

February 9, 2005

On May 13, 2004, Midcontinent Communications, a South Dakota Partnership (Midcontinent), filed a Complaint with the North Dakota Public Service Commission against Polar Telecom, Inc., a North Dakota Corporation d/b/a Polar Communications (Polar), and HTC Services, Inc., a Minnesota corporation (HTC), alleging violations of North Dakota Century Code § 49-21-24.

On June 9, 2004 the Commission determined the Complaint states a prima facie case and served the Complaint on Polar and HTC. On June 11, 2004, the Complaint was referred to the Office of Administrative Hearings pursuant to N.D.C.C. § 49-21-24(2). Administrative Law Judge Allen C. Hoberg (ALJ) was designated to preside as substantive Hearing Officer.

On June 14, 2004 the Polar and HTC filed an answer to the Complaint.

On June 22, 2004 the ALJ issued a Notice of Hearing & Specification of Issues.

On August 23, 2004 Polar and HTC filed an amended answer to the Complaint.

On September 2, 2004 Polar/HTC and Midcontinent each filed a prehearing brief. On September 3, 2004 a public hearing was held. The issues to be considered in this matter include whether under the provisions of N.D.C.C. § 49-21-24:

1. Polar is discriminating against Midcontinent by delaying and refusing to grant Midcontinent Local Number Portability (LNP), when, in fact, Polar grants LNP to Qwest.

2. HTC is discriminating against Midcontinent by delaying and refusing to grant Midcontinent LNP when, in fact, HTC intends to grant LNP to wireless carriers.

On September 27, 2004 Midcontinent filed its Initial Post-Hearing Brief. On October 21, 2004 Midcontinent filed a Reply Brief.

On November 10, 2004 the ALJ issued a Recommended Findings of Fact, Conclusions of Law, and Order finding that the Commission has jurisdiction, that Polar has discriminated against Midcontinent, that HTC has discriminated against Midcontinent, and that Polar and HTC must make unconditional LNP available to Midcontinent in the Mayville and Hillsboro exchanges on or before January 1, 2005.

On January 10, 2005 Polar and HTC filed a letter stating that they see no need to take further action, that Polar and HTC will provide LNP to Qwest on behalf of Midcontinent effective immediately and requested that the Commission amend the proposed order to stay its implementation pending non-compliance by Polar and HTC.

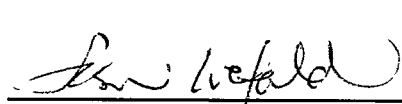
On January 20, 2005 Midcontinent filed a response to the Polar/HTC letter stating that they do not agree the matter is moot. Midcontinent requests that the Commission adopt the proposed order effective February 1, 2005. Midcontinent is concerned that, until it makes a request that Polar/HTC provide unconditional LNP, the process for obtaining LNP is untested and it would be cumbersome and time consuming to require that Midcontinent prove that Polar/HTC did not comply.

The Commission finds the ALJ's Recommended Findings of Fact, Conclusions of Law, and Order is fair and reasonable.


Order

The evidence of record and the findings of fact and conclusions of law of the Administrative Law Judge have been considered and appraised. The attached Recommended Findings of Fact, Conclusions of Law, and Order of the Administrative Law Judge dated November 10, 2004 are adopted as final effective February 9, 2005

PUBLIC SERVICE COMMISSION



Susan E. Wefald
Commissioner



Tony Clark
President



Kevin Cramer
Commissioner

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

IN THE MATTER OF:

Case No. PU-04-237

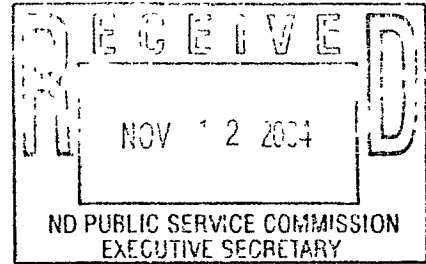
Midcontinent Communications, a
South Dakota Partnership,

Complainant,

vs.

Polar Telecom, Inc.,
a North Dakota Corporation d/b/a Polar
Communications, and HTC Services, Inc.,
A Minnesota Corporation,

Respondents.



RECOMMENDED
FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER
OAH File No. 20040205

November 10, 2004

PRELIMINARY STATEMENT

On May 20, 2004, the North Dakota Public Service Commission (“Commission”) received the Complaint of Midcontinent Communications (“Midcontinent”) against the Respondents Polar Telecom, Inc. (“Polar”) and HTC Services, Inc. (“HTC”) (collectively also referred to as “Respondents”). On June 9, 2004, the Commission found that the Complaint stated a *prima facie* case under N.D.C.C. § 49-21-24 and referred the Complaint to the Office of Administrative Hearings. On June 11, 2004, the undersigned administrative law judge was designated to preside as hearing officer in this matter. On June 22, 2004, the hearing officer issued a Notice of Hearing and Specification of Issue. The notice scheduled an evidentiary hearing for September 3, 2004. On July 16, 2004, the Respondents filed their Answer to the

Complaint. A prehearing conference was held on August 25, 2004. The parties filed prehearing briefs on September 2, 2004.

The hearing was held as scheduled on September 3, 2004. Midcontinent was represented at the hearing by Patrick W. Durick of Bismarck and J.G. Harrington of Washington, D.C. The Respondents were represented at the hearing by William J. Brudvik of Mayville. The Commission was represented at the hearing by William W. Binek and Patrick J. Fahn. Midcontinent called one witness. The Respondents called four witnesses. The Commission called no witnesses. Midcontinent offered 13 exhibits, all of which were admitted (exhibits C1-C13). The Respondents offered four exhibits, all of which were admitted (exhibits R6, R7, R13, and R14). A transcript of the hearing was prepared and received by the Commission on September 23, 2004 (it contains a witness list and exhibit list). The hearing officer also took official notice of CC Docket No. 95-116, a Memorandum Opinion and Order and Further Notice of Proposed Rulemaking before the Federal Communications Commission ("FCC"), submitted by Midcontinent on September 8, 2004; and the Interconnection Agreement between Midcontinent and U S West Communications, Inc. (now Qwest) filed with the Commission on March 23, 1999.

Following the evidentiary hearing and the preparation of the transcript, on September 27, 2004, Midcontinent filed the Initial Post-Hearing Brief of Midcontinent Communications, along with Proposed Findings of Fact and Conclusions of Law and a Proposed Order of the Public Service Commission. The Respondents filed the Respondent's Post-Hearing Brief on October 18, 2004. Midcontinent filed the Reply Brief of Midcontinent Communications on October 21, 2004. The hearing on this matter was closed, then, on October 21, 2004.

The Complaint is essentially that in December of 2002, Midcontinent requested that both Polar and HTC provide local number portability (“LNP”) to Midcontinent for the Hillsboro and Mayville exchanges. Midcontinent alleges that the Respondents have refused to provide LNP to Midcontinent “unless Midcontinent complied with unreasonable and discriminatory conditions imposed by Polar and HTC.” *See* Complaint. Midcontinent further alleges that on “April 5, 2004, Polar rejected a request for LNP for a telephone number in Mayville, North Dakota, citing ‘Rate Center Mismatch’ as the reason for the rejection.” *Id.* Thus, Midcontinent concludes with an allegation that “Polar is discriminating against Midcontinent by delaying and refusing to grant Midcontinent LNP when, in fact, Polar grants LNP to Qwest...” and that “HTC is discriminating against Midcontinent by delaying and refusing to grant Midcontinent LNP when in fact HTC intends to grant LNP to wireless carriers.” *Id.* As bases for this conclusion, Midcontinent cites N.D.C.C. § 49-21-24, which “prohibits a telecommunications company from discriminating against another telecommunications company by refusing or delaying access to the company’s services.”

The issues stated in the specification of issues are

whether under the provisions of N.D.C.C. § 49-21-24: 1. Polar is discriminating against Midcontinent by delaying and refusing to grant Midcontinent Local Number Portability (‘LPN’) (*sic*), when, in fact, Polar grants LPN (*sic*) to Qwest. 2. HTC is discriminating against Midcontinent by delaying and refusing to grant Midcontinent LPN (*sic*) when, in fact, HTC intends to grant LPN (*sic*) to wireless carriers.

The hearing officer's recommended order is based on the following findings and conclusions.

FINDINGS OF FACT

1. Midcontinent, HTC, and Polar are certified local exchange carriers in North Dakota. HTC provides service in Hillsboro, Polar provides service in Mayville, and

Midcontinent is certified to provide service in both Hillsboro and Mayville. In North Dakota, Midcontinent is a reseller of telecommunications services, not a facilities-based provider of telecommunications services. Midcontinent buys telecommunications services at wholesale from Qwest, not from HTC or Polar.

2. Midcontinent requested LNP from HTC and Polar in December 2002. HTC and Polar each acknowledged receipt of that request, and the three parties negotiated concerning the availability of LNP to Midcontinent from HTC and Polar. Negotiations have not resulted in HTC and Polar providing LNP to Midcontinent. To date, HTC and Polar have not provided LNP to Midcontinent.

3. Midcontinent's LNP request was made on its own behalf.

4. There are no technical barriers that would prevent either HTC or Polar from providing LNP to Midcontinent in Hillsboro and Mayville, only economic barriers.

5. HTC and Polar have not sought any waiver of the FCC's number portability requirements from either the FCC or the Commission.

6. The overwhelming majority of telecommunications customers changing carriers want to retain their current telephone numbers. Consequently, denying LNP gives the carrier denying LNP a significant competitive advantage.

7. HTC and Polar have refused to provide LNP to Midcontinent because doing so, in their view, would affect the economics of an extended area service ("EAS") agreement between Polar and HTC.

8. HTC and Polar have claimed that providing LNP to Midcontinent would be a financial burden on them, causing them economic harm, but they have not demonstrated that providing LNP to Midcontinent would be a financial burden on them, causing them economic

harm. At least there was no specific evidence about the extent or the nature of any financial burden imposed upon them by providing LNP to Midcontinent. The exact economic consequences for the Respondents of providing LNP to Midcontinent or others like Midcontinent appear to be uncertain and contingent. Even if HTC and Polar had shown more specific economic financial burden causing economic harm, resulting from providing LNP to Midcontinent, their may be no relief from such a financial burden, at least from the FCC. The waiver requirements of the FCC rules are very specific if a carrier wishes to be excused from the number portability obligations. *See* 47 C.F.R. § 52.23(d). But, again, the Respondents have not sought any waivers of any kind. Furthermore, any financial burden causing economic harm to the Respondents appears to be a logical consequence of their EAS agreement and providing LNP, and the Respondents should not be insulated from the economic consequences of their voluntary business arrangement, at least not where the requirements of providing LNP are concerned.

9. HTC and Polar have stated that they will not provide LNP to Midcontinent until issues related to their EAS agreement are addressed.

10. HTC and Polar both have entered into an interconnection agreement with Qwest that provides for LNP but does not address the issues related to their EAS agreement. HTC and Polar have an EAS larger than Qwest's EAS.

11. HTC and Polar would also require wireless providers to address certain economic issues before they would provide LNP to them, but addressing those issues would not require Qwest's cooperation.

12. The issue relating to the HTC-Polar EAS agreement, that the Respondents say must be addressed before they will provide number portability to Midcontinent, can be addressed

only with Qwest's cooperation. HTC and Polar want Midcontinent to work out the issue for terminating access charges with Qwest before they will provide Midcontinent LNP, because Qwest is the underlying provider. The issue with regard to terminating access charges, however, is only an issue because of the HTC-Polar EAS agreement.

13. Midcontinent has no ability to extend a service area on its own and would have to negotiate with HTC and Polar to do so. Extension of service areas is not an issue for the Commission to decide. Midcontinent is only asking for porting into the resold exchange of Qwest. Telephone calls need to be completed through terminating access and porting a number is not porting if it cannot be completed.

14. The rate centers to be used by Polar or HTC and Midcontinent, once LNP is provided, will be consistent with each other.

15. The HTC-Polar EAS agreement was entered into voluntarily, without the approval of the Commission, approximately six years after the number portability requirement became law. This HTC and Polar policy of basing the charges for calls on the identity of the carrier serving the customer receiving the call in Hillsboro and Mayville, rather than on the location being called, would follow through to ported numbers, too.

16. The real issue preventing a negotiated agreement in this matter, and, indeed, causing HTC and Polar to delay or refuse to port numbers to Midcontinent, is that for outgoing calls placed by HTC and Polar customers to a number ported to a Midcontinent customer, there would be toll charges as well as terminating access charges and someone has to pay for those charges (absent cooperation from Qwest) and the Respondents do not want to have to pay for those charges. However, those charges arise only because of the HTC and Polar EAS, and would not arise in the absence of a number being ported to Midcontinent. In other words,

because of the HTC and Polar EAS, current HTC and Polar customers may lose some of their EAS, if HTC and Polar port numbers to Midcontinent. The same basic issue would be involved in a wireless carrier actually requesting that a number be ported, *i.e.*, who would pay for toll charges and terminating access charges.

CONCLUSIONS OF LAW

1. Under the FCC's rules governing number portability, a local exchange carrier must provide permanent number portability within six months of a bona fide request from a telecommunications carrier absent a waiver from the FCC. 47 C.F.R. § 52.23. HTC and Polar have not sought a waiver from the FCC for providing number portability.

2. Midcontinent's request for LNP from HTC and Polar met the FCC's requirements for a bona fide request.

3. HTC and Polar have failed to comply with the requirements of the FCC's number portability rules.

4. An interconnection agreement with a provider of telecommunications services is not required to obtain LNP from that provider. *Memorandum Opinion and Order*, 18 F.C.C.R. 20971, 20972; *See Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 18 F.C.C.R. 23697, 23710-2 (2003) ("November Order").

5. The FCC's rules do not provide for waivers from the number portability requirements for economic reasons or if local calling areas do not match. 47 C.F.R. § 52.23(d).

6. It is evident from the evidence that there is no issue in this matter that falls within the special expertise of the FCC, but rather, one that falls within the jurisdiction and expertise of the Commission, a discrimination issue.

7. The FCC's rules require number portability to be provided when rate centers match and in many circumstances when rate centers do not match. *November Order*, 18 F.C.C.R. at 23708.

8. A voluntary agreement between two carriers cannot exempt them from compliance with the FCC's number portability requirements. 47 C.F.R. § 52.23.

9. The Telecommunications Act of 1996 ("the Act") did not divest states of any jurisdiction over matters that were not specifically preempted. Section 261 of the Act specifically addresses the effect of the provisions added by the Act on State jurisdiction. *See* 7 U.S.C. § 261(b), (c).

10. The Commission has jurisdiction over this matter under N.D.C.C. ch. 49-21, specifically pursuant to N.D.C.C. § 49-21-24. North Dakota's statutory provisions are not inconsistent with the regulatory scheme of the Act. Relationships between local exchange carriers are within the Commission's jurisdiction.

11. N.D.C.C. § 49-21-24 states, in part:

49-21-24. Prohibited acts --- Arbitration.

1. A telecommunications company may not:

a. Discriminate against another provider of telecommunications services by refusing or delaying access to the company's services;

b. Discriminate against another provider of telecommunications services by refusing or delaying access to essential facilities on terms and conditions no less favorable than those the telecommunications company provides to itself and its affiliates...

c. Degrade the quality of access or service provided to another provider of telecommunications services.

2. A claim that a telecommunications company has violated this section may be resolved by arbitration or by a complaint filed with the commission ... A complaint filed with the commission must be referred to the office of administrative hearings for hearing

and issuance of recommended findings of fact, conclusions of law, and an order pursuant to chapter 28-32...

12. “Discriminate” or “Discrimination” is not defined in N.D.C.C. ch. 49-21. The plain meaning of discrimination more commonly seems to require discrimination against one or more as opposed to others, *i.e.*, unfair treatment as compared to others. *See Blacks Law Dictionary*, eighth edition (2004) (definition of discrimination); *Merriam Webster Collegiate Dictionary*, tenth edition (1993) (definition of discriminate). However, there is nothing in the language of N.D.C.C. § 49-21-24 that seems to require a comparison, *i.e.*, a discrimination against one or more as opposed to others. N.D.C.C. § 49-21-24(1)(a) merely states that “[a] telecommunications company may not ... discriminate against another provider of telecommunications services by refusing or delaying access to the company’s services.” It does not seem to invite comparison to the services provided to other telecommunications companies but, rather, a distinguishing based on and measured by the provider of telecommunications services merely coming forward to request access a telecommunications company’s services and the telecommunications company refusing or delaying access. This same logic is followed through in the wording of N.D.C.C. § 49-21-24(1)(b). This provision, regarding providing essential services, too, seems to be a prohibition of the refusing or delaying telecommunications services to one telecommunications company by a another telecommunications company; it is not discrimination that must be measured against what is provided to others that are not a party, but, rather, on what the telecommunications company provides to itself or its affiliates. Finally, the same logic is followed through in the wording of N.D.C.C. § 49-21-24 (1)(c). A telecommunications company may not degrade the quality or access of services provided to another provider of telecommunications services. Thus, read together, these three provisions of N.D.C.C. § 49-21-24(1) seem to prohibit results that mean a refusing or delaying of the

company's services that it provides to itself or its affiliates, especially essential services, or a degrading of the quality or access of services.

13. Nevertheless, the evidence in this matter shows, by the greater weight of the evidence, that there is also discrimination as compared to others that are not a party in this matter.

14. Polar and HTC have discriminated against Midcontinent, in violation of the requirements of N.D.C.C. § 49-21-24, by entering into interconnection agreements with Qwest that provide for number portability without conditions while insisting that Midcontinent meet conditions to obtain number portability.

15. Polar and HTC have discriminated against Midcontinent, in violation of the requirements of N.D.C.C. § 49-21-24, because they have refused to provide number portability to Midcontinent on the ground that it intends to offer service via resale when they would provide number portability to Midcontinent if it intended to offer service via its own facilities.

16. Polar and HTC have discriminated against Midcontinent, in violation of the requirements of N.D.C.C. § 49-21-24, because they have discriminated in favor of themselves in the availability of numbering resources.

17. Polar and HTC have discriminated against Midcontinent, in violation of the requirements of N.D.C.C. § 49-21-24, because they are willing to provide number portability to wireless carriers upon satisfaction of conditions within the control of the wireless carriers while insisting that Midcontinent can obtain number portability only upon satisfaction of a condition that requires the cooperation of Qwest.

18. Under N.D.C.C. §§ 49-02-02 and 49-21-01.7, the Commission has the power to “[r]equire telecommunications companies to conform to the laws of this state and to all rules

regulations, and orders of the commission not contrary to law.” N.D.C.C. § 49-21-0.1.7(2); *see* 49-02-02(2), which is essentially the same provision but applying to “public utilities and other persons”.

19. The appropriate remedy for the discriminatory actions of Polar and HT is to require them to conform to the laws of this state by providing number portability to Midcontinent by a time certain. Delay has gone on long enough, to the extent that it amounts to refusal. Negotiations have been fruitless and should not be extended.

ORDER

1. The Commission has jurisdiction of this matter under authority of N.D.C.C. ch. 49-21, and specifically N.D.C.C. § 49-21-24.

2. The evidence shows, by the greater weight of the evidence, that Polar has violated the provisions of N.D.C.C. § 49-21-24 by discriminating against Midcontinent by delaying and refusing to grant Midcontinent LNP when, in fact, Polar grants LNP to Qwest.

3. The evidence shows, by the greater weight of the evidence, that HTC has violated the provisions of N.D.C.C. § 49-21-24 by discriminating against Midcontinent by delaying and refusing to grant Midcontinent LNP when, in fact, HTC intends to grant LNP to wireless carriers.

4. Accordingly, Polar and HTC are ordered to make unconditional Local Number Portability available to Midcontinent in the Mayville and Hillsboro exchanges on or before January 1, 2005.

By: 
Allen C. Hoberg, ALJ, Hearing Officer
Public Service Commission
Office of Administrative Hearings



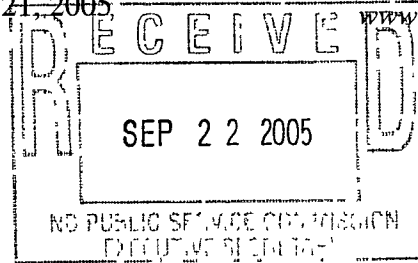
OFFICE OF ADMINISTRATIVE HEARINGS

STATE OF NORTH DAKOTA
1707 North 9th Street
Bismarck, North Dakota 58501-1882

Allen C Hoberg
DIRECTOR

701-328-3260
Fax 701-328-3254
oah@state.nd.us
www.state.nd.us/oah

September 21, 2005



Mr. William W. Binek
Hearing Administrator
Public Service Commission
600 East Boulevard Avenue
Bismarck, ND 58505

Re: Midcontinent Communications v. Polar Telecom, Inc./HTC Services, Inc.
Case No. PU-04-237
OAH File No. 20040205

Dear Mr. Binek:

This is our second notice to inform you that more than sixty days have passed since the final order in the above-titled matter was issued.

In reviewing the file in this matter there is no indication that any further action has been requested. Please confirm, in writing, whether your agency has, or has not, received any requests for further action regarding the final order issued in this matter. If no further action has been requested, the hearing tapes for this matter will be destroyed immediately upon receipt of the enclosed confirmation letter, signed by the appropriate person. If a request for further action has been received, and the Office of Administrative Hearings has been informed of such action, the hearing tapes will be retained for an additional amount of time.

Thank you for your attention to this matter.

Sincerely,

[Handwritten signature of Allen C. Hoberg]

Allen C. Hoberg
Director

lmw
Enc.

Mr. Allen C. Hoberg, Director
Office of Administrative Hearings
1707 North 9th Street – Lower Level
Bismarck, ND 58501-1882

Re: Midcontinent Communications v. Polar Telecom, Inc./HTC Services, Inc.
Case No. PU-04-237
OAH File No. 20040205

Dear Mr. Hoberg:

In response to your request for confirmation of the destruction or retention of the prehearing conference tape in the above-named case, there has been no further activity in regard to this matter. The prehearing conference tape may be destroyed.

Sincerely,

William W. Binek
Public Service Commission



Public Service Commission
Receipt of Payment

Receipt# 6258

Received 5/31/2005 Check# 33860 for \$313 75
Subject Utility Valuation

Docket # PU-04-237

Pearce & Durick
314 E Thayer Ave PO Box 400
Bismarck ND 58501

71 **PU-04-237**

Pages 1

Receipt# 6,258 \$313 75

by Pearce & Durick

05/31/2005



Public Service Commission
Receipt of Payment

Receipt# 6240

Received 5/5/2005 Check# 29988 for \$156 87
Subject Utility Valuation

Docket # PU-04-237

Halstad Telephone Company
345 2ND AVE W
Halstad MN 56548

70 **PU-04-237**

Pages 1

Receipt# 6,240 \$156 87

by Halstad Telephone Company

05/05/2005



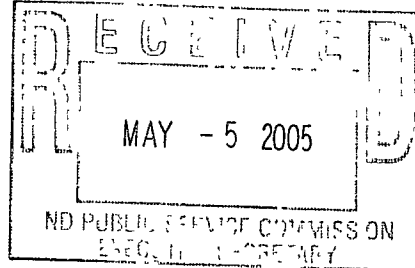
OFFICE OF ADMINISTRATIVE HEARINGS

STATE OF NORTH DAKOTA
1707 North 9th Street
Bismarck, North Dakota 58501-1882

Allen C Hoberg
DIRECTOR

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oah@state.nd.us
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May 4, 2005



Mr. William W. Binek
Hearing Administrator
Public Service Commission
600 East Boulevard Avenue
Bismarck, ND 58505

Re: Midcontinent Communications vs. Polar Telecom, Inc./HTC Services, Inc.
Case No. PU-04-237
OAH File No. 20040205

Dear Mr. Binek:

Our records indicate that on February 9, 2005, the final order in the above-titled matter was issued. More than sixty days have passed since its issuance. In reviewing the file in this matter there is no indication that any further action has been requested. Please confirm, in writing, whether your agency has, or has not, received any requests for further action regarding the final order issued in this matter. If no further action has been requested, the prehearing conference tape for this matter will be destroyed immediately upon receipt of the enclosed confirmation letter, signed by the appropriate person. If a request for further action has been received, and the Office of Administrative Hearings has been informed of such action, the prehearing conference tape will be retained for an additional amount of time.

Thank you for your attention to this matter.

Sincerely,

Allen C. Hoberg
Director

ACH/eap

Enc.

Mr. Allen C. Hoberg, Director
Office of Administrative Hearings
1707 North 9th Street – Lower Level
Bismarck, ND 58501-1882

Re: Midcontinent Communications vs. Polar Telecom, Inc./HTC Services, Inc.
Case No. PU-04-237
File No. 20040205

Dear Mr. Hoberg:

In response to your request for confirmation of the destruction or retention of the hearing tapes in the above-named case, there has been no further activity in regard to this matter. The prehearing conference tape may be destroyed.

Sincerely,

William W. Binek
Hearing Administrator



Public Service Commission
Receipt of Payment

Receipt# 6234

Received 5/4/2005 Check# 2248 for \$156 87
Subject Utility Valuation

Docket # PU-04-237

Polar Telcom, Inc
110 4TH ST E PO BOX 270
Park River ND 58270-0270

APPROVED

Adman
A3.

DATE: 4-20-05 MOTION
KMF

April 20, 2005

Midcontinent Communications vs
Polar Telecom, Inc /HTC Services, Inc
Complaint

Case No. PU-04-237

I move the Commission bill Midcontinent Communications, Polar
Telecom, Inc , and HTC Services, Inc for costs incurred to date in Case No. PU-
04-237, Midcontinent Communications vs Polar Telecom, Inc./HTC Services,
Inc , Complaint.



Public Service Commission

State of North Dakota

COMMISSIONERS

Tony Clark, President
Susan E Wefald
Kevin Cramer

Executive Secretary
Illona A Jeffcoat-Sacco

600 E Boulevard Ave Dept 408
Bismarck, North Dakota 58505-0480
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April 20, 2005

Patrick W Durick
Pearce & Durick
PO Box 400
Bismarck ND 58502-0400

David Dunning
Polar Telecom Inc
PO Box 270
Park River ND 58270-0270

Ron Laqua
HTC Services Inc
PO Box 55
Halstad MN 56548-0055


RE. Case No PU-04-237
Midcontinent Communications vs.
Polar Telecom, Inc./HTC Services, Inc
Complaint

Enclosed is a copy of the statement approved at the April 20, 2005 Public Service Commission meeting for the expenses incurred to date in Case No PU-04-237.

Under N D C C. 49-21-01.7, these expenses are billed through the Valuation Fund and must be paid for by the telecommunications company involved.

Please make your check payable to the *Public Service Commission*.

Sincerely,


Gloria Geiger
Admin Staff Officer
701-328-2401

Enc

Billing Statement

April 20, 2005

Midcontinent Communications vs.
Polar Telecom, Inc./HTC Services, Inc.
Complaint

Case No. PU-04-237

Bill To:

Midcontinent Communications	\$313.75
Polar Telecom, Inc.	156.87
HTC Services, Inc.	156.87

Expenses Incurred to Date:

Office of Administrative Hearings	\$627.49
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Send Payment and a Copy of this Statement To:

Public Service Commission
600 E Boulevard Ave Dept 408
Bismarck ND 58505-0480

Federal Tax ID 45-0309764

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Midcontinent Communications vs.
Polar Telcom, Inc./HTC Services, Inc.
Complaint

Case No. PU-04-237

AFFIDAVIT OF SERVICE BY CERTIFIED MAIL

STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH

Sharon Helbling deposes and says that

she is over the age of 18 years and not a party to this action and, on the **18th day of February, 2005**, she deposited in the United States Mail, Bismarck, North Dakota, **one** envelopes with certified postage, return receipt requested, fully prepaid, securely sealed and each containing a photocopy of:

Order Adopting Administrative Law Judge Recommendation

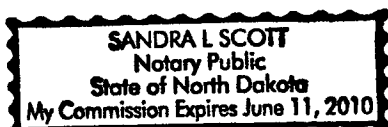
The envelope was addressed as follows

William J Brudvik
P O Box 547
Mayville ND 58257-0547
Cert. No. 7003 2260 0001 3517 9626

Each address shown is the respective addressee's last reasonably ascertainable post office address

Subscribed and sworn to before me
this **18th day of February, 2005**

SEAL



Sharon Helbling

Sandra L Scott

Notary Public

66

PU-04-237

Pages 1

Affidavit of Service

by Public Service Commission

02/18/2005

CC Comm Legal Ilona ALJ

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

**Midcontinent Communications vs.
Polar Telcom, Inc./HTC Services, Inc.
Complaint**

Case No. PU-04-237

AFFIDAVIT OF SERVICE BY CERTIFIED AND ORDINARY MAIL

STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH

Sharon Helbling deposes and says that:

she is over the age of 18 years and not a party to this action and, on the **10th day of February, 2005**, she deposited in the United States Mail, Bismarck, North Dakota, **two** envelopes with certified postage, return receipt requested, fully prepaid, securely sealed and each containing a photocopy of

Order

The envelopes were addressed as follows

David Dunning
Polar Telcom Inc
P O Box 270
Park River ND 58270

Cert. No. 7003 2260 0001 3517 9565

Ron Laqua
HTC Services Inc
P O Box 55
Halstad MN 56548-0055

Cert. No. 7003 2260 0001 3517 9572

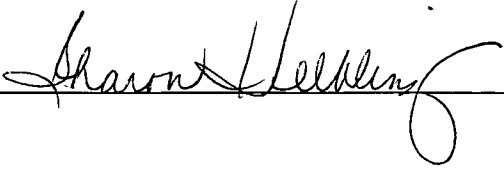
Sharon Helbling further deposes and says that on the **10th day of February, 2005**, she deposited in the United States Mail, Bismarck, North Dakota, **one** envelope by regular mail, with postage fully prepaid, securely sealed, each containing a photocopy of the same

Patrick W Durick
Pearce & Durick
P O Box 400
Bismarck ND 58502-0400

Each address shown is the respective addressee's last reasonably ascertainable post office address.

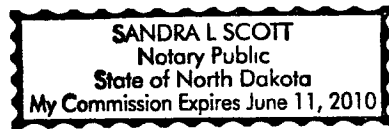
Subscribed and sworn to before me
this **10th day of February, 2005**.

SEAL





Notary Public



101203
DATE 2-9-05
KME

MOTION

February 9, 2005

**Midcontinent Communications vs.
Polar Telcom, Inc./HTC Services, Inc.
Complaint**

Case No. PU-04-237

I move the Commission adopt the Administrative Law Judge's recommended findings of fact, conclusions of law and order in this proceeding, effective February 9, 2005

PJF/sdh

**STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION**

**Midcontinent Communications vs.
Polar Telcom, Inc./HTC Services, Inc.
Complaint**

Case No. PU-04-237

ORDER ADOPTING ADMINISTRATIVE LAW JUDGE RECOMMENDATION

February 9, 2005

On May 13, 2004, Midcontinent Communications, a South Dakota Partnership (Midcontinent), filed a Complaint with the North Dakota Public Service Commission against Polar Telcom, Inc., a North Dakota Corporation d/b/a Polar Communications (Polar), and HTC Services, Inc., a Minnesota corporation (HTC), alleging violations of North Dakota Century Code § 49-21-24.

On June 9, 2004 the Commission determined the Complaint states a prima facie case and served the Complaint on Polar and HTC. On June 11, 2004, the Complaint was referred to the Office of Administrative Hearings pursuant to N.D.C.C. § 49-21-24(2). Administrative Law Judge Allen C. Hoberg (ALJ) was designated to preside as substantive Hearing Officer.

On June 14, 2004 the Polar and HTC filed an answer to the Complaint.

On June 22, 2004 the ALJ issued a Notice of Hearing & Specification of Issues

On August 23, 2004 Polar and HTC filed an amended answer to the Complaint.

On September 2, 2004 Polar/HTC and Midcontinent each filed a prehearing brief. On September 3, 2004 a public hearing was held. The issues to be considered in this matter include whether under the provisions of N.D.C.C. § 49-21-24:

1. Polar is discriminating against Midcontinent by delaying and refusing to grant Midcontinent Local Number Portability (LNP), when, in fact, Polar grants LNP to Qwest

2. HTC is discriminating against Midcontinent by delaying and refusing to grant Midcontinent LNP when, in fact, HTC intends to grant LNP to wireless carriers.

On September 27, 2004 Midcontinent filed its Initial Post-Hearing Brief. On October 21, 2004 Midcontinent filed a Reply Brief.

On November 10, 2004 the ALJ issued a Recommended Findings of Fact, Conclusions of Law, and Order finding that the Commission has jurisdiction, that Polar has discriminated against Midcontinent, that HTC has discriminated against Midcontinent, and that Polar and HTC must make unconditional LNP available to Midcontinent in the Mayville and Hillsboro exchanges on or before January 1, 2005.

On January 10, 2005 Polar and HTC filed a letter stating that they see no need to take further action, that Polar and HTC will provide LNP to Qwest on behalf of Midcontinent effective immediately and requested that the Commission amend the proposed order to stay its implementation pending non-compliance by Polar and HTC.

On January 20, 2005 Midcontinent filed a response to the Polar/HTC letter stating that they do not agree the matter is moot. Midcontinent requests that the Commission adopt the proposed order effective February 1, 2005. Midcontinent is concerned that, until it makes a request that Polar/HTC provide unconditional LNP, the process for obtaining LNP is untested and it would be cumbersome and time consuming to require that Midcontinent prove that Polar/HTC did not comply.

The Commission finds the ALJ's Recommended Findings of Fact, Conclusions of Law, and Order is fair and reasonable.

Order

The evidence of record and the findings of fact and conclusions of law of the Administrative Law Judge have been considered and appraised. The attached Recommended Findings of Fact, Conclusions of Law, and Order of the Administrative Law Judge dated November 10, 2004 are adopted as final effective February 9, 2005.

PUBLIC SERVICE COMMISSION



Susan E. Wefald
Commissioner



Tony Clark
President



Kevin Cramer
Commissioner

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

IN THE MATTER OF:

Case No. PU-04-237

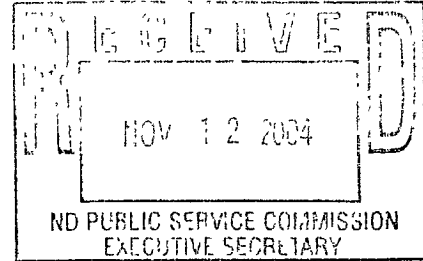
Midcontinent Communications, a
South Dakota Partnership,

Complainant,

vs.

Polar Telecom, Inc.,
a North Dakota Corporation d/b/a Polar
Communications, and HTC Services, Inc.,
A Minnesota Corporation,

Respondents.



RECOMMENDED
FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER
OAH File No. 20040205

November 10, 2004

PRELIMINARY STATEMENT

On May 20, 2004, the North Dakota Public Service Commission (“Commission”) received the Complaint of Midcontinent Communications (“Midcontinent”) against the Respondents Polar Telecom, Inc. (“Polar”) and HTC Services, Inc. (“HTC”) (collectively also referred to as “Respondents”). On June 9, 2004, the Commission found that the Complaint stated a *prima facie* case under N.D.C.C. § 49-21-24 and referred the Complaint to the Office of Administrative Hearings. On June 11, 2004, the undersigned administrative law judge was designated to preside as hearing officer in this matter. On June 22, 2004, the hearing officer issued a Notice of Hearing and Specification of Issue. The notice scheduled an evidentiary hearing for September 3, 2004. On July 16, 2004, the Respondents filed their Answer to the

Complaint. A prehearing conference was held on August 25, 2004. The parties filed prehearing briefs on September 2, 2004.

The hearing was held as scheduled on September 3, 2004. Midcontinent was represented at the hearing by Patrick W. Durick of Bismarck and J.G. Harrington of Washington, D.C. The Respondents were represented at the hearing by William J. Brudvik of Mayville. The Commission was represented at the hearing by William W. Binek and Patrick J. Fahn. Midcontinent called one witness. The Respondents called four witnesses. The Commission called no witnesses. Midcontinent offered 13 exhibits, all of which were admitted (exhibits C1-C13). The Respondents offered four exhibits, all of which were admitted (exhibits R6, R7, R13, and R14). A transcript of the hearing was prepared and received by the Commission on September 23, 2004 (it contains a witness list and exhibit list). The hearing officer also took official notice of CC Docket No. 95-116, a Memorandum Opinion and Order and Further Notice of Proposed Rulemaking before the Federal Communications Commission ("FCC"), submitted by Midcontinent on September 8, 2004; and the Interconnection Agreement between Midcontinent and U S West Communications, Inc. (now Qwest) filed with the Commission on March 23, 1999.

Following the evidentiary hearing and the preparation of the transcript, on September 27, 2004, Midcontinent filed the Initial Post-Hearing Brief of Midcontinent Communications, along with Proposed Findings of Fact and Conclusions of Law and a Proposed Order of the Public Service Commission. The Respondents filed the Respondent's Post-Hearing Brief on October 18, 2004. Midcontinent filed the Reply Brief of Midcontinent Communications on October 21, 2004. The hearing on this matter was closed, then, on October 21, 2004.

The Complaint is essentially that in December of 2002, Midcontinent requested that both Polar and HTC provide local number portability (“LNP”) to Midcontinent for the Hillsboro and Mayville exchanges. Midcontinent alleges that the Respondents have refused to provide LNP to Midcontinent “unless Midcontinent complied with unreasonable and discriminatory conditions imposed by Polar and HTC.” *See* Complaint. Midcontinent further alleges that on “April 5, 2004, Polar rejected a request for LNP for a telephone number in Mayville, North Dakota, citing ‘Rate Center Mismatch’ as the reason for the rejection.” *Id.* Thus, Midcontinent concludes with an allegation that “Polar is discriminating against Midcontinent by delaying and refusing to grant Midcontinent LNP when, in fact, Polar grants LNP to Qwest...” and that “HTC is discriminating against Midcontinent by delaying and refusing to grant Midcontinent LNP when in fact HTC intends to grant LNP to wireless carriers.” *Id.* As bases for this conclusion, Midcontinent cites N.D.C.C. § 49-21-24, which “prohibits a telecommunications company from discriminating against another telecommunications company by refusing or delaying access to the company’s services.”

The issues stated in the specification of issues are

- whether under the provisions of N.D.C.C. § 49-21-24: 1. Polar is discriminating against Midcontinent by delaying and refusing to grant Midcontinent Local Number Portability (‘LPN’) (*sic*), when, in fact, Polar grants LPN (*sic*) to Qwest.
- 2. HTC is discriminating against Midcontinent by delaying and refusing to grant Midcontinent LPN (*sic*) when, in fact, HTC intends to grant LPN (*sic*) to wireless carriers.

The hearing officer's recommended order is based on the following findings and conclusions.

FINDINGS OF FACT

1. Midcontinent, HTC, and Polar are certified local exchange carriers in North Dakota. HTC provides service in Hillsboro, Polar provides service in Mayville, and

Midcontinent is certified to provide service in both Hillsboro and Mayville. In North Dakota, Midcontinent is a reseller of telecommunications services, not a facilities-based provider of telecommunications services. Midcontinent buys telecommunications services at wholesale from Qwest, not from HTC or Polar.

2. Midcontinent requested LNP from HTC and Polar in December 2002. HTC and Polar each acknowledged receipt of that request, and the three parties negotiated concerning the availability of LNP to Midcontinent from HTC and Polar. Negotiations have not resulted in HTC and Polar providing LNP to Midcontinent. To date, HTC and Polar have not provided LNP to Midcontinent.

3. Midcontinent's LNP request was made on its own behalf.

4. There are no technical barriers that would prevent either HTC or Polar from providing LNP to Midcontinent in Hillsboro and Mayville, only economic barriers.

5. HTC and Polar have not sought any waiver of the FCC's number portability requirements from either the FCC or the Commission.

6. The overwhelming majority of telecommunications customers changing carriers want to retain their current telephone numbers. Consequently, denying LNP gives the carrier denying LNP a significant competitive advantage.

7. HTC and Polar have refused to provide LNP to Midcontinent because doing so, in their view, would affect the economics of an extended area service ("EAS") agreement between Polar and HTC.

8. HTC and Polar have claimed that providing LNP to Midcontinent would be a financial burden on them, causing them economic harm, but they have not demonstrated that providing LNP to Midcontinent would be a financial burden on them, causing them economic

harm. At least there was no specific evidence about the extent or the nature of any financial burden imposed upon them by providing LNP to Midcontinent. The exact economic consequences for the Respondents of providing LNP to Midcontinent or others like Midcontinent appear to be uncertain and contingent. Even if HTC and Polar had shown more specific economic financial burden causing economic harm, resulting from providing LNP to Midcontinent, there may be no relief from such a financial burden, at least from the FCC. The waiver requirements of the FCC rules are very specific if a carrier wishes to be excused from the number portability obligations. *See* 47 C.F.R. § 52.23(d). But, again, the Respondents have not sought any waivers of any kind. Furthermore, any financial burden causing economic harm to the Respondents appears to be a logical consequence of their EAS agreement and providing LNP, and the Respondents should not be insulated from the economic consequences of their voluntary business arrangement, at least not where the requirements of providing LNP are concerned.

9. HTC and Polar have stated that they will not provide LNP to Midcontinent until issues related to their EAS agreement are addressed.

10. HTC and Polar both have entered into an interconnection agreement with Qwest that provides for LNP but does not address the issues related to their EAS agreement. HTC and Polar have an EAS larger than Qwest's EAS.

11. HTC and Polar would also require wireless providers to address certain economic issues before they would provide LNP to them, but addressing those issues would not require Qwest's cooperation.

12. The issue relating to the HTC-Polar EAS agreement, that the Respondents say must be addressed before they will provide number portability to Midcontinent, can be addressed

only with Qwest's cooperation. HTC and Polar want Midcontinent to work out the issue for terminating access charges with Qwest before they will provide Midcontinent LNP, because Qwest is the underlying provider. The issue with regard to terminating access charges, however, is only an issue because of the HTC-Polar EAS agreement.

13. Midcontinent has no ability to extend a service area on its own and would have to negotiate with HTC and Polar to do so. Extension of service areas is not an issue for the Commission to decide. Midcontinent is only asking for porting into the resold exchange of Qwest. Telephone calls need to be completed through terminating access and porting a number is not porting if it cannot be completed.

14. The rate centers to be used by Polar or HTC and Midcontinent, once LNP is provided, will be consistent with each other.

15. The HTC-Polar EAS agreement was entered into voluntarily, without the approval of the Commission, approximately six years after the number portability requirement became law. This HTC and Polar policy of basing the charges for calls on the identity of the carrier serving the customer receiving the call in Hillsboro and Mayville, rather than on the location being called, would follow through to ported numbers, too.

16. The real issue preventing a negotiated agreement in this matter, and, indeed, causing HTC and Polar to delay or refuse to port numbers to Midcontinent, is that for outgoing calls placed by HTC and Polar customers to a number ported to a Midcontinent customer, there would be toll charges as well as terminating access charges and someone has to pay for those charges (absent cooperation from Qwest) and the Respondents do not want to have to pay for those charges. However, those charges arise only because of the HTC and Polar EAS, and would not arise in the absence of a number being ported to Midcontinent. In other words,

because of the HTC and Polar EAS, current HTC and Polar customers may lose some of their EAS, if HTC and Polar port numbers to Midcontinent. The same basic issue would be involved in a wireless carrier actually requesting that a number be ported, *i.e.*, who would pay for toll charges and terminating access charges.

CONCLUSIONS OF LAW

1. Under the FCC's rules governing number portability, a local exchange carrier must provide permanent number portability within six months of a bona fide request from a telecommunications carrier absent a waiver from the FCC. 47 C.F.R. § 52.23. HTC and Polar have not sought a waiver from the FCC for providing number portability.
2. Midcontinent's request for LNP from HTC and Polar met the FCC's requirements for a bona fide request.
3. HTC and Polar have failed to comply with the requirements of the FCC's number portability rules.
4. An interconnection agreement with a provider of telecommunications services is not required to obtain LNP from that provider. *Memorandum Opinion and Order*, 18 F.C.C.R. 20971, 20972; *See Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 18 F.C.C.R. 23697, 23710-2 (2003) ("November Order").
5. The FCC's rules do not provide for waivers from the number portability requirements for economic reasons or if local calling areas do not match. 47 C.F.R. § 52.23(d).
6. It is evident from the evidence that there is no issue in this matter that falls within the special expertise of the FCC, but rather, one that falls within the jurisdiction and expertise of the Commission, a discrimination issue.

7. The FCC's rules require number portability to be provided when rate centers match and in many circumstances when rate centers do not match. *November Order*, 18 F.C.C.R. at 23708.

8. A voluntary agreement between two carriers cannot exempt them from compliance with the FCC's number portability requirements. 47 C.F.R. § 52.23.

9. The Telecommunications Act of 1996 ("the Act") did not divest states of any jurisdiction over matters that were not specifically preempted. Section 261 of the Act specifically addresses the effect of the provisions added by the Act on State jurisdiction. *See* 7 U.S.C. § 261(b), (c).

10. The Commission has jurisdiction over this matter under N.D.C.C. ch. 49-21, specifically pursuant to N.D.C.C. § 49-21-24. North Dakota's statutory provisions are not inconsistent with the regulatory scheme of the Act. Relationships between local exchange carriers are within the Commission's jurisdiction.

11. N.D.C.C. § 49-21-24 states, in part:

49-21-24. Prohibited acts --- Arbitration.

1. A telecommunications company may not:

a. Discriminate against another provider of telecommunications services by refusing or delaying access to the company's services;

b. Discriminate against another provider of telecommunications services by refusing or delaying access to essential facilities on terms and conditions no less favorable than those the telecommunications company provides to itself and its affiliates...

c. Degrade the quality of access or service provided to another provider of telecommunications services.

2. A claim that a telecommunications company has violated this section may be resolved by arbitration or by a complaint filed with the commission ... A complaint filed with the commission must be referred to the office of administrative hearings for hearing

and issuance of recommended findings of fact, conclusions of law, and an order pursuant to chapter 28-32...

12. “Discriminate” or “Discrimination” is not defined in N.D.C.C. ch. 49-21. The plain meaning of discrimination more commonly seems to require discrimination against one or more as opposed to others, *i.e.*, unfair treatment as compared to others. *See Blacks Law Dictionary*, eighth edition (2004) (definition of discrimination); *Merriam Webster Collegiate Dictionary*, tenth edition (1993) (definition of discriminate). However, there is nothing in the language of N.D.C.C. § 49-21-24 that seems to require a comparison, *i.e.*, a discrimination against one or more as opposed to others. N.D.C.C. § 49-21-24(1)(a) merely states that “[a] telecommunications company may not ... discriminate against another provider of telecommunications services by refusing or delaying access to the company’s services.” It does not seem to invite comparison to the services provided to other telecommunications companies but, rather, a distinguishing based on and measured by the provider of telecommunications services merely coming forward to request access a telecommunications company’s services and the telecommunications company refusing or delaying access. This same logic is followed through in the wording of N.D.C.C. § 49-21-24(1)(b). This provision, regarding providing essential services, too, seems to be a prohibition of the refusing or delaying telecommunications services to one telecommunications company by a another telecommunications company; it is not discrimination that must be measured against what is provided to others that are not a party, but, rather, on what the telecommunications company provides to itself or its affiliates. Finally, the same logic is followed through in the wording of N.D.C.C. § 49-21-24 (1)(c). A telecommunications company may not degrade the quality or access of services provided to another provider of telecommunications services. Thus, read together, these three provisions of N.D.C.C. § 49-21-24(1) seem to prohibit results that mean a refusing or delaying of the

company's services that it provides to itself or its affiliates, especially essential services, or a degrading of the quality or access of services.

13. Nevertheless, the evidence in this matter shows, by the greater weight of the evidence, that there is also discrimination as compared to others that are not a party in this matter.

14. Polar and HTC have discriminated against Midcontinent, in violation of the requirements of N.D.C.C. § 49-21-24, by entering into interconnection agreements with Qwest that provide for number portability without conditions while insisting that Midcontinent meet conditions to obtain number portability.

15. Polar and HTC have discriminated against Midcontinent, in violation of the requirements of N.D.C.C. § 49-21-24, because they have refused to provide number portability to Midcontinent on the ground that it intends to offer service via resale when they would provide number portability to Midcontinent if it intended to offer service via its own facilities.

16. Polar and HTC have discriminated against Midcontinent, in violation of the requirements of N.D.C.C. § 49-21-24, because they have discriminated in favor of themselves in the availability of numbering resources.

17. Polar and HTC have discriminated against Midcontinent, in violation of the requirements of N.D.C.C. § 49-21-24, because they are willing to provide number portability to wireless carriers upon satisfaction of conditions within the control of the wireless carriers while insisting that Midcontinent can obtain number portability only upon satisfaction of a condition that requires the cooperation of Qwest.

18. Under N.D.C.C. §§ 49-02-02 and 49-21-01.7, the Commission has the power to “[r]equire telecommunications companies to conform to the laws of this state and to all rules

regulations, and orders of the commission not contrary to law.” N.D.C.C. § 49-21-0.1.7(2); *see* 49-02-02(2), which is essentially the same provision but applying to “public utilities and other persons”.

19. The appropriate remedy for the discriminatory actions of Polar and HT is to require them to conform to the laws of this state by providing number portability to Midcontinent by a time certain. Delay has gone on long enough, to the extent that it amounts to refusal. Negotiations have been fruitless and should not be extended.


ORDER

1. The Commission has jurisdiction of this matter under authority of N.D.C.C. ch. 49-21, and specifically N.D.C.C. § 49-21-24.

2. The evidence shows, by the greater weight of the evidence, that Polar has violated the provisions of N.D.C.C. § 49-21-24 by discriminating against Midcontinent by delaying and refusing to grant Midcontinent LNP when, in fact, Polar grants LNP to Qwest.

3. The evidence shows, by the greater weight of the evidence, that HTC has violated the provisions of N.D.C.C. § 49-21-24 by discriminating against Midcontinent by delaying and refusing to grant Midcontinent LNP when, in fact, HTC intends to grant LNP to wireless carriers.

4. Accordingly, Polar and HTC are ordered to make unconditional Local Number Portability available to Midcontinent in the Mayville and Hillsboro exchanges on or before January 1, 2005.

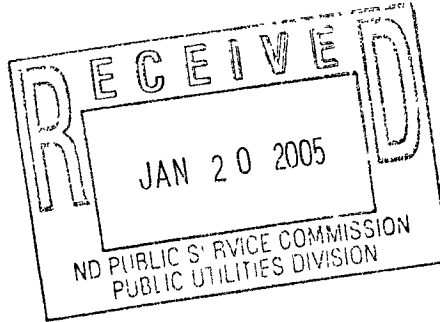
By: 
Allen C. Hoberg, ALJ, Hearing Officer
Public Service Commission
Office of Administrative Hearings



WILLIAM P. PEARCE
 PATRICK W. DURICK
 B. TIMOTHY DURICK
 GARY R. THUNE
 DAVID E. REICH
 JEROME C. KETTLESON
 LARRY L. BOSCHEE •
 LAWRENCE BENDER, P.C. •
 JONATHAN P. SANSTEAD
 BONNIE L. CHRISTNER •

ATTORNEYS AT LAW
 314 EAST THAYER AVENUE
 P.O. BOX 400
 BISMARCK, NORTH DAKOTA 58502
 January 20, 2005

TELEPHONE (701) 223 2890
 FAX (701) 223 7865
 E-MAIL law.office@pearce-durick.com



HAND DELIVERED

Public Service Commission
 Capitol
 600 East Boulevard Avenue
 Bismarck, North Dakota 58505

Attention: Sharon

RE: **Midcontinent Communications vs. Polar Telcom Inc./ HTC Services, Inc.**
 Case NO PU-04-237

Dear Commissioners:

In response to Mr. Brudvik's letter of January 7, 2005, Midcontinent does not agree that this matter is moot. Midcontinent requests that the Commission take action to adopt the Findings of Fact and Conclusions of Law recommended by Administrative Law Judge Hoberg, and further, that the Commission enter the order suggested by Judge Hoberg. The effective date of the Order should be amended from January 1, 2005 to February 1, 2005.

Mr. Brudvik represents that Polar Telcom, Inc /HTC Services, Inc. ("Polar/HTC") will, ". . . provide Local Number Portability to Qwest on behalf of Midcontinent Communications in the Mayville and Hillsboro exchanges, respectively, effective immediately." The recommended order of Judge Hoberg provides that, ". . . Polar and HTC are ordered to make unconditional Local Number Portability available to Midcontinent in the Mayville and Hillsboro exchanges. . ." (Emphasis supplied).

Mr. Brudvik suggests that the Commission enter an amended order, ". . . to stay its implementation pending non-compliance by Polar Telcom, Inc. and HTC Services, Inc." It is non compliance by Polar/HTC that is the concern of Midcontinent. Since the date of Mr. Brudvik's letter, Midcontinent has not had the opportunity to request that Polar/HTC provide unconditional Local Number Portability ("LNP") and until such a request is made, the process for obtaining LNP is untested. If Polar/HTC does not grant Midcontinent unconditional LNP upon request, it would be cumbersome and time

Public Service Commission -2-
January 20, 2004

consuming to require that Midcontinent prove the non-compliance so the order requiring unconditional LNP could be entered.

Midcontinent has gone through the time and expense of pursuing its legal rights with respect to LNP and the proposed order of the Administrative Law Judge provides the basis for a timely remedy if Polar/HTC does not provide unconditional LNP upon request. The circuitous path of entering the order recommended by Judge Hoberg upon non-compliance of providing unconditional LNP is cumbersome, time consuming and provides no advantage.

Midcontinent respectfully requests that the Commission adopt the Findings of Fact and Conclusions of Law recommended by Administrative Law Judge Hoberg, and further, that the Commission enter the order suggested by Judge Hoberg.

Sincerely,


PEARCE & DURICK

PATRICK W. DURICK

PWD/jf

cc · Ms. Mary Lohnes
William J. Brudvik
J.G. Harrington



Practice in all North Dakota
and Minnesota courts

Ohnstad Twichell, P.C.

ATTORNEYS AT LAW

Founded in 1939

Offices in West Fargo, Fargo, Hillsboro, Mayville, Page, Hope and Finley, North Dakota
and Detroit Lakes, Minnesota

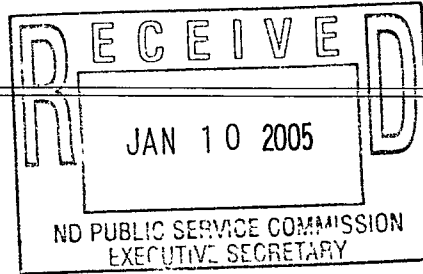
www.ohnstadlaw.com

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ROBERT E ROSENVOLD
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DANIEL R TWICHELL
S LEE VINJE
DAVID L WANNER
PEGGY J BUCHHOLZ, PLS
Office Administrator

*Also licensed in Minnesota

January 7, 2005



Tony Clark, President
North Dakota Public Service Commission
State Capitol, 12th Floor
600 East Boulevard, Dept. 408
Bismarck, North Dakota 58505-0480

RE: MIDCONTINENT COMMUNICATIONS VS POLAR TELCOM INC./HTC SERVICES, INC.

CASE NO. PU-04-237

OAH FILE NO. 20040205

Dear Commissioner Clark:

Polar Telcom, Inc. and HTC Services, Inc. are in receipt of recommended Findings of Fact, Conclusion of Law and Order from Allen C. Hoberg, Administrative Law Judge and Hearing Officer, which were sent to the Public Service Commission on November 10, 2004.

While neither my clients necessarily agree with Judge Hoberg's Conclusions of Law and Order, neither do they feel it prudent to continue to take any further action with respect to this matter. Polar Telecom and HTC Services will provide Local Number Portability to Qwest on behalf of Midcontinent Communications in the Mayville and Hillsboro exchanges, respectively, effective immediately. To the extent that this resolves all matters contained in the Administrative Law Judge's Order, we would respectfully submit that the need of the PSC to take action upon the recommendations of the Administrative Law Judge is now moot. Accordingly, we would request the PSC to amend the proposed Order to stay its implementation pending non-compliance by Polar Telcom, Inc. and HTC Services, Inc.

Sincerely yours,

OHNSTAD TWICHELL LAW OFFICE

William J. Brudvik

WJB:sgg

CC: Patrick Durick
Halstad Telephone Co
Polar Telcom

12 SOUTHEAST THIRD • P O BOX 547 • MAYVILLE, ND 58257-0547 • (701) 788-3251
FAX (701) 788-4243

Pages 1

PU-04-237

61

Recognize ALJ's recommended Findings of Fact by Polar Telecom/HTC Services

CC: Comm Legal Ilona ALJ

01/10/2005



Public Service Commission
Receipt of Payment

Receipt# 6105

Received 1/5/2005 Check# 120636 for \$1,154 92
Subject Utility Valuation

Docket # PU-04-237

Midcontinent Communications
410 So Phillips Ave.
Sioux Falls SD 57104-6824

60 PU-04-237 Pages 1
Receipt# 6,105 \$1,154 92
by Midcontinent Communications
01/05/2005



Public Service Commission
Receipt of Payment

Receipt# 6097

Received 1/5/2005 Check# 2100 for \$577 47
Subject Utility Valuation

Docket # PU-04-237

Polar Telcom, Inc.

APPROVED

DATE: 12-1-04
KMF

MOTION

December 1, 2004

Midcontinent Communications vs.
Polar Telecom, Inc /HTC Services, Inc.
Complaint

Case No PU-04-237

I move the Commission bill Midcontinent Communications, Polar
Telecom, Inc., and HTC Services, Inc for costs incurred to date in Case No. PU-
04-237, Midcontinent Communications vs. Polar Telecom, Inc./HTC Services,
Inc., Complaint

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Pages 3

Utility Valuation Motion/Letter/Billing
Statement
by Public Service Commission

12/01/2004

CC Comm Legal Ilcna ALJ



Public Service Commission

State of North Dakota

COMMISSIONERS

Tony Clark, President
Susan E Wefald
Kevin Cramer

Executive Secretary
Illona A Jeffcoat-Sacco

600 E Boulevard Ave Dept 408
Bismarck, North Dakota 58505-0480
web www.psc.state.nd.us
e-mail ndpsc@state.nd.us
TDD 800-366-6888
Fax 701-328-2410
Phone 701-328-2400

December 1, 2004

Patrick W Durick
Pearce & Durick
PO Box 400
Bismarck ND 58502-0400

David Dunning
Polar Telecom Inc
PO Box 270
Park River ND 58270-0270

Ron Laqua
HTC Services Inc
PO Box 55
Halstad MN 56548-0055


RE: Case No. PU-04-237
Midcontinent Communications vs.
Polar Telecom, Inc./HTC Services, Inc
Complaint

Enclosed is a copy of the statement approved at the December 1, 2004 Public Service Commission meeting for the expenses incurred to date in Case No. PU-04-237.

Under N.D.C.C. 49-21-01.7, these expenses are billed through the Valuation Fund and must be paid for by the telecommunications company involved.

Please make your check payable to the *Public Service Commission*.

Sincerely,


Gloria Geiger
Admin Staff Officer
701-328-2401

Enc.

Billing Statement

December 1, 2004

Midcontinent Communications vs.
Polar Telecom, Inc /HTC Services, Inc.
Complaint

Case No. PU-04-237

Bill To:

Midcontinent Communications	\$1154.92
Polar Telecom, Inc.	577.47
HTC Services, Inc.	577.47

Expenses Incurred to Date:

Office of Administrative Hearings	\$2309.86
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Send Payment and a Copy of this Statement To:

Public Service Commission
600 E Boulevard Ave Dept 408
Bismarck ND 58505-0480

Federal Tax ID 45-0309764

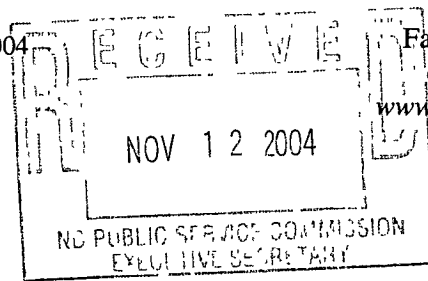


OFFICE OF ADMINISTRATIVE HEARINGS

STATE OF NORTH DAKOTA
1707 North 9th Street
Bismarck, North Dakota 58501-1882

Allen C. Hoberg
DIRECTOR

November 10, 2004



701-328-3260
Fax 701-328-3254
oah@state.nd.us
www.state.nd.us/oah

Ms Illona Jeffcoat-Sacco
Executive Secretary
Public Service Commission
600 E Boulevard Avenue
Bismarck, ND 58505

Re Midcontinent Communications vs Polar Telcom, Inc /HTC Services, Inc
Case No PU-04-237
OAH File No 20040205

Dear Ms Jeffcoat-Sacco

Enclosed are the original Recommended Findings of Fact, Conclusions of Law, and Order, as well as the proposed final Order in regard to the above-titled matter. If the Commissioners agree with my recommendations, they may sign the proposed final Order and serve it on the parties. Alternatively, they may issue their own separate order based on my recommended findings, or they may issue their own findings of fact and conclusions of law and their own separate order based on them.

Please send me a copy of the signed proposed final Order, if they elect to sign it. If they do not sign it, please send me a copy of the final order issued by them in this matter. Also, please send me a copy of the findings of fact and conclusions of law upon which the order is based, if they are different from my recommended findings and conclusions.

Please send me a copy of any decision or order issued by the district court or the supreme court as a result of an appeal of this matter.

I am closing our file on this matter and returning that portion of the record I have in my possession to you for filing with the official agency record of this matter, as appropriate.

I have retained the prehearing conference tape pending a request for review of it or pending an appeal. Unless we hear otherwise from you, the tape of the prehearing conference will be held for a period of sixty days after the issuance of the final order in this matter, or sixty days after a final determination upon reconsideration, unless an appeal has been taken to district court. This hearing was transcribed by a court reporter and the transcript is enclosed.

Sincerely,

Allen C. Hoberg
Administrative Law Judge

ACH/ljc
Encl

cc: Mr. William J. Brudvick
Mr. Patrick W. Durick

56 PU-04-237

Pages 1

Cover letter re Recommended Findings of Fact, Conclusions of Law and Order by Office of Administrative Hearings by Allen Hoberg.

11/12/2004

CC Comm Legal Illona ALJ

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

IN THE MATTER OF:

Case No. PU-04-237

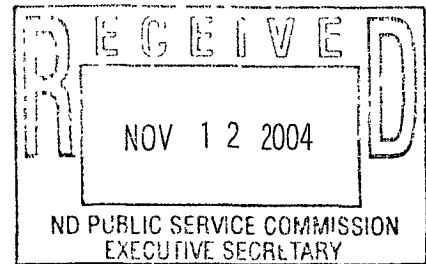
Midcontinent Communications, a
South Dakota Partnership,

Complainant,

vs.

Polar Telecom, Inc.,
a North Dakota Corporation d/b/a Polar
Communications, and HTC Services, Inc.,
A Minnesota Corporation,

Respondents.



RECOMMENDED
FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER
OAH File No. 20040205

November 10, 2004

PRELIMINARY STATEMENT

On May 20, 2004, the North Dakota Public Service Commission ("Commission") received the Complaint of Midcontinent Communications ("Midcontinent") against the Respondents Polar Telecom, Inc ("Polar") and HTC Services, Inc. ("HTC") (collectively also referred to as "Respondents"). On June 9, 2004, the Commission found that the Complaint stated a *prima facie* case under N.D.C.C. § 49-21-24 and referred the Complaint to the Office of Administrative Hearings. On June 11, 2004, the undersigned administrative law judge was designated to preside as hearing officer in this matter. On June 22, 2004, the hearing officer issued a Notice of Hearing and Specification of Issue. The notice scheduled an evidentiary hearing for September 3, 2004. On July 16, 2004, the Respondents filed their Answer to the

Complaint A prehearing conference was held on August 25, 2004. The parties filed prehearing briefs on September 2, 2004.

The hearing was held as scheduled on September 3, 2004. Midcontinent was represented at the hearing by Patrick W. Durick of Bismarck and J.G. Harrington of Washington, D.C. The Respondents were represented at the hearing by William J. Brudvik of Mayville. The Commission was represented at the hearing by William W. Binek and Patrick J. Fahn. Midcontinent called one witness. The Respondents called four witnesses. The Commission called no witnesses. Midcontinent offered 13 exhibits, all of which were admitted (exhibits C1-C13). The Respondents offered four exhibits, all of which were admitted (exhibits R6, R7, R13, and R14). A transcript of the hearing was prepared and received by the Commission on September 23, 2004 (it contains a witness list and exhibit list). The hearing officer also took official notice of CC Docket No. 95-116, a Memorandum Opinion and Order and Further Notice of Proposed Rulemaking before the Federal Communications Commission ("FCC"), submitted by Midcontinent on September 8, 2004; and the Interconnection Agreement between Midcontinent and U.S. West Communications, Inc. (now Qwest) filed with the Commission on March 23, 1999.

Following the evidentiary hearing and the preparation of the transcript, on September 27, 2004, Midcontinent filed the Initial Post-Hearing Brief of Midcontinent Communications, along with Proposed Findings of Fact and Conclusions of Law and a Proposed Order of the Public Service Commission. The Respondents filed the Respondent's Post-Hearing Brief on October 18, 2004. Midcontinent filed the Reply Brief of Midcontinent Communications on October 21, 2004. The hearing on this matter was closed, then, on October 21, 2004.

The Complaint is essentially that in December of 2002, Midcontinent requested that both Polar and HTC provide local number portability (“LNP”) to Midcontinent for the Hillsboro and Mayville exchanges. Midcontinent alleges that the Respondents have refused to provide LNP to Midcontinent “unless Midcontinent complied with unreasonable and discriminatory conditions imposed by Polar and HTC.” *See* Complaint. Midcontinent further alleges that on “April 5, 2004, Polar rejected a request for LNP for a telephone number in Mayville, North Dakota, citing ‘Rate Center Mismatch’ as the reason for the rejection.” *Id.* Thus, Midcontinent concludes with an allegation that “Polar is discriminating against Midcontinent by delaying and refusing to grant Midcontinent LNP when, in fact, Polar grants LNP to Qwest...” and that “HTC is discriminating against Midcontinent by delaying and refusing to grant Midcontinent LNP when in fact HTC intends to grant LNP to wireless carriers.” *Id.* As bases for this conclusion, Midcontinent cites N.D.C.C. § 49-21-24, which “prohibits a telecommunications company from discriminating against another telecommunications company by refusing or delaying access to the company’s services.”

The issues stated in the specification of issues are

whether under the provisions of N.D.C.C. § 49-21-24: 1. Polar is discriminating against Midcontinent by delaying and refusing to grant Midcontinent Local Number Portability (‘LPN’) (*sic*), when, in fact, Polar grants LPN (*sic*) to Qwest. 2. HTC is discriminating against Midcontinent by delaying and refusing to grant Midcontinent LPN (*sic*) when, in fact, HTC intends to grant LPN (*sic*) to wireless carriers.

The hearing officer's recommended order is based on the following findings and conclusions.

FINDINGS OF FACT

1. Midcontinent, HTC, and Polar are certified local exchange carriers in North Dakota. HTC provides service in Hillsboro, Polar provides service in Mayville, and

Midcontinent is certified to provide service in both Hillsboro and Mayville. In North Dakota, Midcontinent is a reseller of telecommunications services, not a facilities-based provider of telecommunications services. Midcontinent buys telecommunications services at wholesale from Qwest, not from HTC or Polar.

2. Midcontinent requested LNP from HTC and Polar in December 2002. HTC and Polar each acknowledged receipt of that request, and the three parties negotiated concerning the availability of LNP to Midcontinent from HTC and Polar. Negotiations have not resulted in HTC and Polar providing LNP to Midcontinent. To date, HTC and Polar have not provided LNP to Midcontinent.

3. Midcontinent's LNP request was made on its own behalf.

4. There are no technical barriers that would prevent either HTC or Polar from providing LNP to Midcontinent in Hillsboro and Mayville, only economic barriers.

5. HTC and Polar have not sought any waiver of the FCC's number portability requirements from either the FCC or the Commission.

6. The overwhelming majority of telecommunications customers changing carriers want to retain their current telephone numbers. Consequently, denying LNP gives the carrier denying LNP a significant competitive advantage.

7. HTC and Polar have refused to provide LNP to Midcontinent because doing so, in their view, would affect the economics of an extended area service ("EAS") agreement between Polar and HTC.

8. HTC and Polar have claimed that providing LNP to Midcontinent would be a financial burden on them, causing them economic harm, but they have not demonstrated that providing LNP to Midcontinent would be a financial burden on them, causing them economic

harm. At least there was no specific evidence about the extent or the nature of any financial burden imposed upon them by providing LNP to Midcontinent. The exact economic consequences for the Respondents of providing LNP to Midcontinent or others like Midcontinent appear to be uncertain and contingent. Even if HTC and Polar had shown more specific economic financial burden causing economic harm, resulting from providing LNP to Midcontinent, there may be no relief from such a financial burden, at least from the FCC. The waiver requirements of the FCC rules are very specific if a carrier wishes to be excused from the number portability obligations. *See* 47 C.F.R. § 52.23(d). But, again, the Respondents have not sought any waivers of any kind. Furthermore, any financial burden causing economic harm to the Respondents appears to be a logical consequence of their EAS agreement and providing LNP, and the Respondents should not be insulated from the economic consequences of their voluntary business arrangement, at least not where the requirements of providing LNP are concerned

9. HTC and Polar have stated that they will not provide LNP to Midcontinent until issues related to their EAS agreement are addressed.

10. HTC and Polar both have entered into an interconnection agreement with Qwest that provides for LNP but does not address the issues related to their EAS agreement. HTC and Polar have an EAS larger than Qwest's EAS.

11. HTC and Polar would also require wireless providers to address certain economic issues before they would provide LNP to them, but addressing those issues would not require Qwest's cooperation.

12. The issue relating to the HTC-Polar EAS agreement, that the Respondents say must be addressed before they will provide number portability to Midcontinent, can be addressed

only with Qwest's cooperation. HTC and Polar want Midcontinent to work out the issue for terminating access charges with Qwest before they will provide Midcontinent LNP, because Qwest is the underlying provider. The issue with regard to terminating access charges, however, is only an issue because of the HTC-Polar EAS agreement.

13. Midcontinent has no ability to extend a service area on its own and would have to negotiate with HTC and Polar to do so. Extension of service areas is not an issue for the Commission to decide. Midcontinent is only asking for porting into the resold exchange of Qwest. Telephone calls need to be completed through terminating access and porting a number is not porting if it cannot be completed.

14. The rate centers to be used by Polar or HTC and Midcontinent, once LNP is provided, will be consistent with each other.

15. The HTC-Polar EAS agreement was entered into voluntarily, without the approval of the Commission, approximately six years after the number portability requirement became law. This HTC and Polar policy of basing the charges for calls on the identity of the carrier serving the customer receiving the call in Hillsboro and Mayville, rather than on the location being called, would follow through to ported numbers, too.

16. The real issue preventing a negotiated agreement in this matter, and, indeed, causing HTC and Polar to delay or refuse to port numbers to Midcontinent, is that for outgoing calls placed by HTC and Polar customers to a number ported to a Midcontinent customer, there would be toll charges as well as terminating access charges and someone has to pay for those charges (absent cooperation from Qwest) and the Respondents do not want to have to pay for those charges. However, those charges arise only because of the HTC and Polar EAS, and would not arise in the absence of a number being ported to Midcontinent. In other words,

because of the HTC and Polar EAS, current HTC and Polar customers may lose some of their EAS, if HTC and Polar port numbers to Midcontinent. The same basic issue would be involved in a wireless carrier actually requesting that a number be ported, *i.e.*, who would pay for toll charges and terminating access charges.

CONCLUSIONS OF LAW

1. Under the FCC's rules governing number portability, a local exchange carrier must provide permanent number portability within six months of a bona fide request from a telecommunications carrier absent a waiver from the FCC. 47 C.F.R. § 52.23. HTC and Polar have not sought a waiver from the FCC for providing number portability.
2. Midcontinent's request for LNP from HTC and Polar met the FCC's requirements for a bona fide request.
3. HTC and Polar have failed to comply with the requirements of the FCC's number portability rules.
4. An interconnection agreement with a provider of telecommunications services is not required to obtain LNP from that provider. *Memorandum Opinion and Order*, 18 F.C.C.R. 20971, 20972; *See Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 18 F.C.C.R. 23697, 23710-2 (2003) ("November Order").
5. The FCC's rules do not provide for waivers from the number portability requirements for economic reasons or if local calling areas do not match. 47 C.F.R. § 52.23(d).
6. It is evident from the evidence that there is no issue in this matter that falls within the special expertise of the FCC, but rather, one that falls within the jurisdiction and expertise of the Commission, a discrimination issue.

7. The FCC's rules require number portability to be provided when rate centers match and in many circumstances when rate centers do not match. *November Order*, 18 F.C.C.R. at 23708.

8. A voluntary agreement between two carriers cannot exempt them from compliance with the FCC's number portability requirements. 47 C.F.R. § 52.23.

9. The Telecommunications Act of 1996 ("the Act") did not divest states of any jurisdiction over matters that were not specifically preempted. Section 261 of the Act specifically addresses the effect of the provisions added by the Act on State jurisdiction. *See* 7 U.S.C. § 261(b), (c).

10. The Commission has jurisdiction over this matter under N.D.C.C. ch. 49-21, specifically pursuant to N.D.C.C. § 49-21-24. North Dakota's statutory provisions are not inconsistent with the regulatory scheme of the Act. Relationships between local exchange carriers are within the Commission's jurisdiction.

11. N.D.C.C. § 49-21-24 states, in part:

49-21-24. Prohibited acts --- Arbitration.

1. A telecommunications company may not:

a. Discriminate against another provider of telecommunications services by refusing or delaying access to the company's services;

b. Discriminate against another provider of telecommunications services by refusing or delaying access to essential facilities on terms and conditions no less favorable than those the telecommunications company provides to itself and its affiliates...

c. Degrade the quality of access or service provided to another provider of telecommunications services.

2. A claim that a telecommunications company has violated this section may be resolved by arbitration or by a complaint filed with the commission ... A complaint filed with the commission must be referred to the office of administrative hearings for hearing

and issuance of recommended findings of fact, conclusions of law, and an order pursuant to chapter 28-32...

12. “Discriminate” or “Discrimination” is not defined in N.D.C.C. ch. 49-21. The plain meaning of discrimination more commonly seems to require discrimination against one or more as opposed to others, *i.e.*, unfair treatment as compared to others. *See Blacks Law Dictionary*, eighth edition (2004) (definition of discrimination); *Merriam Webster Collegiate Dictionary*, tenth edition (1993) (definition of discriminate). However, there is nothing in the language of N.D.C.C. § 49-21-24 that seems to require a comparison, *i.e.*, a discrimination against one or more as opposed to others. N.D.C.C. § 49-21-24(1)(a) merely states that “[a] telecommunications company may not ... discriminate against another provider of telecommunications services by refusing or delaying access to the company’s services.” It does not seem to invite comparison to the services provided to other telecommunications companies but, rather, a distinguishing based on and measured by the provider of telecommunications services merely coming forward to request access a telecommunications company’s services and the telecommunications company refusing or delaying access. This same logic is followed through in the wording of N.D.C.C. § 49-21-24(1)(b). This provision, regarding providing essential services, too, seems to be a prohibition of the refusing or delaying telecommunications services to one telecommunications company by a another telecommunications company, it is not discrimination that must be measured against what is provided to others that are not a party, but, rather, on what the telecommunications company provides to itself or its affiliates. Finally, the same logic is followed through in the wording of N.D.C.C. § 49-21-24 (1)(c). A telecommunications company may not degrade the quality or access of services provided to another provider of telecommunications services. Thus, read together, these three provisions of N.D.C.C. § 49-21-24(1) seem to prohibit results that mean a refusing or delaying of the

company's services that it provides to itself or its affiliates, especially essential services, or a degrading of the quality or access of services.

13. Nevertheless, the evidence in this matter shows, by the greater weight of the evidence, that there is also discrimination as compared to others that are not a party in this matter.

14. Polar and HTC have discriminated against Midcontinent, in violation of the requirements of N.D.C.C. § 49-21-24, by entering into interconnection agreements with Qwest that provide for number portability without conditions while insisting that Midcontinent meet conditions to obtain number portability.

15. Polar and HTC have discriminated against Midcontinent, in violation of the requirements of N.D.C.C. § 49-21-24, because they have refused to provide number portability to Midcontinent on the ground that it intends to offer service via resale when they would provide number portability to Midcontinent if it intended to offer service via its own facilities.

16. Polar and HTC have discriminated against Midcontinent, in violation of the requirements of N.D.C.C. § 49-21-24, because they have discriminated in favor of themselves in the availability of numbering resources.

17. Polar and HTC have discriminated against Midcontinent, in violation of the requirements of N.D.C.C. § 49-21-24, because they are willing to provide number portability to wireless carriers upon satisfaction of conditions within the control of the wireless carriers while insisting that Midcontinent can obtain number portability only upon satisfaction of a condition that requires the cooperation of Qwest.

18. Under N.D.C.C. §§ 49-02-02 and 49-21-01.7, the Commission has the power to “[r]equire telecommunications companies to conform to the laws of this state and to all rules

regulations, and orders of the commission not contrary to law.” N.D.C.C. § 49-21-0.1.7(2); *see* 49-02-02(2), which is essentially the same provision but applying to “public utilities and other persons”.

19. The appropriate remedy for the discriminatory actions of Polar and HT is to require them to conform to the laws of this state by providing number portability to Midcontinent by a time certain. Delay has gone on long enough, to the extent that it amounts to refusal. Negotiations have been fruitless and should not be extended.


ORDER

1. The Commission has jurisdiction of this matter under authority of N.D.C.C. ch. 49-21, and specifically N.D.C.C. § 49-21-24.

2. The evidence shows, by the greater weight of the evidence, that Polar has violated the provisions of N.D.C.C. § 49-21-24 by discriminating against Midcontinent by delaying and refusing to grant Midcontinent LNP when, in fact, Polar grants LNP to Qwest.

3. The evidence shows, by the greater weight of the evidence, that HTC has violated the provisions of N.D.C.C. § 49-21-24 by discriminating against Midcontinent by delaying and refusing to grant Midcontinent LNP when, in fact, HTC intends to grant LNP to wireless carriers.

4. Accordingly, Polar and HTC are ordered to make unconditional Local Number Portability available to Midcontinent in the Mayville and Hillsboro exchanges on or before January 1, 2005.

By: 
Allen C. Hoberg, ALJ, Hearing Officer
Public Service Commission
Office of Administrative Hearings

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

IN THE MATTER OF:

Case No. PU-04-237

Midcontinent Communications, a
South Dakota Partnership,

Complainant,

vs.

Polar Telecom, Inc.,
a North Dakota Corporation d/b/a Polar
Communications, and HTC Services, Inc.,
A Minnesota Corporation,

Respondents.

ORDER
OAH File No. 20040205
November _____, 2004

The evidence of the record in this matter has been considered and appraised. IT IS ORDERED that the recommended findings of fact and conclusions of law of the hearing officer are adopted as the Public Service Commission's findings of fact and conclusions of law in this matter. IT IS FURTHER ORDERED that the recommended order of the hearing officer is adopted as the Public Service Commission's final order in this matter.

SUSAN E. WEFALD
COMMISSIONER

TONY CLARK
COMMISSION PRESIDENT

KEVIN KRAMER
COMMISSIONER

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

IN THE MATTER OF:

Case No. PU-04-237

Midcontinent Communications, a
South Dakota Partnership,

Complainant,

vs.

Polar Telecom, Inc.,
a North Dakota Corporation d/b/a Polar
Communications, and HTC Services, Inc.,
A Minnesota Corporation,

Respondents.

CERTIFICATE OF SERVICE
OAH File No. 20040205

The undersigned certifies that true and correct originals of the **RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**, and the proposed final **ORDER** were mailed, inside mail, at the State Capitol, on the 10 day of November, 2004, to

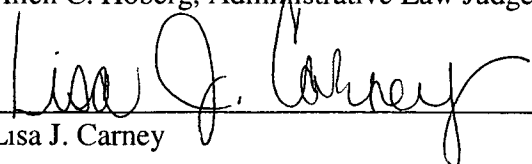
Illona Jeffcoat-Sacco
Executive Secretary
ND Public Service Commission
600 E. Boulevard Avenue
Bismarck, ND 58505

and that true and correct copies of the above documents were mailed, regular mail, on the 10 day of November, 2004, to:

William J. Brudvick
Ohnstad Twichell, P.C.
P.O. Box 547
Mayville, ND 58257

Mr. Patrick W. Durick
Pearce & Durick
P.O. Box 400
Bismarck, ND 58502

OFFICE OF ADMINISTRATIVE HEARINGS
Allen C. Hoberg, Administrative Law Judge



Lisa J. Carney



WILLIAM P. PEARCE
 PATRICK W. DURICK
 B. TIMOTHY DURICK
 GARY R. THUNE •
 DAVID E. REICH
 JEROME C. KETTLESON
 LARRY L. BOSCHEE •
 LAWRENCE BENDER, PC •
 JONATHAN P. SANSTEAD
 BONNIE L. CHRISTNER •

ATTORNEYS AT LAW
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 P.O. BOX 400
 BISMARCK, NORTH DAKOTA 58502

TELEPHONE (701) 223 2890
 FAX (701) 223 7865
 E-MAIL law.office@pearce-durick.com

October 21, 2004

HAND DELIVERED

Alan C. Hoberg, ALJ
 Office of Administrative Hearings
 State of North Dakota
 1707 North Ninth Street
 Bismarck, ND 58501-1882

RE: OAH File No 20040205


Dear Mr. Hoberg

I have enclosed for filing **Reply Brief of Midcontinent Communications** and Affidavit of Service.

Thank you for your consideration. If you have any questions or comments please advise me.

Sincerely,

PEARCE & DURICK


 PATRICK W. DURICK

PWD/jf
 cc w/enc: William Brudvik
 J.G. Harrington
 Mary Lohnes

RECEIVED

OCT 21 2004

OFFICE OF

54 PU-04-237

Pages 1

Cover letter re Reply Brief (Docketed out of sequence) by Midcontinent Communications by Patrick Durick

• ALSO LICENSED IN MINNESOTA • ALSO LICEN

10/21/2004

CC Comm Legal Illona ALJ

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

IN THE MATTER OF:)	
)	
Midcontinent Communications, a	)	No. OAH File No. 20040205
South Dakota Partnership,	)	Case No. PU-04-237
)	
Complainant,)	
)	
vs.)	
)	
Polar Telecom, Inc.)	
a North Dakota Corporation d/b/a Polar)	
Communications and HTC Services, Inc.,)	
a Minnesota corporation,)	
)	
Respondents.)	

Reply Brief of Midcontinent Communications

Midcontinent Communications (“Midcontinent”), by its attorneys, hereby submits its reply brief in the above-referenced matter. For the reasons described below, the Commission should grant the complaint and order HTC Services, Inc. (“HTC”) and Polar Telecommunications (“Polar”) to provide number portability to Midcontinent.

I. Introduction

In their initial brief, Polar and HTC disagree with little or nothing in the Midcontinent brief. Rather, they try to change the subject, arguing that the Commission should defer to the FCC or should focus on narrow legalisms rather than the evidence of record.

This tactic should not come as a surprise. The evidence shows that Polar and HTC have been avoiding their obligation to provide number portability to Midcontinent for close to two years, despite their plain obligation to do so under the FCC’s rules. The evidence also shows that Polar and HTC have no cognizable excuse for their failure to comply with the number

portability rules – indeed, even their claim that there is a rate center mismatch was shown to be incorrect.

Polar and HTC also ignore most of the proof that they are discriminating against Midcontinent. This includes the evidence that they are treating Midcontinent differently than Qwest, differently than wireless providers and differently than they would treat facilities-based providers; and the evidence that their refusal to provide number portability gives them a competitive advantage in the local telephone marketplace. Consequently, the overwhelming weight of the evidence supports the conclusion that the Commission must grant Midcontinent's petition.

The arguments in the Polar and HTC brief are no more relevant than their earlier, abandoned claims. There is no basis for the claim that this proceeding should be brought to the FCC rather than the Commission or the argument that Midcontinent should have engaged in further futile negotiations with Polar and HTC. The Commission plainly should consider all of the evidence on discrimination that was adduced at the hearing, but there is ample evidence of discrimination even if the Commission were to address only the specific examples of discriminatory behavior described in the complaint. Finally, the remedy sought by Midcontinent is well within the Commission's power, as Midcontinent seeks only to have the Commission order the respondents to cease their discrimination.

II. This Proceeding Is Properly Before the Commission.

Polar and HTC make two arguments that amount to claims that this proceeding does not belong before the Commission. The first is that Midcontinent should have gone to the FCC.¹

¹ Respondents' Post-Hearing Brief ("Respondents' Brief") at 2-3.

The second is that Midcontinent had an unfulfilled obligation to negotiate in good faith with Polar and HTC.² Neither claim is correct.

A. Polar and HTC Misconstrue the FCC's Role.

Citing a footnote in the United States Supreme Court's *Iowa Utilities Board* decision, Polar and HTC argue that state commissions, including this Commission, have a limited role under the regulatory regime created by the Telecommunications Act of 1996.³ This is true as far as it goes: The Supreme Court affirmed that the FCC sets the basic rules for carrier obligations under Section 251 of the Communications Act.⁴ However, the state role is not as limited as respondents claim and there is no issue that has to be brought before the FCC.

As an initial matter, the 1996 Act did not divest states of any jurisdiction over matters that were not preempted specifically. Section 261 of the Communications Act specifically addresses the effect of the provisions added by the 1996 Act on state jurisdiction:

- (b) EXISTING STATE REGULATIONS.—Nothing in this part [Part II of Title II of the Communications Act] shall be construed to prohibit any State commission from enforcing regulations prescribed prior to the date of enactment of the Telecommunications Act of 1996, or from prescribing regulations after such date of enactment, in fulfilling the requirements of this part, if such regulations are not inconsistent with the provisions of this part.
- (c) ADDITIONAL STATE REQUIREMENTS.—Nothing in this part precludes a State from imposing requirements on a telecommunications carrier that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part or the Commission's [FCC's] regulations to implement this part.⁵

In other words, the 1996 Act did not preempt existing state regulation or state regulation that complemented the purposes of the 1996 Act.

² *Id.* at 5-6.

³ *Id.* at 2-3.

⁴ *AT&T v. Iowa Utilities Board*, 525 U.S. 366, 378 (1998).

⁵ 47 U.S.C. § 261(b), (c).

This analysis is consistent with the Supreme Court’s reasoning in *Iowa Utilities Board*. The language quoted by respondents does not describe the entirety of the state commission role in local competition, but instead discusses the respective places of the states and the FCC in setting the rules that implement Sections 251 and 252 of the Communications Act. For instance, the passage quoted on page 3 of the Polar and HTC brief is in a footnote to the following text: “We think that the grant in §201(b) means what it says: The FCC has rulemaking authority to carry out the ‘provisions of this Act,’ which include §§251 and 252, added by the Telecommunications Act of 1996.”⁶ In this context, it is clear that the Court was discussing which agencies would set the rules, not which agencies would enforce the requirements of the 1996 Act. In fact, the footnote quoted by respondents goes on to say that “[t]he question is whether the state commissions’ participation in the administration of the new *federal* regime is to be guided by federal-agency regulations.”⁷ Respondents’ citation to a later portion of this decision also is misleading. The Court was not describing approving interconnection agreements and granting rural exemptions as the only roles for state regulators, but merely responding to the lower court’s conclusion that the FCC could not set rules governing those powers.⁸ In both instances, and throughout the decision, the Court said nothing at all about the state role in enforcing obligations under Section 251 and certainly did not hold that states had lost their power to enforce their own statutes governing carrier behavior.

⁶ *Iowa Utilities Board*, 525 U.S. at 378.

⁷ *Id.*, n.6 (emphasis in original).

⁸ In full, the sentence quoted by respondents reads: “While it is true that the 1996 Act entrusts state commissions with the job of approving interconnection agreements, 47 U.S.C. §252(e) (1994 ed., Supp. II), and granting exemptions to rural LECs, §251(f), these assignments, like the rate-establishing assignment just discussed, do not logically preclude the Commission’s issuance of rules to guide the state-commission judgments.” *Id.*, 525 U.S. at 385.

Moreover, Polar and HTC have not identified any dispute that should be brought before the FCC. As Midcontinent's initial brief and the testimony established, the FCC's rules are clear on their face, and there is no basis for either Polar or HTC to seek relief from the number portability requirement.⁹ For that matter, Polar and HTC have chosen not to seek relief from the FCC, even though they have had close to two years to do so.¹⁰ It is particularly telling that respondents' initial brief makes no effort at all to respond to this showing, and as a consequence it is evident that there simply is no issue that falls within the special expertise of the FCC in this proceeding.

Finally, the respondents provide no reason to believe that exercise of the Commission's complaint jurisdiction under NDCC 49-21-24 is inconsistent with the regulatory scheme created by the 1996 Act. While number portability is mandated by federal law, it is an inherent element of local telephone competition, and relationships between local exchange carriers plainly are within the Commission's purview. Respondents point to no federal rule that prohibits this Commission from enforcing its antidiscrimination provisions and, in fact, enforcement of NDCC 49-21-24 is consistent with the language of Section 261(c) of the Communications Act that allows state commissions to "impos[e] requirements on a telecommunications carrier that are necessary to further competition in the provision of telephone exchange service."¹¹ Consequently, there is no reason for the Commission to shy away from exercising its jurisdiction in this proceeding.

⁹ Midcontinent Brief at 3-5, 10-17.

¹⁰ Tr. at 105 (Bodamer), 175 (Schuele).

¹¹ 47 U.S.C. § 261(c).

B. Midcontinent Had No Obligation to Engage in Additional Negotiations with Polar and HTC.

The respondents' next reason for the Commission not to address the complaint is that Midcontinent had an obligation to engage in "good faith negotiations" prior to the establishment of number portability.¹² This claim is inconsistent with the testimony and the FCC's rules and, in any event, Midcontinent was more than patient enough to satisfy any good faith negotiation requirement in its discussions with the respondents.

First, it is apparent from both the FCC's rules and the testimony, that parties need not have an interconnection agreement – or an agreement of any kind – prior to the implementation of number portability. The FCC's rules are quite explicit that only a request for portability is required, and state that "[b]eginning January 1, 1999, all LECs must make a long-term database method for number portability available within six months after a specific request by another telecommunications carrier in areas in which that telecommunications carrier is operating or plans to operate."¹³ The rule makes no mention of a requirement for negotiations or an interconnection agreement. Indeed, when the FCC considered whether an interconnection agreement was necessary for number portability in the context of wireless portability, it concluded – on two separate occasions – that no agreement was required.¹⁴ The *November Order*, in particular, held that there was no need for an agreement to implement number

¹² Respondents' Brief at 5-6.

¹³ 47 C.F.R. § 52.23(c).

¹⁴ Local Number Portability – Carrier Requests for Clarification of Wireless-Wireless Porting Issues, *Memorandum Opinion and Order*, 18 F.C.C.R. 20971, 20972 (“[W]e take this opportunity to reiterate the number portability requirements for wireless-wireless porting [A]ny agreements establishing terms for interconnection are also not required between wireless carriers.”); Telephone Number Portability, *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 18 F.C.C.R. 23697, 23710-2 (2003) (“*November Order*”).

portability “because this obligation can be discharged with a minimal exchange of information.”¹⁵

This conclusion is confirmed by the testimony. The uncontradicted and unchallenged evidence of record is that agreements are not necessary for carriers to implement number of portability.¹⁶ Respondents offer nothing in response.

Even if there were some obligation to negotiate in good faith before obtaining number portability, however, it is clear that Midcontinent would have met that obligation. The record establishes that the parties engaged in discussions for a period of close to a year with no result. During that time there was only real issue of contention, which was the insistence of Polar and HTC that Midcontinent somehow solve the problems created by the Polar-HTC extended area service agreement. Midcontinent tried various approaches to resolving the conflict, including language in interconnection proposals that would have addressed those elements of the issue within its control.¹⁷ Nothing worked, and nothing would have worked, because the respondents were and remain intransigent. Simply put, they refuse to provide number portability unless Midcontinent guarantees them that they will retain the benefit of their private bargain, which

¹⁵ *November Order*, 18 F.C.C.R. at 23711 (“We agree with Sprint that wireline carriers should be required to port numbers to wireless carriers without necessarily entering into an interconnection agreement because this obligation can be discharged with a minimal exchange of information. We thus find that wireline carriers may not unilaterally require interconnection agreements prior to intermodal porting.”)

¹⁶ *See, e.g.*, Tr. at 70-71 (Lohnes) (Midcontinent has obtained number portability elsewhere without negotiating an interconnection agreement), 157 (Schuele).

¹⁷ Some of the language that Midcontinent proposed can be seen in the deleted text of respondents’ proposed interconnection agreement. *See* Exhibit R-14 (proposed interconnection agreement), § VII. *See also* Tr. at 2156 (Dunning) (agreement “went through some . . . revision back and forth”), 219 (Dunning).

they acknowledge that Midcontinent cannot do.¹⁸ If there was a failure to bargain in good faith, it was on the part of the respondents.

III. The Record Establishes that Polar and HTC Have Violated Their State Law Obligation Not to Discriminate.

Respondents limit their response to the showing of discrimination in the initial brief to two elements of Midcontinent's claim that were described in the complaint.¹⁹ They thus effectively concede that the evidence of record shows that they discriminated in other ways. To avoid this fact, they suggest that any evidence other than what supports the specific statements in the complaint should be ignored. This is incorrect as a matter of law, but even if the Commission were limited to considering those statements, the evidence is more than sufficient to show that both HTC and Polar are discriminating against Midcontinent.

As a threshold matter, the record shows that there are multiple grounds to conclude that the respondents are discriminating against Midcontinent. As Midcontinent's initial brief demonstrated, there are four distinct ways that the refusal to provide number portability is unlawfully discriminatory. The respondents discriminated by:

- Being unwilling to provide Midcontinent with the same terms they offered to Qwest;
- Denying number portability to Midcontinent as a reseller when they would have provided it to a facilities-based carrier;
- Giving themselves access to number resources that they denied to Midcontinent; and
- Imposing conditions on access to number portability for Midcontinent that were different from the conditions they would impose on wireless providers.²⁰

Respondents' brief does not deny these showings or the facts that support them. Thus, the Commission must conclude that Polar and HTC are discriminating against Midcontinent.

¹⁸ See, e.g., Tr. at 166 (Schuele) (“[W]e need an understanding with Qwest.”)

¹⁹ Respondents' Brief at 3-4, 7-9.

²⁰ Midcontinent Brief at 5-10.

Rather than address this evidence, respondents make the implicit claim that it should be ignored by limiting their argument to the specific statements made in the complaint. The respondents' brief never explicitly explains why the Commission should not consider all of the evidence adduced at the hearing and how that evidence relates to the respondents' obligations under NDCC 49-21-24. There is no basis for the Commission to disregard what happened at the hearing.

Initially, it would be unreasonable to prevent Midcontinent from using evidence properly obtained at the hearing. Polar and HTC had every opportunity to object or respond to all the evidence of record and to the questions that produced the evidence.²¹ Objections to the pleadings at this late date, such as questions as to the relief requested and the specificity of the allegations of discrimination, evidence the reluctance of the respondents to address the substantive issues and avoid the merits of the action. NDCC 28-32-21, which requires “. . . a clear and concise statement of the claims or charges . . .” mirrors Rule 8 (a), North Dakota Rules of Civil Procedure, which requires that the pleading contain, “. . . a short and plain statement of the claim. . .” Both NDCC 28-32-21 and Rule 8(a) establish a “notice” pleading regime. Under a “notice” pleading regime the pleadings are not required to be comprehensive and detailed. The function of the pleadings is to identify the type of claim that is involved, and the pleadings are to be liberally construed to do substantial justice. *See In re Disciplinary Action Against Garaas*, 652 N.W.2d 918 (N.D. 2002) (Notice pleading in an administrative hearing). The complaint provided notice that Midcontinent was alleging discrimination in the provision of number portability by Polar and HTC, in violation of NDCC 49-21-24. This notice was sufficient for the

²¹ In fact, some of the evidence that supports the showing that the respondents discriminated was introduced by the respondents themselves. *See, e g* , Exhibit R-14 (proposed interconnection agreement).

respondents to present all substantive claims and defenses available to them and, indeed, they do not claim that they would have presented any other evidence if Midcontinent's complaint had been different.

Discovery and pre-hearing/pre-trial conferences are available to sharpen the issues under a "notice" pleading regime. In this case, respondents availed themselves of discovery, and a pre-hearing conference was held at the request of respondents. Among the purposes of a pre-hearing conference as outlined in Section 69-02-03-01, North Dakota Administrative Code are: "1. Simplification of Issues." and "Necessity or desirability of amendments to the pleadings." Respondents did not utilize either discovery or the pre-hearing conference to cure any perceived procedural problems and they should not now be heard in their attempt to avoid the merits of this action on flimsy procedural grounds.

Indeed, it is evident from the evidence presented by the respondents at the hearing that they did not believe that the specific incidents described in the complaint were the only issues relevant to the proceeding. For instance, respondents presented elaborate justifications for their actions in their direct case, including detailed discussions of how they came to enter into their EAS agreement. They would not have done so if they believed that the only issues in the proceeding were the ones addressed in respondents' initial brief.

Moreover, there is nothing unusual about parties making arguments based on new evidence that becomes available in a hearing. The purposes of cross-examination include testing the basis for a party's claims and obtaining a better understanding of the reasons for a party's actions. The results of such examination often bring to light evidence that was not available prior to the hearing, and there is no reason for parties or the Commission to ignore it. In fact, respondents themselves rely on new evidence from the hearing to support a claim not made in

their answer.²² In addition, Midcontinent is not making any new legal claims. Rather, the evidence supports the existing claim of discrimination, which is precisely what the complaint alleged.

Even if the Commission were to consider only the specific factual claims made in the complaint, however, the evidence still would show that Polar and HTC are discriminating against Midcontinent. As a threshold matter, the respondents' response to the specific descriptions of discrimination in the complaint relies on the assumption that their efforts to mislead Midcontinent should be ignored.²³ They should not, and the Commission should not permit Polar and HTC to benefit from their misbehavior.

The evidence supports Midcontinent's claims more directly as well. First, the respondents and Qwest have entered into interconnection agreements that obligate them to provide number portability to Qwest, but they refuse to provide number portability to Midcontinent.²⁴ This evidence is consistent with Midcontinent's claim as to Polar and Qwest, and Polar provided no evidence that it would not honor its obligation to Qwest.²⁵ Thus, the Commission should conclude that Polar is discriminating against Midcontinent and in favor of Qwest in the provision of number portability.

The Commission also should conclude that HTC is discriminating against Midcontinent and in favor of wireless providers. The evidence shows clearly that the conditions that HTC is

²² See, e.g., Respondents' Brief at 5 (citing testimony of Mary Lohnes).

²³ For instance, the respondents' March 3 letter to Midcontinent stated that "Polar is already performing porting under its interconnection arrangements with Qwest." Exhibit C-9. Nevertheless, at the hearing, Polar witness Dunning said that this language did not mean that Polar was porting to Qwest and that he believed that porting numbers *from* Qwest was "performing porting" under the agreement. Tr. at 225-7 (Dunning).

²⁴ See Midcontinent Brief at 6-7.

²⁵ The only evidence is that Polar dishonored a request for number portability that it knew was generated by Midcontinent. See Exhibit C-10.

imposing on Midcontinent are not the same as the conditions applicable to wireless providers because Midcontinent is being required to do something that requires Qwest's assistance, while the wireless providers are not.²⁶ This is plain discrimination. While respondents argue that the Commission should find that this claim is not ripe, it plainly is. The *Sposato* decision cited in respondents' brief is not relevant for two important reasons. The first is that the discrimination being practiced by respondents is not a single incident in the past that might or might not be repeated – it is ongoing and continuous, and Midcontinent's request for number portability never has been extinguished. Thus, there is nothing hypothetical about the relief that Midcontinent seeks. Second, HTC's own testimony is that it will continue to discriminate in the future.²⁷ Consequently, to find that Midcontinent's claim is not ripe, the Commission would have to find that HTC's unchallenged testimony as to its future intentions was unreliable, a leap that the Commission cannot reasonably make. As a result, respondents' claim that Midcontinent's claim is not ripe is not credible.

IV. The Commission Should Grant the Relief Requested by Midcontinent.

Respondents' final argument is that the Commission cannot grant the relief requested by Midcontinent because that relief is solely within the FCC's power. Once again, respondents misconstrue the roles of the Commission and the FCC.

There is no doubt that Polar and HTC are in violation of the FCC's rules. That does not, however, mean that they cannot be violating North Dakota law as well.²⁸ Respondents have presented no reason to believe that the FCC has preempted any element of the Commission's

²⁶ Midcontinent Brief at 9-10.

²⁷ Tr. at 166 (Schuele).

²⁸ If respondents were claiming that they were complying with FCC rules, it is possible they might reasonably argue that compliance with federal requirements would excuse them from meeting their obligations under state law. But that is not the case.

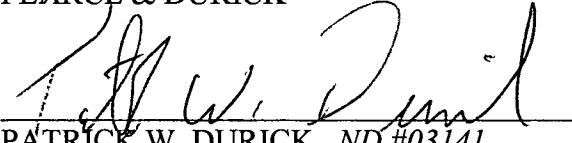
antidiscrimination jurisdiction and, as shown above, federal law specifically preserves state law that does not conflict with federal requirements.²⁹

In any event, the relief requested by Midcontinent is not relief from a violation of federal rules, but a remedy for the discrimination it has suffered. That remedy is for the respondents to end their discriminatory behavior by providing local number portability. While that remedy also will bring the respondents into belated compliance with the FCC's rules, that is not the Commission's concern or Midcontinent's. Rather, the Commission's focus should be on ending the ongoing discrimination that Midcontinent is suffering. That relief plainly is within the Commission's purview and it should be granted.

V. Conclusion

For all these reasons, Midcontinent requests that the Commission grant its complaint and order Polar and HTC to provide number portability to Midcontinent forthwith.

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Attorneys for Midcontinent Communications

²⁹ See *supra* Part II.

STATE OF NORTH DAKOTA

PUBLIC SERVICE COMMISSION

Midcontinent Communications, a)
 South Dakota Partnership,)
)
 Complainant,)
)
 vs.)
)
 Polar Telecom, Inc.)
 a North Dakota Corporation d/b/a Polar)
 Communications and HTC Services, Inc.,)
 a Minnesota corporation,)

No. OAH File No. 20040205
 PU-04-237

Respondents.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NORTH DAKOTA)
) ss.
 COUNTY OF BURLEIGH)

Sara Carr hereby certifies that on October 21, 2004, she served a copy of the attached:

1. Reply Brief of Midcontinent Communications;

by placing a true and correct copy thereof in an envelope and depositing the same, with postage prepaid, in the United States mail at Bismarck, North Dakota. addressed to the following:

Mr. William J. Brudvik
 OHNSTAD TWICHELL, PC
 P. O. Box 547
 Mayville, ND 58247--0547

Allen C. Hoberg, Director
 Office of Administrative Hearings
 1707 North Ninth Street
 Bismarck, ND 58501-1882

via Regular Mail

via Hand Delivery

Sara Carr

Sara Carr

Subscribed and sworn to before me this 21 day of October, 2004.

Jeanne A. Feist

Notary Public

My commission expires:





WILLIAM P. PEARCE
 PATRICK W. DURICK
 B. TIMOTHY DURICK
 GARY R. THUNE
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September 24, 2004

Alan C. Hoberg, ALJ
 Office of Administrative Hearings
 State of North Dakota
 1707 North Ninth Street
 Bismarck, ND 58501-1882

RE. OAH File No. 20040205

Dear Mr. Hoberg:

At the hearing in this matter, Midcontinent requested that you take Administrative Notice of the Interconnection Agreement between Qwest and Midcontinent. The subject interconnection agreement was between US West and Midcontinent and was filed with the PSC on March 23, 1999. Approval of that agreement is contained in PSC Case No. PU-1945-99-125. For your convenience I have attached what Midcontinent considers to be relevant portions of the agreement between US West and Midcontinent, which includes the cover page with filing information, the Table of Contents, the first page of the agreement, Sections 9, INTERIM NUMBER PORTABILITY, Section 10, PERMANENT NUMBER PORTABILITY and the signature page for the agreement.

Midcontinent also requests that you take administrative notice of the fact that Sections 9 and 10 of the subject agreement have not been amended.

I am furnishing Mr. Brudvik with a copy of this letter and attachment so he will have the opportunity to comment or suggest that you consider any other provisions in the agreement.

Sincerely,

PEARCE & DURICK

PATRICK W. DURICK

PWD/jf

cc: William Brudvik w/attachment
 J. G. Harrington, w/attachment
 Mary Lohnes w/

52 PU-04-237

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• ALSO

Administrative Notice of Interconnection
 Agreement between Qwest &
 by Midcontinent Communications by Patrick Durick

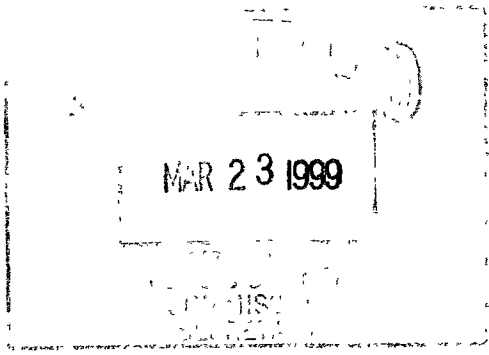
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CC Comm Legal Ilona ALJ

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OFFICE OF
 ADMINISTRATIVE HEARINGS



INTERCONNECTION AGREEMENT

BETWEEN

**MIDCO COMMUNICATIONS, INC.
d.b.a. MIDCONTINENT COMMUNICATIONS, INC.**

AND

U S WEST COMMUNICATIONS, INC.

FOR

NORTH DAKOTA

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APPENDIX A. Application of Rates and Charges

APPENDIX B. Amendments to the Contract

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INTERCONNECTION AGREEMENT

This Interconnection Agreement is made by and between MIDCO Communications, Inc , d b a MidContinent Communications, Inc ("**MIDCO**"), a South Dakota corporation and U S WEST Communications, Inc ("**U S WEST**"), a Colorado corporation.

1. RECITALS

- 1 1 Pursuant to this Interconnection Agreement, MIDCO and U S WEST, will extend certain arrangements to one another within each LATA in which they both operate within the State of North Dakota This Interconnection Agreement is a combination of agreed terms and terms imposed by arbitration under Section 252 of the Communications Act of 1934, as modified by the position of either Party on any given issue The Parties enter into this Interconnection Agreement without prejudice to any position they may have taken previously, or may take in the future in any legislative, regulatory, or other public forum addressing any matters, including matters related to the types of arrangements prescribed by this Interconnection Agreement
- 1 2 The Parties agree and understand that U S WEST is proposing certain provisions in this Interconnection Agreement, based, in large part, on the FCC's First Report and Order, in the Matter of Implementing of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No 96-98, rel Aug 8, 1996 ("FCC 1st Order") and the Second Report and Order and Memorandum Opinion and Order, in the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No 96-98, rel Aug. 8, 1996 ("FCC 2d Order") To the extent that certain of the rules contained in the FCC 1st Order and the FCC 2d Order, or any other FCC Order adopted to implement the Telecommunications Act of 1996, are deemed by the courts to be not effective, the Parties agree to enter into negotiations to modify those portions of this Interconnection Agreement necessary to comport with the final court decisions and subsequent FCC rules adopted to comply with the court's decisions, the remaining provisions of this Interconnection Agreement will remain in full force and effect The Parties agree to negotiate in good faith on replacement language

2. SCOPE OF AGREEMENT

- 2 1 This Interconnection Agreement sets forth the terms, conditions and prices under which U S WEST agrees to provide (a) services for resale (hereinafter referred to as "Local Services") (b) certain Unbundled Network Elements, Ancillary Functions and additional features to MIDCO (hereinafter collectively referred to as "Network Elements" or "Unbundled Network Elements") for MIDCO's own use or for resale to others The Interconnection Agreement also sets forth the terms, conditions and prices under which the parties agree to provide interconnection and reciprocal compensation for the exchange of local traffic between U S WEST and MIDCO for purposes of offering telecommunications services The

security access to the Wire Center. MIDCO will sign off on the completion of the physical space via the Physical or Cageless Physical Collocation completion package. This will activate the monthly billing for leased space. MIDCO may then proceed with the installation of its equipment in the Collocation space. Once MIDCO's equipment has been installed and cable provided to the SPOT Frame, U S WEST will complete all remaining work activities. A second completion package will be provided for MIDCO's approval of the project. This completion package will initiate the recurring collocation charges associated with the remaining monthly charges (e.g., Collocation Entrance Facility, DC Power, etc.)

9. INTERIM NUMBER PORTABILITY

9.1 General Terms

9.1.1 U S WEST shall immediately implement interim number portability solutions to permit end-users to change to MIDCO without changing their telephone numbers. Such interim solutions include Remote Call Forwarding ("RCF") and flexible Direct Inward Dialing ("DID"). MIDCO preferred interim solution is RCF. The Parties shall provide Number Portability on a reciprocal basis to each other to extent technically feasible, and in accordance with rules and regulations as from time to time prescribed by the FCC and/or the Commission.

9.1.2 Until Permanent Number Portability is implemented by the industry pursuant to regulations issued by the FCC or the Commission, the Parties agree to provide Interim Number Portability ("INP") to each other through remote call forwarding, or direct inward dialing.

9.1.3 DID is an INP method that makes use of direct inward dialing trunks. Each DID trunk group used for INP is dedicated to carrying DID INP traffic between the U S WEST end office and the MIDCO switch. Traffic on these trunks cannot overflow to other trunks, so the number of trunks shall be conservatively engineered by U S WEST. Also, inter-switch signaling is usually limited to multi-frequency (MF). This precluded passing Calling Line ID to the MIDCO switch. Once permanent number portability is implemented pursuant to FCC or Commission regulation, either Party may withdraw, at any time and its sole discretion, its INP offerings, subject to advance notice to the other Party and coordination to allow the seamless and transparent conversion of INP customer numbers to permanent number portability. Upon implementation of permanent number portability pursuant to FCC regulations, both parties agree to conform and provide such permanent number portability.

9.1.4 MIDCO shall have the right to use the existing U S WEST 911 infrastructure for all 911 capabilities. With respect to 911 service associated with ported numbers under INP, U S WEST agrees that all ported directory numbers (DN) will remain in the Public Service Answering Points (PSAP) routing databases. When RCF is used, both

the ported numbers and shadow numbers for MIDCO ported subscribers shall be stored in PSAP databases MIDCO shall have the right to verify the accuracy of the information in the PSAP databases

- 9 1 5 U S WEST will update its Line Information Database (“LIDB”) listings for retained numbers, and restrict or cancel calling cards associated with these forwarded numbers as directed by MIDCO LIBD updates shall be completed by the Parties on the same business day each INP arrangement is activated Further, U S WEST will not block third party and collect calls to those numbers unless requested by MIDCO
- 9 1 6 U S WEST shall exchange with MIDCO, SS7 TCAP messages as required for the implementation of Custom Local Area Signaling Services (CLASS) or other features available in the U S WEST network Certain features are not available in the U S WEST network Certain features are not available for INP telephone numbers due to technical limitations The following lists the technically available services under INP Terminating features are those related to calls TO DID or RCF customer’s ported telephone numbers Originating features are those related to calls FROM the ported customer’s MIDCO provided line.

<u>Terminating Features</u>	<u>DID</u>	<u>RCF</u>	<u>Notes</u>
Caller Identification	No	Yes	1
Last Call Return	No	Yes	1
Selective Call Forwarding	No	Yes	1
Call Rejection	No	Yes	1
Call Trace	No	Yes	1
Priority Call	No	Yes	1,2
Call Waiting	Yes	Yes	2
Busy Line Verification	No	No	
Continuous Redial	No	No	3

NOTES

- 1 Requires SS7 connectivity between U S WEST and MIDCO switches (SS7 connectivity not available with DID) and appropriate hardware/software in MIDCO switch to offer “like” services (for RCF)
- 2 Requires ability to forward more than one simultaneous call (for RCF).
- 3 Continuous Redial will not be available for caller dialing ported telephone number

<u>Originating Features</u>	<u>DID</u>	<u>RCF</u>	<u>Notes</u>
Caller Identification	No	No	1,2,3
Last Call Return	No	Yes	1,2
Selective Call Fwrdd	No	No	1,2,3
Call Rejection	No	No	1,2,3

NOTES

- 1 Assumes MIDCO SS7 connectivity and/or offering of services
- 2 Assumes MIDCO has assigned ported customer a new telephone number in its switch
- 3 Called party would receive new MIDCO assigned telephone number that they may not associate with a ported customer

9 1 7 Upon request, U S WEST shall provide to MIDCO INP via Direct Inward Dial Trunks pursuant to applicable tariffs

9 1 8 Where either party has activated an entire NXX for a single customer, or activated a substantial portion of an NXX for a single customer with the remaining numbers in that NXX either reserved for future use or otherwise unused, if such customer chooses to receive service from the other Party, the first Party shall cooperate with the second Party to have the entire NXX reassigned in the LERG (and associated industry databases, routing tables, etc) to an End Office operated by the second Party Such transfer will be accomplished with appropriate industry lead-times for movement of NXXs from one switch to another Other applications of NXX migration will be discussed by the Parties as circumstances arise

9 1 9 The data required for interim local number portability and for billing access, when interim local number portability is used, must be provided to MIDCO at no additional cost above that already paid for with interim local number portability

9 1 10 Access On Interim Number Portability

The terminating carrier shall receive the carrier common line and local switching charges Transport charges shall be shared based on the meet point billing arrangement

9 2 Description of Service

9 2 1 Interim Number Portability Service ("INP") is a service arrangement that can be provided by U S WEST to MIDCO or by MIDCO to U S WEST For the purposes of this Section, the Party porting traffic to the other Party shall be referred to as the "INP Provider" and the Party receiving INP traffic for termination shall be referred to as the "INP Requester"

9 2 2 INP applies to those situations where an end-user customer elects to transfer service from the INP Provider to the INP Requester and they also wish to retain their existing telephone number INP consists of INP Provider's provision to the INP Requester the capability to route calls placed to telephone numbers assigned to the INP Provider's switches to the INP Requester's switches INP is available only for working

telephone numbers assigned to the INP Provider's customers who request to transfer to the INP Requester's service

9 2 3 INP is available as INP-Remote Call Forwarding ("INP-RCF") permitting a call to a INP Provider's assigned telephone number to be translated to the INP Requester's dialable local number. INP Requester may terminate the call as desired. Additional capacity for simultaneous call forwarding is available where technically feasible. The INP Requester will need to specify the number of simultaneous calls to be forwarded for each number ported.

9 2 4 INP is subject to the following restrictions:

9 2 4 1 An INP telephone number may be assigned by INP Requester only to the Requester's customers located within the INP Provider's local calling area and toll rating area that is associated with the NXX of the portable number.

9 2 4 2 INP is applicable only if the INP Requester is engaged in a reciprocal traffic exchange arrangement with the INP Provider.

9 2 4 3 Only the existing, INP Provider assigned end-user telephone number may be used as a ported number for INP.

9 2 4 4 INP will not be provided by the INP Provider for customers whose accounts are in arrears and who elect to make a change of service provider unless and until the following conditions are met:

- Full payment for the account (NOT including directory advertising charges associated with the customer's telephone number) is made by customer or INP Requester agrees to make full payment on behalf of customer.
- INP Provider is notified in advance of the change in service provider and a Change of Responsibility form is issued.
- INP Provider accepts the transfer of responsibility.

9 2 4 5 INP services shall not be resold, shared or assigned by either Party to another CLEC.

9 2 4 6 INP is not offered for NXX Codes 555, 976, 960 and coin telephones, and Service Access Codes (i.e. 500, 700, 800/888, 900). INP is not available for FGA seven-digit numbers, including foreign exchange (FEX), FX and FX/ONAL and foreign Central Office Service. Furthermore, INP numbers may not be used for mass calling events.

9 2 4 7 The ported telephone number will be returned to the originating company (or to the common pool of telephone numbers upon implementation of permanent number portability) when the ported service is disconnected. The company purchasing a ported number may not retain it and reassign it to another customer. The normal intercept announcement will be provided by the INP Provider for the period of time until the telephone number is reassigned by the Provider.

9 2 5 Ordering and Maintenance

9 2 5 1 The INP Requester is responsible for all dealings with and on behalf of its end users, including all end user account activity, e.g. end user queries and complaints.

9 2 5 2 The INP Provider will work cooperatively with the Requester to ensure a smooth customer transition and to avoid unnecessary duplication of other facilities (e.g., unbundled loops). If an end user requests transfer of service from the INP Requester back to INP Provider, the Provider may rely on that end user request to institute cancellation of the INP service. The Provider must have a CA or equivalent verification of the end user intent to convert back. The INP Provider will provide at least 48 hours notice to the INP Requester of the cancellation of INP service, and will work cooperatively with the Requester to ensure a smooth customer transition and to avoid unnecessary duplication of other facilities (e.g., unbundled loops). The Parties will cooperate to develop intercompany procedures to implement the requirements of this paragraph.

9 2 5 3 The Requester's designated INP switch must return answer and disconnect supervision to the INP Provider's switch.

9 2 5 4 The Requester will provide to the E911 database provider the network telephone number that the Requester assigned to the Provider assigned, ported telephone number. Updates to and maintenance of the INP information to the E911 database are the responsibility of the INP Requester.

9 2 5 5 The INP Requester will submit to the INP Provider a disconnect order for each ported number that is relinquished by the Requester's end users.

9 2 6 Cost Recovery

9 2 6 1 Number Ported – This cost is incurred per number ported, per month. Should the INP Requester provide the transport from the Provider's end office to the Requester's end office switch, a lower cost is incurred. This cost represents a single call path from

the Provider's end office switch to the Requester for the portable number

9 2 6 2 Additional Call Path – This cost is incurred per additional call path per month added to a particular ported telephone number. Should the INP Requester provide the transport from the Provider's end office to the Requester's end office switch, a lower cost is incurred.

9 2 6 3 Service Establishment – Per Switch. This non-recurring cost is incurred for each INP Provider's end office switch that is equipped to provide INP to the INP Requester.

9 2 6 4 Service Establishment – Per Number. This non-recurring cost is for each telephone number equipped with INP.

9 2 6 5 Rates are contained in Section 5 1

10. PERMANENT NUMBER PORTABILITY (PNP)

10 1 Upon implementation of Permanent Number Portability (PNP) pursuant to FCC regulations, both parties agree to conform and provide such Permanent Number Portability. To the extent consistent with the FCC rules as amended from time to time, the requirements for PNP shall include the following:

10 2 Subscribers must be able to change local service providers and retain the same telephone number(s).

10 3 The PNP network architecture shall not subject alternate local exchange carriers to any degradation of service compared to U S WEST in any relevant measure, including transmission quality, switching and transport costs, increased call set-up time and post-dial delay.

10 4 When an office is equipped with PNP, all NXXs in the office shall be defined as portable and translations will be changed in the Parties' switches to open those NXXs for database queries. An NXX will be activated for PNP when the first request for PNP is received for that NXX.

10 5 When an NXX is defined as portable, it shall also be defined as portable in all PNP capable offices which have direct trunks to the given switch.

10 6 Prior to implementation of PNP, the Parties agree to develop, implement, and maintain efficient methods to maintain 911 database integrity when a subscriber ports to another service provider. The Parties agree that the customer shall not be dropped from the 911 database during the transition.

10 7 During the process of porting a subscriber a trigger feature shall be applied to the Subscriber's line at most 24 hours prior to the order due date in

order to overcome donor network time delays in the disconnection of the subscriber's line within fifteen (15) minutes of the donor network Local SMSs having received broadcast

11. DIALING PARITY

11.1 Except where otherwise ordered by a state commission, the Parties shall provide Dialing Parity to each other as required under Section 251 (b)(3) of the Act. This Interconnection Agreement does not impact either Party's ability to default intraLATA toll via a specific dialing pattern until otherwise required by the Act.

11.2 Pursuant to Sec. 271 of the act and the FCC rules as effective, U S WEST shall provide dialing parity for intraLATA toll, operator assisted and directory assistance calls. The full two-PIC option must be available for intraLATA and interLATA dialing parity in conformance with Sec. 271.

11.3 For resale, or when Port/Switching Services are provided by U S WEST any end-user shall be able to access the MIDCO network for services using the same dialing protocol that the end-user would use to access the same service on the U S WEST network, subject to the provision in Section 9.2.

11.4 U S WEST must provide routine reporting on local dialing plans by switching type and end office.

11.5 U S WEST shall make N11 services available per the FCC Rules as effective.

12. ACCESS TO TELEPHONE NUMBERS

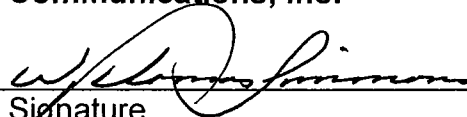
12.1 When MIDCO purchases switching capabilities or resold services from U S WEST, until such time as numbering is administered by a third party, MIDCO requires the ability to obtain telephone numbers on-line from U S WEST, and to assign these numbers with the MIDCO customer on-line. MIDCO also requires to be provided vanity numbers at parity with U S WEST's own internal marketing and order taking personnel. Reservations and aging of numbers remain the responsibility of U S WEST.

12.2 Nothing in this Interconnection Agreement shall be construed in any manner to limit or otherwise adversely impact either Party's right to the request and assignment of any NANP number resources including, but not limited to, central office (NXX) codes pursuant to the Central Office Code Assignment Guidelines (last published by the Industry Numbering Committee ("INC") as INC 95-0407-008, Revision 4/19/96, formerly ICCF 93-0729-010) NXXs, and the initial points of interface for interconnection between the Parties' networks, will be included in Addenda to this Interconnection Agreement.

36 39 Branding Services offered by MIDCO that incorporate Network Elements or Combinations made available to MIDCO pursuant to this Interconnection Agreement, and Local Services that MIDCO offers for resale shall, at MIDCO's sole discretion, be branded exclusively as MIDCO services, or otherwise, as MIDCO shall determine. MIDCO shall provide the exclusive customer service interface to MIDCO Customers in connection with the marketing, offering or provision of MIDCO services, except as MIDCO shall otherwise specify. In those instances where MIDCO requires U S WEST personnel to interface directly with MIDCO Customers, either orally, in person, or by telephone, or in writing, such personnel shall identify themselves as representing MIDCO. All forms, business cards or other business materials furnished by U S WEST to MIDCO Customers shall be subject to MIDCO's prior review, and shall bear no corporate name, logo, trademark or trade name other than MIDCO's or such other brand as MIDCO shall determine, unless otherwise specified by the Commission. In no event shall U S WEST personnel acting on behalf of MIDCO pursuant to this Interconnection Agreement provide information to MIDCO local service customers about U S WEST products or services. U S WEST shall provide, for MIDCO's review, the methods and procedures, training and approaches to be used by U S WEST to ensure that U S WEST meets MIDCO's branding requirements.

IN WITNESS WHEREOF, the Parties hereto have caused this Interconnection Agreement to be executed by their respective duly authorized representatives

**Midco Communications, Inc.
d.b.a MidContinent
Communications, Inc.**



Signature

VICE PRESIDENT

Name Printed/Typed

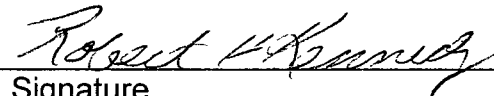
W. Tom Simmons

Title

3/2/99

Date

U S WEST Communications, Inc.



Signature

Robert F. Kennedy

Name Printed/Typed

Manager - Interconnect

Title

3/5/99

Date



WILLIAM P. PEARCE
 PATRICK W. DURICK
 B. TIMOTHY DURICK
 GARY R. THUNE
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September 27, 2004

HAND DELIVERED

Alan C. Hoberg, ALJ
 Office of Administrative Hearings
 State of North Dakota
 1707 North Ninth Street
 Bismarck, ND 58501-1882

RE: OAH File No. 20040205

Dear Mr. Hoberg:

I have enclosed for filing the following:

1. Initial Post-Hearing Brief of Midcontinent Communications.
2. Proposed Findings of Fact and Conclusions of Law.
3. Proposed Order of the Public Service Commission.
4. Affidavit of Service.

Thank you for your consideration. If you have any questions or comments please advise me.

Sincerely,

PEARCE & DURICK

PATRICK W. DURICK

PWD/jf
 cc w/enc:

William Brudvick
 J.G. Harrington
 Mary Lohnes

RECEIVED

SEP 27 2004

51 PU-04-237

Pages 1

♦ ALSO LICENSED IN MINNESOTA ♦ ALSO LICENSED I

Cover letter re filings (Docketed out of sequence) by Midcontinent Communications by Patrick Durick

09/27/2004

CC Comm Legal Ilona ALJ

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

IN THE MATTER OF:)
)
Midcontinent Communications, a) No. OAH File No. 20040205
South Dakota Partnership,) Case No. PU-04-237
)
Complainant,)
)
vs.)
)
Polar Telecom, Inc.)
a North Dakota Corporation d/b/a Polar)
Communications and HTC Services, Inc.,)
a Minnesota corporation,)
)
Respondents.)

INITIAL POST-HEARING BRIEF OF MIDCONTINENT COMMUNICATIONS

Midcontinent Communications, by its attorneys, hereby submits this initial post-hearing brief in the above-referenced proceeding. For the reasons described below, the Commission should grant Midcontinent's complaint and should order Polar Telecom, Inc. ("Polar") and HTC Services, Inc. ("HTC") to provide number portability to Midcontinent forthwith.

I. Introduction

This is a very simple case. Midcontinent is a competitive local exchange carrier certificated in North Dakota. Midcontinent is authorized to provide service in Mayville and Hillsboro, communities served by Polar and HTC. Consistent with the way it has provided service in other markets, Midcontinent planned to enter these markets first by reselling Qwest's local telephone service, then by using unbundled elements, its own facilities or a combination of the two.¹ As Midcontinent's Mary Lohnes explained during the hearing, this approach is "the quickest way into the market" and gives Midcontinent "an opportunity to see what customers' needs are" before

¹ Tr. at 29 (Lohnes).

constructing expensive facilities.² To enter any market, however, Midcontinent needs access to telephone numbers, and to get access to the telephone numbers used by Polar and HTC, Midcontinent needs number portability.

As the evidence during the hearing showed, Midcontinent properly requested number portability from Polar and HTC, as is Midcontinent's right under Section 251(b)(2) of the federal Communications Act of 1934. More than twenty-one months after that request, Polar and HTC have failed to provide number portability, in violation of their obligations under the Communications Act and the rules of the Federal Communications Commission ("FCC"). The testimony and the actions of Polar and HTC demonstrate that the failure to provide portability is not the result of technical difficulties or a misunderstanding, but is a deliberate act that discriminates against Midcontinent as it attempts to enter the telephone market in Mayville and Hillsboro.

Polar and HTC have tried to argue that there are complicated mitigating factors that explain their actions. In fact, the only reason the two companies have for refusing to provide number portability is that they entered into a voluntary agreement for their commercial benefit, and that agreement will become disadvantageous to them if they are required to meet their obligations under the law. They entered into this agreement not before the number portability requirement was adopted, but almost six years after it became the law of the land. This is not, and never has been, a cognizable reason for Polar, HTC or any carrier to refuse to provide number portability.

In this context, the only reasonable response from the Commission is to order Polar and HTC to provide number portability to Midcontinent as quickly as possible. As the parties approach the two-year anniversary of Midcontinent's initial requests, there is no excuse for any further delay.

² *Id*

II. Midcontinent Has Demonstrated That Polar and HTC Have Discriminated Against It by Their Failure to Agree to Provide Local Number Portability.

Midcontinent must make only two showings to prevail in this proceeding. The first is that Midcontinent properly requested number portability and that Polar and HTC failed to provide it. The second is that Polar's and HTC's failure to provide number portability was discriminatory under Section 49-21-24 of the North Dakota Code. The evidence amply supports both of these claims.

A. Polar and HTC Failed to Provide Number Portability in Response to Valid Requests from Midcontinent.

Under Section 251(b)(2) of the federal Communications Act, “[e]ach local exchange carrier” has “[t]he duty to provide, to the extent technically feasible, number portability in accordance with the requirements” of the FCC.³ The FCC adopted rules governing number portability soon after Section 251(b)(2) was enacted in 1996. Those rules created a schedule for the implementation of number portability, including a requirement that “[b]eginning January 1, 1999, all LECs must make a long-term database method for number portability available within six months after a specific request by another telecommunications carrier in areas in which that telecommunications carrier is operating or plans to operate.”⁴

³ 47 U.S.C. § 251(b)(2). A “local exchange carrier” (“LEC”) is defined under the federal statute as “any person that is engaged in the provision of telephone exchange service or exchange access,” except for certain wireless providers. 47 U.S.C. § 153(25). Midcontinent, Polar and HTC all are LECs and all hold certificates to provide local exchange service in North Dakota.

⁴ 47 C.F.R. § 52.23(c). A “telecommunications carrier” is “any provider of telecommunications service, except that such term does not include aggregators of telecommunications services.” 47 U.S.C. § 153(44). “Telecommunications services” is “the offering of telecommunications for a fee to the public, or to such classes of users as to effectively be available directly to the public, regardless of the facilities used.” 47 U.S.C. § 153(46). “Telecommunications” is “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.” 47 U.S.C. § 153(43). All LECs are telecommunications carriers and, consequently, Midcontinent, Polar and HTC all are both telecommunications carriers and LECs. *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, First Report and Order*, 11 FCC Rcd 15499, 15991 (1996) (describing obligations of types of telecommunications carriers).

There is no dispute that Midcontinent made requests for number portability in the Hillsboro and Mayville exchanges during the first week of December, 2002.⁵ Those requests were acknowledged by both Polar and HTC, both of which also provided additional responses during the first week in January, 2003.⁶ Although the additional responses indicated that future correspondence should be directed to Polar and HTC, both companies treated the initial requests as made to them, and witnesses for both companies testified that there was no confusion as to what parties were being asked to provide number portability.⁷

There is no doubt under the FCC's rules that Midcontinent was entitled to request and obtain number portability from both Polar and HTC. Polar and HTC are LECs, obligated to provide number portability within six months of a request from another telecommunications carrier under Section 52.23(c) of the FCC's rules. Midcontinent, likewise is a LEC and, of course, also a telecommunications carrier, which means that Midcontinent is entitled to request and receive number portability under the same rule. Neither Polar nor HTC has disputed these essential facts.⁸

Nevertheless, neither Polar nor HTC has provided number portability to Midcontinent, even though the six month period under the FCC's rules ran out at the beginning of June, 2003, well over a year ago. Neither Polar nor HTC has received – or even sought – a waiver from the FCC or any relief from this Commission.⁹ Thus, the failure to provide number portability is a plain violation of the FCC's rules.

⁵ See Exhibits C-2 (request to Polar, dated December 3, 2002), C-3 (request to HTC, dated December 3, 2002).

⁶ See Exhibits C-4 (letter of Ken Fisher, Polar, dated December 20, 2002), C-5 (letter of Ron Laqua, HTC, dated December 5, 2002), C-6 (letter of Ron Laqua, Polar, dated January 3, 2003), C-7 (letter of David Dunning, HTC, dated January 2, 2003).

⁷ Tr. at 223-24 (Dunning), 246-47 (Laqua).

⁸ One of Respondents' witnesses also agreed that the FCC's rules do not limit portability to a particular type of carrier. Tr. at 124 (Bodamer).

⁹ See Tr. at 105 (Bodamer).

Polar and HTC both have claimed that they are “willing” to provide number portability, but this claim is of no consequence. As the testimony established, this “willingness” is conditioned on Midcontinent meeting a condition that both Polar and HTC admit that Midcontinent cannot meet without cooperation from Qwest.¹⁰ Indeed, even if Midcontinent could ensure Qwest’s cooperation, any agreement to address the compensation issues that are of such concern to Polar and HTC would have to be between those companies and Qwest; Midcontinent would not be a party. In any event, the FCC’s rule does not permit carriers to impose conditions on their provision of number portability, and thus the failure to provide number portability violates the rule on its face.¹¹

B. The Failure to Provide Number Portability Is Discriminatory for Multiple Reasons.

The second element of Midcontinent’s case is a demonstration that the actions of Polar and HTC are discriminatory under Section 49-21-24. The hearing demonstrated that there are several independent reasons for the Commission to conclude that Polar and HTC discriminated against Midcontinent by failing to provide number portability upon request.

Section 49-21-24 prohibits telecommunications companies from discriminating against other telecommunications companies by refusing or delaying access to services.¹² This statute provides fundamental protection for competition in North Dakota by ensuring that competing carriers do not seek to create insuperable advantages for themselves or for other favored carriers in the marketplace. A carrier is guilty of discrimination under Section 49-21-24 if it “refus[es] or delay[s] access to the company’s services” or if it “refus[es] or delay[s] access to essential facilities on terms and conditions no less favorable than those the telecommunications company provides to itself and its affiliates.”¹³ Polar and HTC have violated this requirement in several ways.

¹⁰ Tr. at 220 (Dunning), 261-62 (Laqua).

¹¹ As described *infra* in Part III, there is no other cognizable excuse for Polar’s and HTC’s failure to provide number portability.

¹² N.D.C.C. § 49-21-24.

¹³ *Id*

First, Polar and HTC have entered into interconnection agreements with Qwest that require them to provide number portability without any conditions, yet in their negotiations with Midcontinent they have insisted on conditioning the provision of number portability on resolution of their calling scope issues.¹⁴ Both Polar and HTC have adopted the Qwest-Midcontinent agreement, which states that “Upon implementation of Permanent Number Portability (PNP) pursuant to FCC regulations, both parties agree to conform and provide such Permanent Number Portability.”¹⁵ There is no mention in this agreement of any calling scope issues affecting the availability of number portability. Thus, their agreements with Qwest obligate Polar and HTC to provide number portability to Qwest in conformance with the FCC rules, that is, within six months of a request from Qwest.¹⁶

Polar and HTC never made such an offer to Midcontinent. As the testimony reflects, they have been steadfast in their refusal to provide number portability until their claimed calling scope issues have been addressed to their satisfaction.¹⁷ This insistence is reflected in the draft interconnection agreement that HTC introduced into evidence, which contains language that would

¹⁴ There is no requirement that carriers enter into an interconnection agreement before providing number portability. As described above, the FCC rules call only for a request from the carrier that wishes to obtain portability. *See also* Tr. at 70-71 (Lohnes) (Midcontinent has obtained number portability elsewhere without entering into an interconnection agreement).

Nevertheless, the differences between the Respondents’ treatment of Qwest and their treatment of Midcontinent demonstrates that they have discriminated against Midcontinent.

¹⁵ Midcontinent-Qwest Interconnection Agreement, § 10.1. The agreement goes on to describe the characteristics and technical parameters of number portability. *See also* Tr. at 264 (Laqua) (HTC uses Midcontinent agreement for interconnection with Qwest), 229 (Dunning) (Polar uses Midcontinent agreement for interconnection with Qwest).

¹⁶ 47 C.F.R. § 52.23(c). It is possible that Polar and HTC will argue that, because they adopted an interconnection agreement with Qwest, they had no choice as to the terms and conditions for number portability. That is incorrect. While their decision to adopt an agreement meant they could not change any of the terms in the adopted agreement, both companies always had the option of negotiating an agreement of their own, with terms that met their needs, rather than adopting another carrier’s agreement. *See* 47 U.S.C. §§ 252(c)(1) (requiring incumbent LECs, including Qwest, to engage in good faith negotiations for interconnection agreements); 252 (providing a process for mediation and arbitration if negotiations do not lead to an agreement).

¹⁷ *See, e.g.*, Tr. at 96 (Bodamer), 261 (Laqua).

have required Midcontinent to address the calling scope claim before number portability would be made available.¹⁸

The Respondents' willingness to agree to provide number portability without any meaningful conditions when dealing with Qwest and their refusal to do the same for Midcontinent plainly is discriminatory. Qwest and Midcontinent both are local exchange carriers that compete with Respondents in the Mayville and Hillsboro exchanges. Both are carriers entitled to number portability under the FCC's rules. There is, therefore, no meaningful difference between the two companies from the perspective of interconnection, but Qwest has been granted essentially unfettered number portability rights, while Polar and HTC insist that Midcontinent meet their amorphous conditions. Consequently, Polar and HTC have both "refus[ed]" and "delay[ed] . . . access to" their services, and have violated Section 49-21-24.

Second, the testimony establishes that Polar and HTC would provide number portability to Midcontinent if it were a facilities-based carrier, but that they will not provide number portability to Midcontinent as a resale carrier. As Mr. Schuele said on two distinct occasions during his testimony, there would be no "grounds for refusing portability" if Midcontinent provided services in Mayville and Hillsboro using its own switch.¹⁹ Thus, Polar and HTC are basing their decision, at least according to the testimony, on the nature of the service that Midcontinent will provide. This not only is impermissible under the FCC's rules, which do not make any distinction between facilities-based and resale carriers, but it plainly discriminates against Midcontinent as compared to other carriers that would seek portability from Polar and HTC.

Third, the companies' unwillingness to provide Midcontinent with access to the numbering resources necessary to serve existing Polar and HTC customers constitutes discrimination in favor

¹⁸ See Exhibit R-14 (proposed interconnection agreement), § VII.

¹⁹ Tr. at 180-81 ("I don't believe that would be a reason to refuse to port."), 182 ("I don't think that would be grounds for refusing portability.").

of themselves because they retain access to those numbering resources.²⁰ This conclusion is consistent with both Section 49-21-24(b), which prohibits self-favoring actions in connection with “essential facilities” and with longstanding principles that prohibit carriers from giving themselves artificial advantages over themselves. For instance, in the *Computer Inquiry* decisions, the FCC concluded that it was necessary to adopt safeguards to prevent carriers from discriminating in favor of their own enhanced service offerings (such as voice mail).²¹ The FCC found support for these safeguards in the basic non-discrimination provisions of the federal Communications Act.²² Section 49-21-24(b) provides analogous protection for any essential “facility, feature, function, or capability of the telecommunications network,” a term that plainly applies to number portability and numbering resources generally.²³

Under 49-21-24(b), a facility, feature, function or capability is deemed essential if competitors cannot duplicate it, if use of it by competitors is technically feasible, if denial of it is unreasonable and if it will enable competition. 49-21-24(b)(1)-(4). Number portability clearly is a feature, function or capability to be provided by Polar and HTC. Midcontinent cannot provide portability of Polar and HTC numbers by itself and cannot obtain it from another source because the cooperation of Polar and HTC is required. There is no doubt that the use of portability is technically

²⁰ The testimony establishes that the lack of number portability gives Polar and HTC a significant competitive advantage over Midcontinent. Tr. at 25 (Lohnes) (noting that approximately 90 percent of customers changing carriers want to keep their telephone numbers), 44 (Lohnes) (Without number portability “our ability to gain any telephone customers in those exchanges is very small.”), 263-64 (Laqua) (agreeing that Midcontinent “probably” would have an easier time competing if it had access to number portability).

²¹ See, e.g., Amendment of Section 64.702 of the Commission’s Rules and Regulations (Computer III), *Report and Order*, 104 F.C.C.2d 958, 1026-27 (1986) (describing need for safeguards to prevent carriers from discriminating in favor of their own operations). Among other things, the FCC rules required that certain ancillary services, such as call forwarding, had to be made available to third parties on terms no less favorable than those available to the carrier’s enhanced service operations, and required transactions between a carrier’s regulated and unregulated operations to be conducted on an arm’s length, non-discriminatory basis. See *id* at 964.

²² 47 U.S.C. § 202(a).

²³ N.C.C.C. 49-21-24(b)(1)-(4).

feasible because number portability is available across the country, and in any event no Polar or HTC witness claimed that either company could not provide it.²⁴ Denial of number portability is unreasonable because access to telephone numbers is required by federal law, as described above. Finally, the FCC has held that number portability enables competition, most recently in the *November Order*²⁵ Thus, the unavailability of number portability is unlawfully discriminatory under Section 49-21-24(b).²⁶ However, even if Section 49-21-24(b) did not apply, the principle that carriers cannot discriminate in favor of themselves also should be applicable under Section 49-21-24(a). Indeed, there is no basis to conclude that a carrier's discrimination in favor of itself is any less impermissible than discrimination in favor of another carrier.²⁷

Finally, the Respondents' expressed willingness to provide number portability to wireless carriers without any agreement with Qwest also demonstrates that they are discriminating against Midcontinent. Even though Polar and HTC apparently will require that wireless providers meet unlawful conditions before they will provide number portability, they are willing to permit the wireless providers to control their own fate.²⁸ In Midcontinent's case, Polar and HTC are insisting that Midcontinent cannot receive number portability until some agreement is reached with Qwest,

²⁴ *See, e g*, Tr. at 249 (Laqua).

²⁵ Telephone Number Portability, *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 18 F.C.C.R. 23697, 23708 (2003) ("*November Order*") ("The focus of the porting rules is on promoting competition, rather than protecting individual competitors.").

²⁶ A similar analysis shows that the refusal of Polar and HTC to make the numbers used by their customers available to Midcontinent through number portability violates Section 49-21-24(b). Midcontinent cannot duplicate the numbers currently used by the Polar and HTC customers because those numbers are unique; access to those numbers is technically feasible for the reasons described above; denial of access to the numbers is unreasonable because Polar and HTC are required to provide that access by federal law; and access to the numbers will enable competition because it will make it easier for Midcontinent to serve current Polar and HTC customers.

²⁷ The Respondents' assertion that they will refuse to provide number portability to any other carrier that does not satisfy their demands, regardless of the law, does not immunize them from this claim. The purpose of that refusal is to maintain a marketplace advantage that the Respondents have created for themselves by their EAS agreement, and so their actions constitute discrimination in favor of themselves whether they are discriminating against one other carrier or every other carrier in North Dakota.

²⁸ Tr. at 262 (Laqua).

a company with no interest at all in the relationship between the parties to this proceeding.²⁹ Imposing different conditions on different carriers that wish to receive the same service is discriminatory per se, but the discrimination is compounded when one group of carriers is given conditions that they can address, while another carrier is forced to depend on the actions of a third party that is out of its control to meet its conditions.

Each of the reasons described above would be sufficient grounds for the Commission to conclude that Polar and HTC had engaged in discriminatory practices that are unlawful under Section 49-21-24. Taken together, they show that Polar and HTC have established a pattern of discrimination against Midcontinent that cannot be ignored.

III. Polar and HTC Have No Cognizable Basis for Their Failure to Provide Local Number Portability.

It is not Midcontinent's burden to establish that Polar and HTC had no excuse for their failure to provide number portability, as shown above, number portability is a mandatory obligation of local exchange carriers under the Communications Act and the FCC's rules. Nevertheless, the evidence shows that there was no cognizable basis for Polar and HTC to refuse to provide number portability. Neither company had grounds for or sought a waiver from the FCC, and their claimed grounds for not providing number portability do not justify their actions either. Consequently, they are not and cannot be excused from their obligation to provide portability to Midcontinent.

A. Neither Polar nor HTC Can Be Excused from the Portability Obligation under Federal Law.

The FCC's rules provide only one path for a carrier that wishes to be excused from its number portability obligations. That path is to request a waiver under Section 52.23(d) of the rules.³⁰ The waiver requirements are very specific, and the only ground for a waiver is technical infeasibility of providing permanent number portability. As one of Respondents' witnesses agreed,

²⁹ See, e.g., Tr. at 166 (Schuele) (“[W]e need an understanding with Qwest.”)

³⁰ 47 C.F.R. § 52.23(d).

the rules do not provide for any waiver for financial reasons.³¹ The rules also do not contemplate that carriers can obtain permanent waivers and instead provide that one element of any waiver will be a schedule for the provision of number portability.³²

Neither Polar nor HTC has applied for or received a waiver from the FCC.³³ Moreover, the hearing testimony establishes that there are no technical barriers to either Respondent providing permanent number portability within six months of a request.³⁴ In other words, the testimony demonstrates that the Respondents would not be qualified for a waiver even if they requested one. Consequently, the Respondents have no basis under the FCC's rules for failing to provide number portability.

As a practical matter, this conclusion should end the Commission's inquiry into the question of whether Polar and HTC could avoid their obligation to provide number portability. The FCC is the entity empowered by federal law to determine if a waiver of its own rules should be granted. The failure of Polar and HTC to obtain or even seek a waiver from the FCC means that they were and remain required as a matter of federal law to provide number portability upon request. Nevertheless, Polar and HTC have suggested that there could be additional grounds that would excuse their noncompliance. These claims are addressed below.

³¹ Tr. at 173-74 (Schuele).

³² 47 C.F.R. § 52.23(d). Section 251(f)(2) of the Communications Act gives small carriers the right to seek "suspension" of certain requirements under Section 251, including number portability. 47 U.S.C. § 251(f)(2). Neither Polar nor HTC has sought such relief in North Dakota.

³³ See Tr. at 105 (Bodamer).

³⁴ Tr. at 222 (Dunning) (Only technical issues relate to Galesburg, where Midcontinent has not requested number portability), 244 (Laqua). While one witness testified that Polar would be required to modify some of its trunking arrangements if number portability were implemented, she admitted on cross examination that these modifications were technically feasible and did not suggest it would take more than a few months to accomplish them. Tr. at 109-10 (Bodamer), 135 (Bodamer).

B. There Is No Basis to Conclude that Qwest Is the Real Party in Interest in this Proceeding.

The Respondents' answer argues that Qwest is the party that should be before the Commission, not Midcontinent.³⁵ Although it appears that the Respondents may have abandoned this claim, since they presented no evidence to support it at the hearing, the evidence of record and the law would demonstrate that it is incorrect even if they had provided some support.

First, the evidence of record plainly demonstrates that Midcontinent has been acting on its own behalf since the portability requests first were made in December, 2002. The requests asked for portability to be provided to Midcontinent.³⁶ The parties agree that all negotiations were between Midcontinent on one hand and Polar and HTC on the other.³⁷ The proposed interconnection agreement would have been between Midcontinent and the Respondents.³⁸ Even the request to port a specific number that was made through Qwest was made on Midcontinent's behalf.³⁹ Thus, there can be no doubt that Midcontinent always has been the requesting party, and that it was requesting number portability as a way of serving its own customers.

To the extent that Respondents have a theory to support their claim, it is that Qwest is the "real" party because Midcontinent will be reselling Qwest service. That theory, however, is refuted by the FCC's rules. As noted above, those rules make no distinction at all between facilities-based and resale carriers. In fact, they do not distinguish types of carriers in any way, but allow any "telecommunications carrier" to make a request.⁴⁰ This approach makes perfect sense because number portability is equally important to carriers no matter how they provide service and the "real" party for any portability request, of necessity, must be the carrier that provides retail service to the

³⁵ Amended Answer at 1, 3.

³⁶ See Exhibits C-2, C-3.

³⁷ See, e.g., Tr. at 223-24 (Dunning), 247 (Laqua).

³⁸ See Exhibits C-11, C-12, R-14.

³⁹ Exhibit C-10, Tr. at 42-43 (Lohnes).

⁴⁰ 47 C.F.R. § 52.23(c)

customer. In a resale environment, that is the reseller. The rules, consequently, give a reseller the same rights as any other carrier, and any claim to the contrary must be rejected.

C. Polar and HTC Have Failed to Make a Case that Their Claimed Interest in Preserving Their Current EAS Arrangements Justifies Their Unwillingness to Provide Number Portability.

The real core of Polar's and HTC's case is their claim that the potential disruption to their current EAS arrangement justifies their refusal to provide number portability. As described above, this claim is incorrect for the simple reason that the FCC's rules do not contemplate waivers for anything but technical barriers to the provision of portability. However, there are several other reasons the Commission should not excuse Polar and HTC on the basis of their EAS arrangement. In particular, the Commission should not wait to act until the FCC resolves issues involving inconsistent rate centers because those issues have nothing to do with this case and the Polar-HTC EAS agreement provides no basis for denying portability.

1. There Is No Basis for the Claim that Inconsistent Rate Centers Justify Denial of Number Portability.

Polar and HTC argue, correctly, that the FCC now is considering issues relating to number portability when carriers have inconsistent rate centers. They claim that no action should be taken to require them to provide number portability to Midcontinent until that proceeding is completed.⁴¹ This argument is incorrect, if for no other reason than that the *November Order* does require number portability in many circumstances when rate centers do not match.⁴² Even if the *November Order* did excuse compliance carriers from compliance whenever rate centers do not match, however, that would be irrelevant to this case. The hearing testimony demonstrated that Midcontinent and the Respondents will not have inconsistent rate centers at all – they will use the same rate centers in both

⁴¹ See generally Amended Answer at 1-2.

⁴² *November Order*, 18 F.C.C.R. at 23708 (porting to wireless carriers required even when rate centers do not match)

Mayville and Hillsboro.⁴³ This is the testimony of every party to this proceeding, based on definitions that all parties agreed upon.⁴⁴ Thus, Polar and HTC cannot justify their failure to provide number portability on the basis of inconsistent rate centers.

What the testimony established is that Midcontinent and the Respondents may have inconsistent local calling areas.⁴⁵ This is an entirely different matter from inconsistent rate centers. As the *November Order* explains, inconsistent rate centers make it difficult for carriers to determine the appropriate charges for calls to and from ported numbers because the rates for calls generally are determined by the location of the originating and terminating rate centers.⁴⁶ No such difficulty arises as the result of differing local calling areas, because each carrier determines how it rates its own customers' calls.

Consequently, there is no exception to the number portability requirement for situations in which the carriers' local calling areas do not match. The rules, as noted above, permit waivers only in limited circumstances for technical reasons; they contain no general exception for any carrier or any reason.⁴⁷ Moreover, the *November Order* specifically *requires* carriers to provide number portability in circumstances when local calling areas do not match, as typically is the case for wireless and landline carriers.⁴⁸ In other words, not only is there no exception, but given the opportunity to address the issue of inconsistent local calling areas, the FCC decided the issue so as to require number portability, not to exempt carriers from the requirement. Thus, when rate centers match and local calling areas do not, carriers are required to provide number portability.

⁴³ See Tr. at 171 (Schuele) ("I'm saying that the geographic point to which these rate centers are associated is the same; the calling areas are different.").

⁴⁴ See, e.g., Tr. at 18 (Lohnes) (defining rate center and local calling area), 116 (Bodamer).

⁴⁵ Tr. at 171 (Schuele); *but see* Tr. at 58 (Lohnes) (Midcontinent has not decide the scope of its local calling area).

⁴⁶ *November Order*, 18 F.C.C.R. at 23713-15.

⁴⁷ 47 C.F.R. § 52.23(d).

⁴⁸ *November Order*, 18 F.C.C.R. at 23708 (portability permits customers to take advantage of "larger local calling areas" of wireless providers).

2. Even If the Commission Could Consider the Claimed Financial Burdens on Polar and HTC, Their Claim Is Not Cognizable.

The centerpiece of Respondents' case is the claim that requiring them to provide number portability would be financially burdensome because it would make their EAS agreement – entered into six years after the number portability requirement became law – uneconomic. This claim should not be considered because neither Polar nor HTC provided any evidence at all of the extent or nature of the financial burdens imposed on them, and because the Respondents should not be insulated from the consequences of their voluntary business arrangements.

First, neither Polar nor HTC provided any evidence that would permit the Commission to conclude that providing number portability actually would be burdensome. Through an entire day of hearings and four witnesses, neither party provided any evidence on the costs they would incur; how those costs compared to the companies' revenues from local service in Mayville and Hillsboro; or how those costs would affect the companies' rates or profits.⁴⁹ In fact, when counsel for Midcontinent sought to ask questions about these issues, counsel for Polar and HTC objected on the ground that such questions were irrelevant.⁵⁰ The *only* evidence of record in this proceeding on the financial effects of providing number portability is that Polar and HTC would incur access charges on calls to numbers ported to Midcontinent, but also would *receive* access charges they do not receive today on calls from ported numbers to Polar and HTC customers.⁵¹

Simply put, this evidence provides no basis for the Commission to find that number portability would impose any financial burden on Polar or HTC. Indeed, the evidence on access charges suggests that Polar and HTC even could be better off if their customers make fewer calls to Midcontinent customers than they receive from Midcontinent customers. Thus, to the extent the

⁴⁹ One of Respondents' witnesses testified that she did not "know what the scale of the cost would be or whether it would trigger a change to the customer for his rates." Tr. at 134 (Bodamer).

⁵⁰ Tr. at 231-32.

⁵¹ Tr. at 111-12 (Bodamer), 176-77 (Schuele).

Commission believed there was any basis to consider the Respondents' financial claims, they have utterly failed to meet their burden of proof.

Even if there were evidence to demonstrate that Polar and HTC would experience increased costs or decreased revenue as a result of number portability, the Commission should recognize that those effects would be entirely the result of the voluntary business decision that Polar and HTC made in 2002 to enter into their EAS agreement.⁵² The Commission should not insulate the Respondents from the consequences of this decision or from their failure to account for their regulatory obligations as local exchange carriers.

The hearing testimony establishes clearly that the terms of the EAS agreement, along with the Respondents' local rate plans in Mayville and Hillsboro, were entirely the result of commercial calculations. The agreement was not approved by or even provided to the Commission by either party.⁵³ Polar and HTC did not ask permission to adopt their current rate plans or notify the Commission they were charging customers based on the party being called rather than the location being called.⁵⁴ Both Polar and HTC agree that the current rate structure, which exists because of the EAS agreement, gives them a competitive advantage over Qwest.⁵⁵ In other words, it was a purely commercial decision.

Moreover, that commercial decision was made long after the number portability requirement already was in place. The number portability requirement became law in 1996, and Section 52.23(c) began to govern portability requests in 1999.⁵⁶ Both Polar and HTC began providing service after both of those dates, and the EAS agreement did not go into effect until 2002, or six years after portability first was required. Thus, Polar and HTC entered into the agreement with the awareness

⁵² Tr. at 230 (Dunning).

⁵³ Tr. at 233 (Dunning), 265 (Laqua).

⁵⁴ Tr. at 234 (Dunning), 266 (Laqua).

⁵⁵ Tr. at 108-09 (Bodamer), 234-35 (Dunning), 262-63 (Laqua).

⁵⁶ 47 C.F.R. § 52.23(c).

that they could be asked to provide number portability by any other carrier at any time. They do not even have the excuse that they could not have anticipated the number portability requirement when they entered into the agreement – it already was there.

In this context, it becomes apparent that Polar and HTC simply seek to avoid the consequences of their own voluntary business decisions and, more significantly, to use those business decisions as a shield against competition in Mayville and Hillsboro. There is no basis in the law to let them do so. Equally important, it would be inconsistent with the governing principles of federal and state policy that encourage fair competition. The only decision consistent with those principles is to require Polar and HTC to bear the burdens of their business decision and to require them to provide number portability.

IV. The Commission Should Order Polar and HTC to Cease Their Discrimination Forthwith.

As shown above, the law and the evidence are clear. Polar and HTC have an obligation to provide number portability, which they have not met. They have no justification for their failure to provide number portability: There are no technical barriers and their other excuses are not cognizable by the Commission. Their actions are discriminatory, as Polar and HTC are treating Midcontinent differently than other carriers and as they are favoring themselves over Midcontinent in access to numbering resources used by current Polar and HTC customers.

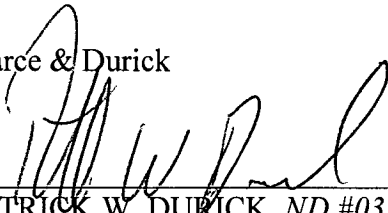
In light of these facts, the Commission must grant an immediate remedy to Midcontinent by ordering Polar and HTC to provide number portability on an expeditious schedule, and in any event no later than the end of 2004. Immediate relief is critical, because soon Midcontinent will have been waiting two years to obtain portability from Polar and HTC. Because there are no technical barriers to the provision of number portability by either Polar or HTC, there simply is no reason to permit any additional delay. Moreover, further delay would compound the harm to Midcontinent and

continue to benefit the Respondents despite their unlawful actions. Thus, the only just result is for the Commission to insist on immediate deployment of number portability by Polar and HTC.

V. Conclusion

Polar and HTC have evaded their obligation to provide local number portability for nearly two years in an effort to preserve the value of a commercial agreement they entered into without regard for regulatory requirements. The Commission should not permit this evasion to continue and therefore should grant to Midcontinent the relief requested herein forthwith.

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Attorneys for Midcontinent Communications

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

IN THE MATTER OF:)	
	)	No. OAH File No. 20040205
Midcontinent Communications, a	)	Case No. PU-04-237
South Dakota Partnership,)	
)	
Complainant,)	
	)	PROPOSED FINDINGS OF FACT
vs.	)	AND CONCLUSIONS OF LAW
)	
Polar Telecom, Inc.)	
a North Dakota Corporation d/b/a Polar)	
Communications and HTC Services, Inc.,)	
a Minnesota corporation,)	
)	
Respondents.)	

Proposed Findings of Fact

1. Midcontinent, HTC and Polar are certificated local exchange carriers in North Dakota. HTC provides service in Hillsboro, Polar provides service in Mayville, and Midcontinent is certificated to provide service in both Hillsboro and Mayville.
2. Midcontinent requested local telephone number portability from HTC and Polar in December, 2002. HTC and Polar each acknowledged receipt of that request, and all three parties negotiated concerning the availability of number portability from HTC and Polar.
3. Midcontinent's number portability request was made on its own behalf.
4. HTC and Polar have not provided number portability to Midcontinent.
5. There are no technical barriers that would prevent either HTC or Polar from providing number portability to Midcontinent in Hillsboro and Mayville, respectively.
6. HTC and Polar have not sought any waiver of the FCC's number portability requirements from the FCC or the Commission.

7. The overwhelming majority of customers changing carriers want to retain their current telephone numbers. Consequently, denying number portability gives a carrier a significant competitive advantage.
8. HTC and Polar have refused to provide number portability to Midcontinent because doing so, in their view, would affect the economics of an extended area service (“EAS”) agreement between Polar and HTC.
9. HTC and Polar have not demonstrated that providing number portability would cause them any economic harm.
10. HTC and Polar have stated that they will not provide number portability to Midcontinent until issues related to their EAS agreement are addressed.
11. HTC and Polar both have entered into an interconnection agreement with Qwest that provides for number portability but does not address the issues related to their EAS agreement.
12. HTC and Polar would require wireless providers to address certain economic issues before they would provide number portability to them, but addressing those issues would not require Qwest’s cooperation.
13. The issues relating to the HTC-Polar EAS agreement that Respondents say must be addressed before they will provide number portability to Midcontinent can be addressed only with Qwest’s cooperation.
14. The rate centers to be used by Polar or HTC and Midcontinent once number portability is provided will be consistent with each other.

15. The HTC-Polar EAS agreement was entered into voluntarily, without the approval of the Commission, approximately six years after the number portability requirement became law.
16. The Polar and HTC policies of basing the charges for calls on the identity of the carrier serving the customer receiving the call in Hillsboro and Mayville were adopted voluntarily and without the approval of the Commission.

Proposed Conclusions of Law

17. Under the FCC's rules governing number portability, a local exchange carrier must provide permanent number portability within six months of a bona fide request from a telecommunications carrier absent a waiver from the FCC.
18. Midcontinent's request for portability met the FCC's requirements for a bona fide request.
19. HTC and Polar have failed to comply with the requirements of the FCC's number portability rules.
20. The FCC's rules do not provide for waivers from the number portability requirements for economic reasons or if local calling areas do not match.
21. The FCC's rules require number portability to be provided when rate centers match.
22. A voluntary agreement between two carriers cannot exempt them from compliance with the FCC's number portability requirements.
23. Polar and HTC have discriminated against Midcontinent, in violation of the requirements of N.D.C.C. § 49-21-24, by entering into interconnection agreements with Qwest that

provide for number portability without conditions while insisting that Midcontinent meet conditions to obtain number portability.

24. Polar and HTC have discriminated against Midcontinent, in violation of the requirements of N.D.C.C. § 49-21-24, because they have refused to provide number portability to Midcontinent on the ground that it intends to offer service via resale when they would provide number portability to Midcontinent if it intended to offer service via its own facilities.
25. Polar and HTC have discriminated against Midcontinent, in violation of the requirements of N.D.C.C. § 49-21-24, because they have discriminated in favor of themselves in the availability of numbering resources.
26. Polar and HTC have discriminated against Midcontinent, in violation of the requirements of N.D.C.C. § 49-21-24, because they are willing to provide number portability to wireless carriers upon satisfaction of conditions within the control of the wireless carriers while insisting that Midcontinent can obtain number portability only upon satisfaction of a condition that requires the cooperation of Qwest.
27. The appropriate remedy for the discriminatory actions of Polar and HTC is to require them to provide number portability to Midcontinent by the end of 2004.

Dated this ____ day of _____, 2004.

Alan C. Hoberg
Administrative Law Judge

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

IN THE MATTER OF:)	
	)	No. OAH File No. 20040205
Midcontinent Communications, a	)	Case No. PU-04-237
South Dakota Partnership,)	
)	
Complainant,)	
)	
vs.)	
)	
Polar Telecom, Inc.)	
a North Dakota Corporation d/b/a Polar)	
Communications and HTC Services, Inc.,)	
a Minnesota corporation,)	
)	
Respondents.)	

ORDER

SEPTEMBER , 2004

.....

On May 13, 2004, Midcontinent Communications, a South Dakota Partnership (“Midcontinent”), filed a Complaint with the North Dakota Public Service Commission (“NDPSC”) against Polar Telecom, Inc., a North Dakota Corporation d/b/a Polar Communications (“Polar”) and HTC Services, Inc., a Minnesota corporation (“HTC”), alleging violations of N.D.C.C. Section 49-21-24(2). On June 11, 2004 the NDPSC referred the Complaint to the Office of Administrative Hearing pursuant to N.D.C.C. Section 49-21-24(2) and on June 22, 2004 Allan C. Hoberg, Administrative Law Judge served a Notice of Hearing and Specification of Issues on the parties and the commission. Hearing Officer Hoberg set the matter for hearing on September 3, 2004 at 9:00 a m. and advised that the issues to be considered in this matter included whether under the provisions of N.D.C.C. Section 49-24-21: 1.) Polar was discriminating against Midcontinent by delaying and refusing to grant Midcontinent Local Number Portability (“LPN”), when, in fact, Polar grants LPN to Qwest; and 2) HTC was discriminating against Midcontinent by delaying and refusing to grant Midcontinent Local Number Portability (“LPN”), when, in fact, HTC intends to grant LPN to wireless carriers.

On Wednesday, September 25, 2004 the Hearing Officer held a pre-hearing conference by telephone. A public hearing was held on September 3, 2004 at which time Midcontinent, Polar and HTC produced evidence through witnesses and exhibits. A transcript of the hearing has been

prepared and made available to the parties and the Hearing Examiner. The parties filed pre-hearing briefs and post hearing briefs and the Hearing Officer has filed his Proposed Findings of Fact and Conclusions of Law.

The NDPSC, having received and reviewed the proposed Findings of Fact and Conclusions of Law of the Hearing Officer and being fully advised in the premises, hereby adopts the proposed Findings of Fact and Conclusion of Law of the Hearing Examiner and enters the following:

ORDER

The NDPSC Orders:

Polar and HTC are hereby ordered to make unconditional Local Number Portability available to Midcontinent in the Mayville/Portland and Hillsboro exchanges respectively on or before January 1, 2005.

PUBLIC SERVICE COMMISSION

SUSAN E. WEFALD	TONY CLARK	KEVIN CRAMER
COMMISSIONER	PRESIDENT	COMMISSIONER

STATE OF NORTH DAKOTA

PUBLIC SERVICE COMMISSION

Midcontinent Communications, a)
 South Dakota Partnership,)
)
 Complainant,)
)
 vs.)
)
 Polar Telecom, Inc.)
 a North Dakota Corporation d/b/a Polar)
 Communications and HTC Services, Inc.,)
 a Minnesota corporation,)

No. OAH File No. 20040205
 PU-04-237

Respondents.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NORTH DAKOTA)
) ss.
 COUNTY OF BURLEIGH)

Renee Friesz hereby certifies that on September 27, 2004, she served a copy of the attached:

1. Initial Post-Hearing Brief of Midcontinent Communications;
2. Proposed Findings of Fact and Conclusions of Law; and
3. Proposed Order of the Public Service Commission.

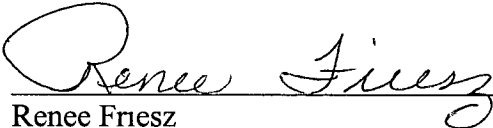
by placing a true and correct copy thereof in an envelope and depositing the same, with postage prepaid, in the United States mail at Bismarck, North Dakota. addressed to the following:

Mr. William J. Brudvik
 OHNSTAD TWICHELL, PC
 P. O. Box 547
 Mayville, ND 58247--0547

Allen C. Hoberg, Director
 Office of Administrative Hearings
 1707 North Ninth Street
 Bismarck, ND 58501-1882

via Regular Mail

via Hand Delivery


Renee Friesz

Subscribed and sworn to before me this 27 day of September, 2004.


Notary Public

My commission expires:



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September 8, 2004

Alan C. Hoberg, ALJ
 Office of Administrative Hearings
 State of North Dakota
 1707 North Ninth Street
 Bismarck, ND 58501-1882


RE: OAH File No. 20040205

Dear Mr. Hoberg:

As you requested, I have enclosed a hard copy of the MEMORANDUM OPINION AND ORDER AND FURTHER NOTICE OF PROPOSED RULEMAKING, In the Matter of Telephone Number Portability CTIA Petitions for Declaratory Rulings on Wireline-Wireless Porting Issues, CC Docket No. 95-116, Before the Federal Communications Commission, Washington, D.C. 20554.

Sincerely,

PEARCE & DURICK


 PATRICK W. DURICK

PWD/jf
 Enclosure.

cc w/enc: William Brudvick, Esq.
 Ms. Mary Lohnes
 J. G. Harrington, Esq.(w/o Enc.)

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SEP - 9 2004

OFFICE OF
 ADMINISTRATIVE HEARINGS

MINNESOTA

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
Telephone Number Portability)	
)	
	)	CC Docket No. 95-116
CTIA Petitions for Declaratory Ruling on)	
Wireline-Wireless Porting Issues)	
)	
)	
)	

**MEMORANDUM OPINION AND ORDER AND FURTHER NOTICE OF PROPOSED
RULEMAKING**

Adopted: November 7, 2003

Released: November 10, 2003

By the Commission Chairman Powell, Commissioners Abernathy, Copps, Martin, and Adelstein issuing separate statements

Comment Date 20 days after publication in the Federal Register

Reply Comment Date 30 days after publication in the Federal Register

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I. INTRODUCTION

1. In this order, we provide guidance to the industry on local number portability (LNP) issues relating to porting between wireless and wireline carriers (intermodal porting). First, in response to a Petition for Declaratory Ruling filed on January 23, 2003, by the Cellular Telecommunications and Internet Association (CTIA), we clarify that nothing in the Commission’s rules limits porting between wireline and wireless carriers to require the wireless carrier to have a physical point of interconnection¹ or numbering resources in the rate center where the number is assigned. We find that porting from a wireline carrier to a wireless carrier is required where the requesting wireless carrier’s “coverage area” overlaps the geographic location in which the customer’s wireline number is provisioned, provided that the porting-in carrier maintains the number’s original rate center designation following the port. The wireless “coverage area” is the area in which wireless service can be received from the wireless carrier. In addition, in response to a subsequent CTIA petition, we clarify that wireline carriers may not require wireless carriers to enter into interconnection agreements as a precondition to porting between the carriers. We also decline to adopt a mandatory porting interval for wireline-to-wireless ports at the present time, but we seek comment on the issue as noted below.

2 In the accompanying Further Notice of Proposed Rulemaking (Further Notice), we seek comment on how to facilitate wireless-to-wireline porting if the rate center associated with the wireless number is different from the rate center in which the wireline carrier seeks to serve the customer. In addition, we seek comment on whether we should require carriers to reduce the length of the porting interval for ports between wireless and wireline carriers

II. BACKGROUND

A. Statutory and Regulatory Background

3 Section 251(b) of the Communications Act of 1934, as amended (the Act) requires local exchange carriers (LECs) to provide local number portability, to the extent technically feasible, in accordance with requirements prescribed by the Commission.² Under the Act and the Commission’s rules, local number portability is defined as “the ability of users of telecommunications services to retain,

¹ Referred to hereinafter as “point of interconnection ”

² 47 U S C § 251(b)(2)

at the same location, existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another ”³

4 The Commission released the Local Number Portability *First Report and Order* in 1996, which promulgated rules and deployment schedules for the implementation of number portability ⁴ The Commission highlighted the critical policy goals underlying the LNP requirement, indicating that “the ability of end users to retain their telephone numbers when changing service providers gives customers flexibility in the quality, price, and variety of telecommunications services they can choose to purchase ”⁵ The Commission found that “number portability promotes competition between telecommunications service providers by, among other things, allowing customers to respond to price and service changes without changing their telephone numbers ”⁶

5. The Commission adopted broad porting requirements, noting that “as a practical matter, [the porting obligation] requires LECs to provide number portability to other telecommunications carriers providing local exchange or exchange access service within the same MSA.”⁷ In addition, the Commission noted the section 251(b) requires LECs to port numbers to wireless carriers. The Commission stated that “section 251(b) requires local exchange carriers to provide number portability to all telecommunications carriers, and thus to Commercial Mobile Radio Service (CMRS) providers as well as wireline service providers.”⁸

6. The Commission adopted rules implementing the LNP requirements. Section 52.21(k) of the rules defines number portability to mean “the ability of users of telecommunications services to retain, at the same location, existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another ”⁹ Section 52.23(b)(1) provides that “all local exchange carriers (LECs) must provide a long-term database method for number portability in the 100 largest Metropolitan Statistical Areas (MSAs) by December 31, 1998 . . . in switches for which another carrier has made a specific request for the provision of number portability . ”¹⁰ Finally, Section 52.23(b)(2)(i) of the Commission rules provides that “any wireline carrier that is certified . . . to provide local exchange service, or any licensed CMRS provider, must be permitted to make a request for the provision of number portability ”¹¹

7 In 1997, in the Local Number Portability *Second Report and Order*, the Commission adopted recommendations from the North American Numbering Council (NANC) for the implementation of

³ 47 U.S.C. § 153(30), 47 C.F.R. § 52.21(k)

⁴ Telephone Number Portability, CC Docket No. 95-116, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 8352 (1996) (First Report and Order)

⁵ *Id.* at 8368, para. 30

⁶ *Id.*

⁷ *Id.* at 8393, para. 77

⁸ *Id.* at 8431, para. 152

⁹ 47 C.F.R. § 52.21(k)

¹⁰ 47 C.F.R. § 52.23(b)(1)

¹¹ 47 C.F.R. § 52.23(b)(2)(i)

wireline-to-wireline number portability¹² Under the guidelines developed by the NANC, porting between LECs was limited to carriers with facilities or numbering resources in the same rate center to accommodate technical limitations associated with the proper rating of wireline calls¹³ The NANC guidelines made no recommendations regarding limitations on intermodal porting

8 Although the Act excludes CMRS providers from the definition of local exchange carrier, and therefore from the section 251(b) obligation to provide number portability, the Commission has extended number portability requirements to CMRS providers¹⁴ In the Local Number Portability *First Report and Order*, the Commission indicated that it had independent authority under sections 1, 2, 4(i), and 332 of the Communications Act of 1934, as amended, to require CMRS carriers to provide number portability.¹⁵ The Commission noted that “sections 2 and 332(c)(1) of the Act give the Commission authority to regulate commercial mobile radio service operators as common carriers . . .”¹⁶ Noting that section 1 of the Act requires the Commission to make available to people of the United States, a rapid, efficient, nation-wide and world-wide wire and radio communication service, the Commission stated that its interest in number portability “is bolstered by the potential deployment of different number portability solutions across the country, which would significantly impact the provision of interstate telecommunications services”¹⁷ Section 4(i) of the Act grants the Commission authority to “perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with [the Communications Act of 1934, as amended] as may be necessary in the execution of its functions”¹⁸ The Commission concluded that “the public interest is served by requiring the provision of number portability by CMRS providers because number portability will promote competition between providers of local telephone services and thereby promote competition between providers of interstate access services.”¹⁹

9 The Commission determined that implementation of wireless LNP, which would enable wireless subscribers to keep their phone numbers when changing carriers, would enhance competition between wireless carriers as well as promote competition between wireless and wireline carriers.²⁰ The

¹² Telephone Number Portability, CC Docket No. 95-116, *Second Report and Order*, 12 FCC Rcd 12,281 (1997) (*Second Report and Order*) The requirement that LECs port numbers to wireless carriers has not been applied previously due to extensions of the deadline for wireless carriers’ implementation of LNP See Telephone Number Portability, Cellular Telecommunications & Industry Association’s Petition for Extension of Implementation Deadlines, CC Docket No. 95-116, *Memoirandum Opinion and Order*, 13 FCC Rcd 16315 (1998), Telephone Number Portability, Cellular Telecommunications & Industry Association’s Petition for Forbearance from Commercial Mobile Radio Services Number Portability Obligations, WT Docket No. 98-229, *Memorandum Opinion and Order*, 14 FCC Rcd 3092 (1999), and Verizon Wireless Petition for Partial Forbearance from the Commercial Mobile Radio Services Number Portability Obligation, WT Docket No. 01-184 and CC Docket No. 95-116, *Memorandum Opinion and Order*, 17 FCC Rcd 14972 (2002)

¹³ North American Numbering Council Local Number Portability Selection Working Group Final report and Recommendation to the FCC, Appendix D at 6 (rel. April 25, 1997) This report is available at <http://www.fcc.gov/wcb/tapd/nanc/lnpastuf.html>

¹⁴ *First Report and Order* at 8431, paras 152-53.

¹⁵ *Id.* at para 153 See 47 U.S.C. §§ 1, 2, 4(i), and 332

¹⁶ *Id.*

¹⁷ *Id.* at 8432, para 153

¹⁸ 47 U.S.C. § 154(i)

¹⁹ *First Report and Order* at 8432, para 153

²⁰ *Id.* at 8434-36, paras 157-160

Commission noted that "service provider portability will encourage CMRS-wireline competition, creating incentives for carriers to reduce prices for telecommunications services and to invest in innovative technologies, and enhancing flexibility for users of telecommunications services."²¹ Commission rules reflecting the wireless LNP requirement provide that, by the implementation deadline, "all covered CMRS providers must provide a long-term database method for number portability . . . in switches for which another carrier has made a request for the provision of LNP."²²

10 In the Local Number Portability *Second Report and Order*, after adopting NANC guidelines applicable to wireline-to-wireline porting, the Commission directed the NANC to develop standards and procedures necessary to provide for wireless carriers' participation in local number portability.²³ The Commission indicated its expectation that changes to LNP processes would need to be made to accommodate porting to wireless carriers. The Commission noted that "the industry, under the auspices of NANC, will probably need to make modifications to local number portability standards and processes as it gains experience in implementing number portability and obtains additional information about incorporating CMRS providers into a long-term number portability solution and interconnecting CMRS providers with wireline carriers already implementing their number portability obligations."²⁴ In addition, the Commission noted that the NANC would have to consider issues of particular concern to wireless carriers, including how to account for differences between service area boundaries for wireline versus wireless services.²⁵

11 In 1998, the NANC submitted a report on the integration of wireless and wireline number portability from its Local Number Portability Administration (LNPA) Working Group to the Common Carrier Bureau (now known as the Wireline Competition Bureau).²⁶ The report discussed technical issues associated with wireless-to-wireline porting. The report noted that differences between the local serving areas of wireless and wireline carriers affected the porting capabilities of each type of carrier, making it infeasible for some wireline carriers to port-in numbers from wireless subscribers. The report explained that because wireline service is fixed to a specific location the subscriber's telephone number is limited to use within the rate center within which it is assigned.²⁷ By contrast, the report noted, because wireless service is mobile and not fixed to a specific location, while the wireless subscriber's number is associated with a specific geographic rate center, the wireless service is not limited to use within that rate center.²⁸ As a result of these differences, the report indicated that, if a wireless subscriber seeks to port his or her number to a wireline carrier, but the subscriber's NPA-NXX is outside of the wireline rate center where the subscriber is located, the wireline carrier may not be able to receive the ported number.²⁹ The NANC did not reach consensus on a solution to this issue, and reported that this lack of symmetry, referred to as

²¹ *Id.* at 8437, para 160

²² 47 C.F.R. § 52.31(a)

²³ *Second Report and Order* at 12333, para 90

²⁴ *Id.*

²⁵ *Id.* at 12334, para 91

²⁶ North American Numbering Council Local Number Portability Administration Working Group Report on Wireless Wireline Integration, May 8, 1998, CC Docket No. 95-116 (filed May 18, 1998) (First Report on Wireless Wireline Integration)

²⁷ *Id.* at 7

²⁸ *Id.*

²⁹ *Id.*

“rate center disparity,” raises questions by some carriers about competitive neutrality.³⁰ The Common Carrier Bureau sought comment on the NANC report³¹

12 The NANC submitted a second report on the integration of wireless and wireline number portability to the Commission in 1999,³² and a third report in 2000,³³ both focusing on porting interval issues. The second report provided an analysis of the wireline porting interval and considered alternatives to reduce the porting interval for ports between wireless and wireline carriers.³⁴ The report recommended that each potential alternative be thoroughly developed and investigated.³⁵ The third report again analyzed the elements of the wireline porting interval and examined whether the length of the porting interval for both intermodal ports and wireline-to-wireline ports could be reduced.³⁶ The NANC determined that the wireline porting interval should not be reduced, but it was unable to reach a consensus on an intermodal porting interval.³⁷ Accordingly, we seek comment on the appropriate interval for intermodal porting.³⁸

B. Outstanding Petitions for Declaratory Ruling

13 On January 23, 2003, CTIA filed a petition requesting that the Commission issue a declaratory ruling that wireline carriers have an obligation to port their customers' telephone numbers to wireless carriers whose service areas overlap the wireline rate center that is associated with the number.³⁹ In its petition, CTIA claims that some LECs have narrowly construed their LNP obligations with regard to wireless carriers, taking the position that portability is only required where the wireless carrier receiving the number already has a point of presence or numbering resources in the wireline rate center.⁴⁰ CTIA urges the Commission to confirm that wireline carriers have an obligation to port to wireless carriers when their respective service areas overlap. CTIA notes that, in several of its decisions, the Commission has found that LNP is necessary to promote competition between the wireless and wireline

³⁰ Letter from Alan C. Hasselwander, Chairman, NANC to A. Richard Metzger, Jr., Chief, Common Carrier Bureau (filed Apr. 14, 1998).

³¹ Common Carrier Bureau Seeks Comment on North American Numbering Council Recommendation Concerning Local Number Portability Administration Wireline and Wireless Integration, CC Docket No. 95-116, *Public Notice*, 13 FCC Rcd 17342 (1998).

³² North American Numbering Council Local Number Portability Administration Working Group Second Report on Wireless Wireline Integration, June 30, 1999, CC Docket No. 95-116 (filed Nov. 4, 1999) (Second Report on Wireless Wireline Integration).

³³ North American Numbering Council Local Number Portability Administration Working Group Third Report on Wireless Wireline Integration, Sept. 30, 2000, CC Docket No. 95-116 (filed Nov. 29, 2000) (Third Report on Wireless Wireline Integration).

³⁴ Second Report on Wireless Wireline Integration at section 3.

³⁵ *Id.* at section 1.1.

³⁶ Third Report on Wireless Wireline Integration at section 3.

³⁷ Letter from John R. Hoffman, NANC Chair to Dorothy Attwood, Chief, Common Carrier Bureau, (filed Nov. 29, 2000).

³⁸ See paras. 45-51, *infra*.

³⁹ CTIA Petition for Declaratory Ruling, CC Docket No. 95-116 (filed Jan. 23, 2003) (January 23rd Petition).

⁴⁰ *Id.* at 3.

industries CTIA argues that, without Commission action to resolve the deadlock over the rate center disparity issue, the reality of wireline-to-wireless porting will be at risk because many wireline subscribers will be unable to port their numbers to wireless carriers that serve their areas⁴¹

14. CTIA also requests that the Commission confirm that a wireline carrier's obligation to port numbers to a wireless carrier can be based on a service-level porting agreement between the carriers, and does not require an interconnection agreement According to CTIA, number portability requires only that a carrier release a customer's number to another carrier and assign the number to the new carrier in the Number Portability Administration Center (NPAC) database, which is queried solely to identify the carrier that can terminate calls to the customer.⁴²

15. The majority of wireless carriers submitting comments support CTIA's request for declaratory ruling They agree with CTIA that, without Commission action to resolve the rate center issue, the majority of wireline customers will be prevented from porting their number to a wireless carrier⁴³ They call for the Commission to reject any proposal that would restrict porting to rate centers where a wireless carrier has already obtained numbers, contending that such a limitation would be inconsistent with the competitive objectives of intermodal LNP and would waste numbering resources⁴⁴

16 Wireline carriers generally oppose CTIA's petition⁴⁵ Some argue that requiring LECs to port to carriers who do not have a point of interconnection or numbering resources in the same rate center in which the number is assigned would give wireless carriers an unfair competitive advantage over wireline carriers.⁴⁶ LECs argue that, in contrast to wireless carriers who have flexibility in establishing their service areas and rates, wireline carriers are governed by state regulations Under the state regulatory regime, they rate and route local and toll calls based on wireline rate centers. Consequently, LECs contend, wireline service providers do not have the same opportunity that wireless carriers have to offer number portability where the rate center in which the number is assigned does not match the rate center in which the LEC seeks to serve the customer⁴⁷ Others argue that CTIA's petition would amount to a system of location portability rather than service provider portability, causing customer confusion over

⁴¹ *Id* at 19

⁴² *Id* at 3

⁴³ AT&T Wireless, Midwest Wireless, Nextel, Sprint, T-Mobile, and US Cellular all filed comments supporting CTIA's January 23rd petition Comments and Reply Comments filed in response to the CTIA's January 23rd and May 13th petitions are listed in Appendix A

⁴⁴ *See, e g*, Sprint Reply Comments on CTIA's January 23rd Petition at 9, T-Mobile Comments on CTIA's January 23rd Petition at 14-15, and Virgin Mobile Reply Comments on CTIA's January 23rd Petition at 4

⁴⁵ Centurytel, Fred Williams & Associates, the Independent Alliance, the Michigan Exchange Carriers Association, NECA and NTCA, the Nebraska Rural Independent Companies, OPASTCO, SBC, TCA, USTA, and Valor Communications all filed comments opposing CTIA's January 23rd petition

⁴⁶ *See, e g*, Centurytel Comments on CTIA's January 23rd Petition at 5-6, Fred Williams & Associates Comments on CTIA's January 23rd Petition at 8, SBC Comments on CTIA's January 23rd Petition at 1, Letter from Cronan O'Connell, Vice President-Federal Regulatory, Qwest to Marlene H Dortch, Secretary, FCC, CC Docket No 95-116 (filed Oct 9, 2003) (Qwest Oct 9th *Ex Parte*), and Letter from Kathleen B Levitz, Vice President-Federal Regulatory, BellSouth to Marlene H Dortch, Secretary, FCC, CC Docket No 95-116 (filed Sept 9, 2003) (BellSouth Sept 9th *Ex Parte*)

⁴⁷ *See, e g*, Letter from James C Smith, Senior Vice President, SBC Telecommunications, Inc to Michael K Powell, Chairman, FCC, CC Docket No 95-116 (filed Aug 29, 2003) (SBC Aug 29th *Ex Parte*), and BellSouth Sept 9th *Ex Parte*

the rating of calls.⁴⁸ Several LECs also argue that the Commission may not permit intermodal porting outside of wireline rate center boundaries without first issuing a Notice of Proposed Rulemaking.⁴⁹ Several rural LECs argue that requiring porting between wireline and wireless carriers where the wireless carriers do not have a point of interconnection in the same rate center as the ported number would raise intercarrier compensation issues, as wireline carriers would be required to transport calls to ported numbers through points of interconnection outside of rural LEC serving areas.⁵⁰

17 On May 13, 2003, CTIA filed a second Petition for Declaratory Ruling. In its petition, CTIA argues that, in addition to the rate center issue that was the subject of its January petition, there are additional LNP implementation issues that have not been resolved by industry consensus and therefore must be addressed by the Commission.⁵¹ Specifically, CTIA requests that the Commission rule on the appropriate length of the porting interval, the necessity of interconnection agreements, a dispute between BellSouth and Sprint concerning the ability of carriers to designate different routing and rating points, definition of the largest 100 Metropolitan Statistical Areas (MSAs), the bona fide request requirement, and whether carriers must support nationwide roaming for customers with ported numbers.

18 On October 7, 2003, we released a Memorandum Opinion and Order addressing carrier requests for clarification of wireless-wireless porting issues.⁵² In response to CTIA's May 13th petition as well as a Petition for Declaratory Ruling/Application for Review, we concluded that wireless carriers may not impose "business rules" on their customers that purport to restrict carriers' obligations to port numbers upon receipt of a valid request to do so. In addition, we clarified that wireless-to-wireless porting does not require the wireless carrier receiving the number to be directly interconnected with the wireless carrier that gives up the number or to have numbering resources in the rate center associated with the ported number. We clarified that, although wireless carriers may voluntarily negotiate interconnection agreements with one another, such agreements are not required for wireless-to-wireless porting. We confirmed also that, in cases where wireless carriers are unable to reach agreement regarding the terms and conditions of porting, all such carriers must port numbers upon receipt of a valid request from another carrier, with no conditions.

19 We encouraged wireless carriers to complete "simple" ports within the industry-established two and one half hour porting interval and found that no action was necessary regarding the porting of numbers served by Type 1 interconnection because carriers are migrating these numbers to switches served by Type 2 interconnection or are otherwise developing solutions.⁵³ Finally, we reiterated the requirement that wireless carriers support roaming nationwide for customers with pooled and ported

⁴⁸ See Centurytel Comments on CTIA's January 23rd Petition at 4-5

⁴⁹ See, e.g., Letter from Gary Lytle, Qwest to Marlene H. Dortch, Secretary, FCC (filed Oct. 17, 2003) (Qwest Oct 17th Ex Parte), and SBC Aug 29th Ex Parte

⁵⁰ NECA and NTCA Comments on CTIA's January 23rd Petition at 6. See, In the Matter of Sprint Petition for Declaratory Ruling, Obligation of Incumbent LECs to Load Numbering Resources Lawfully Acquired and to Honor Routing and Rating Points Designated by Interconnecting Carriers, Sprint Petition for Declaratory Ruling, CC Docket No. 01-92 (filed July 18, 2002) (Sprint Petition for Declaratory Ruling)

⁵¹ CTIA Petition for Declaratory Ruling, CC Docket No. 95-116 (filed May 13, 2003) (May 13th Petition)

⁵² Telephone Number Portability, CC Docket No. 95-116, *Memorandum Opinion and Order*, FCC 03-237, rel. Oct. 7, 2003

⁵³ Type 1 numbers reside in an end office of a LEC and are assigned to a Type 1 interconnection group, which connects the wireless carrier's switch and the LEC's end office switch. Type 2 numbers reside in a wireless carrier's switch and are assigned to a Type 2 interconnection group, which connects the wireless carrier's switch and a LEC access tandem switch or end office switch.

numbers, and we addressed outstanding petitions for waiver of the roaming requirement. We indicated our intention to address issues related to intermodal porting in a separate order.⁵⁴

III. ORDER

A. Wireline-to-Wireless Porting

20 *Background*. In its January 23rd Petition, CTIA requests that the Commission clarify that the LNP rules require wireline carriers to port numbers to any wireless carrier whose service area overlaps the wireline carrier's rate center that is associated with the ported number.⁵⁵ CTIA claims that, absent such a clarification, a majority of wireline customers will not be able to port their phone number to the wireless carrier of their choice because wireless carriers typically have a point of interconnection or numbering resources in only a fraction of the wireline rate centers in their service areas.⁵⁶ Citing prior Commission decisions, CTIA notes that the Commission has cited intermodal competition as a basis for imposing LNP requirements on wireless carriers.⁵⁷ CTIA argues that the Commission's objectives with respect to intermodal competition cannot be realized without prompt action.

21. *Discussion*. The Act and the Commission's rules impose broad porting obligations on LECs. Section 251(b) of the Act provides that all local exchange carriers "have the duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission."⁵⁸ The Act defines number portability as "the ability of users of telecommunications services to retain, at the same location, existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another."⁵⁹ In implementing these requirements in the Local Number Portability *First Report and Order*, the Commission determined that LECs were required to provide portability to all other telecommunications carriers, including CMRS service providers, providing local exchange or exchange access service within the same MSA.⁶⁰ The Commission's rules reflect these requirements, requiring LECs to offer number portability in switches for which another carrier made a request for number portability and providing that all carriers, including CMRS service providers must be permitted to make requests for number portability.⁶¹

⁵⁴ Remaining issues from CTIA's January 23rd and May 13th petitions pertaining to intermodal porting are addressed in this order. Additional issues from CTIA's May 13th petition, including the implication of the porting interval for E911, the definition of the 100 largest MSAs, and the bona fide request requirement have been addressed separately. See Letter from John B. Muleta, Chief, Wireless telecommunications Bureau, to John T. Scott, III, Vice President and Deputy General Counsel, Verizon Wireless and Michael F. Altschul, Senior Vice President, General Counsel, CTIA, CC Docket No. 95-116, DA 03-2190, dated July 3, 2003. See also, Numbering Resource Optimization, *Fourth Report and Order and Fourth Further Notice of Proposed Rulemaking*, CC Docket Nos. 99-200 and 95-116 (rel. June 18, 2003).

⁵⁵ January 23rd Petition at 3.

⁵⁶ *Id.* at 18.

⁵⁷ *Id.* at 12-16.

⁵⁸ 47 U.S.C. § 251(b).

⁵⁹ 47 U.S.C. § 153(30).

⁶⁰ *First Report and Order* at 8393, 8431, paras. 77 and 152.

⁶¹ 47 C.F.R. § 52.23(b)(1), (b)(2)(i).

22 We conclude that, as of November 24, 2003, LECs must port numbers to wireless carriers where the requesting wireless carrier's "coverage area" overlaps the geographic location of the rate center in which the customer's wireline number is provisioned, provided that the porting-in carrier maintains the number's original rate center designation following the port.⁶² Permitting intermodal porting in this manner is consistent with the requirement that carriers support their customers' ability to port numbers while remaining at the same location. For purposes of this discussion, the wireless "coverage area" is the area in which wireless service can be received from the wireless carrier. Permitting wireline-to-wireless porting under these conditions will provide customers the option of porting their wireline number to any wireless carrier that offers service at the same location. We also reaffirm that wireless carriers must port numbers to wireline carriers within the number's originating rate center. With respect to wireless-to-wireline porting, however, because of the limitations on wireline carriers' networks ability to port-in numbers from distant rate centers, we will hold neither the wireline nor the wireless carriers liable for failing to port under these conditions. Rather, we seek comment on this issue in the Further Notice below.

23 We make our determinations based on several factors. First, as stated above, under the Act and the Commission's rules, wireline carriers must port numbers to other telecommunications carriers, to the extent that it is technically feasible to do so, in accordance with regulations prescribed by the Commission.⁶³ There is no persuasive evidence in the record indicating that there are significant technical difficulties that would prevent a wireline carrier from porting a number to a wireless carrier that does not have a point of interconnection or numbering resources in the same rate center as the ported number. Accordingly, the plain text of the Act and the Commission's rules, requiring LECs to provide number portability applies. In fact, several LECs acknowledge that there is no technical obstacle to porting wireline numbers to wireless carriers whose point of interconnection is outside of the rate center of the ported numbers.⁶⁴ Moreover, at least two LECs, Verizon and Sprint, have already established agreements with their wireless affiliates that specifically provide for intermodal porting.⁶⁵ In addition, BellSouth indicates in its comments that it has no intention of preventing customers from porting their telephone numbers to wireless carriers upon the customers' requests – regardless of whether or not the

⁶² We anticipate that a minimal amount of identifying information will be transmitted from the wireless carrier to the LEC when a customer seeks to port. For example, carriers may choose to verify the zip code of the porting-out wireline customer in their validation procedures.

⁶³ 47 U.S.C. § 251(b)(2), 47 C.F.R. § 52.23

⁶⁴ See BellSouth Comments on CTIA's January 23rd Petition at 3, and USTA Comments on CTIA's January 23rd Petition at 7-8.

Several interexchange carriers (IXCs) have brought to the Commission's attention a problem IXCs face in identifying whether a customer has switched carriers. This problem can result in customers receiving erroneous bills from IXCs after they have switched local or interexchange carriers, and could also be a problem when customers port from a wireline carrier to a wireless carrier. While we do not address this issue in the instant order, we have sought comment on carrier petitions regarding this matter. See Pleading Cycle Established for Comments on Petition for Declaratory Ruling and/or Rulemaking, filed by Americatel Corporation, and for Comments on Joint Petition for Rulemaking to Implement Mandatory Minimum Customer Account Record Exchange Obligations on All Local and Interexchange Carriers, filed by AT&T Corp., Sprint Corp., and WorldCom, Inc., CG Docket No. 02-386, *Public Notice*, 17 FCC Rcd 25535 (2002).

⁶⁵ "Verizon and Verizon Wireless Reach Barrier-Free Porting Agreement in Advance of November 24 Deadline," Press Release from Verizon Wireless dated Sept. 22, 2003, available at <http://news.vzw.com/news/2003/09/pr2003-09-22.html>, and "Sprint Wireless Local Number Portability Plans on Track, on Schedule for November Deadline," Press Release from Sprint dated Oct. 1, 2003, available at Sprint.com

carriers' service areas overlap⁶⁶ Accordingly, BellSouth states, number portability can still occur despite the "rate center disparity" issue We note that, to the extent that LECs assert an inability to port numbers to wireless carriers under the circumstances described herein, they bear the burden of demonstrating with specific evidence that porting to a wireless carrier without a point of interconnection or numbering resources in the same rate center to which the ported number is assigned is not technically feasible pursuant to our rules

24. Second, neither the Commission's LNP rules nor any of the LNP orders have required wireless carriers to have points of interconnection or numbering resources in the same rate center as the assigned number for wireline-to-wireless porting In the Local Number Portability *Second Report and Order*, the Commission adopted NANC recommendations regarding several specific aspects of number portability implementation, including technical and operational standards for the provision of number portability by wireline carriers⁶⁷ In this context, the Commission adopted the NANC recommendations concerning the boundaries applicable to wireline-to-wireline porting Specifically, the Commission adopted NANC recommendations limiting the scope of ports to wireline carriers based on wireline carriers' inability to receive numbers from foreign rate centers⁶⁸

25. In this order, we address a different issue, wireline-to-wireless porting The NANC recommendations that were the subject of the *Second Report and Order* included a boundary for wireline-to-wireline porting, but were silent regarding wireline-to-wireless porting issues. In adopting the NANC recommendations, the Commission specifically recognized that the NANC had not included recommendations regarding wireless carriers' participation in number portability and that modifications to existing standards and procedures would probably need to be made as the industry obtained additional information about incorporating CMRS service providers into a long-term number portability solution and interconnecting CMRS carriers with wireline carriers already implementing number portability⁶⁹ However, while the Commission noted that NANC should consider intermodal porting issues of concern to wireless carriers, it did not impose limits on wireline-to-wireless porting while NANC considered these issues, nor did it give up its inherent authority to interpret the statute and rules with respect to the obligation of wireline carriers to port numbers to wireless carriers. Accordingly, we find that in light of the fact that the Commission has never adopted any limits regarding wireline-to-wireless number portability, as of November 24, 2003, LECs must port numbers to wireless carriers where the requesting wireless carrier's coverage area overlaps the geographic location of the rate center to which the number is assigned.⁷⁰

⁶⁶ See BellSouth Comments on CTIA's January 23rd Petition at 3 In recent ex parte filings, BellSouth argues that the Commission cannot proceed to require intermodal porting until it addresses the issues arising from the differences in network architecture, operational support systems, and regulatory requirements that distinguish wireline carriers from wireless carriers See, e.g., BellSouth Sept 9th *Ex Parte*

⁶⁷ See *Second Report and Order* Subsequent NANC reports address technical issues associated with wireless-to-wireline porting In the Further Notice, we seek comment on these technical feasibility issues

⁶⁸ North American Numbering Council Local Number Portability Selection Working Group Final Report and Recommendation to the FCC, Appendix D at 6 (rel April 25, 1997) This report is available at www.fcc.gov/wcb/tapd/nanc/lnpastuf.html

⁶⁹ *Second Report and Order* 12 FCC Rcd at 12333-34

⁷⁰ Similarly, wireless-to-wireline porting is required, as of November 24, 2003, where the requesting carrier's coverage area overlaps the geographic location of the rate center to which the number is assigned

26 We reject the argument advanced by certain wireline carriers,⁷¹ that requiring LECs to port to a wireless carrier that does not have a point of interconnection or numbering resources in the same rate center as the ported number would constitute a new obligation imposed without proper notice. In fact, the requirement that LECs port numbers to wireless carriers is not a new rule. Citing the D.C. Circuit's decision in the *Sprint* case specifying the distinction between clarifications of existing rules and new rulemakings subject to APA procedures, Qwest, for example, argues that the permitting wireline-to-wireless porting in the manner outlined above would change LECs' existing porting obligations.⁷² As described earlier, however, section 251(b) of the Act and the Commission's Local Number Portability *First Report and Order* impose broad porting obligations on wireline carriers. Specifically, these authorities require wireline carriers to provide portability to all other telecommunications carriers, including wireless service providers. While the Commission decision in the Local Number Portability *Second Report and Order* limited the scope of wireline carriers' porting obligation with respect to the boundary for wireline-to-wireline porting, the Commission, as noted above, has never established limits with respect to wireline carriers' obligation to port to wireless carriers. The clarifications we make in this order interpret wireline carriers' existing obligation to port numbers to wireless carriers. Therefore, these clarifications comply with the requirements of the Administrative Procedure Act as well as the D.C. Circuit's decision in the *Sprint* case.

27 We also reject the argument made by some LECs that the scope of wireline-to-wireless porting should be limited because wireline carriers may not be able to offer portability to certain wireless subscribers.⁷³ As discussed above, under the Act and the Commission's rules, wireline carriers must port numbers to other telecommunications carriers, to the extent technically feasible. The fact that there may be technical obstacles that could prevent some other types of porting does not justify denying wireline consumers the benefit of being able to port their wireline numbers to wireless carriers. Each type of service offers its own advantages and disadvantages (e.g., wireless service offers mobility and larger calling areas, but also the potential for dropped calls) and wireline customers will consider these attributes in determining whether or not to port their number. In our view, it would not be appropriate to prevent wireline customers from taking advantage of the mobility or the larger local calling areas associated with wireless service simply because wireline carriers cannot currently accommodate all potential requests from customers with wireless service to port their numbers to a wireline service provider. Evidence from the record shows that limiting wireline-to-wireless porting to rate centers where a wireless carrier has a point of interconnection or numbering resources would deprive the majority of wireline consumers of the ability to port their number to a wireless carrier.⁷⁴ With such limited intermodal porting, the competitive benefits we seek to promote through the porting requirements may not be fully achieved. The focus of the porting rules is on promoting competition, rather than protecting individual competitors. To the extent that wireline carriers may have fewer opportunities to win customers through porting, this disparity results from the wireline network architecture and state regulatory requirements, rather than Commission rules.

28 We conclude that porting from a wireline to a wireless carrier that does not have a point of interconnection or numbering resources in the same rate center as the ported number does not, in and of itself, constitute location portability, because the rating of calls to the ported number stays the same. As stated above, a wireless carrier porting-in a wireline number is required to maintain the number's original rate center designation following the port. As a result, calls to the ported number will continue to be rated

⁷¹ See, e.g., Letter from Gary Lytle, Qwest to Marlene H. Dortch, Secretary, FCC (filed Oct. 17, 2003) (Qwest Oct 17th Ex Parte), and SBC Aug. 29 Ex Parte.

⁷² Qwest Oct. 17th Ex Parte at 11. See *Sprint Corp. v. FCC*, 315 F.3d 369 (D.C. Cir. 2003).

⁷³ See, e.g., SBC Aug. 29th Ex Parte and BellSouth Sept. 9th Ex Parte.

⁷⁴ January 23rd Petition at 6.

in the same fashion as they were prior to the port. As to the routing of calls to ported numbers, it should be no different than if the wireless carrier had assigned the customer a new number rated to that rate center.⁷⁵

29. Some wireline carriers contend that they lack the technical capability to support wireline-to-wireless porting in the manner outlined above, and that they need time to make technical modifications to their systems. We emphasize that our holding in this order requires wireline carriers to support wireline-to-wireless porting in accordance with this order by November 24, 2003, unless they can provide specific evidence demonstrating that doing so is not technically feasible pursuant to our rules.⁷⁶ We expect carriers that need to make technical modifications to do so forthwith, as the record indicates that major system modifications are not required and that several wireline carriers have already announced their technical readiness to port numbers to wireless carriers without regard to rate centers.⁷⁷ We recognize, however, that many wireline carriers outside the top 100 MSAs may require some additional time to prepare for implementation of intermodal portability. In addition we note that wireless carriers outside the top 100 MSAs are not required to provide LNP prior to May 24, 2004, and accordingly are unlikely to seek to port numbers from wireline carriers prior to that date. Therefore for wireline carriers operating in areas outside of the 100 largest MSAs, we hereby waive, until May 24, 2004, the requirement that these carriers port numbers to wireless carriers that do not have a point of interconnection or numbering resources in the rate center where the customer's wireline number is provisioned. We find that this transition period will help ensure a smooth transition for carriers operating outside of the 100 largest MSAs and provide them with sufficient time to make necessary modifications to their systems.

30. Carriers inside the 100 largest MSAs (or outside the 100 largest MSAs, after the transition period) may file petitions for waiver of their obligation to port numbers to wireless carriers, if they can provide substantial, credible evidence that there are special circumstances that warrant departure from existing rules.⁷⁸ We note that several wireline carriers have already filed requests for waiver.⁷⁹ We will

⁷⁵ As noted in paras 39-40 below, there is a dispute as to which carrier is responsible for transport costs when the routing point for the wireless carrier's switch is located outside the wireline local calling area in which the number is rated. See Sprint Petition for Declaratory Ruling. The existence of this dispute over transport costs does not, however, provide a reason to delay or limit the availability of porting from wireline to wireless carriers.

We recognize that the Act limits wireline carriers' ability to route calls outside of Local Access Transport Area (LATA) boundaries. See 47 U.S.C. § 272. See also, Application by SBC Communications, Inc., Southwestern Bell Telephone, and Southwestern Bell Communications, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas, *Memorandum Opinion and Order*, 15 FCC Rcd 18354 (2000). Accordingly, we clarify that our ruling is limited to porting within the LATA where the wireless carrier's point of interconnection is located, and does not require or contemplate porting outside of LATA boundaries.

⁷⁶ 47 U.S.C. § 251(b). We anticipate that, as a general matter, enforcement issues regarding both wireless-wireless and wireless-wireline local number portability at this time are likely to be better addressed in the context of Section 208 formal complaint proceedings or related mediations as opposed to FCC-initiated forfeiture proceedings. In this connection, we note that a violation of our number portability rules would constitute an unjust and unreasonable practice under section 201(b) of the Act.

⁷⁷ We note that Verizon has already announced its intention to port numbers without regard to rate centers. See "Verizon and Verizon Wireless Reach Barrier-Free Porting Agreement in Advance of November 24 Deadline," Press Release from Verizon Wireless dated Sept. 22, 2003, available at <http://news.vzw.com/news/2003/09/pr2003-09-22.html>

⁷⁸ 47 C.F.R. § 1.3, 52.25(e). See also *WAIT Radio v. FCC*, 418 F.2d 1153, 1158 (D.C. Cir. 1969), cert. denied, 409 U.S. 1027 (1972).

consider these requests separately, and our decision in this order is without prejudice to any potential disposition of these requests

B. Interconnection Agreements

31 *Background* In its January 23rd petition, CTIA requests that the Commission confirm that a wireline carrier's obligation to port numbers to a wireless carrier requires only that a carrier release a customer's number to another carrier and assign the number to the new carrier in the Number Portability Administration Center (NPAC) database, which is queried solely to identify the carrier that can terminate calls to the customer. From a practical perspective, CTIA contends, such porting can be based on a service-level porting agreement between carriers, and does not require direct interconnection or an interconnection agreement. Moreover, CTIA argues, because the Commission imposed number portability requirements on wireless carriers pursuant to its authority under sections 1, 2, 4(i), and 332 of the Act, and outside the scope of sections 251 and 252, number portability between wireline and wireless carriers is governed by a different regime than number portability between wireline carriers and is subject to the Commission's unique jurisdiction over wireless carriers.⁸⁰

32 A number of wireless carriers agree with CTIA, arguing that requiring wireless carriers to establish interconnection agreements with wireline carriers from whom they sought to port numbers would delay LNP implementation.⁸¹ Several wireline carriers, however, assert that interconnection agreements for porting are necessary.⁸² SBC, for example, argues that under sections 251 and 252 of the Act, LECs must establish interconnection agreements for porting.⁸³ SBC contends that interconnection agreements guarantee parties their right to negotiate, provide a means of resolving disputes, and allow public scrutiny of agreements.⁸⁴ In addition, some LECs argue that, without interconnection agreements, they have no means to ensure that they will receive adequate compensation for transporting and terminating traffic to wireless carriers

33 Other LECs, on the other hand, disagree that interconnection agreements are a necessary precondition to intermodal porting. Verizon contends that intermodal porting is not a Section 251 requirement and is therefore not necessary to incorporate wireless-wireline porting into Section 251 agreements.⁸⁵ AT&T questions whether either service level agreements or interconnection agreements are necessary, contending that because such little information needs to be exchanged between carriers for porting, less formal arrangements may be sufficient.⁸⁶ Sprint argues that interconnection agreements are

⁷⁹ See e.g., Franklin Telephone Company, Inc. Petition for Waiver, CC Docket Nos. 95-116 (filed Sept. 24, 2003), Intercommunity Telephone Company, LLC Petition for Waiver, CC Docket No. 95-116 (filed Sept. 24, 2003), and North Central Telephone Cooperative, Inc. Petition for Waiver, CC Docket No. 95-116 (filed Sept. 24, 2003).

⁸⁰ May 13th Petition at 17-18

⁸¹ See Sprint Comments on CTIA's May 13th Petition at 16, T-Mobile Comments on CTIA's May 13th Petition at 8, and Virgin Mobile Comments on CTIA's May 13th Petition at 4-5

⁸² See Missouri Independent Telephone Company Group Comments on CTIA's May 13th Petition, National Telecommunications Cooperative Association Comments on CTIA's May 13th Petition, and SBC Comments on CTIA's May 13th Petition

⁸³ SBC Comments on CTIA's May 13th Petition at 8

⁸⁴ *Id.*

⁸⁵ Sprint Comments on CTIA's May 13th Petition at 18, Verizon Comments on CTIA's May 13th Petition at 10

⁸⁶ AT&T Reply Comments on CTIA's May 13th Petition at 7-8

not required for LNP because whether or not a customer ports a number from one carrier to another has nothing to do with the interconnection arrangements two carriers use for the exchange of traffic⁸⁷ Several LECs urge the Commission to let carriers determine on their own what type of agreement to use to facilitate porting⁸⁸

34 *Discussion* We find that wireless carriers need not enter into section 251 interconnection agreements with wireline carriers solely for the purpose of porting numbers. We note that the intermodal porting obligation is also based on the Commission's authority under sections 1, 2, 4(i) and 332 of the Act. Sprint argues that interconnection agreements are not required to implement every section 251 obligation⁸⁹ Sprint also claims that because porting involves a limited exchange of data (e.g., carriers need only share basic contact and technical information sufficient to allow porting functionality and customer verification to be established), interconnection agreements should not be required here⁹⁰ We agree with Sprint that wireline carriers should be required to port numbers to wireless carriers without necessarily entering into an interconnection agreement because this obligation can be discharged with a minimal exchange of information We thus find that wireline carriers may not unilaterally require interconnection agreements prior to intermodal porting Moreover, to avoid any confusion about the applicability of section 252 to any arrangement between wireline and wireless carriers solely for the purpose of porting numbers, we forbear from these requirements as set forth below

35 To the extent that the *Qwest Declaratory Ruling Order* could be interpreted to require any agreement pertaining solely to wireline-to-wireless porting to be filed as an interconnection agreement with a state commission pursuant to sections 251 and 252 of the Act, we forbear from those requirements First, we conclude that interconnection agreements are not necessary to prevent unjust or unreasonable charges or practices by wireless carriers with respect to porting The wireless industry is characterized by a high level of competition between carriers Although states do not regulate the prices that wireless carriers charge, the prices for wireless service have declined steadily over the last several years⁹¹ No evidence suggests that requiring interconnection agreements for intermodal porting is necessary for this trend to continue

36. For similar reasons, we find that interconnection agreements for intermodal porting are not necessary for the protection of consumers⁹² The intermodal LNP requirement is intended to benefit

⁸⁷ Letter from Luisa L. Lancetti, Vice President, PCS Regulatory Affairs, Sprint to John Rogovin, General Counsel, FCC (filed Sept. 22, 2003)

⁸⁸ See Association for Local Telecommunications Services Reply Comments on CTIA's May 13th Petition at 3, BellSouth Comments on CTIA's May 13th Petition at 9, and USTA Reply Comments on CTIA's May 13th Petition at 6

⁸⁹ See note 87

⁹⁰ Sprint's profile information exchange process is an example of the type of contact and technical information that would trigger an obligation to port See, Letter from Luisa L. Lancetti, Vice President PCS Regulatory Affairs, Sprint Corp. to John B. Muleta, Chief, Wireless Telecommunications Bureau (filed Sept. 23, 2003), and Letter from Luisa L. Lancetti, Vice President, PCS Regulatory Affairs, Sprint Corp. to John B. Muleta, Chief, Wireless Telecommunications Bureau and William Maher, Chief, Wireline Competition Bureau (filed August 8, 2003)

⁹¹ Implementation of Section 6002(b) of the Omnibus Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, *Eighth Report*, FCC 03-150, at 45 (rel. July 14, 2003)

⁹² Certain LECs have expressed concern that without interconnection agreements between LECs and CMRS carriers, calls to ported numbers may be dropped, because NPAC queries may not be performed for customers who have ported their numbers from a LEC to a CMRS carrier See Letter from Mary J. Sisak, Counsel for Centurytel, Inc. to Marlene H. Dortch, Secretary, FCC (filed Oct. 23, 2003) We do not find these concerns to be justified,

consumers by promoting competition between the wireless and wireline industries and creating incentives for carriers to provide new service offerings, reduced prices, and higher quality services. Requiring interconnection agreements for the purpose of intermodal porting could undermine the benefits of LNP to consumers by preventing or delaying implementation of intermodal porting. We also do not believe that the state regulatory oversight mechanism provided by Section 251 is necessary to protect consumers in this limited instance.

37 Finally, we conclude that forbearance is consistent with the public interest. Number portability, by itself, does not create new obligations with regard to exchange of traffic between the carriers involved in the port. Instead, porting involves a limited exchange of data between carriers to carry out the port. Sprint, for example, notes that to accomplish porting, carriers need only exchange basic contact information and connectivity details, after which the port can be rapidly accomplished.⁹³ Given the limited data exchange and the short time period required to port, we conclude that interconnection agreements approved under section 251 are unnecessary. In view of these factors, we conclude that it is appropriate to forbear from requiring interconnection agreements for intermodal porting.

C. The Porting Interval

38. CTIA requests that the Commission require wireline carriers to reduce the length of the porting interval, or the amount of time it takes two carriers to complete the process of porting a number, for ports from wireline to wireless carriers.⁹⁴ Currently, the wireline-to-wireline porting interval is four business days.⁹⁵ The wireline porting interval was adopted by the NANC in its Architecture and Administrative Plan for Local Number Portability, which was approved by the Commission.⁹⁶ Upon subsequent review of the porting interval, the NANC agreed that the four business day porting interval for wireline-to-wireline porting should not be reduced, it did not specify a porting interval for intermodal porting.⁹⁷ The current porting interval for wireless-to-wireless ports is two and one half hours.⁹⁸ We decline to require wireline carriers to follow a shorter porting interval for intermodal ports at this time. Instead, we will seek comment on this issue in the Further Notice. We note that, while we seek comment on whether to reduce the length of the wireline porting interval, the current four business day porting

however, because the Commission's rules require carriers to correctly route calls to ported numbers. See Telephone Number Portability, CC Docket No. 95-116, *First Memorandum Opinion and Order on Reconsideration*, 12 FCC Rcd 7236, 7307-08, paras. 125-126.

⁹³ Sprint Comments on CTIA's May 13th Petition at 13-14.

⁹⁴ May 13th Petition at 7.

⁹⁵ Wireline carriers are required to complete the LSR/FOC exchange within 24 hours and complete the port within three business days thereafter. See North American Numbering Council Local Number Portability Selection Working Group Final Report and Recommendation to the FCC, Appendix E (rel. April 25, 1997).

⁹⁶ *Second Report and Order*, 12 FCC Rcd 12281 (1997).

⁹⁷ Letter from John R. Hoffman, NANC Chair to Dorothy Attwood, Chief, Common Carrier Bureau, (filed Nov 29, 2000).

⁹⁸ See North American Numbering Council Local Number Portability Administration Working Group Report on Wireless Wireline Integration, May 8, 1998, CC Docket No. 95-116 (filed May 18, 1998) (First Report on Wireless Wireline Integration), North American Numbering Council Wireless Number Portability Subcommittee Report on Wireless Number Portability Technical, Operational, and Implementation Requirements Phase II, CC Docket No. 95-116 (filed Sept 26, 2000), ATIS Operations and Billing Forum, Wireless Intercarrier Communications Interface Specification for Local Number Portability, Version 2, at § 2 p. 6 (Jan. 2003).

interval represents the outer limit of what we would consider to be a reasonable amount of time in which wireline carriers may complete ports. We note also that whatever porting interval affiliated wireline and wireless service providers offer within their corporate family must also be made available to unaffiliated service providers.⁹⁹

D. Impact of Designating Different Routing and Rating Points on LNP

39. CTIA asks the Commission to resolve the intercarrier dispute between BellSouth and Sprint as it affects the rating and routing of calls to ported numbers.¹⁰⁰ CTIA contends that, although the dispute largely concerns matters of intercarrier compensation, to the extent LECs argue that they need not differentiate between rating and routing points for local calls, intermodal porting may not be available to consumers.¹⁰¹ To ensure that permitting porting beyond wireline rate center boundaries does not cause customer confusion with respect to charges for calls, we clarify that ported numbers must remain rated to their original rate center. We note, however, that the routing will change when a number is ported. Indeed, several wireline carriers have expressed concern about the transport costs associated with routing calls to ported numbers. The National Exchange Carrier Association (NECA) and National Telecommunications Cooperative Association (NTCA), for example, argue in their joint comments, that when wireless carriers establish a point of interconnection outside of a rural LEC's serving area, a disproportionate burden is placed on rural LECs to transport originating calls to the interconnection points.¹⁰² They argue that requiring wireline carriers to port telephone numbers to out-of-service area points of interconnection could create an even bigger burden. Other carriers point out, however, that issues associated with the rating and routing of calls to ported numbers are the same as issues associated with rating and routing of calls to all wireless numbers.¹⁰³

40. We recognize the concerns of these carriers, but find that they are outside the scope of this order. As noted above, our declaratory ruling with respect to wireline-to-wireless porting is limited to ported numbers that remain rated in their original rate centers. We make no determination, however, with respect to the routing of ported numbers, because the requirements of our LNP rules do not vary depending on how calls to the number will be routed after the port occurs. Moreover, as CTIA notes, the rating and routing issues raised by the rural wireline carriers have been raised in the context of non-ported numbers and are before the Commission in other proceedings.¹⁰⁴ Therefore, without prejudging the outcome of any other proceeding, we decline to address these issues at this time as they relate to intermodal LNP.

IV. FURTHER NOTICE OF PROPOSED RULEMAKING

A. Wireless-to-Wireline Porting

41. *Background* As noted above, some LECs argue that allowing wireless carriers to port numbers wherever their coverage area overlaps the rate center in which the number is assigned would

⁹⁹ 47 U.S.C. §§ 201(b) and 202(a)

¹⁰⁰ May 13th Petition at 25-26

¹⁰¹ *Id.*

¹⁰² NECA and NTCA Comments on CTIA's January 23rd Petition at 6

¹⁰³ BellSouth Comments on CTIA's May 13th Petition at 11-12

¹⁰⁴ *See, e.g.* In the Matter of Sprint Petition for Declaratory Ruling, Obligation of Incumbent LECs to Load Numbering Resources Lawfully Acquired and to Honor Routing and Rating Points Designated by Interconnecting Carriers, Sprint Petition for Declaratory Ruling, CC Docket No. 01-92 (filed July 18, 2002)

give wireless service providers an unfair competitive advantage over wireline carriers.¹⁰⁵ They contend that while this may facilitate widespread wireline-to-wireless porting, wireless-to-wireline porting can only occur in cases where the wireless customer is physically located in the wireline rate center associated with the phone number.¹⁰⁶ If the customer's physical location is outside the rate center associated with the number, porting the number to a wireline telephone at the customer's location could result in calls to and from that number being rated as toll calls. As a result, the LECs assert, they are effectively precluded from offering wireless-to-wireline porting to those wireless subscribers who are not located in the wireline rate center associated with their wireless numbers.¹⁰⁷ Furthermore, the LECs contend that for them to offer wireless-to-wireline porting in this context would require significant and costly operational changes.¹⁰⁸ Qwest, for example, argues that if the Commission were to make the Local Access Transport Area (LATA) or Numbering Plan Area (NPA) the relevant geographic area for porting, LECs would be required to upgrade switches, increase trunking, and rework billing and provisioning systems.¹⁰⁹

42 *Discussion.* We seek comment on how to facilitate wireless-to-wireline porting where there is a mismatch between the rate center associated with the wireless number and the rate center in which the wireline carrier seeks to serve the customer. Some wireline commenters contend that requiring porting between wireline and wireless carriers where the wireless carrier does not have a point of interconnection or numbering resources in the rate center creates a competitive disparity because wireline carriers would not have the same flexibility to offer porting to wireless customers whose numbers are not associated with the wireline rate center. We seek comment on the technical impediments associated with requiring wireless-to-wireline LNP when the location of the wireline facilities serving the customer requesting the port is not in the rate center where the wireless number is assigned. We seek comment on whether technical impediments exist to such an extent as to make wireless-to-wireline porting under such circumstances technically infeasible. Commenters that contend there are technical implications should specifically describe them, including any upgrades to switches, network facilities, or operational support systems that would be necessary. Commenters should also provide detailed information on the magnitude of the cost of such upgrades along with documentation of the estimated costs. We also seek comment on whether the benefits associated with offering wireless-to-wireline porting would outweigh the costs associated with making any necessary upgrades. We seek comment on the expected demand for wireless-to-wireline porting. We note that wireline customers who decide to port their numbers to wireless carriers are able to port their numbers back to wireline carriers if they choose, because the numbers remain associated with their original rate centers.

43 In addition to technical factors, we seek comment on whether there are regulatory requirements that prevent wireline carriers from porting wireless numbers when the rate center associated with the number and the customer's physical location do not match. Commenters that suggest such obstacles exist and result in a competitive disadvantage should submit proposals to address these impediments, as well as consider the collateral effect on other regulatory objectives as a result of these proposals. We note that wireline carriers are not able to port a number to another wireline carrier if the rate center associated with the number does not match the rate center associated with the customer's

¹⁰⁵ See, e.g., Centurytel Comments on CTIA's January 23rd Petition at 5-6, Fred Williams & Associates Comments on CTIA's January 23rd Petition at 8, and SBC Comments on CTIA's January 23rd Petition at 1.

¹⁰⁶ See, e.g., Qwest Oct 9th *Ex Parte*, and Letter from Herschel L. Abbott, Jr., Vice President-Government Affairs, BellSouth to Michael K. Powell, Chairman, FCC (filed Oct 14, 2003).

¹⁰⁷ *Id.*

¹⁰⁸ See Letter from Cronan O'Connell, Vice President-Federal Regulatory, Qwest to Marlene H. Dortch, Secretary, FCC (filed July 24, 2003) at 4-5 (Qwest July 24th *Ex Parte*), and SBC Aug 29th *Ex Parte*.

¹⁰⁹ See Qwest July 24th *Ex Parte* at 4-5.

physical location. We seek comment on whether wireless and wireline numbers should be treated differently in this regard. We also seek comment on whether there are any potential adverse impacts to consumers resulting from wireless-to-wireline porting where the rate center associated with the wireless number is different from the rate center in which the wireline carrier seeks to serve the customer.

44 In addition, we seek comment on whether there are other competitive issues that could affect our LNP requirements. For example, to the extent that wireless-to-wireline porting may raise issues regarding the rating of calls to and from the ported number when the rate center of the ported number and the physical location of the customer do not match, we seek comment on the extent to which wireline carriers should absorb the cost of allowing the customer with a number ported from a wireless carrier to maintain the same local calling area that the customer had with the wireless service provider. Alternatively, we seek comment on the extent to which wireline carriers can serve customers with numbers ported from wireless carriers on a Foreign Exchange (FX) or virtual FX basis.¹¹⁰ A third option is for wireline carriers to seek rate design and rate center changes at the state level to establish larger wireline local calling areas. We seek comment on the procedural, technical, financial, and regulatory implications of each of these approaches. We also seek comment on the viability of each of these approaches and whether there are any alternative approaches to consider.

B. Porting Interval

45 *Background* Over the past several years, the NANC has studied the wireline porting interval and reviewed options for reducing the length of the interval for simple ports.¹¹¹ In the Third Report on Wireless/Wireline Integration, the Local Number Portability Administration Working Group analyzed the elements of the wireline porting interval and investigated how reducing the length of the interval for simple ports would affect carriers' operations.¹¹² The report noted that reducing the porting interval would require wireline carriers to make significant changes to their operations. First, reducing the porting interval would require wireline carriers to automate and make uniform the Local Service Request (LSR)/Local Service Request Confirmation (LSC) Firm Order Confirmation (FOC) process.¹¹³ In addition, the report indicated that wireline carriers would likely have to eliminate or adjust their batch processing operations. The report noted that a change from batch processing to real time data processing would require in-depth system analysis of all business processes that use batch processing systems.¹¹⁴ Based on its analysis of these and other challenges, the working group concluded that because most wireline carriers already found their processes and systems challenged to meet the current porting interval it was not feasible to reduce the length of the wireline porting interval for simple ports.¹¹⁵

46 Because of the number and complexity of changes that would be required in the porting process for wireline carriers, the NANC was not able to reach consensus on reducing the porting interval.

¹¹⁰ T-Mobile Comments on CTIA's January 23rd Petition at 11.

¹¹¹ See Second Report on Wireless Wireline Integration, Third Report on Wireless Wireline Integration.

¹¹² See Third Report on Wireless Wireline Integration. Simple ports are defined as those ports that do not involve unbundled network elements, involve an account for a single line (porting a single line from a multi-line account is not a simple port), do not include complex switch translations (e.g., Centrex or Plexar, ISDN, AIN services, remote call forwarding, multiple services on the loop), may include CLASS features such as Caller ID, and do not include a reseller. All other ports are considered "complex" ports. *Id.* at 6.

¹¹³ *Id.* at 13.

¹¹⁴ *Id.* at 13-14.

¹¹⁵ *Id.* at 14.

to accommodate intermodal porting¹¹⁶ The wireless industry expressed concern that the wireline four business day porting interval does not fit within its business model¹¹⁷ In order to accommodate the wireless business model, the NANC attempted to shorten the porting interval for wireline-to-wireless ports by developing a process that will allow the wireless carrier to activate the port before the wireline carrier activates the disconnect in the Number Portability Administration Center (NPAC) This process results in a situation referred to as a "mixed service" condition, whereby the customer can make calls on both the wireline and wireless phones before the port is completed The NANC reported that this mixed service condition can result in misdirected callbacks in an emergency situation¹¹⁸ That is, for example, if the emergency operator attempts to callback a person that made a call from the wireless phone, the call may be routed to the wireline phone. The NANC consulted with the National Emergency Number Association and concluded that, while the mixed service condition is not desirable, the incidence of such is low and would not impede intermodal porting¹¹⁹

47 LECs contend that their current porting interval cannot be reduced readily for intermodal porting, because it is necessary to support the complex systems and procedures of wireline carriers¹²⁰ SBC, for example, explains that the current porting interval not only ensures that the porting out carrier correctly ports a number to the porting in carrier, but also that these carriers accurately update other systems, including E911, billing, and maintenance.¹²¹ Qwest notes that wireline carriers have longer porting intervals due to differences in network and system configurations¹²² Qwest indicates that wireline carriers are often constrained by the provisioning of physical facilities (e.g., loops) to serve customers.¹²³ Moreover, LECs contend, reducing the length of the current wireline porting interval would require them to make changes to many of their systems and would involve significant expense.¹²⁴

48. Wireless carriers argue that a reduced intermodal porting interval would encourage more consumers to use porting by eliminating confusion about the porting process.¹²⁵ They argue that a reduced porting interval is technically achievable and that wireline carriers should be required to make the

¹¹⁶ Letter from John R. Hoffman, NANC Chair to Dorothy Attwood, Chief, Common Carrier Bureau (filed Nov 29, 2000)

¹¹⁷ Wireline carriers are required to complete the LSR/FOC exchange within 24 hours and complete the port within three business days thereafter. See North American Numbering Council Local Number Portability Selection Working Group Final Report and Recommendation to the FCC, Appendix E (rel April 25, 1997) See also Letter from John R. Hoffman, NANC Chair to Dorothy Attwood, Chief, Common Carrier Bureau (filed Nov 29, 2000)

¹¹⁸ See Second Report on Wireless Wireline Integration

¹¹⁹ See Letter from John R. Hoffman, Chair, NANC to Dorothy Attwood, Chief, Common Carrier Bureau, FCC, dated Nov 29, 2000.

¹²⁰ See letter from Kathleen Levitz, Vice President-Federal Regulatory, BellSouth to Marlene H. Dortch, Secretary, FCC, dated Oct 15, 2003

¹²¹ SBC Aug 29th *Ex Parte*

¹²² Qwest Comments on CTIA's May 13th Petition at 7

¹²³ *Id*

¹²⁴ *Id* at 5

¹²⁵ See, e.g., AT&T Wireless Comments on CTIA's May 13th Petition at 3-6, Sprint Comments on CTIA's May 13th Petition at 6-12, and T-Mobile Comments on CTIA's May 13th Petition at 7-9

necessary changes to their systems. At least one wireless carrier recognizes, however, that significant changes to LEC systems may be required to achieve reduced porting intervals.¹²⁶

49. *Discussion* Reducing the porting interval could benefit consumers by making it quicker for consumers to port their numbers. To that end, wireless carriers intend to complete intramodal wireless ports within two and one-half hours.¹²⁷ There, however, may be technical or practical impediments to requiring wireline carriers to achieve shorter porting intervals for intermodal porting. We seek comment on whether we should reduce the current wireline four business day porting interval for intermodal porting. If so, what porting interval should we adopt? Commenters proposing a shorter porting interval should specify what adjustments should be made to the LNP process flows developed by the NANC.¹²⁸ For example, the wireline NANC LNP Process Flows establish that the FOC must be finalized within 24 hours of receiving the port request.¹²⁹ Specific time periods are also established for other steps within the porting process that may require adjustment in the event that a shorter porting interval is adopted.

50. We also seek comment on whether adjustments to the NPAC processes, including interfaces and porting triggers, would be required.¹³⁰ In addition, we seek comment on the risks, if any, associated with reducing the porting interval for intermodal porting. We seek comment on an appropriate transition period in the event a shorter porting interval is adopted, during which time carriers can modify and test their systems and procedures.

51. We seek input from the NANC on reducing the interval for intermodal porting. The NANC recommendation should include corresponding updates to the NANC LNP process flows and any recommendations on an appropriate transition period. The NANC should provide its recommendations promptly as we intend to review the record and address this issue expeditiously.

V. PROCEDURAL MATTERS

A. Initial Regulatory Flexibility Analysis

52. As required by the Regulatory Flexibility Act, *see* 5 U.S.C. § 603, the Commission has prepared an Initial Regulatory Flexibility Analysis ("IRFA") of the possible significant economic impact on small entities of the proposals suggested in the *Further Notice*. The IRFA is set forth in Appendix B. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments filed in response to the *Further Notice*, and must have a separate and distinct heading designating them as responses to the IRFA.

¹²⁶ See Sprint Comments on CTIA's May 13th Petition.

¹²⁷ See First Report on Wireless Wireline Integration, North American Numbering Council Wireless Number Portability Subcommittee Report on Wireless Number Portability Technical, Operational, and Implementation Requirements Phase II, CC Docket No. 95-116 (filed Sept. 26, 2000), and ATIS Operations and Billing Forum, Wireless Intercarrier Communications Interface Specification for Local Number Portability, Version 2, at § 2 p. 6 (Jan. 2003).

¹²⁸ See Local Number Portability Selection Working Group Final Report and Recommendation to the FCC (rel. April 25, 1997).

¹²⁹ FOC, or Firm Order Confirmation refers to the response the old service provider sends to the new service provider upon receiving the new service provider's request to port a number, setting a due time and date for the port. See Local Number Portability Selection Working Group Final Report and Recommendation to the FCC (rel. April 25, 1997).

¹³⁰ The NPAC, administered by NeuStar, operates and maintains the centralized databases associated with LNP. Interaction with the NPAC is required for all porting transactions.

B. Paperwork Reduction Analysis

53 This *Further Notice* contains no new or revised information collections

C. Ex Parte Presentations

54 This is a permit-but-disclose notice and comment rule making proceeding. Members of the public are advised that ex parte presentations are permitted, provided they are disclosed under the Commission's Rules.¹³¹

D. Comment Dates

55. Pursuant to Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before twenty (20) days from the date of publication of this *Further Notice* in the Federal Register and reply comments thirty (30) days from the date of publication of this *Further Notice* in the Federal Register. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies.

56. Comments filed through the ECFS can be sent as an electronic file via the Internet to <http://www.fcc.gov/e-file/ecfs.html>. Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of this proceeding, however, commenters must transmit one electronic copy of the comments to each docket or rule making number referenced in the caption. In completing the transmittal screen, commenters should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an E-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form <your e-mail address>." A sample form and directions will be sent in reply.

57. Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rule making number appear in the caption of this proceeding, commenters must submit two additional copies for each additional docket or rule making number. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). The Commission's contractor, Natek, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, N.E., Suite 110, Washington, DC 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW, Washington, DC 20554. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center of the Federal Communications Commission, Room TW-A306, 445 12th Street, S.W., Washington, D.C. 20554.

58. Parties who choose to file by paper should also submit their comments on diskette. These diskettes should be submitted to the Commission's Secretary, Marlene H. Dortch, Office of the Secretary, Federal Communications Commission. The Commission's contractor, Natek, Inc., will receive hand-delivered or messenger-delivered diskette filings for the Commission's Secretary at 236 Massachusetts Avenue, N.E., Suite 110, Washington, DC 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be

¹³¹ See generally 47 C.F.R. §§ 1.1202, 1.1203, 1.1206(a).

disposed of before entering the building. Commercial overnight mail (other than U S Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U S Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to: 445 12th Street, SW, Washington, DC 20554. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission. Such a submission should be on a 3.5-inch diskette formatted in an IBM compatible format using Word for Windows or compatible software. The diskette should be accompanied by a cover letter and should be submitted in "read only" mode. The diskette should be clearly labeled with the commenter's name, the docket number of this proceeding, type of pleading (comment or reply comment), date of submission, and the name of the electronic file on the diskette. The label should also include the following phrase "Disk Copy - Not an Original". Each diskette should contain only one party's pleading, preferably in a single electronic file. In addition, commenters must send diskette copies to the Commission's copy contractor, Qualex International, Portals II, 445 12th Street, S W , Room CY-B402, Washington, D.C 20554.

59 Accessible formats (computer diskettes, large print, audio recording and Braille) are available to persons with disabilities by contacting Brian Millin, of the Consumer & Governmental Affairs Bureau, at (202)418-7426, TTY (202) 418-7365, or at bmillin@fcc.gov. This Further Notice can be downloaded in ASCII Text format at: <http://www.fcc.gov/wtb>

E. Further Information

60 For further information concerning this Further Notice of Proposed Rulemaking, contact: Jennifer Salhus, Attorney Advisor, Policy Division, Wireless Telecommunications Bureau, at (202) 418-1310 (voice) or (202) 418-1169 (TTY) or Pam Slipakoff, Attorney Advisor, Telecommunications Access Policy Division, Wireline Competition Bureau at (202) 418-1500 (voice) or (202) 418-0484 (TTY)

VI. ORDERING CLAUSES

61 Accordingly, IT IS ORDERED THAT, pursuant to sections 4(i) and 10 of the Communications Act of 1934, as amended, 47 U.S.C. sections 154(i) and 160, the Petitions for Declaratory Ruling filed by CTIA on January 23, 2003, and May 13, 2003, are GRANTED to the extent stated herein.

62 IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Notice, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

List of Parties

A. January 23rd PetitionComments

ALLTEL
AT&T
AT&T Wireless
BellSouth
California Public Utilities Commission (CA PUC)
CenturyTel, Inc
Fred Williamson & Associates
Illinois Citizens Utility Board
Independent Alliance
Michigan Exchange Carriers Association
Midwest Wireless
National Exchange Carrier Association and National Telephone Cooperative Association (NECA & NTCA)
Nebraska Rural Independent Companies
New York State Department of Public Service (NY DPS)
Nextel
Ohio Public Utilities Commission (Ohio PUC)
Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO)
Rural Telecommunications Group (RTG)
SBC
TCA, Inc
Texas 911 Agencies
T-Mobile
United States Telecom Association (USTA)
United States Cellular (US Cellular)
WorldCom

Reply Comments

AT&T
AT&T Wireless
BellSouth
CA PUC
Cingular Wireless
CTIA
Fred Williamson & Associates
McLeod USA Telecommunications Services
Mid-Missouri Cellular
Bernie Moskal
South Dakota Telecommunications Association
Sprint
T-Mobile
USTA

Valor Telecommunications Enterprises
Virgin Mobile

B. May 13th Petition

Comments

ALLTEL
AT&T
AT&T Wireless
BellSouth
CA PUC
Cincinnati Bell Wireless
Cingular Wireless
City of New York
First Cellular of Southern Illinois
Illinois Citizens Utility Board
Independent Alliance
Missouri Independent Telephone Group
Nebraska Public Service Commission
NENA
Nextel
Ohio PUC
OPASTCO
Qwest
Rural Cellular Association
Rural Iowa Independent Telephone Association
RTG
SBC
Sprint
T-Mobile
Triton PCS
USTA
Verizon
Verizon Wireless
Virgin Mobile
Western Wireless
Wireless Consumers Alliance

Reply Comments

ALLTEL
ALTS
AT&T
AT&T Wireless
Cellular Mobile Systems of St Cloud, LLC
Cingular Wireless
CTIA
ENMR-Plateau
Illinois Citizens Utility Board

Missouri Independent Telephone Group
NTCA
NTELOS Inc
T-Mobile
South Dakota Telecommunications Association
Sprint
US Cellular
USTA
Verizon
Verizon Wireless
XIT Cellular

APPENDIX B

**Initial Regulatory Flexibility Analysis
Further Notice of Proposed Rulemaking
CC Docket No. 95-116**

1. As required by the Regulatory Flexibility Act, as amended (RFA),¹³² the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this Further Notice of Proposed Rulemaking (Further Notice), CC Docket No. 95-116. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the Further Notice. The Commission will send a copy of the Further Notice, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration. See 5 U.S.C. § 603(a). In addition, the Further Notice and IRFA (or summaries thereof) will be published in the *Federal Register*.¹³³

A. Need for, and Objectives of, the Proposed Rules

2. The Further Notice seeks comment on how to facilitate wireless-to-wireline porting where the rate center associated with the wireless number and the rate center in which the wireline carrier seeks to serve the customer do not match. The Further Notice also seeks comment on whether the Commission should reduce the current four-business day porting interval for intermodal porting.

B. Legal Basis for Proposed Rules

3. The proposed action is authorized under Section 52.23 of the Commission's rules, 47 C.F.R. § 52.23, and in Sections 1, 3, 4(i), 201, 202, 251 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 153, 154(i), 201-202, and 251.

C. Description and Estimate of the Number of Small Entities To Which the Proposed Rules Will Apply

4. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.¹³⁴ The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."¹³⁵ In addition, the term "small business" has the same meaning as the term "small business concern" under Section 3 of the Small Business Act.¹³⁶ Under the Small Business Act, a "small business concern" is one that: (1) is independently owned and operated, (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established

¹³² See 5 U.S.C. § 603. The RFA, see 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

¹³³ See 5 U.S.C. § 603(a).

¹³⁴ See 5 U.S.C. § 603(b)(3).

¹³⁵ 5 U.S.C. § 601(6).

¹³⁶ 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definitions(s) in the Federal Register."

by the Small Business Administration (SBA).¹³⁷ A small organization is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."¹³⁸ Nationwide, as of 1992, there were approximately 275,801 small organizations.¹³⁹

5 Incumbent Local Exchange Carriers. We have included small incumbent local exchange carriers LECs in this RFA analysis. As noted above, a "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard (e.g., a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation."¹⁴⁰ The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not "national" in scope.¹⁴¹ We have therefore included small incumbent LECs in this RFA analysis, although we emphasize that this RFA action has no effect on the Commission's analyses and determinations in other, non-RFA contexts. According to the FCC's *Telephone Trends Report* data, 1,337 incumbent local exchange carriers reported that they were engaged in the provision of local exchange services.¹⁴² Of these 1,337 carriers, an estimated 1,032 have 1,500 or fewer employees and 305 have more than 1,500 employees.¹⁴³

6 Competitive Local Exchange Carriers. Neither the Commission nor the SBA has developed a specific small business size standard for providers of competitive local exchange services. The closest applicable size standard under the SBA rules is for Wired Telecommunications Carriers. Under that standard, such a business is small if it has 1,500 or fewer employees.¹⁴⁴ According to the FCC's *Telephone Trends Report* data, 609 companies reported that they were engaged in the provision of either competitive access provider services or competitive local exchange carrier services.¹⁴⁵ Of these 609 companies, an estimated 458 have 1,500 or fewer employees and 151 have more than 1,500 employees.¹⁴⁶

7. Wireless Service Providers. The SBA has developed a size standard for small businesses within the two separate categories of Cellular and Other Wireless Telecommunications or Paging. Under

¹³⁷ 15 U.S.C. § 632.

¹³⁸ *Id.* § 601(4).

¹³⁹ Department of Commerce, U.S. Bureau of the Census, 1992 Economic Census, Table 6 (special tabulation of data under contract to Office of Advocacy of the U.S. Small Business Administration).

¹⁴⁰ 5 U.S.C. § 601(3).

¹⁴¹ See Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to Chairman William E. Kennard, FCC (May 27, 1999). The Small Business Act contains a definition of "small business concern," which the RFA incorporates into its own definition of "small business." See 5 U.S.C. § 632(a) (Small Business Act), 5 U.S.C. 601(3) (RFA). SBA regulations interpret "small business concern" to include the concept of dominance on a national basis. 13 C.F.R. § 121.102(b).

¹⁴² FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, *Trends in Telephone Service*, at Table 5.3, p. 5-5 (Aug. 2003) (*Telephone Trends Report*).

¹⁴³ *Id.*

¹⁴⁴ 13 C.F.R. § 121.201, NAICS code 513310.

¹⁴⁵ Telephone Trends Report, Table 5.3.

¹⁴⁶ *Id.*

that standard, such a business is small if it has 1,500 or fewer employees.¹⁴⁷ According to the FCC's *Telephone Trends Report* data, 719 companies reported that they were engaged in the provision of wireless telephony.¹⁴⁸ Of these 719 companies, an estimated 294 have 1,500 or fewer employees and 425 have more than 1,500 employees.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities.

8 To address concerns regarding wireline carriers' ability to compete for wireless customers through porting, future rules may change wireline porting guidelines. In addition, future rules may require wireline carriers to reduce the length of the current wireline porting interval for ports to wireless carriers. These potential changes may impose new obligations and costs on carriers.¹⁴⁹ Commenters should discuss whether such changes would pose an unreasonable burden on any group of carriers, including small entity carriers.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

9 The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities, (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards, and (4) an exemption from coverage of the rule, or any part thereof, for small entities.¹⁵⁰

10. The Further Notice reflects the Commission's concern about the implications of its regulatory requirements on small entities. Particularly, the Further Notice seeks comment on the concern that wireline carriers, including small wireline carriers, have expressed that permitting wireless carriers to port numbers wherever their rate center overlaps the rate center in which the number is assigned would give wireless carriers an unfair competitive advantage over wireline carriers. Wireline carriers contend that while permitting porting outside of wireline rate center boundaries may facilitate widespread wireline-to-wireless porting, wireless-to-wireline porting can only occur in cases where the wireless customer is physically located in the wireline rate center associated with the phone number. If the customer's physical location is outside the rate center associated with the number, porting the number to a wireline telephone at the customer's location could result in calls to and from that number being rated as toll calls. As a result, LECs assert, they are effectively precluded from offering wireless-to-wireline porting to those wireless subscribers who are not located in the wireline rate center associated with their wireless numbers.

11 The Further Notice seeks comment on how to facilitate wireless-to-wireline porting when the location of the wireline facilities serving the customer requesting the port is not in the rate center where the wireless number is assigned. The Further Notice seeks comment on whether there are technical or regulatory obstacles that prevent wireline carriers from porting-in wireless numbers when the rate center associated with the number and the customer's physical location do not match. The Further Notice

¹⁴⁷ 13 C.F.R. § 121.201, NAICS code 513322

¹⁴⁸ Telephone Trends Report, Table 5.3

¹⁴⁹ See e.g., Further Notice, paras. 41, 48-49

¹⁵⁰ See 5 U.S.C. § 603

asks commenters that contend that such obstacles exist and result in a competitive disadvantage to submit proposals to mitigate these obstacles

12 In addition, the Further Notice seeks comment on alternative methods to facilitate wireless-to-wireline porting. To the extent that wireless-to-wireline porting may raise issues regarding the rating of calls to and from the ported number when the rate center of the ported number and the physical location of the customer do not match, the Further Notice seeks comment on the extent to which wireline carriers should absorb the cost of allowing the customers with a number ported from a wireless carrier to maintain the same local calling area that the customer had with the wireless service provider. Alternatively, the Further Notice seeks comment about whether wireline carriers may serve customers with numbers ported from wireless carriers on a Foreign Exchange (FX) or Virtual FX basis. The Further Notice seeks comment on the procedural, technical, and regulatory implications of each of these approaches. These questions provide an excellent opportunity for small entity commenters and others concerned with small entity issues to describe their concerns and propose alternative approaches.

13 The Further Notice also seeks comment about whether the Commission should require wireline carriers to reduce the length of the current wireline porting interval for ports to wireless carriers. The Further Notice analyzes the current wireline porting interval and seeks comment about whether there are technical or practical impediments to requiring wireline carriers to achieve shorter porting intervals for intermodal porting. The Further Notice recognizes that, if a reduced porting interval was adopted, carriers may need additional time to modify and test their systems and procedures. Accordingly, the Further Notice seeks comment on an appropriate transition period in the event a shorter porting interval is adopted.

14 Throughout the Further Notice, the Commission emphasizes in its request for comment, the individual impacts on carriers as well as the critical competition goals at the core of this proceeding. The Commission will consider all of the alternatives contained not only in the Further Notice, but also in the resultant comments, particularly those relating to minimizing the effect on small businesses.

F. Federal Rules that Overlap, Duplicate, or Conflict with the Proposed Rules

15 None

**SEPARATE STATEMENT OF
CHAIRMAN MICHAEL K. POWELL**

Re. *In re Telephone Number Portability, CTIA Petitions for Declaratory Ruling on Wireline-Wireless Porting Issues, CC Docket No 95-116*

After today it's easier than ever to cut the cord. By firmly endorsing a customer's right to untether themselves from the wireline network – and take their telephone number with them – we act to eliminate impediments to competition between wireless and wireline services. Seamless wireline-to-wireless porting is another landmark on the path to full fledged facilities-based competition.

Our action promises significant consumer benefits for wireline and wireless customers. I have heard the concerns expressed by some wireline providers that wireline network architectures and state-imposed rate centers complicate number portability. This proceeding has undoubtedly focused the Commission's attention on these issues. State regulators have long been champions of local number portability and I appreciate their support. I look forward, however, to working with my colleagues in the states to remove additional barriers to inter-modal local number portability such as the difficulty of some providers to consolidate rate centers to more accurately match wireless carrier service areas.

In the end, the consumer benefits associated with inter-modal LNP convince me that the time for Commission action is now. No doubt there will be some bumps in the road to implementation, but I trust that carriers will use their best efforts to ensure consumers have the highest quality experience possible. I look forward to the Commission's November 24th trigger for this obligation and to working with my colleagues to ensure that full wireline to wireless portability is a reality for all consumers everywhere.

SEPARATE STATEMENT OF
COMMISSIONER KATHLEEN Q. ABERNATHY

Re Telephone Number Portability – CTIA Petitions for Declaratory Ruling on Wireline-Wireless Porting Issues, CC Docket No 95-116

This Order removes the final roadblocks to implementing wireline-to-wireless number portability, which is an important step in facilitating intermodal competition. The Commission mandated local number portability (LNP) within and across the wireline and wireless platforms, where technically feasible, with the goal of maximizing consumer choice. As of November 24, 2003, this goal will become a reality. Most consumers who seek to switch wireless providers or to move from a local exchange carrier to a wireless carrier will be able to retain their existing telephone numbers. While I expressed sympathy in the past to arguments that the November 24 deadline was premature, our present focus must be on implementation, and the foregoing Order provides much-needed clarity regarding the parties' obligations.

I recognize that wireline network architecture and state rating requirements will prevent many (if not most) consumers from porting wireless numbers to wireline carriers. Although, in the short term, wireline carriers will have more limited opportunities to benefit from intermodal LNP than wireless carriers will, I was simply not willing to block consumers from taking advantage of the porting opportunities that are technologically feasible today. I am hopeful that existing obstacles to wireless-to-wireline porting will be addressed as expeditiously as possible through technological upgrades and, where necessary, state regulatory changes.

Finally, I am pleased that the Commission is stepping up its consumer outreach efforts on the issues of wireless and intermodal LNP. To this end, I commend the recent proactive efforts of the Wireless Telecommunications Bureau and the Consumer and Government Bureau to educate the public about our LNP rules. I am also pleased with the recent efforts of industry to reach out to consumers so that they understand what number-porting opportunities are available to them. For consumers to benefit from our expanded LNP regime, it is imperative for them to have sufficient information to make the most appropriate choices for themselves.

**SEPARATE STATEMENT OF
COMMISSIONER MICHAEL J. COPPS**

Re *Telephone Number Portability CTIA Petitions for Declaratory Ruling
on Wireline-Wireless Porting Issues (CC Docket No 95-116)*

With today's action, consumers are assured that intermodal telephone number portability will begin, at last, to become a reality later this month. After numerous delays, consumers are on the verge of enjoying the significant new ability to take their current telephone numbers with them when they switch between carriers and technologies. This gives consumers much sought-after flexibility and it provides further competitive stimulus to telephone industry competition. This makes it a win-win situation for consumers and businesses alike.

It was some seven years ago, in the 1996 Act, when Congress recognized that the ability of consumers to retain their phone numbers when switching providers would facilitate the development of competition. Congress instructed us to get this job done and to use "technical feasibility" as our guide in making sure the vision became reality. This we have labored mightily to do. As a result, American consumers will be able to take their digits with them, unimpeded by the hassle, loss of identity and attendant expenses that until now have accompanied switching between service providers and technologies.

The bulk of the problems accompanying the challenge of porting numbers are behind us now. A very limited few remain and these are the subject of the Further Notice of Proposed Rulemaking also approved today. I am confident that these can be handled expeditiously if all interested parties work together. Similarly, any minor implementation problems that develop should be amenable to swift and cooperative corrective actions. It has taken considerable cooperation to bring us to this important point, and I believe consumer support for porting will encourage all parties to reach quick resolution of the few remaining challenges.

Finally, it is difficult to see how we are ever going to have true intermodal competition in the telephone industry apart from initiatives like the one we embark on today. Intermodal competition always receives strong rhetorical support. Today it gets some action, too.

**SEPARATE STATEMENT OF
COMMISSIONER KEVIN J. MARTIN**

Re Telephone Number Portability, CTIA Petitions for Declaratory Ruling on Wireline-Wireless Porting Issues, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, CC Docket No. 95-116

I am pleased to support this item because it provides important consumer benefits by promoting competition in the wireline telephone market. One of the primary reasons I supported wireless local number portability is the additional competition it is likely to encourage in the wireline market. See Press Statement of Commissioner Kevin J. Martin on the Commission's Decision on Verizon's Petition for Permanent Forbearance from Wireless Local Number Portability Rules (July 16, 2002). As I stated last year, the ability to transfer a wireline phone number to a wireless phone is an important part of ensuring that competition with wireline phones continues to grow. I am glad that today the full Commission agrees.

I am disappointed, however, that the Commission was not able to provide this guidance until weeks before the LNP requirement is scheduled to take effect. The Commission has an obligation to minimize the burdens our regulations place on carriers, and I wish we had provided the guidance in this Order considerably sooner.

Finally, I recognize that LNP – although very important for consumers – places real burdens on the carriers, particularly the small and rural carriers. Accordingly, I support the decision to waive our full porting requirements until May 24, 2004, for wireline carriers operating in areas outside of the largest 100 MSAs. I am also pleased that we emphasize that those wireline carriers may file waiver requests if they need additional time.

SEPARATE STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN

Re In re Telephone Number Portability, CTIA Petitions for Declaratory Ruling on Wireline-Wireless Porting Issues, CC Docket No 95-116

I am pleased to support this Order because it clarifies that our rules and policies provide for enhanced number portability opportunities for American consumers. Specifically, we enable consumers to port their wireline telephone numbers to local wireless service providers. We also affirm that wireless carriers are required to port telephone numbers to wireline carriers but recognize that wireline carriers are only able to receive those numbers from wireless carriers on a limited basis. Finally, we rightly seek comment on how to deal with these limitations and further facilitate wireless-to-wireline porting.

I believe that our decision is consistent with Section 251(b) of the Communications Act, which requires local exchange carriers (LECs) to provide local number portability to the extent technically feasible. However, I do recognize that there may be certain limitations on the ability of the nation's smallest LECs to technically provide local number portability. In this regard, I am extremely pleased we made the decision to waive until May 24, 2004, the requirement of LECs operating in areas outside of the largest 100 MSAs to port numbers to wireless carriers that do not have a point of interconnection or numbering resource in the rate center where the LEC customer's wireline number is provisioned.

I recognize that there may be other compelling circumstances that make it disproportionately difficult for these same LECs to provide full number portability. Consequently, I am pleased we agreed to the language in the item recognizing that those wireline carriers may need to file additional waivers of our LNP requirement.

I remain concerned, however, that today's clarification of our LNP rules and obligations will exacerbate the so-called "rating and routing" problem for wireless calls that are rated local, but are in fact carried outside of wireline rate centers. While I appreciate the language in the Order that clarifies that ported numbers must remain rated to the original rate center, the rating and routing issue continues to remain unresolved for rural wireline carriers as well as neighboring LECs and the wireless carriers whose calls are being carried. I believe that we must redouble our efforts to resolve this critical intercarrier compensation issue as quickly and comprehensively as possible.

Finally, I take very seriously the concerns of those wireline carriers that have argued wireline-to-wireless number portability should be limited pending the resolution of issues associated with full wireless-to-wireline porting. While I do not believe that these concerns outweigh the very significant benefits to American consumers that our clarification provides today, I do want to highlight my keen interest in working both with industry and the Chairman and my fellow Commissioners on solutions to address this inequity. The Commission should constantly strive to level the proverbial playing field, and the situation presented by our LNP rules and policies should not be any different.

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Midcontinent Communications, a)
South Dakota Partnership,)
)
Complainant,)
vs.)
)
Polar Telecom, Inc.)
a North Dakota Corporation, d/b/a)
Polar Communications and)
HTC Services, Inc.,)
a Minnesota Corporation,)
)
Respondents.)


ORDER

Case No. PU-04-237

The undersigned, Administrative Law Judge, hereby acknowledges receipt of the Request for Extension by William J. Brudvik as counsel for Polar Telecom, Inc. and HTC Services, Inc.

I hereby grant such an extension.

Dated this 8th day of July, 2004.



Office of Administrative Hearings
By: Allen C. Hoberg, Director
1707 North 9th Street
Bismarck, North Dakota 58501-1882



OFFICE OF ADMINISTRATIVE HEARINGS

STATE OF NORTH DAKOTA
1707 North 9th Street
Bismarck, North Dakota 58501-1882

Allen C. Hoberg
DIRECTOR

701-328-3260
Fax 701-328-3254
oah@state.nd.us
www.state.nd.us/oah

July 8, 2004

Mr. William J. Brudvik
Ohnstad Twichell, P.C.
P.O. Box 547
Mayville, ND 58257-0547

Re: Midcontinent Communications v. Polar Telecom, Inc. and HTC Services, Inc.
OAH File No. 20040205

Dear Mr. Brudvik:

Your request for an extension of time, until July 14, 2004, to file an answer to the complaint in this matter is **granted**. See copy of July 8, 2004, Order, enclosed.

Sincerely,

Allen C. Hoberg
Administrative Law Judge

ACH/ljc

Enc.

cc: Mr. Patrick W. Durick
Pearce & Durick



Practice in all North Dakota
and Minnesota courts

Ohnstad Twichell, P.C.

ATTORNEYS AT LAW

Founded in 1939

Offices in West Fargo, Fargo, Hillsboro, Mayville, Page, Hope and Finley, North Dakota
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DAVID L WANNER

PEGGY J BUCHHOLZ, PLS
Office Administrator

*Also licensed in Minnesota

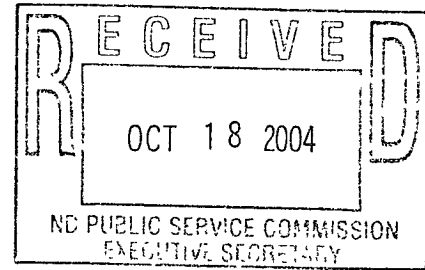
Sent by US MAIL and E-Mail:

October 15, 2004

North Dakota Public Service Commission
Attn: William W. Binek
600 East Boulevard Avenue, Dept. 408
Bismarck, North Dakota 58505-0480

Office of Administrative Hearings
Attn: Allen C. Hoberg
1707 North 9th Street
Bismarck, North Dakota 58501-1882

Pearson & Durick
Attn: Patrick Durick
P. O. Box 400
Bismarck, North Dakota 58502-0400



**RE: MIDCONTINENT COMMUNICATIONS VS POLAR TELCOM,
INC./HTC SERVICES, INC.
CASE NO. PU-04-237 OAH File No. 20040205**

Gentlemen:

Enclosed herewith for filing and service by e-mail please find the respondent's Post Hearing Brief. The original and seven copies are being mailed to the Public Service Commission as done previously. Also enclosed is Revised Exhibit C-1 consisting of two pages, one a colored diagram of the exchange areas and one showing the calling scope and prefixes of the companies

Sincerely yours,

OHNSTAD TWICHELL LAW OFFICE

William J. Brudvik

WJB:sgg

Pages 2

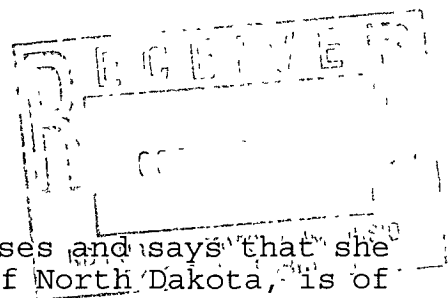
Cover letter re filings and Affidavit of
Service
by Polar Telecom/HTC Services
10/18/2004

CC Comm Legal Ilona ALJ

45 PU-04-237

AFFIDAVIT OF SERVICE BY MAIL AND E-MAIL

STATE OF NORTH DAKOTA)
) ss
COUNTY OF TRAILL)



Shireen Grinager, being duly sworn, deposes and says that she is a resident of the City of Mayville, State of North Dakota, is of legal age; and that she served the within

RESPONDENT'S POST-HEARING BRIEF

on October 15, 2004, by transmitting a true and correct copy thereof to the persons named below by regular mail and e-mail indicated as follows:

Post Office Address
ND Public Service Commission
600 E. Blvd. Ave. Dept. 408
Bismarck, ND 58505-0480

E-Mail Address
ijs@psc.state.nd.us

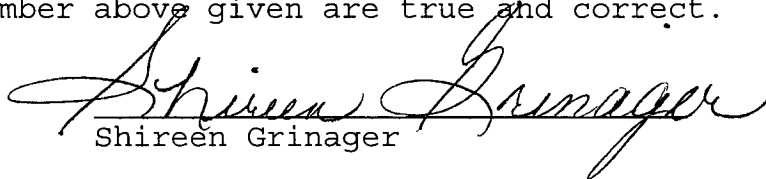
Off. Of Admin. Hearings
Attn: Allen C. Hoberg
1707 North 9th St.
Bismarck, ND 58501-1882

ahoberg@state.nd.us

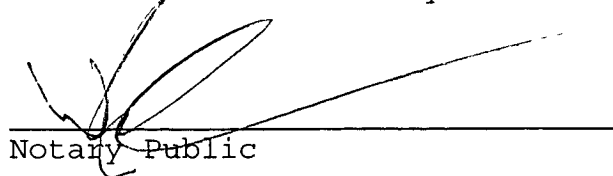
Pearce & Durick
Attn: Patrick Durick
P.O. Box 400
Bismarck, ND 58502

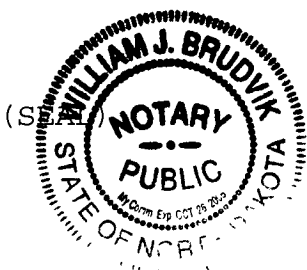
pwd@pearce-durick.com

To the best of affiant's knowledge, the post office address, e-mail address and fax number above given are true and correct.


Shireen Grinager

Subscribed and sworn to before me this 15th day of October, 2004.


Notary Public



OCT 18 2004
 ND PUBLIC SERVICE COMMISSION
 CIVIL SECRETARY

Local Calling Areas and Exchange Locations

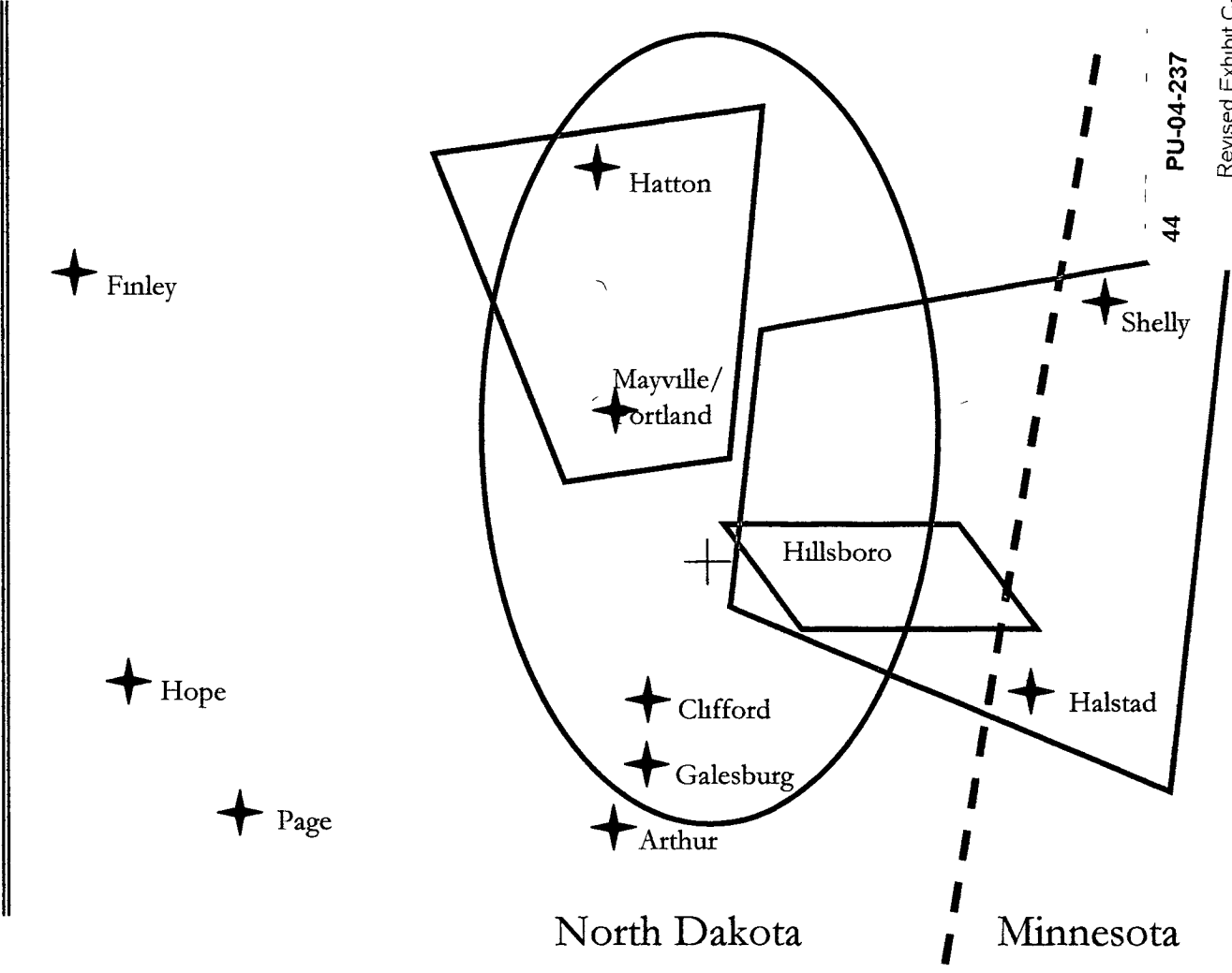
Revised Exhibit C-1 (diagram of exchange areas)
 by Polar Telecom/HTC Services
 Exhibit # Revised C-1
 10/18/2004
 CC Comm Legal Ilona ALJ

Key

- State border
- Exchange boundaries
- Halstad
- Polar Telecom
- Qwest
- Serving carriers
- Halstad +
- Polar Telecom +
- Halstad, Polar, Qwest +

Notes:

- (1) *Not to scale.*
- (2) *Not all exchanges shown.*
- (3) *No Qwest-only exchanges are shown.*



North Dakota

Minnesota

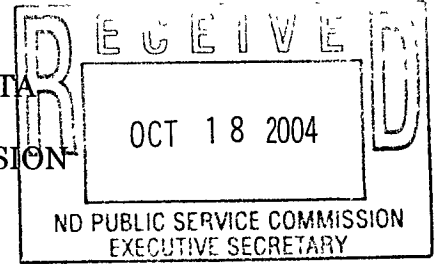
C-1

Local Calling Areas

This chart illustrates the local calling areas for calls to and from Polar and Halstad NXX codes in North Dakota. Not all prefixes are included.

Exchange	Prefix	Local Calling From/To	Local Calling To/From	Prefix
Hatton	Q 543	Hatton	Hatton Mayville/Portland	Q 543 Q 786 P 788
	H 636	Hillsboro	Hillsboro Shelly Halstad Mayville/Portland	Q 436 H 636 Q 436 H 636 H 886 H 456 P 788
Mayville/Portland	Q 786	Mayville/Portland	Mayville/Portland Hatton	Q 786 P 788 Q 543
	P 788		Mayville/Portland Hillsboro Hatton Galesburg	Q 786 P 788 H 636 Q 543 P 488

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION



IN THE MATTER OF:

Midcontinent Communications,)	
)	
Complainant,	)	Civil No. CV-97-03679
	)	OAH File No. 2004025
vs)	
	)	RESPONDENTS' POST - HEARING
Polar Telecom, Inc., and	)	BRIEF
HTC Services, Inc.)	
)	
Respondents.)	

STATEMENT OF THE CASE

This is a case brought before the North Dakota Public Service Commission on an alleged claim of discrimination by Polar Telecom, Inc. and HTC Services, Inc. against Midcontinent Communications pursuant to NDCC 49-21-24. The Public Service Commission referred the case for an Administrative Hearing, which was held September 3, 2004. At the hearing the complainant presented its evidence through one witness: Mary Lohnes, Manager of Regulatory Affairs of Midcontinent.

Although the issues before the Administrative Hearing officer were, or should have been, limited to the specific allegations of discrimination contained in Midco's Complaint, the hearing ranged into the much larger issues of local number portability, how it can be implemented when the calling areas of the competing telecommunication companies are different; whether an interconnection agreement will be necessary; routing of calls; terminating access charges, etc.

The introduction of this testimony by Polar Telecom, Inc. and HTC Services, Inc. was purposeful and intended to establish a record before the North Dakota Public Service

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Commission that these two long standing and exemplary telephone coops have been, at all times, acting in good faith in their negotiations with the Complainant. Nevertheless, these issues, which consumed the vast majority of the time at the hearing, are within the exclusive jurisdiction of the Federal Communications Commission.

The Post Trial Brief of Messrs Durick and Harrington, though well drafted, is more properly a brief for a Federal Communications Commission hearing on alleged violations of the Telecommunications Act. The requested relief as contained in Midco's proposed Order is that "Polar Telecom, Inc. and HTC Services, Inc. make unconditional local number portability available to Midcontinent in the Mayville-Portland and Hillsboro exchanges, respectively, on or before January 1, 2005". Even if the Complainant were to prevail in this case, neither the North Dakota Public Service Commission nor the Administrative Hearings Office has the power to order HTC Services, Inc. and Polar Telecom, Inc. to extend local number portability to the Complainant.

In the case of AT& T Corporation, et al v Iowa Utilities Board, et al, 525 US 366, 119 Sect. 721 the United States Supreme Court considered the jurisdiction of the Federal Communications Commission vis a viz State Commissions to implement the local competition provisions of Section 251 of the Federal Communications Act. The Court stated that six months after the Telecommunications Act of 1996 was passed the FCC issued its "First Report and Order Implementing the Local Competition Provisions", In Re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, 11 FCC Rcd 15499 (1996) (First Order and Report). This led to numerous challenges to this rule making filed across the country by incumbent LEC's and State Utility Commissions which were consolidated into one proceeding before the United States Courts of Appeals – Eighth Circuit. The Court stated: "the

basic attack was jurisdictional. The LEC and State Commissions insisted that primary authority to implement the local – competition provisions belonged to the states rather than to the FCC”. The Court of Appeals agreed. The Supreme Court reversed. The Court stated “...But the question in these cases is not whether the Federal Government has taken the regulation of local telecommunications competition away from the states. With regard to the matters addressed by the 1996 Act, it unquestionably has...” The Court stated, further, that Section 201b explicitly gives the FCC jurisdiction to make rules governing matters to which the 1996 Act applies.

The Court also recognized those limited areas over which state commissions retained certain powers under the act: “...While it is true that the 1996 Act entrusts State Commissions with the job of approving Interconnection Agreements, 47 USC Section 252(e), 1994 Ed, Supp. (II), and granting exemptions to rural LEC’s, Section 251(f)...” From the foregoing, it is clear the only matters over which the state PSCs have jurisdiction in connection with the local competition provision of the Telecommunications Act are in the area of granting extensions and in the area of approving or arbitrating Interconnection Agreements.

STATEMENT OF ISSUES

The issue before the hearing officer in this case is whether either Polar Telecom, Inc. or HTC Services, Inc., individually, and by separate alleged conduct, discriminated against Midco in violation of NDCC 49-21-24. This brief will be confined, therefore, to those issues. The specific allegations of discrimination in the complaint are as follows:

1. Whether HTC Services, Inc. discriminated against Midco because it “intends to implement local number portability for wireless carriers in the Hillsboro exchange by May 24, 2004” (Complaint – Paragraph VI)

2. Whether Polar Telecom, Inc. discriminated against Midco because it is “providing local number portability to Qwest in the Mayville, North Dakota, exchange area pursuant to interconnection arrangements with Qwest” (Complaint - Paragraph V).

LEGAL ANALYSIS

1. **ADMINISTRATIVE AGENCIES PRACTICES ACT.** The Administrative Agencies Practices Act, NDCC Chapter 28-32, governs these proceedings.

“For adjudicated proceedings involving a hearing on a complaint against a specific named respondent, a complainant shall prepare and file a clear and concise complaint with the agency having subject matter jurisdiction of the proceeding. The complaint shall contain a concise statement of the claims or charges upon which the complainant relies, including reference to the statute or rule alleged to be violated, and the relief sought”. NDCC 28-32-21(1)(a).

- 2 **BURDEN OF PROOF.** At the hearing the complainant has the burden of proof throughout the case to prove by a fair preponderance of the evidence the material allegations of the complaint. Midland Oil & Royalty Company v Schuler 126 NW 2nd 149.

In its Brief Complainant alleges that it need only make two showings to prevail in this proceeding. (1) that Midcontinent properly requested number portability and that HTC, Services, Inc. and Polar, Inc. failed to provide it; and (2) Polar and HTC’s failure to provide number portability was discriminatory under Section 49-21-24 of the North Dakota Century Code. (Midco Post Hearing Brief, Page 3).

DUTY TO NEGOTIATE AS AN ELEMENT OF PROPER REQUEST

At the hearing Mary Lohnes testified that she believed that all Midco had to do to obtain local number portability pursuant to Section 251 of the Federal Communications Act was to make the request and that Midco's December 2002 letter addressed to both HTC Services, Inc. and Polar Telecom, Inc. was sufficient. She believed, as do Midco's attorneys, apparently, that Midco has no duty whatsoever to do anything more once the request was made. (Transcript Pages 78-79). Section 251(c)(1) of the Telecommunications Act provides as follows: "The duty to negotiate in good faith in accordance with Section 251 of this title the particular terms and conditions of agreements to fulfill the duties described in Paragraphs (1) to (5) of sub-section (b) of this section and this subsection. **The requesting telecommunication carrier also has the duty to negotiate in good faith the terms and conditions of such agreement**". (Emphasis added).

The Telecommunications Act upon which the Complainant relies to support its request for local number portability requires both parties to negotiate in good faith. It is not enough for Midco to send a letter to Polar Telecom, Inc. and HTC Services, Inc. requesting local number portability and expect them to carry the laboring oar from that point forward, particularly where, as in this case, there is a reseller of Qwest services and the re-seller's calling scope and the competitor's calling scopes are different. It is important to note that neither Polar Telecom, Inc. nor HTC Services, Inc. at any time indicated to Midco that LNP would not be granted. Even more importantly, it is apparent that HTC Services, through its manager, Ronald Laqua, was continuously trying to jump start the negotiations after there would be long periods of time with no communication from Midco. (Exhibit R-6 Laqua letter to Midco). By failing and refusing to negotiate in good faith it cannot be said that Midco's request for LNP was properly made.

Furthermore, Midco's alleged claim of discrimination, before negotiations were concluded, rings hollow.

DISCRIMINATION

In this case the complainant is alleging that HTC Services, Inc. and Polar Telecom, Inc., each, committed separate and distinct acts of discrimination in violation of NDCC 49-21-24. In it's Complaint, Midco appears to limit its allegations to NDCC 49-21-24(1)(a) which provides that a telecommunications company may not "discriminate against another provider of telecommunication services by refusing or delaying access to the company's services". The complainant's post hearing brief, however, seems to suggest that it is proceeding under NDCC 49-21-24(1)(b) which refers to refusing or delaying "access to essential facilities on terms and conditions no less favorable than those the telecommunications company provides to itself and its affiliates..." (Midco Post-Hearing Brief, Page 8). This is objectionable and unfairly prejudicial to the respondents since it introduces new elements into this case upon which a hearing officer can rely but which were not asserted in the complaint.

In order for discrimination to occur, discrimination must be defined. Neither the North Dakota Century Code nor the legislative history of this bill when it was enacted are particularly helpful in defining discrimination as it was intended to be applied in this statute; and it becomes necessary to search elsewhere. Blacks Law Dictionary defines discrimination as follows: "With reference to common carriers (especially railways) a breach of the carrier's duty to treat all shippers alike and afford them equal opportunities to market their product... a carrier's failure to treat all alike under substantially similar conditions... in general, a failure to treat all equally favoritism".

Federal cases are more instructive. In the case of AT&T Communications in the Southern States, Inc. v GTE Florida, Inc., (ND Florida) 123 F Supp 2nd 1318, the Court stated as follows: “The Telecommunications Act of 1996 seeks to prevent an incumbent (or any carrier) from favoring one competing carrier over another. The act does so by requiring each carrier to make available to any competitor the same interconnection, service of network elements, terms that the carrier has made available to any other competitor”. Inherent in these definitions is the fact that discrimination requires a showing that respondents are treating complainant differently than some other carrier.

HTC SERVICES, INC. ALLEGED DISCRIMINATION

With respect to HTC Services, Inc., the “concise statement of the claims or charges upon which the complainant relies” is that HTC Services, Inc. is discriminating because it “intends to implement LNP for wireless carriers in the Hillsboro exchange area by May 24, 2004”. (Complaint Paragraph VI). In the respondent’s Pre-Trial Brief Statement of Law, Paragraph C we stated, in part, as follows:

The exact nature of the allegation against HTC Services, Inc. is not that it has discriminated **in fact** but that it **intends** to discriminate in the future because it will or may be offering local number portability to wireless carriers as mandated by the FCC. The Complainant was not able to show any request for local number portability had been received by HTC Services, Inc. from a wireless carrier or any other carrier for that matter.

This is essentially an issue of ripeness. In the case of Anthony Sposato v Robin Sposato 570 NW 2nd 212 (November 1997), the North Dakota Supreme Court dealt with a paternal grandfather who sought visitation with children after the parents of the children were divorced.

The grandfather brought an action to compel a specific visitation event and the order was granted by the court. However, the visitation never occurred because of unrelated logistical problems. Nevertheless, the children's mother, who was the daughter-in-law of the grandfather, appealed the order to the Supreme Court on the grounds that, even though the order was for a specific visitation which never occurred, that there may be future such visitation requests and that the court needed to rule on such future requests. The North Dakota Supreme Court declined to exercise jurisdiction. The court held that: "an issue is not ripe for review if it depends on future contingencies which, although they might occur, necessarily may not, thus making addressing the question premature". Further, the court stated "addressing an issue involving mootness or ripeness would be the equivalent of rendering a purely advisory opinion". This court is not empowered to render a purely advisory opinion merely because the issue may arise in the future". Citing Bies v Obregon 558 NW 2nd 855.

As in the Sposato case, the issue as presented by the complainant in this case is that HTCS is **now** discriminating because it **may** offer local number portability in the future once it receives a request it has not yet received.

At the hearing held in this matter the sole witness for the complainant was Mary Lohnes.

On cross-examination the following exchange occurred:

Brudvik: In your complaint you indicate that...HTC Services is discriminating against Midco because they intend to offer local number portability to some other company in the future.

Lohnes: Correct

Brudvik: When the complaint was drawn HTC Services, Inc. was not porting numbers to any other carriers is that correct.

Lohnes: I wouldn't know.

Brudvik: And at the time the complaint was drawn HTC Services, Inc. had no other interconnection agreement with any other potential CLEC in the Hillsboro exchange.

Lohnes: I wouldn't know.

(Transcript Page 55)

The complainant, having the burden of proof, provided absolutely no evidence to support the allegations in the complaint against HTC Services, Inc. Furthermore, HTC Services, Inc.'s manager, Ronald Laqua, testified that HTC Services, Inc. has received no request for ported numbers from wireless carriers before or after May 2004. (Transcript Page 244) For the Administrative Law Judge to find that HTC Services, Inc. has committed an act of discrimination in violation of NDCC 49-21-24 based on the evidence before it would be purely an advisory opinion, and premature at this time.

**ALLEGED
POLAR'S DISCRIMINATION**

With respect to Polar the specific allegation and basis for discrimination is that Polar is "providing local number portability with Qwest in the Mayville, North Dakota exchange pursuant to Interconnect Agreements with Qwest" (Complaint Paragraph V) On cross-examination the following exchange occurred:

Brudvik: And I think in your Complaint also the basis for your discrimination complaint against Polar was that Polar was at the time the Complaint was filed porting numbers to Qwest.
Lohnes: Based on the letter in Exhibit C-9 we believe that was true
Brudvik: If that was not true, Polar has never ported a number to Qwest - you don't know that
Lohnes: Correct.
(Transcript Page 56-57)

Dave Dunning, Manager of Polar Telecom, Inc., testified that Polar has never ported a 788 number to Qwest. Transcript Page 209.

Based upon the foregoing testimony it is apparent that the plaintiff has failed to sustain its burden of proof that discrimination has occurred in violation of NDCC 49-21-24.

RELIEF

NDCC 28-32-21 requires the Complainant in an Administrative Hearing to reference the statute or rule alleged to be violated **and the relief sought**. Midco's Complaint in this case fails in this regard. It alleges discrimination under NDCC 49-21-24 but in its prayer for relief Midcontinent simply "requests that the Public Service Commission enter its Order referring this matter to the Office of the Administrative Hearing for a hearing on the allegations contained herein and issuance of recommended Findings of Fact, Conclusions of Law and Proposed Order". For the first time in the Complainant's post trial brief do we learn what they believe the remedy should be. The Complainant's proposed order states as follows:

"HTC Services, Inc. and Polar Telecom, Inc. are hereby ordered to make unconditional local number portability available to Midcontinent in the Mayville-Portland and Hillsboro exchanges respectively on or before January 1, 2005".

As stated previously, this is a matter exclusively within the jurisdiction of the Federal Communications Commission. (AT& T Corp, et al v Iowa Utilities Board, et al, Supra)

During the negotiations between Midco and the respondents herein, Midco took the position that local number portability is mandated by Section 251 of the Telecommunications Act and that no Interconnection Agreement was necessary. Attorney Harrington made it clear in his letter of August 18, 2003, that he was willing to consider an Interconnection Agreement but that he did not believe that it had any bearing on the LNP requirement. (Exhibit C-11). In so doing, Midco relieved the North Dakota PSC from any jurisdiction over this matter.

Had Midco agreed to negotiate an Interconnection Agreement it would have been able to avail itself of the North Dakota PSC since any Interconnection Agreements entered into pursuant

to Section 251 require approval of the State Utilities Commission. Furthermore, the State Utilities Commission has the power to arbitrate Interconnection Agreements and, interestingly enough, the power to arbitrate alleged claims of discrimination under Section NDCC 49-21-24


Midco had the capability of bringing this matter within the realm of the North Dakota Public Service Commission but chose not to do so. Instead Midco issued a Complaint under NDCC Section 49-21-24 and chose not to have an Interconnection Agreement. We can find no case law brought as a result of a violation of NDCC 49-21-24 and therefore believe that the only relief available to the complainant even if it should prevail would be pursuant to NDCC 49-07-01.1 which provides for civil penalty.

CONCLUSION

Both Polar Telecom, Inc. and HTC Services, Inc. recognize, and have at all times recognized a duty to give LNP to Midco. That is not the issue before the Administrative Hearing Office and, contrary to Messrs Durick and Harrington who seem to believe that the North Dakota PSC can order local number portability, those issues are for another day and another jurisdiction. The hearing officer must confine its rulings in this case to the issue of discrimination pursuant to NDCC 49-21-24 and whether the Complainant has met its burden of proof with respect thereto. As shown herein, the transcript is void of any such proof. To find that HTC Services, Inc. had discriminated because it intends to do something in the future is an advisory opinion and nothing more. To find that Polar discriminated because it offered LNP to Qwest is simply untrue.

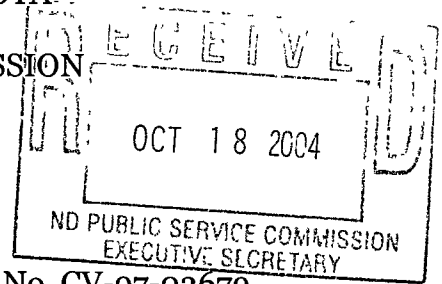
Respectfully Submitted,

Dated this 14th day of October, 2004



William J. Brudvik
OHNSTAD TWICHELL LAW OFFICE
12 SE Third Street
P O Box 547
Mayville, ND 58257
Attorney for HTC Services, Inc. &
Polar Telecom, Inc.
ND License #03290
Tel: 701-788-3251
Fax: 701-788-4243

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION



IN THE MATTER OF:

Midcontinent Communications,)
)
Complainant,)
)
vs)
)
Polar Telecom, Inc., and)
HTC Services, Inc.)
)
Respondents.)

Civil No. CV-97-03679
OAH File No. 2004025

PROPOSED
FINDINGS OF FACT,
CONCLUSIONS OF LAW

PRROPOSED FINDINGS OF FACT

1. Polar Telecom, Inc. is a facility based competitive local exchange carrier (CLEC) in the Mayville Portland area. HTC Services, Inc. is a facilities based CLEC in the Hillsboro exchange area. Midcontinent provides telecommunications service as a re-seller of Qwest in Hillsboro, Mayille and Portland.
2. Polar Telecom and HTC Services, Inc. have an extended area service agreement which provides for toll free calls between the Polar, Mayville Portland exchange, and the HTC Services, Inc. Hillsboro exchange.
3. Midcontinent's calling area is limited to the Qwest exchanges, which do not have toll free calling between the Mayville Portland exchange and the Hillsboro Exchange.

4. Midcontinent requested local number portability from HTC and Polar in December 2002. HTC and Polar each acknowledge receipt of that request.
5. Although Midcontinent had a duty to negotiate the extension of local number portability in good faith with Polar and HTC but it failed and refused to complete said negotiations and instead brought this action before the Public Service Commission.
6. At the hearing Midco was not able to provide any evidence that HTC Services, Inc. was porting numbers to any other competing telephone companies within the Hillsboro exchange area nor that it had been requested to do so. The allegation that HTC Services, Inc. is discriminating because it might give LNP to another telecommunications company in the future is speculative.
7. At the hearing Midco was not able to provide any evidence that Polar was porting numbers to Qwest in the Mayville Portland exchange area.

CONCLUSIONS OF LAW

1. Neither the Office of Administrative Hearings nor the North Dakota Public Service Commission has the jurisdiction to order local number portability. These matters rest exclusively within the jurisdiction of the Federal Communications Commission pursuant to 47 USC Section 251, et seq.
2. HTC Services, Inc. has not discriminated against Midcontinent. The allegation that HTC Services, Inc. is discriminating against Midcontinent because it intends to offer local number portability at some time in the future is an issue not ripe for review. It depends on future contingencies which, although they might occur,

necessarily may not, thus making the addressing the question premature. The Office of Administrative Hearings is not empowered to render purely advisory opinions merely because the issue may arise in the future.

3. It has not been shown that Polar ported numbers to Qwest or to any other competing carrier and as such no discrimination has been established against Polar.
4. It is the recommendation of the Office of Administrative Hearings that the complaints against HTC Services, Inc. and Polar Telecom, Inc. be in all things dismissed with prejudice and without costs to the parties.

Dated this _____ day of _____, 2004.

Office of Administrative Hearings

Allen C. Hoberg
Administrative Law Judge

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

IN THE MATTER OF:

Midcontinent Communications,)	
)	
Complainant,	)	Civil No. CV-97-03679
	)	OAH File No. 2004025
vs)	
)	
	)	ORDER
)	
Polar Telecom, Inc., and)	
HTC Services, Inc.)	
)	
Respondents.)	

On May 13, 2004, Midcontinent Communications, a South Dakota Partnership, ("Midcontinent") filed a Complaint with the North Dakota Public Service Commission ("NDPSC") against Polar Telecom, Inc., a North Dakota Corporation d/b/a Polar Communications ("Polar") and HTC Services, Inc., a Minnesota Corporation ("HTC"), alleging violations of N.D.C.C. Section 49-21-23(2). On June 11, 2004, the NDPSC referred the Complaint to the Office of Administrative Hearing pursuant to N.D.C.C. Section 49-21-24(2) and on June 22, 2004, Allan C. Hoberg, Administrative Law Judge served a Notice of Hearing and Specification of Issues on the parties and the commission. Hearing Officer Hoberg set the matter for hearing on September 3, 2004, at 9:00 a.m. and advised that the issues to be considered in this matter included whether under the provisions of N.D.C.C. Section 49-24-21: 1.) Polar was discriminating against Midcontinent by delaying and refusing to grant Midcontinent Local Number Portability ("LPN"), when, in fact, Polar grants LPN to Qwest; and 2) HTC was discriminating against Midcontinent by delaying and refusing to grant Midcontinent

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MAYVILLE ND 58257-0547
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Local Number Portability ("LPN"), when, in fact, HTC intends to grant LPN to wireless carriers.

On Wednesday, September 25, 2004, the Hearing Officer held a pre-hearing conference by telephone. A public hearing was held on September 3, 2004, at which time Midcontinent, Polar and HTC produced evidence through witnesses and exhibits. A transcript of the hearing has been prepared and made available to the parties and the Hearing Examiner. The parties filed pre-hearing briefs and post hearing briefs and the Hearing Officer has filed his Proposed Findings of Fact and Conclusions of Law.

The NDPSC, having received and reviewed the proposed Findings of Fact and Conclusions of Law of the Hearing Officer and being fully advised in the premises, hereby adopts the proposed Findings of Fact and Conclusions of Law of the Hearing examiner and enters the following:

ORDER

The complaint of Midcontinent Communications, a South Dakota Partnership, against Polar Telecom, Inc., a North Dakota corporation, dba Polar Communications and HTC Services, Inc., a Minnesota corporation, alleging discrimination pursuant to NDCC 49-21-24 is dismissed with prejudice and without costs to either party.

Susan E. Wefald, Commissioner

Tony Clark, President

Kevin Cramer, Commissioner

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INTERCONNECTION AGREEMENT

between

MIDCONTINENT COMMUNICATIONS

and

CLEC-NAME

for

NORTH DAKOTA

39 PU-04-237

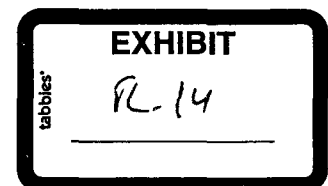
Pages 23

Draft Interconnection Agreement between
Midcontinent & CLEC-Name for ND
by HTC Services Inc

Exhibit # R14

09/03/2004

CC Comm Legal Ilona ALJ



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INTERCONNECTION AND NUMBER PORTABILITY AGREEMENT

This Interconnection Agreement, effective as of the ____ day of _____, 2003 (“Effective Date”), by and between Midcontinent Communications (“Midcontinent”) and CLEC-NAME (“CLEC”) [~~Should use abbreviation of party name in final agreement~~] CLEC and Midcontinent are each a Party and collectively the Parties to this Agreement).

I. RECITALS

Pursuant to this Interconnection ~~and Number Portability and Number Portability Agreement (“Agreement”)~~ [~~conforms text to actual title~~], Midcontinent and CLEC will interconnect their networks for the purposes of exchanging Local Traffic, including ISP-Bound Traffic, and Non-Local Traffic and provide for the porting of telephone numbers between their respective companies (collectively, “services”). This Agreement includes terms and conditions for such services.

II. SCOPE OF AGREEMENT

- A. This Agreement sets forth the terms, conditions and prices under which the Parties agree to provide interconnection and traffic exchange pursuant to Section 251 of the Act and for the provision of number portability. The Agreement includes all accompanying appendices.
- B. In the performance of their obligations under this Agreement, the Parties shall act in good faith and consistently with the intent of the Act. Where notice, approval or similar action by a Party is permitted or required by any provision of this Agreement, such action shall not be unreasonably delayed, withheld or conditioned.

III. DEFINITIONS

As used in this Agreement, the following terms shall have the meanings specified in this Section. When not inconsistent with the context, words in the singular number include the plural number, and words in the plural number include the singular number. The word “shall” is always mandatory and not merely directory. The word “may” is directory and discretionary and not mandatory. Terms, phrases and words not defined herein will be as defined in the Act or FCC regulations or construed in accordance with their customary usage in the telecommunications industry.

- A. “Act” means the Communications Act of 1934 (47 U.S.C. § 151, et. seq.), as amended by the Telecommunications Act of 1996, and as from time to time interpreted judicially and in the duly authorized rules and regulations of the FCC or the Commission within its state of jurisdiction.
- B. “Bill and Keep” means the originating Party of Local Traffic has no obligation to pay terminating charges to the terminating Party.

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- C. “Calling Party Number” or “CPN” is a Common Channel Signaling (“CCS”) parameter that refers to the number transmitted through a network identifying the calling party.
- D. “Commission” means the North Dakota Public Service Commission.
- E. “Common Channel Signaling” or “CCS” means a method of digitally transmitting call set-up and network control data over a special signaling network fully separate from the public voice switched network elements that carry the actual call. The CCS used by the Parties shall be Signaling System 7 (“SS7”).
- F. “Interconnection” is as described in the Act and refers to the connection of separate pieces of equipment, facilities, or platforms between or within networks for the purpose of transmission and routing of telecommunications traffic. Interconnection does not include the transport and termination of traffic
- G. “ISP-Bound Traffic” has the definition shown in the ISP-Bound Traffic Order.
- H. “ISP-Bound Traffic Order” means the FCC’s August 18, 2001 Order on Remand and Report and Order in CC Docket 99-68, Inter-carrier Compensation for ISP-Bound Traffic.
- I. “LIS” is defined as local interconnection services. Only LIS circuits may be used to route Local Traffic between the Parties. No Non-Local Traffic may be routed over LIS circuits.
- J. “Local Traffic” and / or “Mandatory EAS” means traffic that originates and terminates within a calling area defined by CLEC as a non-optional local calling area, including ISP-Bound Traffic that otherwise qualifies as such traffic. CLEC shall define this local calling area by specifying the NPA-NXX codes included.
- K. “Point of Interface” or “POI” is a mutually agreed upon point of demarcation where the exchange of traffic and/or physical interconnection of the Parties’ networks occurs.
- L. Transit Traffic is traffic that, for purposes of this Agreement only, neither originates nor terminates with the Party providing the Transit Service.
- M. “Transit Service,” for the purposes of this Agreement only, is the provision of tandem switching and transport by either Party for traffic which:
1. originates on one Party’s network, transit’s—transits the other Party’s network and terminates to an a third party network; or
 2. originates on a third party network, transits one Party’s network, and terminates on the other Party’s network.

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IV. RECIPROCAL TRAFFIC EXCHANGE

A. Scope

This Agreement addresses the exchange of Local Traffic (including ISP-Bound Traffic that otherwise qualifies as Local Traffic), non-Local Traffic and Transit Traffic between Midcontinent end users and CLEC end users.

B. Types of Traffic

Local Traffic, (including ~~Local~~–Transit Traffic and ISP-Bound Traffic that otherwise qualify as Local Traffic), and Non-Local Traffic shall be exchanged pursuant to this Agreement at rates discussed in Appendix A.

V. INTERCONNECTION

A. Definition

~~“Interconnection” is the linking of the Midcontinent and CLEC networks for the mutual exchange of traffic. Interconnection does not include the transport and termination of traffic.~~

B.A. Physical Point of Interface (POI)

Each Party is responsible for providing its own facilities, including the cost of those facilities, up to the actual physical POI. The Parties shall negotiate the facilities arrangement(s) between their networks and the physical POI. Refer to Appendix B.

C.B. Traffic Routing

1. The Parties agree to exchange Local Traffic and non-Local Traffic directly and indirectly between their networks.
2. Interconnection for non-Local Traffic may be ordered from the terminating Party's interstate or intrastate access tariff(s), depending upon the originating location of the call.
3. Overflow Local Traffic may be routed to a third party local tandem to avoid network blocking. The originating Party is responsible for payment of any third party charges resulting from such routing. If either party determines based on generally accepted trunk engineering standards that direct trunking is warranted to avoid third party transit, then either Party may request to provision or augment direct interconnection trunks. Parties agree to promptly negotiate in good faith for the compensation and implementation of such trunking. The Parties agree to augment network capacity on direct routes [Polar/Halstad to propose language describing when augments will occur]. Transit Service may be provided to a third party if overflow Local Traffic to the third party tandem persists.

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4. Transit Service may be provided to third party carriers for Local Traffic, but such transit service shall not alter the originating carrier's obligation to compensate the terminating Party according to the applicable access tariff or interconnection agreement and the transiting Party shall not be responsible for such compensation.

D.C. Traffic Identification

1. For billing purposes, each Party shall pass original and true Calling Party Number ("CPN") information on each call that is terminated to the other Party. Neither Party will alter the CPN Field.
 - a) If one Party is passing CPN but the other Party is not properly receiving information, the Parties will work cooperatively to correct the problem.
 - b) The CPN shall be used to validate the jurisdictional nature of the traffic, i.e., Local Traffic or Non-Local Traffic and the carrier responsible for compensation associated with the traffic. When the percentage of calls passed without a valid CPN is less than ten percent (10%), all calls exchanged without CPN information will be billed as either Local Traffic or Non-Local Traffic in direct proportion to the minutes of use ("MOU") of calls exchanged with CPN information (excluding ISP-Bound Traffic). If the percentage of calls passed without CPN is greater than ten percent (10%), all calls passed without CPN will be billed as IntraLATA Switched Access Service.

E.D. Service Interruptions

1. The characteristics and methods of operation of any circuits, facilities or equipment of either Party connected with the services, facilities or equipment of the other Party pursuant to this Agreement shall not: 1) interfere with or impair service over any facilities of the other Party, its affiliated companies, or its connecting and concurring carriers involved in its services; 2) cause damage to their plant; 3) violate any applicable law or regulation regarding the invasion of privacy of any communications carried over the Party's facilities; or 4) create hazards to the employees of either Party or to the public. Each of these requirements is hereinafter referred to as an "Impairment of Service."
2. To facilitate trouble reporting and to coordinate the repair of the service provided by each Party to the other under this Agreement, each Party shall designate a Trouble Reporting Control Office (TRCO) for such service. Each Party shall provide a method for receiving trouble reports on a 24-hour basis. A mechanized recording process that is reviewed during normal business hours shall satisfy this requirement.
3. Each Party shall furnish a trouble reporting telephone number.

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4. Before either Party reports a trouble condition, ~~they~~that Party shall use ~~their~~its best efforts to be sure that the trouble is not caused by its own facilities.
 - a. In cases where a trouble condition affects a significant portion of the ~~other's~~other Party's service, the Parties shall assign the same priority provided to other interconnecting carriers.
 - b. The Parties shall cooperate in isolating trouble conditions.

VI. COMPENSATION

A. Compensation for ISP-Bound Traffic

The Parties acknowledge they were not exchanging traffic pursuant to an interconnection agreement prior to the date of the ISP-Bound Traffic Order. Pursuant to the ISP-Bound Traffic Order, the Parties shall exchange ISP-Bound Traffic pursuant to this Agreement on a Bill and Keep basis.

B. Compensation For Local Traffic

1. The Parties agree ~~expect~~ that Local Traffic, other than ISP-bound Traffic, will be exchanged pursuant to this Agreement and shall be in balance by plus or minus ten percent (10%). Accordingly Local Traffic pursuant to this Agreement shall be exchanged on a Bill and Keep basis ~~while Local Traffic is in balance~~until such time as the requirements of paragraph 2 of this section are met.
2. If a Party establishes through a minimum of three (3) months of traffic data ~~that one Party is originating more than sixty percent (60% of the Local Traffic exchanged between the Parties is out of balance by plus or minus ten (10) percent, within thirty (30) days written notice, and the difference in the number of minutes terminated by each Party, on average during that period, exceeds [20xxx,000] per month, the Parties shall begin compensation for Local Traffic terminated for Exchanges shown in Appendix BC, pursuant to the rates in Appendix A no less than thirtysixty (3060) days after written notice to the other Party. [Final threshold to be discussed based on agreed-to rates for reciprocal compensation.]~~
3. During any time when compensation is being paid pursuant to paragraph 2 of this section, the Parties may mutually agree to exchange traffic on a Bill and Keep basis

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C. Compensation for Non-Local Traffic NOTE: see paragraph 1, below. I think this was a double negative and should be changed as I note below.

Non-Local Traffic is subject to Access Service charges under each Party's applicable Intrastate or Interstate Access Service tariffs or contract(s). Non-Local Traffic includes:

1. Traditional toll traffic, e.g. 1+ traffic between End Users not physically located in rate centers that have ~~not~~ been designated as Local or mandatory EAS. The Party transporting the call between exchanges is responsible for payment of originating or terminating Switched Access charges to the other Party.
2. Originating and terminating foreign exchange traffic or traffic that would be rated as Local Traffic based on the rate centers associated with the originating and terminating numbers, but actually originates and terminates in different local calling areas, due to the physical location of end user customers. The Party offering common carrier service between exchanges is responsible for payment of originating or terminating Switched Access charges to the other Party depending on the directionality of the call. Note to parties: do we do this? [Need for this or substitute language to be addressed after Polar/Halstad determination about whether offer foreign exchange services.] {Note: Leave this in. Moot point if we are not providing this service.} They will get back to us

D. Transit Traffic

1. Local Transit Traffic:

The Parties agree that Local Transit Traffic, consistent with Section V.B above V.B above V.B above V.C above, shall be exchanged, with compensation owed to the terminating Party from the third-party carrier. Upon request, the Party providing the transit service to the third-party carrier will provide traffic reports and/or billing records ("Transit Usage Records") to the party terminating Transit Traffic.

2. Non-Local Transit Traffic:

The Parties agree that Non-Local Transit Traffic, consistent with Section V.B.4V.B.4V.B.4V.C.4 shall be exchanged pursuant to each party's access tariffs or other interconnection agreements pursuant to the rates and terms thereof and billable to the third-party carrier that originated the Transit Traffic. The Party providing Non-Local Transit Traffic to third party carriers is responsible for provision of Transit Usage Records to the terminating Party or payment of access charges for such traffic if the Party providing the transit function is unable to produce Transit Usage Records.

3. Transit Usage Reports

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Upon request, the Party providing the Transit Services to the third-party carriers for Local Traffic and Non-Local Traffic will provide traffic reports and/or billing records (“Transit Usage Records”) to the party terminating Transit Traffic.

- a) Transit Usage Reports shall identify the third-party carrier that originated the Transit Traffic by Carrier Identification Code (CIC) or Operating Company Number (OCN).
- b) Transit Usage Reports shall identify the usage period and the actual usage in minutes of use.

VII. NUMBER PORTABILITY

This Section sets forth terms and conditions for Number Portability provided by Midcontinent and CLEC for the porting of NXXs issued to ~~CLEC~~ one of the Parties (aka “~~native~~ Native NXXs”). Porting of NXXs native to a third party carrier (i.e., Qwest) is outside the scope of this Section VII and will be provided between parties pursuant to the terms of Agreement between the third party native NXX owner and Midcontinent or CLEC. Note to Parties: Need to make this reciprocal. [Certain of the marked changes in Part VII are intended to address this.]

~~A. Determination of Local Calling~~

~~Parties agree that numbers assigned to CLEC will maintain the local calling scope as defined by the CLEC, provided, however, that nothing in this Agreement will preclude either Party from introducing differing or optional calling plans for their respective subscribers on an out-bound calling basis.~~

A. Determination of Local Calling NOTE added this back but made mutual – this is the whole point of this agreement

Parties agree that Native NXX numbers assigned to each Party will maintain the local calling scope as defined by the Party issued the Native NXX, provided, however, that nothing in this Agreement will preclude either Party from introducing differing or optional calling plans for their respective subscribers on an out-bound calling basis.

B. Responsibility of the Parties

1. Each Party is responsible to program and update its own switches and network systems to recognize and route traffic to the other Party at all times.
2. Each Party is responsible to input required data into the Routing Data Base Systems (RDBS) and into the Telcordia Rating Administrative Data Systems (BRADS) or other appropriate system(s) necessary to update the Local Exchange Routing Guide (LERG), unless negotiated otherwise.

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3. Neither Party is responsible for notifying the other Parties' End Users of any changes in dialing arrangements, including those due to NPA exhaust.
4. The Parties agree that the industry has established local routing number (LRN) technology as the method by which permanent number portability (PNP) will be provided in response to FCC Orders in FCC 95-116 (i.e., First Report and Order and subsequent Orders issued to the date this agreement was signed). As such, the parties agree to provide PNP via LRN to each other as required by such FCC Orders or Industry agreed upon practices.

C. Request for Portability

1. If a Party desires to have PNP capability deployed in an End Office of the other Party, which is not currently capable, the requesting Party shall issue a written request which specifically requests PNP, identifies the discrete geographic area covered by the request, and provides a tentative date that the requesting Party expects to need PNP to port prospective customers.
2. The Party receiving a written request for PNP pursuant to Section VII.B.1 above shall respond to the requesting Party within ten (10) Business Days of receipt of the request, with a date for which PNP will be available in the requested End Office. The receiving Party will proceed to provide PNP in compliance with the procedures and timelines set forth in FCC 96-286, Paragraph 80, and FCC 97-74, Paragraphs 65-67.
3. At the time of execution of this Agreement, CLEC has not deployed PNP in its switch. Pursuant to the written request process in Section XXX, Midcontinent has requested, and CLEC shall deploy PNP in its switch within- 90 days of the signing of this Agreement.
4. CLEC may cancel any line-based calling cards associated with telephone numbers ported from its switch.

D. Additional Obligations of Midcontinent of the Parties

1. ~~Midcontinent~~ Each Party is responsible for advising the Number Portability Administration Center (NPAC) of telephone numbers that it imports and the associated data as identified in industry forums as being required for PNP.
2. When ~~Midcontinent~~ a Party requests that an NXX in an LRN capable CLEC switch become portable, ~~Midcontinent~~ that Party shall follow the industry standard LERG procedure.
3. ~~Midcontinent~~ Each Party shall be established with the Regional NPAC prior to scheduling Intercompany testing of PNP.

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4. For PNP orders ~~Midcontinent~~ Each Party shall adhere to CLEC's the other Party's Local Service Request (LSR) format and PNP due date intervals.
5. Both parties shall adhere to reserved number standards as set by the FCC and / or the State Commission.

E. Obligations of ~~Both Parties~~ for Porting

1. The Parties shall cooperate in performing activities required to port Customer telephone number(s). The Party acquiring the End User Customer (porting in the Customer telephone number(s)) will assume primary responsibility for the coordination of such activities.
2. When a ported telephone number becomes vacant, e.g., the telephone number is no longer in service by the original End User, the ported telephone number will be released back to the carrier owning the switch in which the telephone number's NXX is native after appropriate time has elapsed for intercept notification.
3. Each Party has the right to block default routed calls from entering a network in order to protect the public switched network from overload, congestion, or failure propagation.
4. ~~Industry~~ Wireline industry guidelines shall be followed regarding all aspects of porting numbers between Midcontinent and CLEC.
5. Each Party shall become responsible for the End User's other telecommunications related items, e.g. E911, Directory Listings, Operator Services, Line Information Database (LIDB), when it ports the End User's telephone number to its switch.
6. The Parties will provide a 10-digit trigger on all LNP orders unless a coordinated conversion of numbers is requested on the PNP order.

F. Limitations of Service Note: Their changes are non-sense. I have added back what we originally had with modest changes.

1. Parties agree that this Agreement specifically addresses the porting of Native NXXs with calling scope defined by the holder of the Native NXX.
2. In the event that either Party is requested to port a Native NXX end user number to a third party provider or switch, the Party from whom such port is requested will bear all responsibility, both financially, operationally, and contractually, to ensure that the porting of that number meets the calling scope requirements outlined herein.

The Parties agree that

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~~1. Parties agree that this Agreement specifically addresses the porting of NXXs with calling scope defined by the CLEC. In the event that one Party (the "Porting Out Party") has an agreement with another local exchange carrier (a "Third Party LEC") to treat calls to an NXX as local calls for purposes of reciprocal compensation and/or customer charges; and,~~

~~2. In the event that either Party is requested to port a CLEC native NXX end user number to a third party provider or switch, the Party from whom such port is requested will bear all responsibility, both financially, operationally, and contractually to ensure that the porting of that number meets the calling scope requirements outlined herein. The other Party (the "Porting In Party") ports any numbers from such an NXX code;~~

~~the Porting In Party shall not impose access charges on the Third Party LEC for calls terminated to the ported numbers, provided that, if the Third Party LEC is an affiliate of the Porting Out Party, the Porting In Party shall be permitted to impose access charges on any Non-Local Calls to the ported numbers unless it is afforded the rights and privileges of the Porting Out Party under the Porting Out Party's agreement with the Third Party LEC.~~

G. Service Descriptions

1. The switch's LRN software determines if the called party is in a portable NXX. If the called party is in a portable NXX, a query is launched to the PNP database to determine whether or not the called number is ported.
2. When the called number with a portable NXX is ported, an LRN is returned to the switch that launched the query. Per industry standards, the LRN appears in the CPN (Called Party Number) field of the SS7 message and the called number then appears in the GAP (Generic Address Parameter) field.
3. When the called number with a portable NXX is not ported, the call is completed as in the pre-PNP environment.
4. The FCI (Forward Call Identifier) field's entry is changed from 0 to 1 by the switch triggering the query when a query is made, regardless of whether the called number is ported or not.
5. The N-1 carrier (N carrier is the responsible Party for terminating call to the End User) has the responsibility to determine if a query is required, to launch the query, and to route the call to the switch or network in which the telephone number resides.
6. If either Party chooses not to fulfill its N-1 carrier responsibility, the other Party will perform queries on calls to telephone numbers with portable NXXs received from the other Party and route the call to the switch or network in which the telephone number resides. Each Party will perform LNP service for the other pursuant to applicable tariff or, if such tariff

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does not exist, pursuant to the rate set forth in National Exchange Carrier Association (NECA) Tariff FCC No. 5.

Both Parties shall populate the Jurisdictional Identification Parameter (JIP) field with the first six (6) digits (NPA NXX format) of the appropriate LRN of the originating switch.

H. Changes in Law and Industry Procedures

The Parties acknowledge that the obligations and services described in this Part VII are based on the rules of the FCC and industry procedures that are in place as of the date of this Agreement. To the extent that there are changes in such rules and/or procedures, the Parties agree to conform their actions to the requirements of the rules and/or procedures at the time such changes go into effect. The Parties further agree to negotiate in good faith to amend this Agreement as necessary to reflect such changes. The obligations of the Parties under this section are in addition to those of Section XII.AA.

VIII. CUSTOMER CUTOVER PROCEDURES

The Parties agree to establish procedures to coordinate cutoverporting of customers from one Party's switch to that of the other Party. Such procedures shall provide, at a minimum, for ordering processes, scheduling of cutover dates and times, within [two (2) hour] windows, for notification from each Party to the other of cutover activities, and for confirmation of the completion of those activities.

VIII.IX. BILLING AND PAYMENT

A. Billing Period.

Each Party shall bill on a monthly (30-day) basis for services provided under this Agreement.

B. Invoices.

The Parties shall include minutes of use on its invoices to enable the other Party to reasonably verify the accuracy of the usage, charges, and credits.

C. Payment

1. The Parties shall pay invoices within forty-five (45) days of receipt of the invoice.
2. Disputed Amounts. A Party must give written notice to the other Party identifying any dispute of an invoiced amount. A Party may withhold payment of a properly disputed portion of an invoice, but must timely pay the undisputed portion. The Parties agree that they will each make a good faith effort to promptly resolve any billing dispute.

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- a) If a Party properly disputes charges and withholds payment of the disputed amount, such amount shall be subject to late payment charges as set forth in ~~IX C 3~~~~VIII~~~~IX.C.3~~ following.
- (1) If the dispute is resolved in favor of the invoicing Party, the disputed amount plus the late payment charge shall be paid to the invoicing Party within twenty (20) days of resolution of the dispute.
- (2) If the dispute is resolved in favor of the disputing Party, then the invoicing Party shall credit the invoice of the disputing Party for the amount of the disputed charges, plus any late payment charges assessed on such amount no later than the second bill date after the resolution of the dispute.
- b) If a Party properly disputes charges that it already has paid and the dispute is resolved in favor of the disputing Party, then the invoicing Party shall credit the invoice of the disputing Party for the amount of any disputed charge [plus interest calculated from the date of payment at the rate for late charges set forth in IX.C.3 following] no later than the second bill date after the resolution of the dispute.
3. Late Payment Charges. Any amounts owed under the terms of this Agreement by one Party to the other Party, if not paid when due, shall be subject to a late payment fee equal to the lesser of: (a) one and one-half percent (1½%) per month, and (b) the highest rate of interest that may be charged under applicable law, compounded daily, for the number of days from the date on which such payment was due until the date on which such payment is made and available. Notwithstanding the foregoing, if charges are billed in a period after the invoice for the billing period in which they occur, neither Party shall be liable for any underbilled charges for which usage data was not furnished by a third party the billed Party's payment of those charges shall be deemed timely if such payment is made within the number of days after the invoice on which such charges were billed that is equal to the number of days between the date of the invoice for the period when the charges occurred and the date of the invoice on which such charges were billed.

IX.X. DIALING PARITY

The Parties shall provide Dialing Parity to each other as required under Section 251(b)(3) of the Act.

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X.XI. NOTICE OF CHANGES

If a Party makes a change in its network that it believes will materially affect the inter-operability of its network with the other Party, the Party making the change shall provide at least ninety (90) days advance written notice of such change to the other Party. In addition, the Parties will comply with the Network Disclosure rules adopted by the FCC in CC Docket No. 86-79 as may be amended from time to time advance notice of such change to the other Party in accordance with the deadlines for notification of such changes under the FCC's rules. [Polar/Halstad looking at language for this section]

XI.XII. MISCELLANEOUS TERMS

A. General Provisions

1. Each Party is individually responsible to provide facilities within its network which are necessary for routing, transporting, measuring, and billing traffic from the other Party's network and for delivering such traffic to the other Party's network in the standard format compatible with the other Party's network and to terminate the traffic it receives in that standard format to the proper address on its network. Such facility shall be designed based upon the description and forecasts provided under this Agreement.
2. Neither Party shall use any service related to or use any of the services provided in this Agreement in any manner that interferes with other persons in the use of their service, prevents other persons from using their service, or otherwise impairs the quality of service to other carriers or to either Party's customers, and each Party may discontinue or refuse service if the other Party violates this provision. Upon such violation, either Party shall provide the other Party notice of such violation, if practicable, at the earliest practicable time.
3. Each Party is solely responsible for the services it provides to its customers and to other Telecommunications Carriers.
4. The Parties shall work cooperatively to minimize fraud associated with third-number-billed calls, calling card calls, and any other services related to this Agreement.

B. Term of Agreement

This Agreement shall become effective on the date of Commission approval pursuant to Sections 251 and 252; but the Parties may agree to implement the provisions of this Agreement immediately. The end of the initial term of this Agreement shall be September 30, 2004~~2005~~. The Agreement shall continue on a month-to-month basis after the initial term ~~unless until ninety (90) days after one Party provides written notice terminating the Agreement is provided no later than three months before the end of the then-current term of termination to the other Party.~~ This Agreement shall remain in effect until replaced by another Agreement.

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C. Taxes

Each Party securing services hereunder shall pay or otherwise be responsible for all federal, state, or local sales, use, excise, gross receipts, transaction or similar taxes, fees or surcharges levied against or upon such securing Party (or the providing Party when such providing Party is permitted to pass along to the securing Party such taxes, fees or surcharges), except for any tax on either Party's corporate existence, status or income. Whenever possible, these amounts shall be billed as a separate item on the invoice.

D. Force Majeure

Neither Party shall be liable for any delay or failure in performance of any part of this Agreement from any cause beyond its control and without its fault or negligence including, without limitation, acts of nature, acts of civil or military authority, government regulations, embargoes, epidemics, terrorist acts, riots, insurrections, fires, explosions, earthquakes, nuclear accidents, floods, work stoppages, equipment failure, power blackouts, volcanic action, other major environmental disturbances, unusually severe weather conditions, inability to secure products or services of other persons or transportation facilities or acts or omissions of transportation carriers (collectively, a "Force Majeure Event"). In the event of a labor dispute or strike, the Parties agree to provide service to each other at a level equivalent to the level they provide themselves.

E. Confidentiality/Proprietary Information.

1. The parties agree that it may be necessary to exchange certain confidential information during the term of this Agreement, including, without limitation, technical and business plans, technical information, proposals, specifications, drawings, procedures, orders for services, usage information in any form, customer account data and Customer Proprietary Network Information ("CPNI") as that term is defined by the Communications Act of 1934, as amended, and the rules and regulations of the Federal Communications Commission and similar information ("Confidential Information") shall be deemed Confidential Information.. The Confidential Information is deemed proprietary to the Disclosing Party and the Recipient shall protect it as the Recipient would protect its own proprietary information. Confidential Information shall not be disclosed or used for any purpose other than to provide service as specified in this Agreement.
2. Recipient shall have no obligation to safeguard Confidential Information (i) ~~which that~~ was in the Recipient's possession free of restriction prior to its receipt from Disclosing Party, (ii) after it becomes publicly known or available through no breach of this Agreement by Recipient, (iii) after it is rightfully acquired by Recipient free of restrictions on its Disclosing Party, or (iv) after it is independently developed by personnel of Recipient to whom the Disclosing Party's Confidential information had not been previously disclosed. Recipient may disclose Confidential Information if

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required by law, a court, or governmental agency, provided that Disclosing Party has been notified of the requirement promptly after Recipient becomes aware of the requirement, and provided that Recipient undertakes all reasonable lawful measures to avoid disclosing such information until Disclosing Party has had reasonable time to obtain a protective order. Recipient agrees to comply with any protective order that covers the Confidential Information to be disclosed.

3. Each party agrees that Disclosing Party would be irreparably injured by a breach of this Agreement section by Recipient or its representatives and that Disclosing Party shall be entitled to seek equitable relief, including injunctive relief and specific performance, in the event of any breach of this paragraph section. Such remedies shall not be exclusive, but shall be in addition to all other remedies available at law or in equity.

F. Limitation of Liability

1. Each Party shall be liable to the other for direct damages for any loss, defect or equipment failure resulting from the causing Party's conduct or the conduct of its agents or contractors in performing the obligations contained in this Agreement.
2. Neither Party shall be liable to the other under this Agreement for indirect, incidental, consequential, or special damages, including (without limitation) damages for lost profits, lost revenues, lost savings suffered by the other Party regardless of the form of action, whether in contract, warranty, strict liability, tort, including (without limitation) negligence of any kind and regardless of whether the Parties know the possibility that such damages could result.
3. Nothing contained in this Section shall limit either Party's liability to the other for willful or intentional misconduct.
4. Nothing contained in this Section shall limit either Party's obligations of indemnification as specified in the Indemnity Section of this Agreement.

G. Warranties

NOTWITHSTANDING ANY OTHER PROVISION OF THIS AGREEMENT, THE PARTIES AGREE THAT NEITHER PARTY HAS MADE, AND THAT THERE DOES NOT EXIST, ANY WARRANTY, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.

H. Assignment

Neither Party may assign or transfer (whether by operation of law or otherwise) this Agreement (or any rights or obligations hereunder) to a third party without the prior written consent of the other Party (such consent will not be

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unreasonably withheld) provided that each Party may assign this Agreement to a corporate affiliate or an entity under its common control or an entity acquiring all or substantially all of its assets or equity by providing prior written notice to the other Party of such assignment or transfer. Any attempted assignment or transfer that is not permitted is void ab initio. Without limiting the generality of the foregoing, this Agreement shall be binding upon and shall inure to the benefit of the Parties' respective successors and assigns.

I. Severability

In the event that any one or more of the provisions contained herein shall for any reason be determined to be unenforceable or in conflict with state or federal law in any respect, the Parties will negotiate in good faith for replacement language. If replacement language cannot be agreed upon, either Party may seek regulatory intervention, including negotiations pursuant to Sections 251 and 252 of the Act.

J. Nondisclosure

All information, including but not limited to specifications, microfilm, photocopies, magnetic disks, magnetic tapes, drawings, sketches, models, samples, tools, technical information, data, employee records, maps, financial reports, and market data furnished by one Party to the other Party shall remain the property of the disclosing Party. A Party ~~who~~ that receives ~~Proprietary Confidential~~ Information via an oral communication may request written confirmation that the material is ~~Proprietary Confidential~~ Information.

K. Survival

The Parties' obligations under this Agreement, which by their nature are intended to continue beyond the termination or expiration of this Agreement, including the provisions of Section IX (J), shall survive the termination or expiration of this Agreement.

L. Dispute Resolution

If any claim, controversy or dispute between the Parties, their agents, employees, officers, directors or affiliated agents ("Dispute") cannot be settled through negotiation, it shall be resolved by arbitration conducted by a single arbitrator engaged in the practice of law, under the then current rules of the American Arbitration Association ("AAA"), or in the alternative pursuant to the jurisdiction of the appropriate regulatory agency. The Federal Arbitration Act, 9 U.S.C. Secs. 1-16, not state law, shall govern the arbitrability of all Disputes. The arbitrator shall not have authority to award punitive damages. All expedited procedures prescribed by the AAA rules shall apply. The arbitrator's award shall be final and binding and may be entered in any court having jurisdiction thereof. Each Party shall bear its own costs and attorneys' fees, and shall share equally in the fees and expenses of the arbitrator. The arbitration shall occur at a location agreed to by the Parties. Nothing in this Section shall be

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construed to waive or limit either Party's right to seek relief from the Commission or the Federal Communications Commission as provided by state or federal law.

No Dispute, regardless of the form of action, arising out of this Agreement, may be brought by either Party more than two (2) years after the cause of action accrues.

M. Controlling Law

This Agreement was negotiated by the Parties in accordance with the terms of the Act and the laws of North Dakota. It shall be interpreted solely in accordance with the terms of the Act and the applicable North Dakota law.

N. Joint Work Product

This Agreement is the joint work product of the Parties and has been negotiated by the Parties and their respective counsel and shall be fairly interpreted in accordance with its terms and, in the event of any ambiguities, no inferences shall be drawn against either Party.

O. Notices

Any notices required by or concerning this Agreement shall be sent to the Parties at the addresses shown below:

Midcontinent Communications

and

CLEC-NAME.

Each Party shall inform the other of any changes in the above addresses.

P. Responsibility of Each Party

Each Party is an independent contractor, and has and hereby retains the right to exercise full control of and supervision over its own performance of its obligations under this Agreement and retains full control over the employment, direction, compensation and discharge of all employees assisting in the performance of such obligations. Each Party will be solely responsible for all matters relating to payment of such employees, including compliance with social security taxes, withholding taxes and all other regulations governing matters. Each Party will be solely responsible for proper handling, storage, transport and disposal at its own expense of all (i) substances or materials that it or its contractors or agents bring to, create or assume control over at work locations or, (ii) waste resulting therefrom or otherwise generated in connection with its or its contractors' or agents' activities at the work locations. Subject to

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the limitations on liability and except as otherwise provided in this Agreement, each Party shall be responsible for (i) its own acts and performance of all obligations imposed by applicable law in connection with its activities, legal status and property, real or personal and, (ii) the acts of its own affiliates, employees, agents and contractors during the performance of that Party's obligations hereunder.

Q. No Third Party Beneficiaries

Except as may be specifically set forth in this Agreement, this Agreement does not provide and shall not be construed to provide third parties with any remedy, claim, liability, reimbursement, cause of action, or other privilege.

R. Referenced Documents

All references to Sections and Appendixes shall be deemed to be references to Sections of, and Appendixes to, this Agreement unless the context shall otherwise require. Whenever any provision of this Agreement refers to a technical reference, technical publication, Midcontinent practice, CLEC practice, any publication of telecommunications industry administrative or technical standards, or any other document specifically incorporated into this Agreement, it will be deemed to be a reference to the most recent version or edition (including any amendments, supplements, addenda, or successors) of such document that is in effect, and will include the most recent version or edition (including any amendments, supplements, addenda, or successors) of each document incorporated by reference in such a technical reference, technical publication, Midcontinent practice, CLEC practice, or publication of industry standards unless the Parties mutually agree otherwise. Should there be any inconsistency between or among publications or standards, the Parties will discuss any inconsistencies and reach agreement.

S. Publicity and Advertising Note: we propose a compromise for resolving this issue however our basic requirement for strong protections and breach are added back in this agreement

- ~~1. Neither Party, including affiliates and designated agents, shall publish or use any advertising, sales promotions or other publicity materials that use the other Party's logo, trademarks or Marks without the prior written approval of the other Party. This Agreement does not grant either Party any license to use the name, service marks or trademarks of the other Party or any of its affiliated companies.~~
2. Neither Party may imply any direct or indirect affiliation with or sponsorship or endorsement of it or its services or products by the other Party.
3. Each Party shall provide the exclusive interface to its own subscribers.

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4. Neither party shall convey derogatory information about the other party's products and services to the other party's subscribers. Any marketing materials or written or verbal information that reference the other party's products and services shall be limited to accurate, factual information such as actual ad truthful rate comparisons. Parties will be solely responsible for any actions of their agents that violate this section, and any violation of this section shall be considered a breach of this agreement subject to requirements of paragraph 6 below. Except as specifically permitted by a Party, in no event shall either Party provide information to the other Party's subscribers about the other Party or the other Party's products or services for any purpose. Parties will be solely responsible for the activities of their own agents in compliance with this Section XI (S).

If one Party believes that the other Party or any agent of the other Party, is engaged in unfair marketing practices or is providing inaccurate information concerning the first Party, its services or its prices, the first Party shall so inform the other Party. The other Party shall then take such action in response to the first Party's claim as it deems appropriate and inform the first Party of such action. The Parties agree that the intent of this paragraph is to promote cooperation between the Parties in resolving issues relating to marketing practices and to avoid unnecessary conflicts.

55. Parties agree that in the event either Party is contacted by customers of the other Party in error (i.e., misdirected repair or other service inquiry call) that the Party receiving such call will provide the contact information for the other Party as provided by that Party. In no event will either Party use such misdirected contacts to attempt to sell its own services or to in any way use such contact as an opportunity to provide negative information about the other Party to that Party's customers.

66. If one Party believes that the other Party or any agent of the other Party, is engaged in unfair marketing practices or is providing inaccurate information concerning the first Party in violation of paragraphs 4 or 5 of this Section, the first Party shall first so inform the other Party before invoking remedies outline in paragraph 7 of this Section. The other Party shall then take such action in response to the first Party's claim as it deems appropriate and promptly inform the first Party of such action. The Parties agree that the intent of this paragraph is to promote cooperation between the Parties in resolving issues relating to marketing practices and to avoid unnecessary conflicts.

7. Nothing in this section shall be deemed to limit the ability of either Party to seek any remedies available at law or in equity. Repeated or unresolved violations of this Section XI (S) will be considered a breach of this Agreement. Each Party agrees that irreparable injury may be caused by a breach of this section by the other Party or its

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~~representatives, and that the injured Party shall be entitled to seek equitable relief, including injunctive relief and specific performance, in the event of any breach of this paragraph. Such remedies shall not be exclusive, but shall be in addition to all other remedies available at law or in equity. Any violation of this Section XI. (S) will be considered a breach of this Agreement. Each Party agrees that irreparable injury may be caused by a breach of this section by the other Party or its representatives, and that the injured Party shall be entitled to seek equitable relief, including injunctive relief and specific performance, in the event of any competitive injury or any breach of the requirements of this paragraph section. Such remedies shall not be exclusive, but shall be in addition to all other remedies available at law or in equity.~~

T. Amendment

The Parties may mutually agree to amend this Agreement in writing. Since it is possible that amendments to this Agreement may be needed to fully satisfy the purposes and objectives of this Agreement, the Parties agree to work cooperatively, promptly and in good faith to negotiate and implement any such additions, changes and corrections to this Agreement which may be needed to exchange Local Traffic

U. Executed in Counterparts

This Agreement may be executed in any number of counterparts, each of which shall be deemed an original; but such counterparts shall together constitute one and the same instrument.

V. Headings of No Force or Effect

The headings of Articles and Sections of this Agreement are for convenience of reference only, and shall in no way define, modify or restrict the meaning or interpretation of the terms or provisions of this Agreement.

W. Regulatory Approval

The Parties understand and agree that this Agreement will be filed with the Commission and shall, at all times, be subject to review by the Commission. In the event any such review rejects any portion of this Agreement, renders it inoperable or creates any ambiguity of requirement for further amendment, the Parties agree to meet and negotiate in good faith to arrive at a mutually acceptable modification.

X. Compliance

Each party shall comply with all applicable federal, state, and local laws, rules and regulations applicable to its performance under this Agreement.

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Y. Compliance with the Communications Law Enforcement Act of 1994 (“CALEA”)

Each Party represents and warrants that any equipment, facilities or services provided to the other Party under this Agreement comply with CALEA. Each party shall indemnify and hold the other Party harmless from any and all penalties imposed upon the other Party for such noncompliance and shall at the non-compliant Party’s sole cost and expense, modify or replace any equipment, facilities or services provided to the other Party under this Agreement to ensure that such equipment, facilities and services fully comply with CALEA.

Z. Audit Rights

Subject to the provisions of Section ~~XII.EXII.EXII.E~~, a Party (“Auditing Party”) may audit the other Party’s (“Audited Party”) books, records, data and other documents concerning the services and rates provided herein, not more than once each year for the purpose(s) of: (i) evaluating the accuracy of Audited Party’s billing and invoicing, and (ii) verification of compliance with any provision of this Agreement.

AA. Changes of Law

AA-To the extent required by any subsequently prescribed law, rule, regulation or guideline (a “Change of Law”), the Parties agree to meet and negotiate in good faith to arrive at a mutually acceptable modification to the Agreement that is consistent with the law then in effect and, to the extent possible, with the intent of this Agreement. The Parties agree that this provision shall be construed narrowly and that no provision of this Agreement shall be deemed unlawful under this section unless such a result is required by a Change of Law.

AA.BB.Entire Agreement

This Agreement constitutes the entire agreement between the Parties and supersedes all prior oral or written agreements, representations, statements, negotiations, understandings, proposals and undertakings with respect to the subject matter hereof.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by their respective duly authorized representatives.

Midcontinent Communications

By _____
Its

By _____
Its

Draft – for Discussion Purpose Only

Date

Date

Draft – for Discussion Purpose Only

**Appendix A
Rates and Charges**

ISP Bound Traffic	Bill and Keep
Local Traffic *	\$0.00xxxxx
Transit	
Local Traffic	\$0.00XXXXX per MOU per route mile
Non-Local Traffic	\$0.00XXXXX per MOU per route mile
Non-Local Traffic	Access Tariff (State or Interstate)

* Parties agree that bill and keep applies to the extent that traffic remains in balance pursuant to this Agreement.

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Appendix B
Point Of Interface (POI)

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**Appendix C
Number Portability**

Native NXX

Local / Non-Mandatory Calling Scope

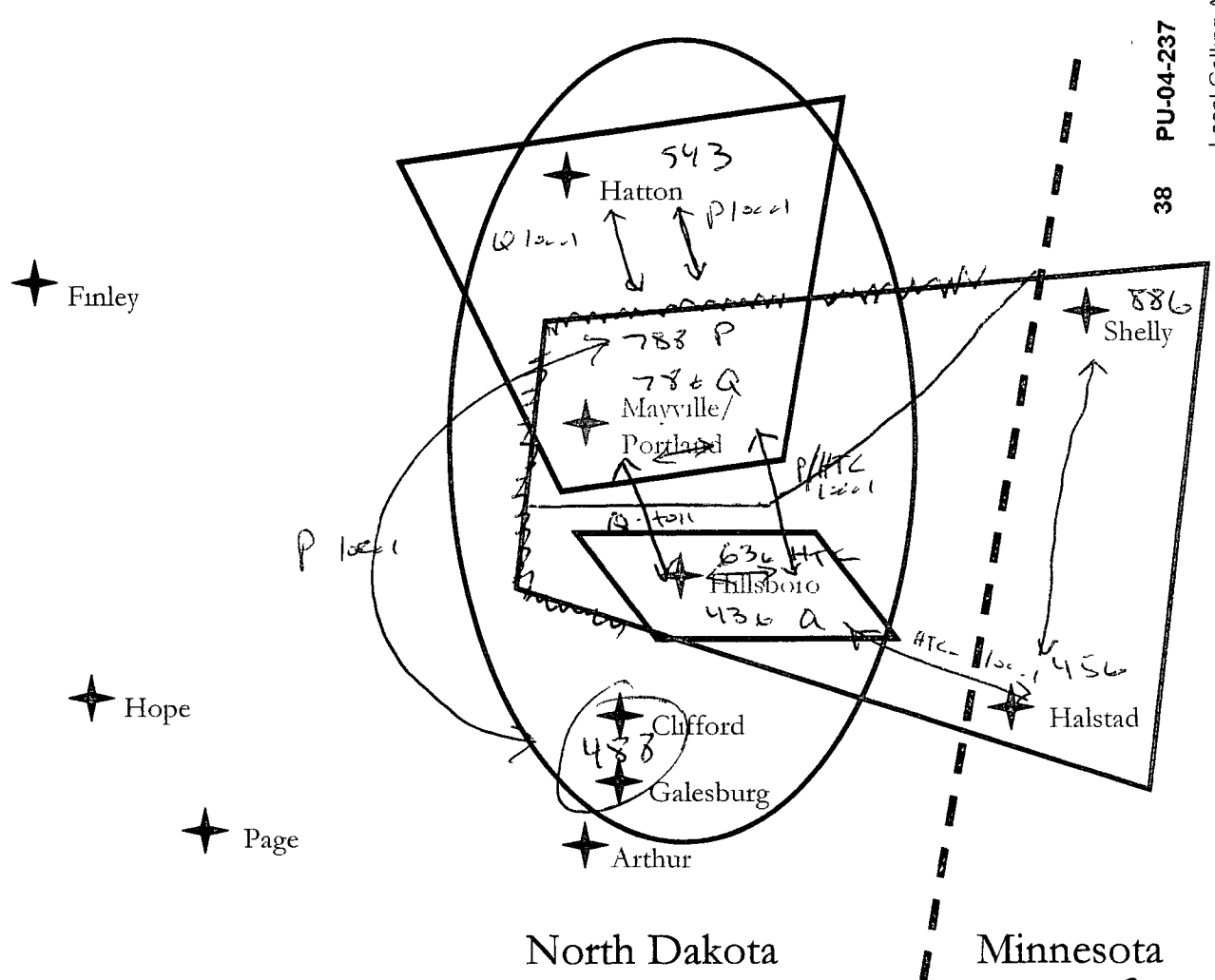
Local Calling Areas and Exchange Locations

Key

State border	---
Exchange boundaries	—
Halstad	—
Polar Telecom	—
Qwest	—
Serving carriers	
Halstad	★
Polar Telecom	★
Halstad, Polar, Qwest	★

Notes:

- (1) *Not to scale.*
- (2) *Not all exchanges shown.*
- (3) *No Qwest-only exchanges are shown.*



12-13



Post-it® Fax Note 7671		Date 6/30/03	# of pages 1
To Bill Brudvik	From CAROL		
Co./Dept.	Co		
Phone #	Phone #		
Fax #	Fax #		

June 30, 2003

Dow, Lohnes & Albertson, PLLC
 Attn: J. G. Harrington
 1200 New Hampshire Ave, NW, Suite 800
 Washington, D.C. 20036-6802

Dear Mr. Harrington:

This letter is in response to your letter of June 16. For clarification in future correspondence, HTC Services, Inc., is a wholly-owned subsidiary of Halstad Telephone Company, doing business as a CLEC in Hillsboro under the name of Halstad Telephone Company.

I take issue with some points made in Paragraph 2 of your letter. HTC Services has not contended that it is exempt from LNP requirements on the basis of being a rural carrier, nor has HTC Services contended that resellers or UNE-based providers are not entitled to request LNP. I am not sure what you are referring to as my "previous claims", as I find no record of having made them.

My staff has worked diligently to determine how LNP can be provided between HTC Services and Midcontinent in the Hillsboro exchange, given that HTC has no such arrangement in place with Qwest. This situation presents a number of technical challenges. We believe the most difficult hurdle is the difference in calling scope and rate center between HTC Services and Qwest, because Qwest's is the underlying service that Midcontinent will be reselling.

It has been my understanding that Midcontinent wants to duplicate the service and calling scope provided by Qwest, but wants the ability to port HTC numbers to certain customers. We feel an interconnection agreement is the only reliable way to reach a mutual understanding on how certain calls made to and from "former" HTC phone numbers will be routed and billed. The arrangements we currently have with Qwest may be applicable, but the challenge is to replicate them when a number taken from HTC Services' NXX is involved. This is why an interconnection agreement is needed at this time, so that all parties fully understand each other's obligations and agree to the technical arrangements being used to meet them.

I am available to begin work on such an agreement. I hope that you see this as a productive method of resolving this issue, and will agree to negotiate with us. Please reply in writing or call me at 218-456-2125. Thank you,

Sincerely,

Ronald Laqua
 General Manager

Cc: Mary Lohnes,
 Midcontinent

Phone

37

PU-04-237

Pages 1

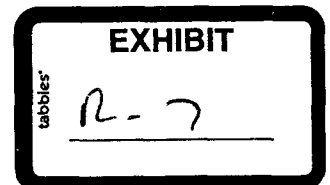
Letter to J. G. Harrington from Ron Laqua

by HTC Services, Inc.

Exhibit # R7

09/03/2004

CC Comm Legal Ilona ALJ





SINCE 1904

May 27, 2003

Mary Lohnes
Midcontinent Communications
5001 W. 41st Street
Sioux Falls, SD 57106

Re: LNP -- Hillsboro, ND

Dear Ms. Lohnes:

Since our telephone conversation of March 12, I have received no further correspondence from you or others at Midco regarding the Hillsboro LNP. HTC Services awaits further correspondence from Midco on this matter.

Sincerely,

Ronald Laqua
General Manager
HTC Services, Inc., and Halstad Telephone Company

Phone 2

36

PU-04-237

Pages 1

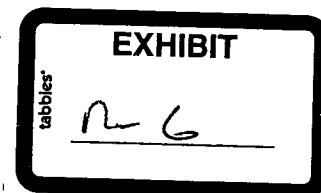
Letter to Mary Lohnes from Ron Laqua

by HTC Services Inc by

Exhibit # R6

09/23/2004

CC Comm Legal Ilona ALJ



Defined Terms

Rate center

The geographic point from which call distances are measured for a specific NXX code.

Rate area

The area covered by an NXX code and associated with a specific rate center.

Local calling area

The area to which a customer may make local calls.

Extended area service

A service that permits a customer to make local calls over an area larger than the local calling area.



DOW, LOHNES & ALBERTSON, PLLC
ATTORNEYS AT LAW

J G. HARRINGTON
DIRECT DIAL 202 776 2818
jharrington@diallaw.com

WASHINGTON, D C
1200 NEW HAMPSHIRE AVENUE, N W SUITE 800 WASHINGTON, DC 20036 6802
TELEPHONE 202 776 2000 FACSIMILE 202 776 2222

ONE RAVINIA DRIVE SUITE 1600
ATLANTA, GEORGIA 30346 2108
TELEPHONE 770 901 8800
FACSIMILE 770 901 8874

August 18, 2003

VIA FEDEX

Mr Ronald Laqua
General Manager
Halstad Telephone Company
345 2nd Avenue West
Halstad, MN 56548

Re: Number Portability

Dear Mr Laqua.

I am in receipt of your June 30, 2003, letter concerning Midcontinent's number portability request. In that letter, you suggest that the parties should enter in negotiations for an interconnection agreement. Although an interconnection agreement is not prerequisite for number portability under the FCC's rules, Midcontinent is willing to enter into such negotiations. To that end, I have enclosed a copy of Midcontinent's current standard interconnection agreement for your review.¹ Midcontinent would propose an initial meeting, by conference call, on August 28 or August 29, at 10:00 am Central time, to discuss any questions you may have concerning the draft.

Midcontinent's willingness to negotiate an interconnection agreement should not be understood, however, as obviating its earlier request for number portability, or as an acquiescence in any delay in the implementation of number portability. As Midcontinent previously has discussed with you, the potential differences in calling scope between Midcontinent and your company do not create any barrier to the technical implementation of number portability.² Further, the FCC's rules do not permit a carrier to delay implementation of number portability while interconnection negotiations are pending or for any other reason than that carrier's technical inability to implement portability in the switches where portability has been sought by another carrier.³ For that reason, I reiterate my earlier request that you provide

¹ If you would like an electronic version, please send me an e-mail at the address above and I will send one to you.

² Indeed, the FCC's rules specifically permit porting at any customer location, without regard for the boundaries of the new carrier's local calling area. See 47 C.F.R. § 52.21(k) (definition of number portability).

³ See 47 C.F.R. § 52.23(c).

34 PU-04-237

Pages 2

Letter to Ron Laqua from J G Harrington

by Midcontinent Communications

Exhibit # C12

09/03/2004

CC Comm Legal Ilona ALJ

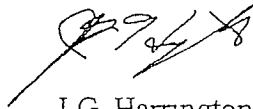


Mr Ronald Laqua
August 18, 2003
Page 2

the target date for your implementation of number portability in the area specified in
Midcontinent's initial request

Please inform me if any questions should arise in connection with this letter

Very truly yours,

A handwritten signature in black ink, appearing to read 'J G Harrington', with a long horizontal stroke extending to the left.

J G Harrington

Counsel to Midcontinent Communications

JGH/

Enclosure

Mr Ronald Laqua
August 18, 2003
Page 3

bcc Mary Lohnes

Exhibit 11

DOW, LOHNES & ALBERTSON. PLLC
ATTORNEYS AT LAW

J.G HARRINGTON
DIRECT DIAL 202 776 2818
jharrington@dlalaw.com

WASHINGTON, D.C.
1200 NEW HAMPSHIRE AVENUE, N.W. SUITE 800 WASHINGTON, D.C 20036 6802
TELEPHONE 202 776 2000 - FACSIMILE 202 776 2222

ONE RAVINIA DRIVE SUITE 1600
ATLANTA, GEORGIA 30346 2108
TELEPHONE 770 901 8800
FACSIMILE 770 901 8874

August 18, 2003

VIA FEDEX

Mr David L Dunning
CEO/General Manager
Polar Communications
P O Box 270
110 4th Street E
Park River, ND 58270



Re: Number Portability

Dear Mr Dunning

I am in receipt of your June 30, 2003, letter concerning Midcontinent's number portability request. In that letter, you suggest that the parties should enter in negotiations for an interconnection agreement. Although an interconnection agreement is not prerequisite for number portability under the FCC's rules, Midcontinent is willing to enter into such negotiations. To that end, I have enclosed a copy of Midcontinent's current standard interconnection agreement for your review.¹ Midcontinent would propose an initial meeting, by conference call, on August 28 or August 29, at 10 00 am Central time, to discuss any questions you may have concerning the draft.

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¹ If you would like an electronic version, please send me an e-mail at the address above and I will send one to you.

² Indeed, the FCC's rules specifically permit porting at any customer location, without regard for the boundaries of the new carrier's local calling area. See 47 C.F.R. § 52.21(k) (definition of number portability)

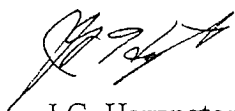
³ See 47 C.F.R. § 52.23(c)

Mr. David L. Dunning
August 18, 2003
Page 5

the target date for your implementation of number portability in the area specified in
Midcontinent's initial request

Please inform me if any questions should arise in connection with this letter

Very truly yours,



J G Harrington

Counsel to Midcontinent Communications

JGH/

Enclosure

Mr David L Dunning
August 18, 2003
Page 6

bcc: Mary Lohnes

Subject: LSR Jeopardy PON 4892010316 VER EC VER 01

LSR Jeopardy EC VER 01
CCNA M07
PON 0084892010316
VER
LSR ID 9918593



Jeopardy Notification Message(s)

1 Order N10760125 SO - Subscriber Other
Estimated Due Date FDT: AFVR

Comments

Polar rejected the LSR stating "The request for port of 788-4037 is being denied at this time due to Rate Center mismatch " This is a 4hr jep

Qwest Representative Qwest Rep
Representative Telephone Number: 888-796-9087

Qwest Private
Disclose and Distribute Solely to Qwest Employees, Partners or Affiliates
Having a
Need to Know
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of Qwest

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Privacy. <http://www.qwest.com/legal/privacy.html>

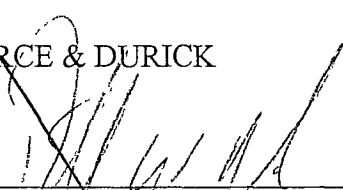
IX.

Section 49-21-24, N.D.C.C., prohibits a telecommunications company from discriminating against another telecommunications company by refusing or delaying access to the company's services. Polar is discriminating against Midcontinent by delaying and refusing to grant Midcontinent LNP when, in fact, Polar grants LNP to Qwest. HTC is discriminating against Midcontinent by delaying and refusing to grant Midcontinent LNP when in fact HTC intends to grant LNP to wireless carriers.

WHEREFORE, Midcontinent requests that the Public Service Commission enter its order referring this matter to the Office of Administrative Hearings for a hearing on the allegations contained herein and issuance of recommended findings of fact, conclusions of law and proposed Order

Dated this 13th day of May, 2004

PEARCE & DURICK



PATRICK W. DURICK ND #03141
Individually and as a Member of the Firm
314 E. Thayer Avenue
P O Box 400
Bismarck, ND 58502-0400
(701) 223-2890

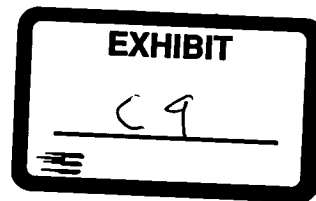
Attorneys for Midcontinent Communications, Inc

HTC Services, Inc.

POLAR

March 3, 2004

J G. Harrington
Dow, Lohnes & Albertson
1200 New Hampshire Avenue, N.W.
Suite 800
Washington, DC 20036-6802



Sent Via E-Mail and US Mail

Dear Mr. Harrington:

We have received your letter dated February 25, 2004. In that letter, you specifically request the date by which our companies will implement LNP.

1. Per Polar's letter dated January 7, 2004, Polar is already performing porting under its interconnection arrangements with Qwest
2. HTC intends to meet its federal requirements to implement number portability by May 24, 2004. HTC realizes that it is obligated to provide LNP six months from the receipt of a bona fide request. However, the only requests HTC considers bona fide at this time have been from wireless carriers. By FCC rule, these requests carry an implementation deadline of May 24, 2004.

In your letter, you indicate that you sought guidance from unnamed FCC staff regarding the obligations of carriers to provide portability upon request. Your letter purports to summarize that guidance, but falls well short in doing so. The main roadblock that complicates porting of numbers between our companies - the difference in local calling scope - is indeed very real. If it were not, the FCC would not have opened a rulemaking to address it with regard to wireless-to-wireline LNP. You indicate that the "staff" does not feel that the difference in calling scope justifies "denial" of your request for LNP. We do not disagree. In fact, if you read HTC's December 29, 2003 letter carefully, HTC said exactly the same thing.

HTC is not claiming that this [FCC] decision exempts it from porting numbers to Midcontinent. However, the policy reasons behind this decision are very much on point, and need to be resolved – at least on an interim basis - if we are to provide LNP to Midcontinent as requested

(By “interim basis”, HTC was referring to the time until the FCC fully addresses the issue of calling scope differences in its current NPRM regarding intermodal LNP)

Midcontinent continues to mischaracterize the calling scope areas as being an originating problem. You use the “smaller calling scope going to larger calling scope” argument to support your dismissal of our good faith efforts to address the “**larger** calling scope going to **smaller**” question. Because the FCC itself is seeking to answer this problem in its NPRM, it is surprising that staff dismissed the issue as insignificant. Can you please tell us to whom you spoke with on this matter? While you may find ex-parte conversations with staff on this matter to be appropriate, it would be helpful if we had more information about your discussion. Each party conveying its side of the argument to separate FCC staff members, and possibly obtaining varying opinions, is not likely to be a productive exercise. We would obviously prefer a format in which both sides of the argument are presented, or in which the FCC staff members involved are, at the very least, identified.

Despite your repeated use of the phrase “denial of a request”, our companies have not denied Midcontinent’s request for LNP. HTC and Polar remain committed to completing the interconnection agreement between our respective companies, in a manner that will resolve all outstanding issues, including those related to LNP. We were working in good faith to do so, when Midcontinent unilaterally ended these negotiations. We are ready and willing for these discussions to resume, but heard nothing further from Midcontinent until your December 19th letter regarding FCC “guidance.”

We will be pleased to resume these negotiations with you, if you so choose. But in order to make progress, you should be prepared to provide sufficient information to move the discussion forward. For example, we still need to know the switch location and CLLI from which you intend to offer local service in the exchanges in which Polar and HTC are operating. Without this information, we cannot effectively plan for interconnection or LNP. Will you be providing facilities-based local service, resale, UNE-P, or a combination thereof? This too is a critical question in terms of local interconnection, reciprocal compensation, and LNP. These are items that wireless carriers have provided to us, which is why we consider their LNP requests to be bona fide.

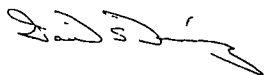
We also feel Midcontinent should be prepared to discuss the issue raised in the FCC’s NPRM, and which we called to your attention in our recent responses to you. Do you propose that Midcontinent customers porting an HTC or Polar number be given the same local calling scope that they had prior to obtaining your service? And if so, how do you propose to accomplish this? Do you plan to pay transport and access charges to terminate any calls that extend outside the Qwest local calling area, and then absorb those costs? In the alternative, do you plan to pass those charges through to your customers in the form of toll charges, effectively giving them only the equivalent of the Qwest local calling

area? Do you propose some other solution to this issue? And if so, should it not be formalized in the interconnection agreement?

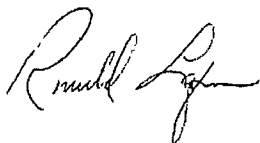
We hope that this letter provides you with the information you were seeking in your letter. The dates on which our companies are or will be LNP capable are provided above. But the fact that we are LNP capable still doesn't mean we have all the necessary information to exchange ported numbers with Midcontinent. The issues listed above, as well as the completion of the interconnection agreement, are still essential to completing that task.

Thank you and we look forward to hearing from you

Sincerely,



Dave Dunning, General Manager / CEO
Polar Communications



Ron Laqua, General Manager
HTC Services

February 24, 2004

VIA EXPRESS MAIL

David Dunning, CEO/General Manager
Polar Communications
PO Box 270
110 4th Street E.
Park River, ND 58270

Re: Number Portability



Dear Mr. Dunning:

I am writing to follow up to my letter of December 19, 2003 concerning the request of Midcontinent Communications, Inc. for telephone number portability in the area served by your company. In light of your company's response to that letter, Midcontinent sought guidance from the staff of the FCC's Wireline Competition Bureau concerning the obligations of carriers to provide portability upon request. This letter summarizes that guidance.

Based on the FCC's current number portability rules and previous orders, including the *Wireline-Wireless Number Portability Order* described in my December 19 letter, the FCC staff is of the opinion that the issues raised by your company cannot justify denial of a request for number portability. Specifically, the staff did not believe that questions relating to the calling scope offered by the porting-in carrier or a third carrier (such as Qwest in this case) or to the charges imposed by a carrier for calls to the ported number have any effect on the porting-out carrier's obligation to provide portability in accordance with the FCC's rules.

I note that this conclusion is consistent with the FCC's determination, in the *Wireline-Wireless Number Portability Order*, that it would not delay the advent of wireline-to-wireless number portability until such time as calling scope issues were addressed. Moreover, the FCC's further notice of proposed rulemaking in that proceeding addresses only situations in which there is a mismatch between the rate centers associated with the wireless and landline number, which is not the case here.

In light of this specific guidance from the FCC staff and the consistent conclusions of the FCC in its previous number portability orders, it is apparent that there is no basis for your company to continue to refuse to implement number portability in response to a request that now has been pending for nearly fourteen months. Please inform me by March 8 of the date by which number portability will be implemented in

the requested calling area. It is Midcontinent's expectation that the implementation date will be no later than sixty (60) days after the date of this letter. If Midcontinent does not receive a satisfactory response by March 8, it will continue to pursue enforcement options at the FCC so that it may begin providing service as soon as possible.

Finally, Midcontinent continues to be willing to negotiate a formal interconnection agreement with your company. As you know, the parties had made significant progress on issues other than number portability implementation and Midcontinent believes that those issues can be resolved in a mutually satisfactory way. To the extent your company wishes to continue those negotiations, please contact me at your convenience.

Please inform me if any questions should arise in connection with this letter.

Sincerely,

J.G. Harrington

Counsel to Midcontinent Communications,

Inc.

Exhibit 4

POLAR TELCOM

January 2, 2003

Mary Lohnes, Regulatory Affairs Manager
Midcontinent Communications
410 South Phillips Avenue
Sioux Falls, SD 571047

Dear Ms. Lohnes

I have received your letter dated December 3, 2002 requesting that Polar Telecommunications, Inc ("Polar") deploy long-term number portability to support your competitive local exchange activities in Mayville and Portland. Please be advised that the entity deploying telecommunications services in that exchange is Polar Telcom. Therefore, all future correspondence on this matter should be directed to the address listed on this letter.

I am unclear, however, on what basis you make your request since you have indicated the intent to establish porting between Polar and a switch that is not owned by Midcontinent Communications. Any porting implementation between Polar and Qwest, the actual owner of the switch in question, would necessitate modifications by both Polar and Qwest of order processes, compensation, and other contractual arrangements. I do not believe that even if Polar were in a position to deploy number porting that we could do so via a third party request.

Polar is a rural service provider and has chosen, for economic feasibility reasons, not to deploy number portability in its switches at this time. Should the company decide to do so at a future date, it will provide the appropriate industry notifications.

Polar remains committed to meeting its competitive market obligations through other methods of service provision including interconnection, resale and interim number portability options. I am available to discuss alternatives with you upon request.

If you have additional questions, please don't hesitate to contact me at 701-284-4287.

Sincerely,



David Dunning
Executive Vice President

29 PU-04-237

Pages 1

Letter to Mary Lohnes from David Dunning

by Midcontinent Communications
Exhibit # C7





SINCE 1904

January 3, 2003

Mary Lohnes
Mid Continent Communications
5001 W 41st Street
Sioux Falls, SD 57106

Re Request for Local Number Portability in Hillsboro

Dear Ms Lohnes

This letter follows my letter of December 5 in which I acknowledged receipt of your December 3 request for local number portability (LNP) in Hillsboro, ND

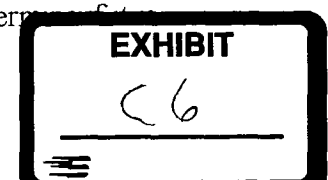
First, to clarify, Halstad Telephone Company's wholly owned subsidiary, HTC Services, Inc, is the company that provides CLEC services in Hillsboro, d/b/a Halstad Telephone Company All future correspondence on the LNP matter should be directed to HTC Services, Inc, at the same address shown on this letterhead

If and when we have resolved the issue outlined below, HTC Services will provide the LNP service that you have requested, initially on a remote forwarding basis The implementation date will be announced to you when we are able to release it

The item of great concern for you to note High potential for confusion and frustration among the residents of the Hillsboro area, and in surrounding communities, that could result from Midcontinent's provision of telephone service using an HTC Services prefix In Hillsboro, HTC Services provides EAS (Extended Area Service) toll-free calling to/from 6 exchanges However, Qwest provides no EAS or toll-free calling from its Hillsboro 436 prefix customers, except local calling to HTC's Hillsboro 636 prefix Customers have received orientation on, and have experienced the benefits of the EAS distinction between the 436 and 636 prefixes If Midcontinent provides services using the 636 prefix, and has no EAS except local calling to the 436 prefix, the backlash of confusion and frustration from both your customers and customers of Qwest and HTC Services will be significant In my opinion, this will be primarily detrimental to Midcontinent, as it will be associated with the customer's change of service to Midcontinent

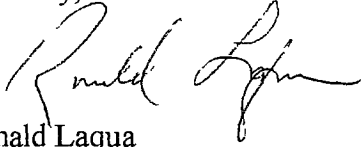
Should Midcontinent choose to move ahead with LNP from HTC Services, I will expect that all local carriers in Hillsboro - Midcontinent, Qwest, and HTC Services - should share in the cost of customer education and orientation in and adjacent to the Hillsboro exchange I expect that education and orientation will be an on-going obligation of all companies, if Midcontinent is successful in winning over any customers of HTC Services Why on-going? As Midcontinent acquires an HTC Services customer, there is potential for the customer to only realize after conversion that he/she can no longer call/be called toll free to/from a neighboring exchange You are likely to receive a complaint call from that customer HTC Services will receive complaint calls from our customers in other exchanges that have become accustomed to EAS to/from Hillsboro, resulting in on-going orientation time and expense

Please take under advisement this issue of EAS "come and gone" to determine...



still in your best interest to move ahead with LNP from HTC Services. If you are still determined to move ahead, HTC Services will, of course, work to the best of its ability to fulfill your request within the framework of applicable rules.

Sincerely,

A handwritten signature in black ink, appearing to read "Ronald Laqua". The signature is fluid and cursive, with the first name being more prominent.

Ronald Laqua
General Manager
Halstad Telephone Company and HTC Services, Inc

Exhibit 2



SINCE 1904

December 5, 2002

Mary Lohnes
Midcontinent Communications
5001 W 41st Street
Sioux Falls, DS 57106

RE Local Number Portability Bona Fide Request for Hillsboro, ND

Dear Ms. Lohnes

Today I am in receipt of your letter of December 3, in which you requested number portability in Hillsboro on behalf of your company

I will be in further contact with you regarding this request

My initial contact addresses are as follows

Ronald Laqua, General Manager
Halstad Telephone Company
P O Box 55
345 Second Avenue West
Halstad, MN 56548

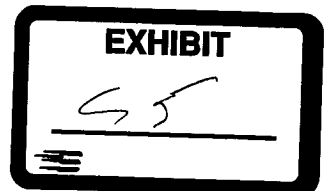
Phone 218-456-2125
Fax. 218-456-2196
Email rlaqua@rrv net

Sincerely,

Ronald Laqua
General Manager

27 PU-04-237 Pages 1
Letter to Mary Lohnes from Ron Laqua
by Midcontinent Communications
09/03/2004 Exhibit # C5
CC Comm Legal Ilona ALJ

345 2nd Avenue West • Halstad, Minnesota 56548
Phone 218/456-2125 • Fax 218/456-2196 • Web Site www.halstadtel.com
This Cooperative is an equal opportunity provider



POLAR

COMMUNICATIONS

December 20, 2002

Mary Lohnes
Regulatory Affairs Manager
Midcontinent Communications
410 S Phillips Ave
Sioux Falls, SD 57104

Dear Mary:

Please accept this letter as Polar's acknowledgement that we are in receipt of your company's local number portability request. We are presently researching this matter and will be responding in detail in the near future

Please call me at (701) 284-7221 if you have any questions

Sincerely,

Ken Fischer
Ken Fischer,
Operations Manager

26 PU-04-237

Pages 1

Letter to Mary Lohnes from Ken Fischer

by Midcontinent Communications

09/03/2004

Exhibit # C4

CC Comm Legal Ilona ALJ



Exhibit 1



5001 West 41st Street
Sioux Falls, South Dakota 57106

December 3, 2002

Ron Laqua, General Manager
Halstad Telephone Company
P.O. Box 55
Halstad, MN 56548-0055

RE Local Number Portability Bona Fide Request

Dear Mr. Laqua

Midcontinent Communications is a certified CLEC in North Dakota and is providing resold, via Qwest Communications, local service in Hillsboro. Please accept this letter as a bona fide request for number portability between our companies in Hillsboro.

Qwest CLI: HLBONDBCRS4

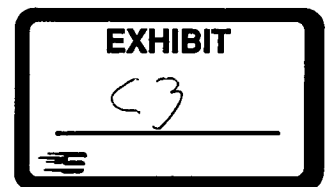
Midcontinent Communications
5001 W 41st Street
Sioux Falls, SD 57106

Contact: Mary Lohnes
Phone (605) 357-5459
Fax (605) 339-4419
Email mary_lohnes@mm1.net

Please contact me with any questions, or should you need further information

Sincerely,

Mary Lohnes
Regulatory Affairs Manager
Midcontinent Communications



Over Fifty Years of Service

Exhibit 1



5001 West 41st Street
Sioux Falls, South Dakota 57106

December 3, 2002

Ken Fisher
Polar Telecommunications
110 4th Street E
Park River, ND 58270

RE Local Number Portability Bona Fide Request

Dear Mr Fisher:

Midcontinent Communications is a certified CLEC in North Dakota and is providing resold, via Qwest Communications, local service in Mayville and Portland. Please accept this letter as a bona fide request for number portability between our companies in those communities.

Qwest CLLI. MYVLNDBCRS7

Midcontinent Communications
5001 W 41st Street
Sioux Falls, SD 57106

Contact: Mary Lohnes
Phone: (605) 357-5459
Fax (605) 339-4419
Email: mary_lohnes@mmi.net

Please contact me with any questions, or should you need further information.

Sincerely,

Mary Lohnes
Regulatory Affairs Manager
Midcontinent Communications



Local Calling Areas and Exchange Locations

Key

State border **---**

Exchange boundaries

 Halstad **—**

 Polar Telecom **—**

 Qwest **—**

Serving carriers

 Halstad **★**

 Polar Telecom **★**

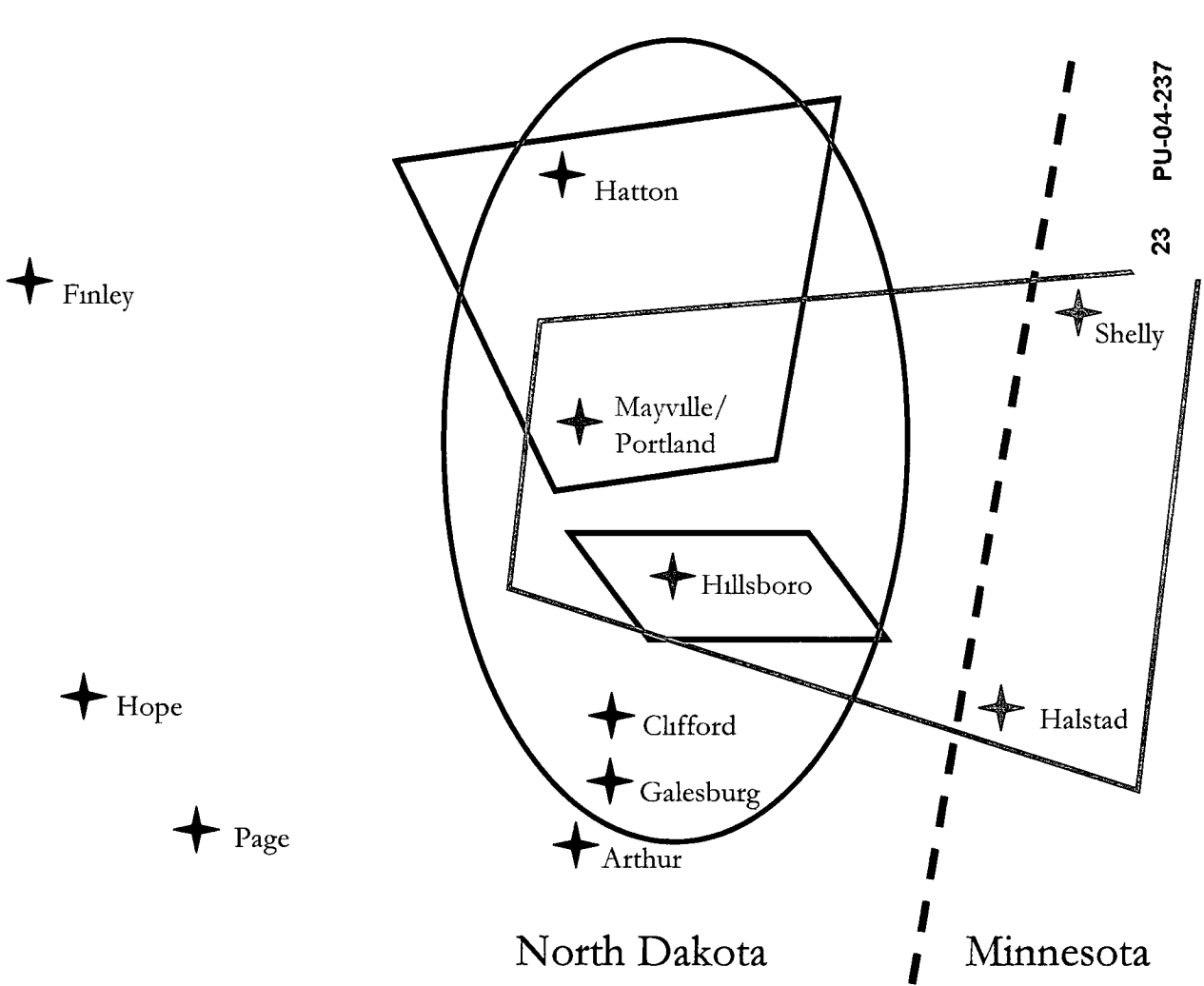
 Halstad, Polar, Qwest **★**

Notes:

(1) *Not to scale.*

(2) *Not all exchanges shown.*

(3) *No Qwest-only exchanges are shown.*



Local Calling Areas

This chart illustrates the local calling areas for calls to and from Polar and Halstad NXX codes in North Dakota. Not all prefixes are included.

Exchange	Prefix	Local Calling From <i>ITD</i>	Local Calling To <i>Area</i>	Prefix
Hatton	Q 543	Hatton	Hatton	Q 543
			Mayville/Portland	Q 786 P 788
Hillsboro	Q 436	Hillsboro	Hillsboro	Q 436 H 636
	H 636	Hillsboro	Hillsboro Mayville/Portland	Q 436 H 636 P 788
Mayville/Portland	Q 786	Mayville/Portland	Mayville/Portland	Q 786 P 788
	P 788		Hatton Mayville/Portland Hillsboro Hatton Galesburg	Q 543 Q 786 P 788 H 636 Q 543 P 488

456
886



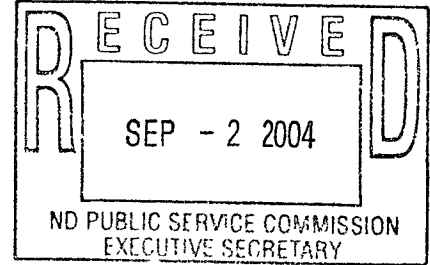
WILLIAM P. PEARCE
 PATRICK W. DURICK
 B. TIMOTHY DURICK
 GARY R. THUNE •
 DAVID E. REICH
 JEROME C. KETTLESON
 LARRY L. BOSCHEE •
 LAWRENCE BENDER PC •
 JONATHAN P. SANSTEAD
 BONNIE L. CHRISTNER •

ATTORNEYS AT LAW
 314 EAST THAYER AVENUE
 P.O. BOX 400
 BISMARCK, NORTH DAKOTA 58502

TELEPHONE (701) 223 2890
 FAX (701) 223 7865
 E-MAIL law.office@pearce-durick.com

September 2, 2004

Mr. William Binek
 Public Service Commission
 600 East Boulevard Avenue-Dept. 408
 Bismarck, North Dakota 58505-0480



RE: Midcontinent Communications - Complaint
 Case No. PU-04-237; OAH File No. 20040205


Dear Sir:

Enclosed for filing is an original and seven copies of PREHEARING BRIEF OF MIDCONTINENT COMMUNICATIONS, INC..

Thank you for your attention to this matter.

Sincerely,

PEARCE & DURICK


 PATRICK W. DURICK

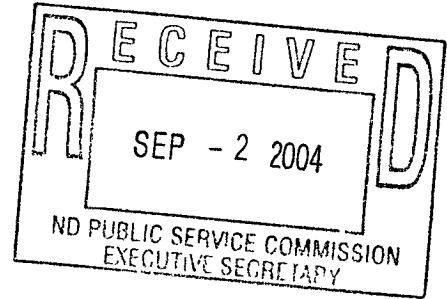
PWD/jf
 Enclosures.
 cc w/enc:

Mr. Allan C. Hoberg
 William J. Brudvik
 Ms. Mary Lohnes

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

No. OAH File No. 20040205
PU-04-237

Midcontinent Communications, a)
South Dakota Partnership,)
)
Complainant,)
)
vs.)
)
Polar Telecom, Inc.)
a North Dakota Corporation d/b/a Polar)
Communications and HTC Services, Inc.,)
a Minnesota corporation,)
)
Respondents.)



PREHEARING BRIEF OF MIDCONTINENT COMMUNICATIONS, INC.

Midcontinent Communications, Inc. ("Midcontinent"), by its attorneys, hereby submits this prehearing brief in the above-captioned proceeding. This brief outlines the relevant issues in this proceeding based on the pleadings of the parties to date and shows that the Commission should grant the relief requested by Midcontinent.

Number portability is one of the basic requirements of the Telecommunications Act of 1996, as codified in the Communications Act of 1934. Number portability allows customers to switch from one local telephone company to another without changing their telephone numbers. Midcontinent's experience, as the evidence will show, is that the vast majority of customers want to keep their telephone numbers, so the availability of number portability is an important factor in the development of local telephone competition. To facilitate that competition, Midcontinent has requested number portability from both Respondents, and they have failed to provide it. Their reasons for failing to provide number portability are related entirely to their own business interests

and are not cognizable under the FCC's rules. The failure to provide number portability is discriminatory because the Respondents have indicated that they are providing it to other parties and because it gives the Respondents an unlawful competitive advantage in the affected markets.

I. Midcontinent Made a Proper Request for Number Portability and the Respondents Did Not Respond to It in Accordance with the FCC's Rules.

Number portability is governed by a very simple set of rules. Those rules call for carriers to provide number portability upon request under a specific timeline and with specific, limited exemptions. Midcontinent has complied with those rules; the Respondents have not.

Section 52.23 of the FCC's rules governs when long-term number portability must be provided.¹ Since 1999, local exchange carriers ("LECs") have been required to provide number portability no more than 180 days after receiving a request from any other carrier.² Under both the rules and the underlying statutory provision, the number portability obligation applies to all LECs, including competitive LECs.³ Under the rules, LECs that do not believe they can provide number portability within 180 days of a request must seek relief from the FCC at least 60 days prior to the deadline.⁴ In addition, small incumbent local exchange carriers can seek relief from number portability and other obligations by filing petitions for suspension of those requirements with the state utilities commission.⁵

¹ 47 C.F.R. § 52.23 "Long-term" number portability is number portability that meets a set of criteria established by the FCC to ensure that customers may move their telephone numbers from one carrier to another without impairment of the functionality of their service. *See id.* Long-term portability uses a database to route calls to the proper carrier. Short-term or transitional number portability uses remote call forwarding or other similar services to route calls to a new provider. Short-term portability generally degrades the quality of service in some way, for instance by making it impossible to pass caller ID information correctly.

² 47 C.F.R. § 52.23(c).

³ 47 U.S.C. § 251(b)(2), 47 C.F.R. § 52.23(a), (c).

⁴ 47 C.F.R. § 52.23(e) This waiver provision requires the LEC to provide a timetable for deployment of number portability. It does not contemplate permanent waivers of the requirement.

⁵ 47 U.S.C. § 251(f)(2).

The evidence will show that Midcontinent requested number portability from the Respondents under these rules by letter in December, 2002, more than a year and a half ago.⁶ Under the FCC's rules, both Respondents were required to provide number portability to Midcontinent by June, 2003. Neither one has provided number portability or even a timetable for making it available.⁷

Further, the Respondents do not fall within any of the limited exceptions to the requirement to provide number portability under the FCC's rules. First, neither company has shown or even alleged that it lacks the technical ability to provide number portability and neither company has asked the FCC for a waiver of its obligations, as provided in the FCC's rules.⁸ It is important to note that the FCC procedure is the only mechanism that carriers can use to seek a waiver for technical reasons; it would be contrary to the federal rules governing number portability for a state commission to consider such claims.

Second, neither company can obtain relief as a small carrier. Neither company qualifies for that relief in the markets where Midcontinent is seeking number portability, because the Respondents operate as competitive LECs, not incumbent LECs, in those areas. Further, that relief can be obtained only in a separate proceeding, not in response to a complaint.⁹

Finally, there is no basis in the FCC's rules or decisions for any claim that issues relating to carrier rates can affect number portability. The rules clearly delineate the limited circumstances in which a request can be delayed or denied and contain no generalized waiver or exception provision.

⁶ Both Respondents acknowledged receipt of the letters.

⁷ On several occasions, Respondents provided Midcontinent with dates on which they said portability would be available to other parties, such as wireless providers.

⁸ Neither respondent ever suggested that it would be unable to provide portability

⁹ In any event, such relief is prospective only, and cannot cure a past failure to comply with regulatory requirements

Thus, any claim outside the scope of the rules cannot be considered.

The Respondents' failure to provide number portability to Midcontinent is discriminatory for at least two reasons. The first is that they have told Midcontinent they intend to provide number portability to other parties, including wireless carriers and Qwest. Thus, the Respondents apparently intend to meet their obligations as to some parties, but not as to others. This plainly is unlawful discrimination. Second, the failure to provide number portability creates a competitive advantage for the Respondents over Midcontinent, despite regulatory requirements intended to eliminate that advantage. Since so many customers will not change carriers if they cannot keep their telephone numbers, the inability to port numbers clearly disadvantages Midcontinent in the marketplace, and favors the Respondents. Thus, by failing to provide number portability, they are discriminating in favor of themselves. The Respondents' claimed justifications for not providing number portability are insubstantial.

Over the long period between Midcontinent's initial requests and this proceeding, the Respondents have made two arguments against providing number portability. The first is that an alleged mismatch between rate centers must be addressed before number portability can be provided, and the second is that Qwest, not Midcontinent, should have made the request.¹⁰ Neither claim provides any basis for the Respondents to avoid their number portability obligations. The Respondents' rate center claim is not based on the locations of rate centers at all. The rate centers for the NXX codes at issue will not (indeed, cannot) change as the result of number portability because those rate centers are set when the codes are first created and are placed in a national

¹⁰ See, e.g., Letter from Ron Laqua, HTC Services, Inc., to Mary Lohnes, Midcontinent, Jan 3, 2003 (expressing concern about claimed rate center mismatch), Letter from David Dunning, Polar Telecom, to Mary Lohnes, Midcontinent, Feb. 18, 2003 (claiming request is made on behalf of Qwest). Midcontinent will introduce these letters and other correspondence between the parties into evidence

database known as the Local Exchange Routing Guide. Only the carrier that creates it or a regulatory agency can change a rate center.¹¹ Thus, porting a telephone number has no effect on the rate center to which it is assigned.

As a consequence of these facts, the Respondents' claim has nothing to do with rate centers. Instead, it actually relates to local calling areas.¹² Based on the information provided to Midcontinent during discussions with the Respondents, the evidence will show that the Respondents have designed their calling plans so that calls between Respondents' customers in Hillsboro and Mayville, the areas where Midcontinent has requested portability, and their customers in other locations are treated as local calls, even though calls to Qwest customers in Hillsboro and Mayville are treated as toll calls. (In other words, the local calling area for Respondents' customers depends not just on the location being called but also on the carrier serving the customer being called.) This arrangement is possible because, today, all Qwest customers in Hillsboro and Mayville share the same NXX code (that is, one NXX code in Hillsboro and one in Mayville) and so calls to them can be distinguished easily from calls to Polar or Halstad customers. Once number portability is implemented, it may become difficult for Respondents and their customers to tell which carrier serves a customer in Hillsboro or Mayville, and consequently the current arrangement could break

¹¹ The process for obtaining NXX codes and setting up rating points is described in the Central Office Code Assignment Guidelines, established by the Alliance for Telecommunications Industry Solutions, a national standards-setting body for the telephone industry. The term "rate center" can have two meanings. As described above, it is the geographic point to which an NXX code is assigned for purposes of billing calls. The term also can be used to mean the area within which numbers from an NXX code can be assigned, such as a town, although the terms "rate area" and "rate center area" also used for this purpose. (For clarity, this brief will use "rate area.") Like the geographic point used for billing purposes, this area is designated by the carrier that obtains the NXX code, and cannot be changed by any other carrier

¹² Local calling areas are the places to which a customer can make a call without having to pay toll charges. Local calling areas typically include several rate areas, but could be as small as a single rate area

down¹³

There is no immediate regulatory barrier to the Respondents continuing to permit free calls to their former Hillsboro and Mayville customers.¹⁴ However, it is Midcontinent's belief that this arrangement is dependent on the Respondents' current financial arrangements. In particular, Midcontinent believes that the Respondents do not assess intrastate access charges on calls to their Hillsboro and Mayville customers from their customers in other communities. However, if those Hillsboro and Mayville customers were to migrate to another carrier, notably Qwest, and the Respondents did not have a way to distinguish those calls, they might have to pay intrastate access charges on those calls. Having to pay access charges would turn the free calling arrangement into a financial drain, and it is unlikely it could be sustained.

These arrangements raise many interesting and important issues, including the permissibility of charging customers different rates depending on the carrier serving the party receiving a call; whether the local calling areas in eastern North Dakota should be realigned; and even the reasonableness of current intrastate access rates. Not one of these issues, however, is relevant to or cognizable under the FCC's number portability rules. Indeed, none of these issues has anything to do with the customers whose numbers would be ported, but only with customers in areas where portability has not been requested. For that reason, the Respondents' concerns about their current local calling arrangements are irrelevant to this proceeding.

The Respondents have suggested that their calling area concerns are relevant to number

¹³ The Respondents may, in fact, be able to determine the terminating carrier on calls to Hillsboro after number portability has been implemented by using the same database that is used for routing calls in a portable number environment. Once that is done, a tone or other message could be introduced in the call stream to indicate that a call is being treated as local or toll

¹⁴ Midcontinent expresses no opinion as to the permissibility of charging customers different rates depending on the identity of the terminating carriers for their calls

portability because the FCC is considering questions related to “inconsistent” rate centers in a pending rulemaking. This rulemaking, however, has nothing to do with the claims that Respondents are making, except to make it clear that carriers have an obligation to port whenever it is technically feasible to do so. The specific issue the FCC is considering is how to facilitate porting from wireless to landline carriers when the rate center for the wireless carrier is outside the geographic area served by the rate center where the customer is located.¹⁵ The FCC is not considering any issue related to the scope of local calling areas. In fact, it has made it clear that landline-to-wireless portability must be implemented despite the differences in rate centers because there is no technical barrier to doing so.¹⁶ Consequently, the pending FCC proceeding does not provide any basis for the Respondents to deny portability.

The second claim that Respondents have made is that Qwest, not Midcontinent, should be making the number portability request. The Respondents’ theory is that they believe that Midcontinent will provide service via resale, and that Qwest, as a result, will be the “real” carrier.

This theory has no basis in the FCC’s rules or in fact. The FCC’s rules are quite clear that a LEC must provide number portability within six months of a request by “another telecommunications carrier” that provides service or intends to provide service in the requested area.¹⁷ The rule does not distinguish between types of carriers or the mode of service. Even if the

¹⁵ Telephone Number Portability, *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 23697, 23714 (2003) (“We seek comment on how to facilitate wireless-to-wireline porting where there is a mismatch between the rate center associated with the wireless number and the rate center in which the wireline carrier seeks to serve the customer”) This issue arises because wireless carriers typically have relatively few rate centers compared to landline carriers. Competitive LECs generally mirror the rate centers used by incumbent LECs, so the issue does not arise for landline-landline porting.

¹⁶ *Id.* at 23708. Because wireless carriers have fewer rate centers, their rate areas cover more territory, and a landline customer’s NXX is certain to be located in the wireless carrier’s rate area

¹⁷ 47 C F R § 52.23(c)

rule did make such a distinction, however, the evidence will show that Midcontinent informed Respondents that it intended to provide service using a mix of approaches, including resale and unbundled elements. This fact eliminates any basis for a claim that the request should have come from Qwest.

III. TRADE SECRETS

Midcontinent informally requested that counsel for Respondents furnish Midcontinent with a copy of the agreement between the two entities that provides for Extended Area Service (“EAS”) between the Hillsboro and Mayville/Portland exchanges. Counsel has refused to provide a copy of that agreement to Midcontinent and claims that the agreement is confidential and proprietary. Midcontinent has offered to enter into a reasonable protective order concerning the agreement. Whether or not Midcontinent receives a copy of the agreement prior to the hearing scheduled for September 3, 2004, Midcontinent will question Respondents’ witnesses on such an agreement.

Chapter 69-02-09, Trade Secret Procedures, North Dakota Administrative Code governs the process for claims of trade secret status for materials in an administrative proceeding. While it is too late for Respondents to file an application for trade secret protection as provided in Section 69-02-09-01 of that Chapter, Midcontinent would suggest that Section 69-02-09-05 is relevant to Respondents’ claim of confidentiality. Under Subsection 69-02-09-05 (1) the burden of proof on the issue of trade secret protection is on the party seeking to prevent disclosure, in this case the Respondents.

It is Midcontinent’s position that the agreement between Respondents is not entitled to trade secret protection. In determining whether material is entitled to protection afforded trade secret status, the Commission is guided by North Dakota Century Code subsection 47-25.1-01 which provides in relevant part that,

“4. ‘Trade Secret’ means information . . . that: a. Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and b. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.”

It is generally known that Respondents have an agreement that calls between their respective exchanges by their respective customers are toll free. Calls to Qwest customers by these same customers are treated as toll calls. Paragraph VII of Respondents’ Amended Answer raises issues concerning toll vs. local calls from ported numbers to customers outside the Qwest exchange and Paragraph VIII of Respondents’ Amended Answer specifically refers to the Interconnection Agreement between Respondents.

Respondents have not provided any basis for the claim that their agreement concerning EAS is entitled to trade secret status and Midcontinent cannot envision any set of facts that would provide the basis for a claim of trade secret status for the Interconnection Agreement. Respondents brought up the Interconnection Agreement in their joint amended answer and Midcontinent is entitled to know the terms of this agreement.

IV. Conclusion

The evidence will show that Midcontinent has worked diligently to attempt to address the concerns raised by the Respondents, even though it was not Midcontinent’s responsibility to do so. Midcontinent has exhibited extraordinary patience over a long period, and attempted to find accommodations whenever possible, but the Respondents have asked Midcontinent to make guarantees that it cannot make and have proposed no solutions of their own. The Respondents will not be able to demonstrate any cognizable basis for their failure to provide number portability in accordance with the FCC’s rules and, consequently, they should be ordered to comply with the number portability requirements on an expedited basis so that Midcontinent can provide additional

competition in Hillsboro and Mayville.

Dated this 7th day of September, 2004.

PEARCE & DURICK



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STATE OF NORTH DAKOTA

PUBLIC SERVICE COMMISSION

Midcontinent Communications, a)
South Dakota Partnership,)
)
Complainant,)
)
vs.)
)
Polar Telecom, Inc.)
a North Dakota Corporation d/b/a Polar)
Communications and HTC Services, Inc.,)
a Minnesota corporation,)

No. OAH File No. 20040205
PU-04-237

Respondents.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

Renee Freisz hereby certifies that on September 2, 2004, she served a copy of the attached **PREHEARING BRIEF OF MIDCONTINENT COMMUNICATIONS, INC.** by placing a true and correct copy thereof in an envelope and depositing the same, with postage prepaid, in the United States mail at Bismarck, North Dakota. addressed to the following:

Mr. William J. Brudvik
OHNSTAD TWICHELL, PC
P. O. Box 547
Mayville, ND 58247--0547
via Facsimile 701-786-4243

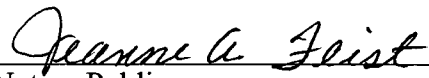
Allen C. Hoberg, Director
Office of Administrative Hearings
1707 North Ninth Street
Bismarck, ND 58501-1882
via Hand Delivery

ND Public Service Commission
600 East Boulevard Avenue, Dept. 408
Bismarck, ND 58505-0480
via Hand Delivery



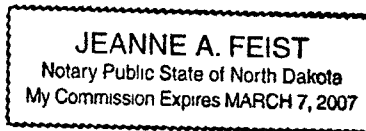
Renee Freisz

Subscribed and sworn to before me this 2 day of September, 2004.



Notary Public

My commission expires:





Ohnstad Twichell, P.C.

ATTORNEYS AT LAW

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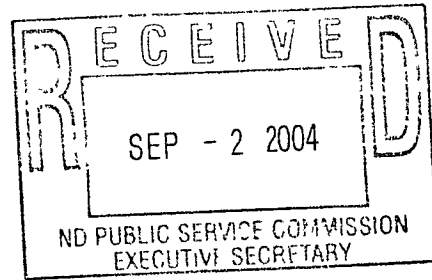
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September 1, 2004

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**RE: MIDCONTINENT COMMUNICATIONS VS POLAR TELCOM,
INC./HTC SERVICES, INC.
CASE NO. PU-04-237
OAH File No. 20040205**

Gentlemen:

Enclosed herewith please find the Respondent's Pre-Trial Brief with an original and seven copies to the PSC as required. Thank you.

Sincerely yours,

OHNSTAD TWICHELL LAW OFFICE


William J. Brudvik

WJB:sgg

20 PU-04-237

Pages 2

Cover letter and Affidavit of Mailing

by Polar Telcom Inc /HTC Services Inc

09/02/2004

CC Comm Legal Illona ALJ

STATE OF NORTH DAKOTA)
) ss **AFFIDAVIT OF MAILING**
COUNTY OF TRAILL)

SHIREEN GRINAGER, being first duly sworn on oath, deposes and says that she is of legal age and is a resident of Mayville, North Dakota; that she served the attached:

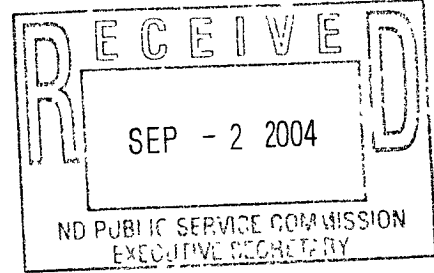
Respondent's Pretrial Brief

on the following persons:

North Dakota Public Service Commission
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Bismarck, North Dakota 58505-0480

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by depositing in the U.S. Post Office at Mayville, North Dakota on September 1, 2004 at 4:30 p.m., a true and correct copy thereof, enclosed in separate sealed envelopes, with postage thereon fully paid for first class mail, addressed to each person above named at above address.

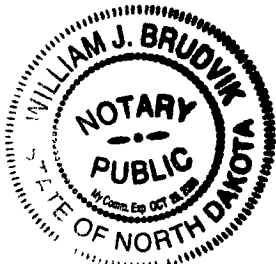
That the undersigned knows the person served to be the person named in the papers served and the papers intended to be served.

Shireen Grinager
Shireen Grinager

Subscribed and sworn to before me this 1st day of September, 2004.

William J. Brudvik

Notary Public



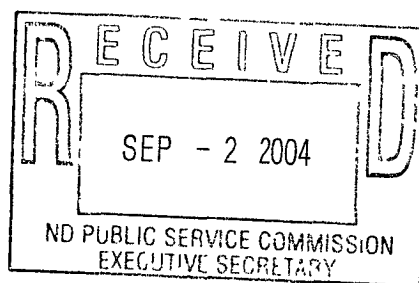
STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

IN THE MATTER OF:

Midcontinent Communications,)
)
)
Complainant,)
)
vs.)
)
Polar Telcom, Inc. And,)
HTC Services, Inc.)
)
Respondents.)

Civ. No. CV-97-03679
OAH File No. 2004025

RESPONDENT'S PRETRIAL BRIEF



STATEMENT OF THE FACTS

Polar Telcom, Inc. (Polar) is a North Dakota Corporation and a wholly owned subsidiary of Polar Telecommunications Corporation, a North Dakota telephone cooperative. Polar has a Certificate of Public Convenience and Necessity to offer telecommunication services in the State of North Dakota. Polar is a competitive local exchange carrier (CLEC) in the Mayville, North Dakota, exchange area which is also served by Qwest as the incumbent local exchange carrier (ILEC). Polar operates in this exchange with a "788" prefix and Qwest operates in this exchange with a "786" prefix.

HTC Services, Inc. (HTCS) is a Minnesota Corporation and a wholly owned subsidiary of Halstad Telephone Company, a Minnesota Telephone Cooperative. HTCS has a Certificate of Public Convenience and Necessity to offer telecommunication services in the State of North Dakota. HTCS is a CLEC in the Hillsboro, North Dakota, exchange area which is also served by Qwest as

the ILEC. HTCS operates in this exchange with a "636" prefix and Qwest operates in this exchange with a "436" prefix.

Polar and HTCS have entered into an agreement which provides for two-way "Extended Area Service" (EAS) between the two exchanges. In addition, Polar has established two-way EAS between its Mayville (788) exchange and the Clifford-Galesburg (488) exchange served by Polar Telecommunications Corporation. Both Polar and Qwest offer two-way EAS from their respective Mayville exchanges to the Hatton exchange, (543) prefix, operated by Qwest.

HTCS has established two-way EAS to the Halstad (456) and Shelly (886) exchanges operated by Halstad Telephone Company .

Qwest has entered into an Agreement with Midco whereby Qwest provides Midco its telecommunications services at a wholesale discount. Midco then offers these services to customers as a CLEC in various Qwest exchanges, including the Qwest territories in the Hillsboro and Mayville exchanges, which are also served on a facilities-based basis by HTCS and Polar, respectively.

Among the provisions of the Federal Telecommunications Act of 1996 are the requirements that every local exchange carrier has the following duties... **Number Portability**: The duty to provide to the extent technically feasible, number portability in accordance with the requirements prescribed by the commission; and **Dialing Parity**: The duty to provide dialing parity to competitive providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have non-discriminatory access to telephone numbers, operators services, directory assistance and dialing listing, with no unreasonable dialing delays. 47 USCA § 251(b). 47 USC §202 requires services to competitors in a non-discriminatory manner.

The FCC's First Order and Report implementing this statute, without elaboration, required carriers to port numbers to the rivals only "at the same location". 11 F.C.C.R. at 8383, §58, see also 47 C.F.R. §52.21(q).

In December 2002, Midco sent identical letters to Halstad Telephone Company and Polar Telecommunications Corporation requesting local number portability in the Hillsboro and Mayville exchanges. Although the letters were sent to the wrong parties (the letters were sent to both Halstad Telephone Company's and Polar Telecommunications Corporation, instead of the CLEC subsidiaries), HTCS and Polar both sent prompt replies to Midco acknowledging the request. The replies both stated that although the request was sent to the wrong entity, both parties would agree to work with Midco to meet Midco's local number portability request. At the same time, both companies pointed out that certain technical difficulties existed because the Midco/Qwest rate centers were different than the HTCS/Polar rate centers. Since Midco initially indicated that its porting request was for the establishment of porting between Polar and HTCS and the Qwest network, Polar and HTCS informed Midco that Qwest needed to be a party to any negotiations with respect to local number portability.

Then followed a series of letters, telephone calls, and e-mail communication between the companies, continuing through February 2004, wherein the parties attempted to work toward a resolution of these issues (See Exhibit B to HTC Services, Inc. and Polar Telcom, Inc. Answers to Interrogatories.)

Midco abruptly and without explanation ended negotiations at this time and instituted this action before the Public Service Commission, alleging violations of Section 49-21-24 of the North Dakota Century Code.

STATEMENT OF LAW

A. Applicable statutes. NDCC 49-21-24

1. The language of the complainant would suggest that it is alleging a violation of Subdivision (a) of Section 49-21-24 of the North Dakota Century Code which

provides as follows: A telecommunication company may not: (1)(a) discriminate against another provider for telecommunication services by refusing or delaying access to the company's services.

2. Subdivision 2 of NDCC 49-21-24 provides that a claim of a violation of this section may be resolved by arbitration or a complaint filed with the Public Service Commission. The plaintiff has chosen to follow the complaint process.

B. Legal Issues. The exact nature of the allegations against the two respondents, Polar Telcom, Inc. and HTC Services, Inc. are different. The issues as to each respondent are as follows:

1. Whether HTC Services, Inc. discriminated against Midco because it intends to offer local number portability to wireless carriers at some point in the future.
2. Whether Polar Telcom, Inc. discriminated against Midco because it offers local number portability to Qwest but refuses to do so with Midco.

C. Legal Argument.

The exact nature of the allegation against HTC Services, Inc. is not that it has discriminated **in fact** but, that it **intends** to discriminate in the future because it will or may be offering local number portability to wireless carriers as mandated by the FCC. It is anticipated that the complainant will be able to show no specific requests for local number portability have been received by HTC Services, Inc. from a wireless carrier. The only order for local number portability that HTC Services, Inc. has received, which post-dates the filing of the complaint herein, is from Qwest on behalf of Midco for a number that was no longer in service. NeuStar, the national administrator of local number portability, has directed that local number portability orders must be associated with a working and active number.

As to the respondent, HTCS, this is essentially an issue of ripeness. In the case of Anthony Sposato v Robin Sposato 570 NW 2nd 212 (November 1997), the North Dakota Supreme Court dealt

with a paternal grandfather who sought visitation with children after the parents of the children were divorced. The grandfather brought an action to compel a specific visitation event and the order was granted by the court. However, the visitation never occurred because of unrelated logistical problems. Nevertheless, the children's mother, who was the daughter-in-law of the grandfather, appealed the order to the Supreme Court on the grounds that, even though the order was for a specific visitation which never occurred, that there may be future such visitation requests and that the court needed to rule on such future requests. The North Dakota Supreme Court declined to exercise jurisdiction. The court held that: "an issue is not ripe for review if it depends on future contingencies which, although they might occur, necessarily may not, thus making addressing the question premature". Further, the court stated, "addressing an issue involving mootness or ripeness would be the equivalent of rendering a purely advisory opinion. This court is not empowered to render a purely advisory opinion merely because the issue may arise in the future". (Citing Bies v Obregon 558 NW 2nd 855.) As in the Sposato case, the issue as presented by the complainant in this case is that HTCS is **now** discriminating because it **may** offer local number portability in the future once it receives a request it has not yet received. For the Administrative Law Judge to rule on this case would be purely an advisory opinion, and premature at this time.

With respect to Polar Telcom, Inc. Midco alleges that Polar is discriminating because it offers local number portability to Qwest but has refused to offer local number portability to Midco. First, the allegation that Polar offers local number portability to Qwest as a basis for discrimination is simply not true. There has been no 788 prefix number given to a Qwest customer. Second, neither Polar (nor HTCS) has ever denied local number portability to Midco. Polar has always held forth the recognition that local number portability would be made available to Midco when the technical issues involving the different rate centers were resolved.

It is the position of HTCS and Polar that in order for the two CLECs to grant local number portability to Midco, certain issues must be resolved. Polar and HTCS have suggested that the means by which to do this is an Interconnection Agreement. Midco denies that an Interconnection Agreement is necessary. Whatever it is titled, there needs to be some type of agreement that identifies and resolves these complex issues,

Furthermore, Midco, through its attorneys, has now requested that numbers ported to Midco be granted the same extended local calling areas that currently exist in the HTC and Polar CLECs. At the same time, Midco's underlying provider for its resold services (Qwest) has indicated that any calls originating from a ported (788) or (636) number ported onto the Qwest network will be treated according to Qwest's definition of EAS. In other words, these calls will be treated as toll – and presumably subject to long distance charges on the underlying toll carrier. While this outbound calling scope definition is – as Midco has repeatedly stated – merely a customer education and marketing issue for Midco in its role as a reseller of Qwest, the treatment of calls from non-Qwest lines to the newly ported lines is the fundamental issue that necessitates the need for an agreement. How calls from these subscribers will be routed and treated is solely subject to the interpretation of Midco's underlying network provider (Qwest). To date, Qwest, has declined to answer the question in writing of whether or not calls originating in a HTCS (636) or Polar (788) exchange or the exchanges with which they have an extended calling area will be routed on their lines and treated as “toll” for purposes of assessing access charges - rather than local reciprocal call compensation.

Midco, through its attorneys, has recently indicated that they are now seeking to compel the CLECs to maintain for Midco's benefit the extended area service currently enjoyed by the subscribers of the CLEC who are served in the expanded exchange areas that are the subject of this complaint. Midco has not indicated how they expect this to be accomplished or funded. Nor has Midco indicated how local calls will be terminated, absent local trunks between the switch providers.

Will the Polar and HTCS CLECs be expected to absorb the access charges that Midco's underlying network provider may assess to the CLECs? Will the third party ILECs, if expected to treat these calls as local, be forced to pay terminating access charges to Qwest, because Qwest treats the calls as toll? Because Midco expects its customers to benefit from an expanded local calling area, will it properly compensate the other carriers for the benefits and facilities provided? Whether it is an Interconnection Agreement or some other form of agreement there must be a meeting of the minds on these complex issues and it must inevitably include Qwest.

There is very little case law dealing with the issue of "CLEC to CLEC number portability. The case of AT&T Communications Association, Inc vs GTE Florida, Inc., 123 F Supp 2nd 1318 is instructive. In that case, the court stated [the Telecommunications Act of 1996 seeks to prevent an incumbent (**or any carrier**) from favoring one competing carrier over another. The Act does so by requiring each carrier to make available to any competitor the same interconnection, service or network element terms that the carrier has made available to any other competitor. The court sites 47 USC § 252 (i), which mirrors NDCC 49-21-24. The reference to "or any carrier" would seem to suggest that an Interconnection Agreement between CLECs in the same exchange area would also require an Interconnection Agreement.

In the case of Trinko v Bell Atlantic Corporation, 305 F 3rd 89 the court stated as follows:

"While Section 251 [of the Telecommunications Act of 1996] establishes a number of broad-based stated duties that can be construed as substantive norms of behavior, the Telecommunications Act allows an ILEC to substantially fulfill its duties under Subsection (b) and (c) of Section 251 by entering into Interconnection Agreements with telecommunication carriers seeking to enter the local market. These agreements are reached primarily through a process of negotiation and must ultimately be approved by a state commission. The parties may ask the state commission to arbitrate any disputes that arise in the negotiating process. After the state commission approves such an agreement, the Telecommunications Act intends that the ILEC be governed directly by the specific agreement rather than the general duties described in Subsection (b) and (c) of Section 251".

The reference to requiring Interconnection Agreements between “telecommunications carriers seeking to enter the local market” would also suggest that an Interconnection Agreement be required between Polar/HTCS and Midco. 47 USC § 252 requires any such agreement to be approved by the PSC. 47 USC § 252 also provides for arbitration by a state commission in the event that disputes arise in the negotiation of an Interconnection Agreement. NDCC 49-21-24 also provides for arbitration, which the complainant in this case did not take advantage of. The complainant thereby limited its options to utilize the State PSC to arbitrate an Interconnection Agreement. The complainant therefore cannot claim to have been discriminated against by other parties, when the complainant itself rejected and chose not to pursue the most obvious mechanism for securing its desired services: an Interconnection Agreement.

USC § 252 requires an interconnection agreement between an incumbent local exchange carrier (ILEC) and a CLEC. The FCC has determined that an Interconnection Agreement between a wireless carrier and a wireline carrier is not required. There is no law existent or FCC regulations existent that deal with the issue of CLEC to CLEC Interconnection Agreements, but it is clear that the North Dakota Century Code Section 49-21-24 is patterned after the anti-discrimination provisions of Section 252 of the 47 USC § 252 (See Section 252I). Furthermore, there seems to be no logical reason why the rationale existent for an Interconnection Agreement between an incumbent local exchange carrier and a competitive local exchange carrier would not also apply to the relationship between one competitive local exchange carrier and another competitive local exchange carrier.

As stated above, the FCC’s Second Order indicated that local number portability must be at the same “location”. In the case of Starnet, Inc. vs Global NAPS, 355F 3rd 634, the United States

Court of Appeals, 7th Circuit, considered the issue of number portability from CLEC to CLEC. Although the case ultimately involved parties dissimilar to the wireline carriers in this case, the court engaged in a lengthy discussion of number portability. The court's discussion is instructive in this case. It focused on the issue of "location" as it relates to rate centers.

One way to read "location" is as the end of the wire, the physical location where the call (and the phone service) terminates. If this is right, then moving the modem pool moves the "location" and disentitles StarNet to portability. But there is another possible reading, less confined than the end of the wire yet more confined than "anywhere in the nation, as long as the corporate HQ does not move." On this reading, the "location" is the telephone rate center - - the area within which all calls are **treated the same for billing purposes** (Emphasis added). Usually a rate center corresponds to the group of customers (a subset of an area code) served by a given complement of telephone switching equipment. On this understanding, the local exchange carrier defines its own "location" by choosing where to put its switches and how to bill its customers. **One termination point within the area covered by the switch then would be treated the same as any other.** (Emphasis added).

Clearly the FCC has not yet addressed the issue of local number portability to a location where the rate centers at that location are different. Interestingly, the Court ultimately deferred the matter to the FCC under the doctrine of "Primary Jurisdiction" stating: "We use the phrase in the weaker sense, as a means to allow the court to refer an issue to an agency that knows more about the issue".

Midco, which is not a facility based provider and merely a purchaser of re-sold telecommunication services from Qwest, has requested local number portability as a CLEC in the expanded Hillsboro and Mayville exchanges of the CLECs. Midco has also relayed an expectation that its ported customers will be permitted the same extended area that is enjoyed by HTCS and Polar. Qwest, however, has suggested that it will not honor the expanded calling currently enjoyed by these rural communities and will instead impose its own local calling scope on its resellers and the facilities-based CLECs that compete with Qwest in these exchanges. Midco, as merely a reseller,

may certainly accept the limited calling options presented by its chosen underlying provider (Qwest). If Midco chooses to do so, then it bears the burden of educating its customers about the changes in their service and the limitations of Midco's local calling area. But Midco has no logical or statutory basis, nor any industry precedent, to expect other carriers to bear the cost of removing these limitations and expanding Midco's local calling scope beyond that of Qwest. As a reseller of Qwest's services, Midco should expect only to be able to offer its customers service that is equivalent to Qwest. Midco has no reason to expect to be able to offer services equivalent to other facilities-based carriers that have made the specific, significant investments necessary to deliver expanded and superior services in this region.

It is respectfully submitted, therefore, that no discrimination has occurred against Midco. The notion that the number porting requested by Midco or any other carrier could be implemented absent resolution of the complex issues listed above is clearly impossible. The CLECs are not resellers of Qwest. They are not bound by Qwest's services or calling scopes. Unlike Midco, they are not forced to replicate Qwest's services to their target markets. Nor should the CLECs or their affiliated ILECs be forced to subsidize Midco's effort to offer expanded services for which it does not choose to make the necessary investment. It is not possible to grant LNP to Midco or any other provider in the absence of an agreement that will resolve these issues. It is not possible to have an Interconnection Agreement without the involvement and/or consent of Qwest as the provider of the services. It certainly cannot be said that HTCS or Polar are discriminating, unless it can be shown that Midco is being treated in this scenario any different than Qwest or any other purchaser of Qwest's resold services. Nor can it be shown that Midco is being treated any differently than any wireless carrier, contrary to the complaint against HTC Services. HTC Services would not agree, and has not agreed, to provide LNP to any wireless carrier with whom it has these same unresolved issues relating to the

rating and routing of calls, or the unresolved issue of terminating access charges vs. reciprocal compensation for the termination of traffic.

With reference to the issue of standing, it is the position of HTCS and Polar, for the reasons set forth herein that Midco lacks standing to bring this action. It is not the real party of interest, since it is merely a reseller of Qwest services which is the underlying facilities-based provider. The court in Trinko, *Supra*, dealt with the issue of standing and held: "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or the particular issues. This inquiry involves both constitutional limitations on federal court jurisdiction and prudential limitations on its exercise. . . . To meet the constitutional test for standing plaintiff must allege personal injury fairly traceable to the defendants allegedly unlawful conduct and likely to be redressed by the requested relief. Since Midco is merely a reseller of Qwest, and hostage to Qwest's rate center, Midco is powerless to obtain any relief either in this court or the FCC without the involvement of Qwest as an indispensable party. Furthermore, under this same rationale, Qwest is the real party in interest in this case because Midco as a purchaser of resold services is not capable of asserting its own rights but only asserting rights that would belong to Qwest.

CONCLUSION

In conclusion, the grounds cited by Midco for an alleged case of discrimination simply do not exist. In the case of HTCS, any determination at this time would be merely advisory, which the North Dakota Supreme Court has clearly stated that courts do not have jurisdiction to issue. With respect to Polar, the base allegation for discrimination, that Polar is now porting numbers to Qwest, is simply not true.

Our discussion could end with the foregoing; however, both HTCS and Polar want to make it clear to the Public Service Commission that they have been acting in throughout in good faith and have continuously sought to negotiate an agreement with Midco whereby local number portability could be made available. To that end, Polar and HTCS propose that in order for local number portability to be made available to Midco (or any other carrier for that matter) the following conditions must be met:

1. A physical connection must be established between Polar and the Midco switch provider for the exchange of local calls.
2. The two parent telephone companies, Halstad Telephone Company and Polar Telecommunications Corporation who are not direct parties to this complaint, must also be permitted to establish a direct or indirect local facility for the exchange of this traffic as local / EAS to the underlying switch provider.
3. An agreement must be reached requiring that the local calling areas defined by Polar for the Mayville/Portland NXX will be honored. Calls to this code, regardless of the underlying switch provider, will be treated as local and subject to reciprocal compensation and not access charges, on parity with the way they are treated today in the Polar switch. If an originating company (HTC or Polar Mutual) delivers a call to the NXX as local, consistent with the local calling scope defined by HTC, Polar, and Polar Mutual, then the terminating party cannot impose its own calling scope on that call for purpose of assessing terminating access charges.

Respectfully submitted this 1st day of September, 2004.



William J. Brudvik
OHNSTAD TWICHELL LAW OFFICE
12 Southeast Third Street
P O Box 547
Mayville, North Dakota, 58257
Attorney for Respondents, HTC Services, Inc.
And Polar Telcom, Inc.
ND Attorney License #03290
Telephone: 701-788-3251
Fax: 701-788-4243



Practice in all North Dakota
and Minnesota courts

Ohnstad Twichell, P.C.

ATTORNEYS AT LAW

Founded in 1939

Offices in West Fargo, Fargo, Hillsboro, Mayville, Page, Hope and Finley, North Dakota

and Detroit Lakes, Minnesota

www.ohnstadlaw.com

MANFRED R. OHNSTAD 1914-1987

DUANE R. BREITLING*
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DAVID L. WANNER

PEGGY J. BUCHHOLZ, PLS.
Office Administrator

*Also licensed in Minnesota

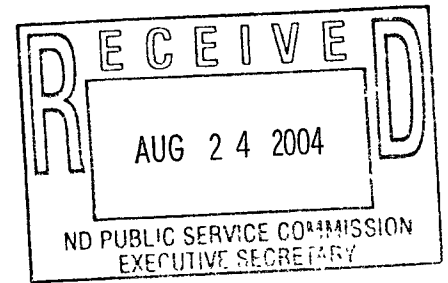
Sent by Fax and US Mail:

August 24, 2004

North Dakota Public Service Commission
Attn: William W. Binck
600 East Boulevard Avenue, Dept. 408
Bismarck, North Dakota 58505-0480

Office of Administrative Hearings
Attn: Allen C. Hoberg
1707 North 9th Street
Bismarck, North Dakota 58501-1882

Pearson & Durick
Attn: Patrick Durick
P. O. Box 400
Bismarck, North Dakota 58502-0400



**RE: MIDCONTINENT COMMUNICATIONS VS POLAR TELCOM,
INC./HTC SERVICES, INC.
CASE NO. PU-04-237
OAH File No. 20040205**

Gentlemen:

In preparation for the hearing which has been scheduled for September 3rd I am wondering if it would be helpful to have some type of pre-hearing conference to seek to identify issues, anticipated witnesses, anticipated length of our case and briefing. I am lead to believe that cases involving violations of this statute are relatively rare. I have not personally been involved with such a case before the PSC and I have a fear that the testimony might be greater than one day. I understand that Pat is in trial and unavailable this week. I will be out of the office on Thursday and Friday of this week. I would like to propose a teleconference meeting sometime on Monday, the 30th. I would like to tentatively suggest 11:00 in the morning but I certainly don't want to overstep my bounds

Pages 2

PU-04-237

Letter re proposed pre-hearing conference
by Polar Telecom Inc./HTC Services Inc

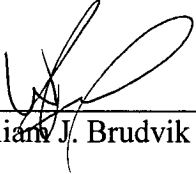
CC Comm Legal Ilona ALJ

08/24/2004

if the Office of Administrative Hearings thinks this would be appropriate. I would welcome your comments.

Sincerely yours,

OHNSTAD TWICHELL LAW OFFICE



William J. Brudvik

WJB:sgg



Ohnstad Twichell, P.C.

ATTORNEYS AT LAW

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and Detroit Lakes, Minnesota
www.ohnstadlaw.com

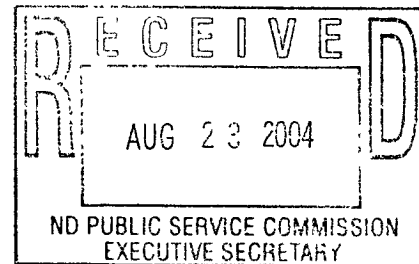
MANFRED R. OHNSTAD 1914-1987
DUANE R. BREITLING*
WILLIAM J. BRUDVIK*
JAY D. CARLSON*
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DANIEL R. TWICHELL
S. LEE VINJE
DAVID L. WANNER
PEGGY J. BUCHHOLZ, PLS
Office Administrator

*Also licensed in Minnesota

August 19, 2004

North Dakota Public Service Commission
Attn: William W. Binek
600 East Boulevard Avenue, Dept. 408
Bismarck, North Dakota 58505-0480

Office of Administrative hearings
Attn: Allen C. Hoberg
1707 North 9th Street
Bismarck, North Dakota 58501-1882



RE: Midcontinent Communications vs Polar Telcom, Inc./HTC Services, Inc.
Case No. PU-04-237

Gentlemen:

Enclosed herewith for filing please find the following:

1. Stipulation for Amended Answer
2. Amended Answer
3. Affidavit of Mailing

Please make this a part of the file. I am sending original and seven copies of the Amended Answer to the Public Service Commission with copies to the Office of Administrative Hearings. I hope this is correct. Thank you.

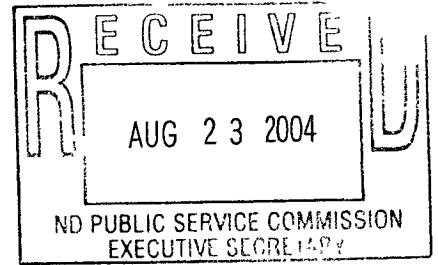
Sincerely yours,

OHNSTAD TWICHELL LAW OFFICE

William J. Brudvik

WJB:sgg
CC: Patrick Durick
HTC Services
Polar Telcom

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

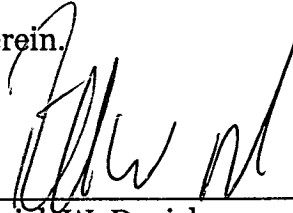


IN THE MATTER OF:)
)
Midcontinent Communications)
)
Complainant,)
)
vs)
)
Polar Telcom, Inc. and)
HTC Services, Inc.)
)
Respondents.)


STIPULATION FOR
AMENDED ANSWER

OAH File No. 20040205
Case No. PU-04-237

The undersigned, counsel for Midcontinent Communications, Complainant and Polar Telcom, Inc. and HTC Services, Inc., Respondents, respectively, hereby stipulate and agree to permit Respondents by and through their attorney to serve and file an Amended Answer herein, receipt of which is acknowledged by the Complainant herein.

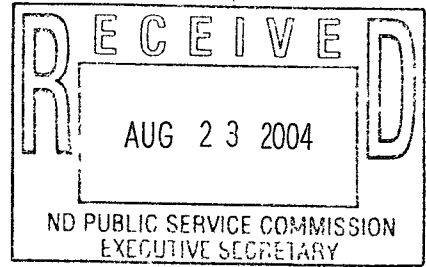


Patrick W. Durick Date 8/17/04
314 E. Thayer Avenue
P O Box 400
Bismarck, North Dakota 58502-0400
Attorney for Midcontinent Communications



William J. Brudvik Date 7/30/04
12 SE Third Street
P O Box 547
Mayville, North Dakota 58257
Attorney for Respondents

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION



IN THE MATTER OF:)
)
Midcontinent Communications)
)
Complainant,)
)
vs)
)
Polar Telcom, Inc. and)
HTC Services, Inc.)
)
Respondents.)

AMENDED ANSWER

OAH File No. 20040205
Case No. PU-04-237

Polar Telcom, Inc. (Polar) and HTC Services, Inc. (HTC) for their amended and respective answers to the Complainant's Complaint state and allege as follows:

I.

Except as hereinafter admitted, qualified or otherwise explained, deny each and every allegation, matter and thing contained in the Complainant's Complaint.

II.

Affirmatively allege that the Complainant lacks standing and is not the real party in interest and therefore not entitled to bring this action in the State of North Dakota.

III.

Both the Respondents allege that the Federal Communication's Commission has jurisdiction over local number portability issues and made and entered its "Wireline - Wireless Portability Order" on November 10, 2003, mandating that local exchange carriers provide local number portability on or before May 25, 2004. The FCC has only put forth rules regarding wireline to wireline local number portability for situations in which the rate centers of the two carriers match. While no FCC rules have been issued for situations in which the rate centers of two wireline carriers do not match, such matters reside firmly

within the jurisdiction of the FCC pursuant to Section 251(b) of the Federal Communications Act of 1934.

IV.

Notwithstanding the foregoing, Polar and HTC each admit the allegations contained in Paragraphs I through IV of the Complaint.

V.

Polar for its separate answer to Paragraph V of the Complaint clarifies that to date, Polar has ported no customers to Qwest or any other carrier in the Mayville, North Dakota exchange. Polar's only porting activity has been those customers porting **from** Qwest in the Qwest defined-Mayville calling area exchange **to** the same calling area exchange on the Polar network. The necessary arrangements to implement the porting of those customer numbers are addressed in Polar's interconnection agreement with Qwest. Midco's porting request to Polar (and HTC) defined calling area exchanges and as such the practical issues between the parties for porting and the exchange of traffic are not defined. Polar and HTC have both indicated to Midco that an Interconnection Agreement is necessary to resolve certain outstanding issues relating to rating and routing of calls as well as to facilitate the terms and conditions for local number portability in the exchanges in question. Polar and HTC have attempted to negotiate such an agreement in good faith and on a non-discriminatory basis with Midco until Midco terminated those discussions and filed this complaint.

VI.

HTC for its separate answer to Paragraph VI of the Complaint states that it has indicated its intent to honor Bona Fide Requests for local number portability by wireless carriers on or before May 24, 2004, as mandated by the Federal Communications Commission. To date HTC has received no active porting requests from wireless carriers. Where the rate centers of the wire line carrier and the wireless carrier do not match the FCC has issued specific guidelines and rules. No such rules have been issued by the FCC where the rate centers of two wireline carriers do not match.

VII.

Polar and HTC for their joint answer to Paragraph VII of the Complaint state that they have negotiated with the Complainant in good faith. Neither party has imposed unreasonable conditions on the Complainant but have repeatedly stated that current wire line to wireline local number portability rules do not accommodate porting between carriers whose rate centers do not match. Both HTC and Polar have repeatedly stated to Midco that certain specific issues related to rate centers must be resolved which issues include responsibility for transport costs; toll vs local treatment of calls from ported numbers to customers outside the Qwest (Midco re-sold); rate center appropriate compensation for termination of call (reciprocal comp vs access charges). These are all issues that are not

clearly addressed in the current wire line to wireline local number portability rules and therefore must be resolved between the two carriers. Both Polar and HTC suggested to Midco that an Interconnection Agreement is the best method of resolving such issues and both companies opened good-faith negotiations with Midco in 2003 to pursue an Interconnection Agreement. Midco ended these negotiations for reasons that it has never explained to Polar or HTC, or explained in its Complaint. It may also be unclear whether the real party in interest should be Qwest with whom Polar and HTC have Interconnection Agreements and with whom Midco has an agreement to resell its services.

VIII.

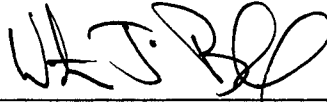
Polar for its separate answer to Paragraph VIII of the Complaint re-alleges Paragraph VII, supra, with respect to the need to resolve issues that need to be resolved in order to grant the Complainant's request for local number portability. More particularly, it is known to the parties hereto but perhaps not to the Public Service Commission that Qwest is the incumbent local exchange carrier in both Mayville and Hillsboro and does not have extended area service between the two exchanges. Polar is a competitive local exchange carrier in Mayville and Halstad is a competitive local exchange carrier in the Hillsboro exchange area. Polar and Halstad have extended area service between the two exchanges through an Interconnection Agreement. Numerous complicated issues will arise as a result of the rate center variances.

IX.

Polar and HTC for their joint answer to Paragraph IX of the Complaint deny that any discrimination has occurred. Both parties are prepared to honor any bonafide request for local number portability that comply with all FCC rules and which meet the requirements of a bonafide request. Neither party discriminates against any carrier in this regard and requires all carriers requesting local number portability to meet these same requirements.

WHEREFORE, Polar and HTC jointly request that the matter before the Public Service Commission be in all things dismissed and that the Respondents have their costs and disbursements herein.

Dated this 30th day of July, 2004.



William J. Brudvik
Ohnstad Twichell Law Office
12 Southeast Third Street
Mayville, North Dakota 58257
Attorney for Respondents Polar Telcom, Inc.
and HTC Services, Inc.
Telephone: 701-788-3251
Fax: 701-788-4243
ND- 03290

STATE OF NORTH DAKOTA)
) ss **AFFIDAVIT OF MAILING**
COUNTY OF TRAILL)

SHIREEN GRINAGER, being first duly sworn on oath, deposes and says that she is of legal age and is a resident of Mayville, North Dakota; that she served the attached:

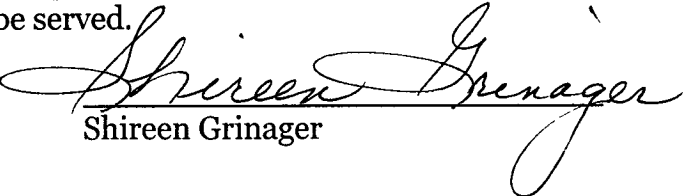
Amended Answer

on the following person:

Pearce & Durick
Attn: Patrick W. Durick
P O Box 400
Bismarck, North Dakota 58502-0400

by depositing in the U.S. Post Office at Mayville, North Dakota on July 30, 2004, at 4:30 p.m., a true and correct copy thereof, enclosed in separate sealed envelopes, with postage thereon fully paid for first class mail, addressed to each person above named at above address.

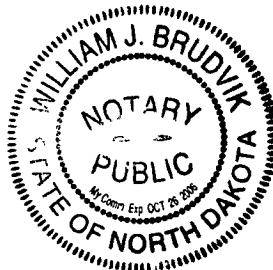
That the undersigned knows the person served to be the person named in the papers served and the papers intended to be served.


Shireen Grinager

Subscribed and sworn to before me this 30TH day of July, 2004.



Notary Public





Ohnstad Twichell, P.C.

ATTORNEYS AT LAW

Founded in 1939

Offices in West Fargo, Fargo, Hillsboro, Mayville, Page, Hope and Finley, North Dakota
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www.ohnstadlaw.com

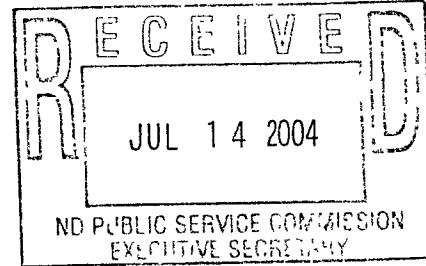
MANFRED R OHNSTAD 1914-1987

DUANE R BREITLING*
WILLIAM J BRUDVIK*
JAY D CARLSON*
JOHN P DOSLAND*
THOMAS D FIEBIGER*
SEAN M FREDRICKS*
ROBERT G HOY*
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DANIEL R TWICHELL
S LEE VINJE
DAVID L WANNER
PEGGY J BUCHHOLZ, PLS
Office Administrator

*Also licensed in Minnesota

July 14, 2004

North Dakota Public Service Commission
Attn: William W. Binek
600 East Boulevard Avenue, Dept. 408
Bismarck, North Dakota 58505-0480



**RE: Midcontinent Communications vs Polar Telecom, Inc./HTC Services, Inc.
Case No. PU-04-237**

Dear Mr. Binek:

Enclosed herewith and served upon the Public Service Commission please find the original and seven copies of the Answer of the Respondents herein. Also enclosed please find Affidavit of Service upon the Complainant's attorney. Thank you.

Sincerely yours,

OHNSTAD TWICHELL LAW OFFICE



William J. Brudvik

WJB:sgg
Enc.

cc Office of Administrative Hearings
Allan Hoberg

cc Pearce and Durick

Also sent by FAX
and e-mail

14 PU-04-237

Pages 1

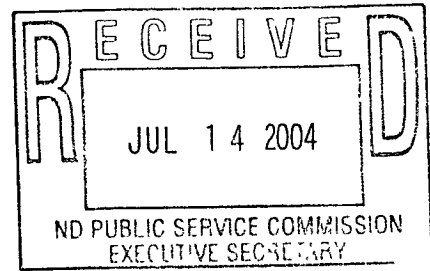
Cover letter re Answer

by Polar Telecom Inc /HTC Services Inc

07/14/2004

CC Comm Legal Ilona ALJ

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION



IN THE MATTER OF:)
)
Midcontinent Communications)
)
Complainant,)
)
vs)
)
Polar Telcom, Inc. and)
HTC Services, Inc.)
)
Respondents.)

ANSWER

OAH File No. 20040205
Case No. PU-04-237

Polar Telcom, Inc. (Polar) and HTC Services, Inc. (HTC) for their respective answers to the Complainant's Complaint state and allege as follows:

I.

Except as hereinafter admitted, qualified or otherwise explained, deny each and every allegation, matter and thing contained in the Complainant's Complaint.

II.

Affirmatively allege that the Complainant lacks standing and is not the real party in interest and therefore not entitled to bring this action in the State of North Dakota.

III.

Both the Respondents allege that the Federal Communication's Commission has jurisdiction over local number portability issues and made and entered its "Wireline - Wireless Portability Order" on November 10, 2003, mandating that local exchange carriers provide local number portability on or before May 25, 2004. "The FCC has only put forth rules regarding wireline to wireline local number portability for situations in which the rate centers of the two carriers match. While no FCC rules have been issued for situations in which the rate centers of two wireline carriers do not match, such matters reside firmly within the jurisdiction of the FCC pursuant to Section 251(b) of the Federal Communications Act of 1934."

IV.

Notwithstanding the foregoing, Polar and HTC each admit the allegations contained in Paragraphs I through IV of the Complaint.

V.

Polar for its separate answer to Paragraph V of the Complaint alleges that Polar is providing member portability for porting of limited Qwest NXX's under an Interconnection Agreement with Qwest. Polar and HTC have both indicated to Midco that an Interconnection Agreement is a necessary prerequisite to local number portability in the two exchanges.

VI.

HTC for its separate answer to Paragraph VI of the Complaint states that it has indicated its intent to honor Bona Fide Requests for local number portability by wireless carriers on or before May 24, 2004, as mandated by the Federal Communications Commission. To date HTC has received no active porting requests from wireless carriers. Where the rate centers of the wire line carrier and the wireless carrier do not match the FCC has issued specific guidelines and rules. No such rules have been issued by the FCC where the rate centers of two wireline carriers do not match.

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VIII.

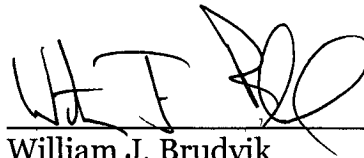
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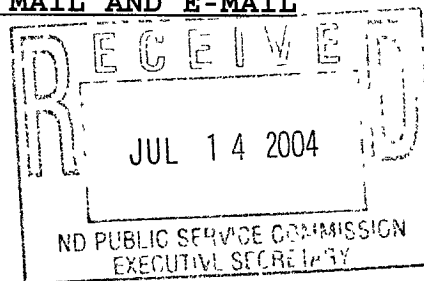
WHEREFORE, Polar and HTC jointly request that the matter before the Public Service Commission be in all things dismissed and that the Respondents have their costs and disbursements herein.

Dated this 14 day of July, 2004.



William J. Brudvik
Ohnstad Twichell Law Office
12 Southeast Third Street
Mayville, North Dakota 58257
Attorney for Respondents Polar Telcom, Inc.
and HTC Services, Inc.
Telephone: 701-788-3251
Fax: 701-788-4243
ND- 03290

AFFIDAVIT OF SERVICE BY FAX AND MAIL AND E-MAIL



STATE OF NORTH DAKOTA)
) ss
COUNTY OF TRAILL)

Annette Bakken, being duly sworn, deposes and says that she is a resident of the City of Mayville, State of North Dakota, is of legal age; and that she served the within

ANSWER-PU-04-237

on July 14, 2004, by transmitting a true and correct copy thereof to the persons named below by regular mail, fax and e-mail indicated as follows:

<u>Post Office Address</u>	<u>FAX NO.</u>	<u>E-Mail Address</u>
ND Public Service Commission 600 E. Blvd. Ave. Dept. 408 Bismarck, ND 58505-0480	(701)328-2410	ijs@psc.state.nd.us
Off. Of Admin. Hearings Attn:Allen C. Hoberg 1707 North 9 th St. Bismarck, ND 58501-1882	(701)328-3254	ahoberg@state.nd.us
Pearce & Durick Attn: Patrick Durick P.O. Box 400 Bismarck, ND 58502	(701)223-7865	pwd@pearce-durick.com

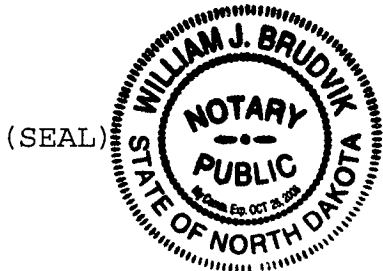
To the best of affiant's knowledge, the post office address, e-mail address and fax number above given are true and correct.

Annette Bakken

Subscribed and sworn to before me this 14th day of July, 2004.

Notary Public

OHNSTAD TWICHELL
12 SOUTHEAST THIRD
POST OFFICE BOX 547
MAYVILLE ND 58257-0547
(701) 788 3251





Practice in all North Dakota
and Minnesota courts

Ohnstad Twichell, P.C.

ATTORNEYS AT LAW

Founded in 1939

Offices in West Fargo, Fargo, Hillsboro, Mayville, Page, Hope and Finley, North Dakota

and Detroit Lakes, Minnesota

www.ohnstadlaw.com

MANFRED R OHNSTAD 1914-1987

DUANE R BREITLING*
WILLIAM J BRUDVIK*
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JOHN P DOSLAND*
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MARSHALL W McCULLOUGH, CPA
STEVEN E McCULLOUGH*
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BRIAN D NEUGEBAUER*
ROBERT E ROSENVOLD*
BRENDA R ROSTEN*
SARA K SORENSON*
DANIEL R TWICHELL*
S LEE VINJE
DAVID L WANNER

PEGGY J BUCHHOLZ, PLS
Office Administrator

*Also licensed in Minnesota

June 29, 2004

Office of Administrative Hearing
Attn: Allen C. Hoberg
1707 North 9th Street
Bismarck, North Dakota 58501-1882

SENT BY FAX AND MAIL

**RE: MIDCONTINENT COMMUNICATIONS VS POLAR TELECOM, INC./HTC
SERVICES, INC. COMPLAINT
CASE NO. PU-04-237**

Dear Mr. Holberg:

Enclosed herewith for filing in your office please find my Notice of Appearance in connection with the above matter along with the Affidavit of Service upon Attorney Durick. Also by this correspondence please consider my request for an extension of time in which to answer the complaint that has been filed. I note that the complaint was served upon my clients by mail dated June 10th. With three day service by mail and the 20 day answer period my answer would be due on or about July 3rd. I am requesting an extension until July 14th to provide this answer. I have been advised by Attorney Durick that he does not object to this extension request but I am sending a copy of this letter to him as well so that he may correspond with you directly if he does have such objection. Thank you.

Sincerely yours.

OHNSTAD TWICHELL LAW OFFICE


William J. Brudvik

WJB:sgg
Enc.

CC: Patrick W. Durick, William Binek, Polar Telecom, Halstad Telco
P.S. I am also enclosing a proposed form of Order for extension of time to interpose an answer. wjb

12 PU-04-237

Pages 1

Cover letter re Notice of Appearance

12 SOUTHEAST TR

by William J Brudvik Attorney

07/05/2004

CC Comm Legal Illona ALJ

RECEIVED

JUL 07 2004

OFFICE OF

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Midcontinent Communications, a)
South Dakota Partnership,)
)
Complainant,)
vs.)
)
Polar Telecom, Inc.)
a North Dakota Corporation, d/b/a)
Polar Communications and)
HTC Services, Inc.,)
a Minnesota Corporation,)
)
Respondents.)

NOTICE OF APPEARANCE

Case No Pu-04237

TO: Midcontinent Communications

PLEASE TAKE NOTICE that the undersigned attorney will appear in the above-entitled action for Polar Telecom, Inc., a North Dakota Corporation, d/b/a Polar Communications, a Minnesota Corporation and HTC Services, Inc., a Minnesota Corporation.

An appropriate motion, answer or other response will be served and filed by the undersigned who reserves all defenses available including those which may be asserted pursuant to Civil Rule 12, if any such defenses are applicable.

The undersigned attorney requests that copies of all papers subsequent to the Summons and Complaint be served upon him at the undersigned address.

OHNSTAD TWICHELL
12 SOUTHEAST THIRD
POST OFFICE BOX 547
MAYVILLE ND 58257-0547
(701) 788-3251

Dated this 30th day of June 2004.

OHNSTAD TWICHELL, P.C.
Attorneys for Polar Communications and
HTC Services
12 SE Third Street
P.O. Box 547
Mayville, ND 58247
TEL (701) 788-3251
FAX (701) 788-4243

BY: 

William J. Brudvik
A Member of the Firm
ND ID #03290

C:\DATA\WORD DOCUMENTS\HALSTAD TELEPHONE - MIDCO\NOTICE OF APPEARANCE.WPD

OHNSTAD TWICHELL
12 SOUTHEAST THIRD
POST OFFICE BOX 547
MAYVILLE ND 58257-0547
(701) 788-3251



Public Service Commission
State of North Dakota

COMMISSIONERS

Tony Clark, President
Susan E Wefald
Kevin Cramer

Executive Secretary
Illona A Jeffcoat-Sacco

600 E Boulevard Ave Dept 408
Bismarck, North Dakota 58505-0480
web www.psc.state.nd.us
e-mail ndpsc@psc.state.nd.us
TDD 800-366-6888
Fax 701-328-2410
Phone 701-328-2400

June 25, 2004

Patrick W. Durick
Pearce & Durick
P O Box 400
Bismarck, ND 58502-0400

David Dunning
Polar Telecom, Inc.
P. O. Box 270
Park River, ND 58270

Ron Laqua
HTC Services, Inc.
P O Box 55
Halstad, MN 56548-0055

Re Request for Court Reporter
Midcontinent Communications vs.
Polar Telecom, Inc /HTC Services, Inc
Complaint
Case No. Case No. PU-04-237

Dear Gentlemen:

The hearing in the above case has been scheduled for September 3, 2004, beginning at 9 a m , in the Commission Hearing Room The Commission will tape record the hearing. If parties would like a court reporter present at the hearing they may do so, and may make their own arrangements However, if parties would like the Commission to arrange for a court reporter please notify the Commission in writing within ten days of receipt of this letter and our office will make the necessary arrangements.

Parties will pay all costs associated with the court-reporting service.

If you have any questions, please contact us

Sincerely,

William W Binek
Hearing Administrator

WWB/sls

C Allen Hoberg, Office of Administrative Hearings



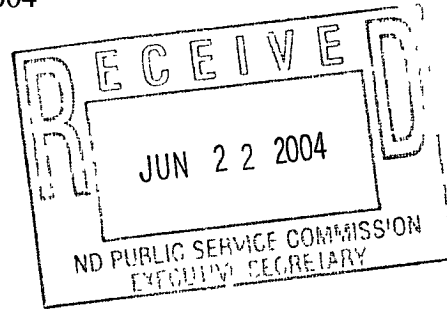
OFFICE OF ADMINISTRATIVE HEARINGS

STATE OF NORTH DAKOTA
1707 North 9th Street
Bismarck, North Dakota 58501-1882

Allen C. Hoberg
DIRECTOR

701-328-3260
Fax 701-328-3254
oah@state.nd.us
www.state.nd.us/oah

June 22, 2004



Ms. Ilona Jeffcoat-Sacco
Executive Secretary
ND Public Service Commission
600 E. Boulevard Avenue
Bismarck, ND 58505

Re: Midcontinent Communications vs. Polar Telecom, Inc.,
HTC Services, Inc., Complaint – Case No. PU-04-237
OAH File 20040205

Dear Ms. Jeffcoat-Sacco:

Enclosed is the original Notice of Hearing and Specification of Issues signed by me in regard to the captioned matter, which was served on the named parties. Please serve it on anyone else you believe needs to be served. I have retained a copy for my file.

Sincerely,

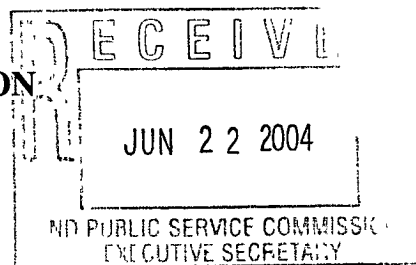
Allen C. Hoberg
Administrative Law Judge
Hearing Officer

ACH:ps

Enc.

cc: Ms. Sandi Scott, PSC

**STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION**



IN THE MATTER OF:)
)
 Midcontinent Communications)
)
 Complainant,)
)
 vs.)
)
 Polar Telecom, Inc. and HTC Services, Inc.)
)
 Respondents.)

**NOTICE OF HEARING
AND SPECIFICATION OF ISSUES**

**OAH File No. 20040205
Case No. PU-04-237**

.....

On May 13, 2004, Midcontinent Communications, a South Dakota Partnership (“Midcontinent”), filed a Complaint with the North Dakota Public Service Commission against Polar Telecom, Inc., a North Dakota Corporation d/b/a Polar Communications (“Polar”), and HTC Services, Inc., a Minnesota corporation (“HTC”), alleging violations of N.D.C.C. § 49-21-24. See Complaint, which was served on the Commission and the respondents. On June 11, 2004, the Complaint was referred to the Office of Administrative Hearings pursuant to N.D.C.C. § 49-21-24(2). Administrative Law Judge Allen C. Hoberg was designated to preside as Hearing Officer.

A public hearing will be held on the Complaint on **September 3, 2004**, beginning at **9:00 a.m. CDT (8 a.m. MDT)** in the Commission hearing room, State Capitol, 12th Floor, Bismarck, North Dakota. You may listen to a broadcast of the hearing on the Commission’s website at <http://www.psc.state.nd.us/psc/media/comm-live.html>.

Post-it® Fax Note 7671		Date 8-25-04	# of pages 2
To Al Emineth	From	Bawde	
Co /Dept	Co	PSC	
Phone # 255-3513	Phone #	328-4081	
Fax # 255-6079	Fax #	328-2410	

Issues to be considered in this matter include whether under the provisions of N.D.C.C.

§ 49-21-24:

1. Polar is discriminating against Midcontinent by delaying and refusing to grant Midcontinent Local Number Portability ("LPN"), when, in fact, Polar grants LPN to Qwest.
2. HTC is discriminating against Midcontinent by delaying and refusing to grant Midcontinent LPN when, in fact, HTC intends to grant LPN to wireless carriers.

For more information contact the Public Service Commission, State Capitol, Bismarck, North Dakota 58505, 701-328-2400 or Relay North Dakota 1-800-366-6888 TTY. If you require any auxiliary aids or services, such as readers, signers, or Braille materials, please notify Illona Jeffcoat-Sacco, Executive Secretary, at least 24 hours prior to the hearing.

Dated at Bismarck, North Dakota this 22nd day of June, 2004.

State of North Dakota
Public Service Commission

By: 

Allen C. Hoberg
Administrative Law Judge
Hearing Officer
Office of Administrative Hearings
1707 North 9th Street
Bismarck, North Dakota 58501-1882
Telephone: (701) 328-3260

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

IN THE MATTER OF:)	
)	
Midcontinent Communications)	
)	
Complainant,	)	CERTIFICATE OF SERVICE
)	
vs.)	
	)	OAH File No. 20040205
Polar Telecom, Inc. and HTC Services, Inc.	)	Case No. PU-04-237
)	
Respondents.)	

.....

The undersigned certifies that a true and correct original copy of the **NOTICE OF HEARING AND SPECIFICATION OF ISSUES** was mailed, inside mail, at the State Capitol, on the 22 day of June

Ms. Ilona Jeffcoat-Sacco
Executive Secretary
ND Public Service Commission
600 East Boulevard Avenue
Bismarck, ND 58505

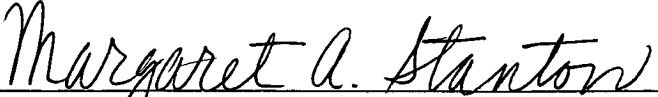
and that true and correct copies of the above document was mailed, regular mail, on the 22 day of June, 2004, to:

Polar Telcom, Inc.
Attn: Mr. David Dunning
P.O. Box 270
Park River, ND 58270

HTC Services, Inc.
Attn: Mr. Ron Laqua
P.O. Box 55
Halstad, MN 56548-0055

Mr. Patrick W. Durick
Pearce & Durick
P.O. Box 400
Bismarck, ND 58502

OFFICE OF ADMINISTRATIVE HEARINGS
Allen C. Hoberg, Administrative Law Judge


Margaret A. Stanton

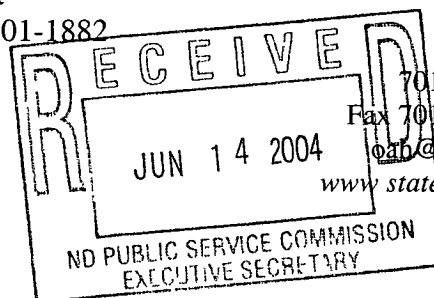


OFFICE OF ADMINISTRATIVE HEARINGS

STATE OF NORTH DAKOTA
1707 North 9th Street
Bismarck, North Dakota 58501-1882

Allen C Hoberg
DIRECTOR

June 11, 2004



701-328-3260
Fax 701-328-3254
oah@state.nd.us
www.state.nd.us/oah

Mr. William Binek
Hearing Administrator
Public Service Commission
600 E. Boulevard Avenue – Dept. 408
Bismarck, ND 58505-0480

Dear Mr. Binek:

Thank you for your June 9, 2004, request of the designation of an administrative law judge from the Office of Administrative Hearings to conduct a hearing in the matter of Polar Telecom, Inc., and HTC Services, Inc. (PU-04-237). I hereby designate myself as administrative law judge to conduct the hearing, make recommended findings of fact and conclusions of law, and issue a recommended order in regard to this matter.

Please send all additional relevant documents in regard to this matter (correspondence, and other pleadings and documents) to the designated administrative law judge at 1707 North 9th Street, Bismarck, North Dakota 58501. The administrative law judge will schedule the proceedings required for this matter and give notice as required by law.

Your request has been assigned OAH File No. 20040205. Please include this number on all future documents and correspondence filed for this matter with the Office of Administrative Hearings.

Sincerely,

Allen C. Hoberg
Director

AHC:ps

Enclosure: OAH Informational Guide to Polar Telecom, Inc.
OAH Informational Guide to HTC Services, Inc.

cc: David Dunning
Ron Laqua
Patrick W. Durick



Public Service Commission
State of North Dakota

COMMISSIONERS

Tony Clark, President
Susan E Wefald
Kevin Cramer

Executive Secretary
Illona A Jeffcoat-Sacco

600 E Boulevard Ave Dept 408
Bismarck, North Dakota 58505-0480
web www.psc.state.nd.us
e-mail ndpsc@psc.state.nd.us
TDD 800-366-6888
Fax 701-328-2410
Phone 701-328-2400

June 9, 2004

Mr. Allen C. Hoberg
Office of Administrative Hearings
1707 North 9th Street, Lower Level
Bismarck, ND 58501

Re: Midcontinent Communications
vs. Polar Telecom, Inc./HTC Services, Inc.
Complaint
Case No. PU-04-237

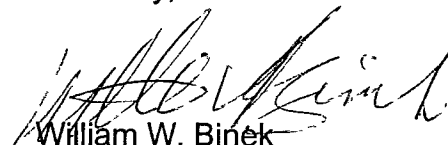
Dear Mr. Hoberg:

Enclosed is a request for a substantive administrative law judge in the above case. The Commission requests that the administrative law judge schedule and conduct a hearing in this case, and issue a recommended findings of fact, conclusions of law and order. A copy of the case is enclosed.

Please provide the Commission with a copy of any filings issued by your office in this matter.

If you have any questions, please contact me. Thank you.

Sincerely,


William W. Binek
Hearing Administrator

WWB/sls
Enclosure

C Patrick W Durick, Attorney
David Dunning
Ron Laqua



REQUEST FOR ADMINISTRATIVE LAW JUDGE--COMPLAINT
 NORTH DAKOTA OFFICE OF ADMINISTRATIVE HEARINGS
 SFN 17818 (Rev 03-2001)

Name of Agency, Board, or Commission Public Service Commission		
Name of Respondent(s) Polar Telecom, Inc	Address Attn David Dunning, P O Box 270, Park River, ND 58270	Telephone Number 701-284-7221
HTC Services, Inc.	Attn Ron Laqua, P O Box 55, Halstad, MN 56548-0055	218-456-2125

The above named agency, board, or commission has taken administrative action pursuant to its authority found in Title 49 _____ (North Dakota Century Code and/or North Dakota Administrative Code)

The administrative action is more fully described as follows
 Midcontinent Communications vs. Polar Telecom, Inc /HTC Services, Inc , Complaint, Case No PU-04-237

Has the respondent been provided a copy of the complaint? Yes No

Attached is a copy of the complaint, related documents and correspondence, and certificate, affidavit or admission of service. If the respondent has otherwise been notified about this administrative action, please explain in the comments section below

It requests designation of an administrative law judge (please check one)

- To conduct the hearing and issue **recommended findings of fact, conclusions of law, and order.**
- To serve as a **procedural administrative law judge only (no recommended decision). The agency head will be present at the hearing as required by NDCC 54-57-04(6).**
- To conduct the hearing, issue findings of fact, conclusions of law, and a **final order.**

PLEASE MAKE A REQUEST FOR AN ADMINISTRATIVE LAW JUDGE AT LEAST ONE MONTH BEFORE THE HEARING.

Agency Contact Person(s) William W Binek, Chief Counsel	Telephone Number 328-4088
--	------------------------------

Representation [attorney (or other)] if known

Agency William W Binek, Public Service Commission	Telephone Number 328-4088
Party Patrick W Durick, P O Box 400, Bismarck, ND 58502, Attorney for Midcontinent Communication	Telephone Number 701-223-2890
Party	Telephone Number

Additional Comments

Please schedule and conduct a hearing and issue a recommended findings of fact, conclusions of law and order Please provide the

Commission with a copy of all documents issued by the OAH regarding this case

(For agencies required to use OAH, notice of hearing will be issued by the administrative law judge, unless a procedural administrative law judge is requested Other requesting agencies and agencies requesting a procedural administrative law judge should first contact OAH about scheduling a hearing If notice has already been issued, attach a copy of the notice)

Typed or Printed Name and Title of Requesting Person William W Binek, Hearing Administrator	Date 6-9-04
Signature of Requesting Person X	Telephone Number 328-4088

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Midcontinent Communications vs.
Polar Telecom, Inc./HTC Services, Inc.
Complaint

Case No. PU-04-237

AFFIDAVIT OF SERVICE BY CERTIFIED AND ORDINARY MAIL

STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH

Sharon Helbling deposes and says that.

she is over the age of 18 years and not a party to this action and, on the **10th day of June, 2004**, she deposited in the United States Mail, Bismarck, North Dakota, **two** envelopes with certified postage, return receipt requested, fully prepaid, securely sealed and each containing a photocopy of

Complaint

The envelopes were addressed as follows

David Dunning
Polar Telecom Inc
P O Box 270
Park River ND 58270
Cert. No. 7002 2410 0003 4912 5840

Ron Laqua
HTC Services Inc
P O Box 55
Halstad MN 56548-0055
Cert. No. 7002 2410 0003 4912 5857

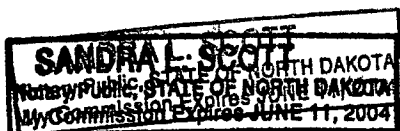
Sharon Helbling further deposes and says that on the **10th day of June, 2004**, she deposited in the United States Mail, Bismarck, North Dakota, **one** envelope by regular mail, with postage fully prepaid, securely sealed, each containing a photocopy of the same

Patrick W Durick
Pearce & Durick
P O Box 400
Bismarck ND 58502-0400

Each address shown is the respective addressee's last reasonably ascertainable post office address

Subscribed and sworn to before me
this **10th day of June, 2004**

SEAL



Sharon Helbling

Patrick W Durick

Notary Public

MOTION

June 9, 2004

APPROVED

DATE: 6-9-04

Kmf

**Midcontinent Communications vs.
Polar Telecom, Inc./HTC Services, Inc.
Complaint**

Case No. PU-04-237

I move the Commission find the complaint filed under N.D.C.C. 49-21-24 states a *prima facie* case, serve the complaint on Polar Telecom, Inc. and HTC Services, Inc., and refer the complaint to the office of administrative hearings for hearing and issuance of recommended findings of fact, conclusions of law and order

PJF/sdh

PEARCE & DURICK

WILLIAM P. PEARCE
PATRICK W. DURICK
B. TIMOTHY DURICK
GARY R. THUNE •
DAVID E. REICH
JEROME C. KETTLESOM
LARRY L. BOSCHEE •
LAWRENCE BENDER, PC •
JONATHAN P. SANSTEAD
BONNIE L. CHRISTNER

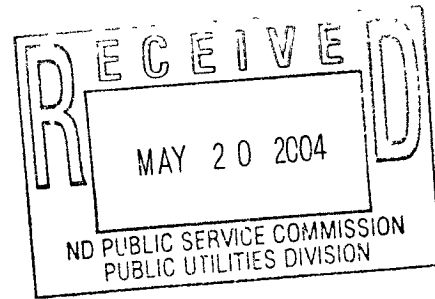
ATTORNEYS AT LAW
314 EAST THAYER AVENUE
P.O. BOX 400
BISMARCK, NORTH DAKOTA 58502

TELEPHONE (701) 223 2890
FAX (701) 223 7865
E-MAIL law.office@pearce-durick.com

May 14, 2004

Executive Secretary
Public Service Commission
600 East Boulevard Avenue-Dept. 408
Bismarck, North Dakota 58505-0480

RE: Midcontinent Communications - Complaint
Case No. _____



Dear Sir,

Enclosed for filing is an original and seven copies of this letter and the enclosed Midcontinent Communications Complaint of discrimination against Midcontinent by Polar Telecom, Inc and HTC Services, Inc. Pursuant to Subsection 49-21-24(2.), N. D. C. C., the Complaint requests that the Public Service Commission enter its order referring this matter to the Office of Administrative Hearings for a hearing on the allegations contained in the Complaint and issuance of recommended findings of fact, conclusions of law and proposed Order.

This document is also being transmitted electronically to your office. Also enclosed is an extra copy of the Complaint to be filed stamped and returned in the self-addressed, stamped envelope.

Thank you for your attention to this matter.

Sincerely,

PEARCE & DURICK

PATRICK W. DURICK

PWD/jf

Enclosures.

cc w/enc: Ms. Mary Lohnes
Midcontinent Communications, Inc.
J. G. Harrington
Dow, Lohnes & Albertson

2

PU-04-237

Pages 2

Cover letter re Complaint

by Midcontinent Communications by Patrick W. Durick

05/20/2004

CC Comm Legal Ilona

May 14, 2004 -2-

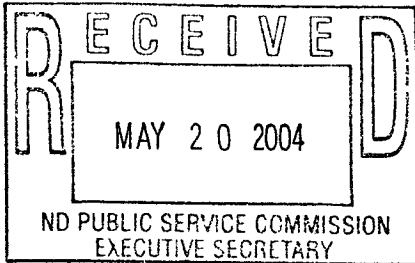
David Dunning
Polar Communications

Ron Laqua
HTC Services, Inc.

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Case No. _____

Midcontinent Communications, a)
South Dakota Partnership,)
)
Complainant,)
)
vs.)
)
Polar Telecom, Inc.)
a North Dakota Corporation d/b/a Polar)
Communications and HTC Services, Inc.,)
a Minnesota corporation,)



Respondents.

COMPLAINT

For its complaint against Polar Telecom, Inc. ("Polar") and HTC Services, Inc. ("HTC"), Midcontinent Communications ("Midcontinent") alleges as follows:

I.

Midcontinent has Certificates of Public Convenience and Necessity to provide local exchange telecommunications services to Mayville and Hillsboro, North Dakota.

II.

Midcontinent provides local exchange telecommunications services to the Mayville and Hillsboro, North Dakota exchanges pursuant to a resale agreement with Qwest Communications.

III

Polar has a Certificate of Public Convenience and Necessity to provide local exchange telecommunications services in areas of the Red River Valley in eastern North Dakota including the Mayville, North Dakota, exchange and Polar provides facilities based telecommunications services

to that exchange.

IV.

HTC has a certificate of Public Convenience and Necessity to provide local exchange telecommunications services to Hillsboro, North Dakota, and HTC provides facilities based telecommunications services to Hillsboro.

V.

Polar is providing Local Number Portability ("LNP") with Qwest in the Mayville, North Dakota exchange pursuant to Interconnect arrangements with Qwest.

VI.

HTC intends to implement LNP for wireless carriers in the Hillsboro exchange by May 24, 2004.

VII.

By written instrument in December of 2002, Midcontinent requested that both Polar and HTC provide LNP to Midcontinent for the Hillsboro and Mayville exchanges. Over the next 14 months, Midcontinent continued to attempt to obtain LNP from Polar and HTC. Despite repeated written requests, including a request as recently as December, 2003, and several negotiation sessions, Polar and HTC continued to refuse to provide LNP unless Midcontinent complied with the unreasonable and discriminatory conditions imposed by Polar and HTC.

VIII.

On April 5, 2004, Polar rejected a request for LNP of a telephone number in Mayville, North Dakota, citing "Rate Center mismatch" as the reason for the rejection. A copy of the jeopardy notice is attached hereto as Exhibit "A".

IX.

Section 49-21-24, N.D.C.C., prohibits a telecommunications company from discriminating against another telecommunications company by refusing or delaying access to the company's services. Polar is discriminating against Midcontinent by delaying and refusing to grant Midcontinent LNP when, in fact, Polar grants LNP to Qwest. HTC is discriminating against Midcontinent by delaying and refusing to grant Midcontinent LNP when in fact HTC intends to grant LNP to wireless carriers.

WHEREFORE, Midcontinent requests that the Public Service Commission enter its order referring this matter to the Office of Administrative Hearings for a hearing on the allegations contained herein and issuance of recommended findings of fact, conclusions of law and proposed Order.

Dated this 13th day of May, 2004

PEARCE & DURICK



PATRICK W. DURICK ND #03141

Individually and as a Member of the Firm
314 E. Thayer Avenue
P. O. Box 400
Bismarck, ND 58502-0400
(701) 223-2890

Attorneys for Midcontinent Communications, Inc.

To: nikki_norberg@mmi.net
Subject: LSR Jeopardy PON: C 892010316 VER: EC VER: 01

LSR Jeopardy EC VER 01
CCNA M07
PON. 0084892010316
VER
LSR ID 9918593

Jeopardy Notification Message(s)

1 Order: N10760125 SO - Subscriber Other.
Estimated Due Date: FDT: AFVR.

Comments

Polar rejected the LSR stating "The request for port of 788-4037 is being denied at this time due to Rate Center mismatch." This is a 4hr jep.

Qwest Representative. Qwest Rep
Representative Telephone Number: 888-796-9087

Qwest Private

Disclose and Distribute Solely to Qwest Employees, Partners or Affiliates
Having a

Need to Know.

Copyright (c) 2001 Qwest All Rights Reserved. Unpublished and Confidential
Property
of Qwest.

Legal: <http://www.qwest.com/legal/index.html>
Privacy: <http://www.qwest.com/legal/privacy.html>

PU-04-237

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to

William J Brudock
PO Box 547
Mayville MA 58257-0547

2. Article Number

(Transfer from service label)

7003 2260 0001 3517 9626

PS Form 3811, February 2004

Domestic Return Receipt

102595-02-M-1540

PU-04-237

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Ron Laguna
HSC Services Inc
Halstead Ma 56548-0055

2. Article Number

(Transfer from service label)

7003 2260 0001 3517 9572

PS Form 3811, February 2004

Domestic Return Receipt

102595-02-M-1540

PU-04-237

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

David Dunning
Polar Telecom Inc
PO Box 270
Park River ND 58270

2. Article Number

(Transfer from service label)

7003 2260 0001 3517 9565

COMPLETE THIS SECTION ON DELIVERY

A Signature

X Donna M Wilkie

Agent

Addressee

B Received by (Printed Name)

Donna M Wilkie

C Date of Delivery

2-22-05

D Is delivery address different from item 1? If YES, enter delivery address below.

Yes

No

3. Service Type

Certified Mail

Express Mail

Registered

Return Receipt for Merchandise

Insured Mail

C.O.D.

4. Restricted Delivery? (Extra Fee)

Yes

COMPLETE THIS SECTION ON DELIVERY

A Signature

X Melanie Nelson

Agent

Addressee

B Received by (Printed Name)

Melanie Nelson

C Date of Delivery

2/14/05

D Is delivery address different from item 1? If YES, enter delivery address below.

Yes

No

3. Service Type

Certified Mail

Express Mail

Registered

Return Receipt for Merchandise

Insured Mail

C.O.D.

4. Restricted Delivery? (Extra Fee)

Yes

COMPLETE THIS SECTION ON DELIVERY

A Signature

X Janice Casper

Agent

Addressee

B Received by (Printed Name)

Janice Casper

C Date of Delivery

2-15-05

D Is delivery address different from item 1? If YES, enter delivery address below.

Yes

No

3. Service Type

Certified Mail

Express Mail

Registered

Return Receipt for Merchandise

Insured Mail

C.O.D.

4. Restricted Delivery? (Extra Fee)

Yes

PU-04-237

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3 Also complete item 4 if Restricted Delivery is desired
- Print your name and address on the reverse so that we can return the card to you
- Attach this card to the back of the mailpiece, or on the front if space permits

1 Article Addressed to

Ron Ragua
 LLC Services Inc
 PO Box 55
 Ubatul Mn 56548-0055

2 Article Number
(Transfer from service label)

7002 2410 0003 4912 5857

PS Form 3811, August 2001

Domestic Return Receipt

2ACPRI-03-Z-0985

COMPLETE THIS SECTION ON DELIVERY

A Signature
 X *Melanie Nelson* Agent Addressee

B Received by (Printed Name) *Melanie Nelson* C Date of Delivery *6-17-04*

D Is delivery address different from item 1? Yes No
 if YES, enter delivery address below

3 Service Type
 Certified Mail Express Mail
 Registered Return Receipt for Merchandise
 Insured Mail C O D

4 Restricted Delivery? (Extra Fee) Yes

PU-04-237

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3 Also complete item 4 if Restricted Delivery is desired
- Print your name and address on the reverse so that we can return the card to you
- Attach this card to the back of the mailpiece, or on the front if space permits

1 Article Addressed to

David Dunning
 Polar Telecom Inc
 PO Box 270
 Park River ND 58270

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STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

IN THE MATTER OF: :
: :
Midcontinent Communications, :
: :
Complainant, :
: :
-vs- : Case No. :
: PU-04-237 :
Polar Telecom, Inc., and HTC :
: :
Services, Inc., :
: :
Respondents. :

TRANSCRIPT OF
PUBLIC HEARING

Taken At
State Capitol
Bismarck, North Dakota
September 3, 2004

40 PU-04-237 Filed 9/23/2004 Pages 275
Transcript of Hearing (Original)

Emineth & Associates Court Reporters

BEFORE ALLEN C. HOBERG
-- ADMINISTRATIVE LAW JUDGE --

EMINETH & ASSOCIATES
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BISMARCK, NORTH DAKOTA
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ORIGINAL

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State Capitol
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FOR THE PUBLIC SERVICE
COMMISSION.

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C O N T E N T S (Continued)

COMPLAINANT'S EXHIBITS:

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C7	Letter to Mary Lohnes from David Dunning, January 2, 2003	36	36
C8	Letter to David Dunning from J.G. Harrington, February 24, 2004	38	39
C9	Letter to J.G. Harrington from Dave Dunning, March 3, 2004	39	39
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RESPONDENTS' EXHIBITS:

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R7	Letter to J.G. Harrington from Ron Laqua, June 30, 2003	242	242

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C O N T E N T S (Continued)

RESPONDENTS' EXHIBITS:

No.	Description	O	R
R13	Local Calling Areas and Exchange Locations	137	237
R14	Draft Interconnection Agreement between Midcontinent Communications and CLEC-NAME for North Dakota	214	215

1 (The following proceedings were had and
2 made of record herein, commencing at 8:58 a.m.,
3 Friday, the 3rd day of September, 2004:)

4 JUDGE HOBERG: For the record it's nine
5 o'clock a.m. on -- or thereabouts on September 3rd,
6 2004. This is the time and place scheduled in the
7 Public Service Commission hearing room in Bismarck,
8 North Dakota, for the administrative complaint
9 hearing in the matter of Midcontinent
10 Communications versus Polar Telecom, Inc., and HTC
11 Services, Inc.

12 Complaint has been filed with the Public
13 Service Commission by Midcontinent under North
14 Dakota Century Code Section 49-21-24 requesting
15 administrative action against Polar Telecom and HTC
16 Services under North Dakota Century Code Chapter
17 49-21.

18 In the complaint submitted it has been
19 alleged that Polar is discriminating against
20 Midcontinent by delaying and refusing to grant
21 Midcontinent LNP, when, in fact, Polar grants LPN
22 to Qwest; and that HTC is discriminating against
23 Midcontinent by delaying and refusing to grant
24 Midcontinent LNP, when, in fact, HTC intends to
25 grant LNP to wireless carriers.

1 Again, these acts are alleged to have
2 occurred in violation of North Dakota Century Code
3 Section 49-21-24.

4 For the record, my name is Allen Hoberg.
5 I've been duly designated by the Commission to
6 preside in this matter. At this time let's take
7 appearances from the parties -- counsel for the
8 parties, and perhaps you could tell us who you have
9 with you, too. Starting with the complainant
10 Midcontinent, Mr. Durick, please.

11 MR. DURICK: Thank you, Mr. Hearing
12 Officer. My name is Pat Durick, and I'm appearing
13 on behalf of Midcontinent. Mr. J.G. Harrington is
14 to my left, and at this point I'd move for his
15 admission pro hac vice for purposes of this
16 proceeding.

17 JUDGE HOBERG: Thank you, Mr. Durick. Mr.
18 Brudvik?

19 MR. BRUDVIK: We would have no objection.

20 JUDGE HOBERG: Mr. Binek?

21 MR. BINEK: No objection.

22 JUDGE HOBERG: Okay. I'll grant the
23 motion.

24 MR. DURICK: Thank you. Back and to the
25 left here is Mr. Tom Simmons, who is the vice

1 president for public policy with Midcontinent. In
2 the middle is Nancy Vogel. Nancy is the business
3 director for communications with Midcontinent, and
4 directly behind me is Mary Lohnes, who is the
5 manager of regulatory affairs for Midcontinent.

6 JUDGE HOBERG: Thank you, Mr. Durick.

7 MR. DURICK: Mr. Hearing Officer, I'll
8 give you the cards.

9 JUDGE HOBERG: Why don't you give them to
10 the court reporter.

11 MR. DURICK: Okay.

12 JUDGE HOBERG: Thank you. Mr. Brudvik,
13 please.

14 MR. BRUDVIK: Thank you, Your Honor. My
15 name is William Brudvik, attorney representing both
16 of the respondents, Polar Telecom, Inc., and HTC
17 Services, Inc. They appear -- and I represent
18 both. They do appear separately as defendants.
19 Their defenses may at sometimes be joint and
20 sometimes separate, but we have discussed that.

21 JUDGE HOBERG: Why don't you pull that
22 mike over in front of you, please.

23 MR. BRUDVIK: All right. Like this? Do
24 you want me to start over again?

25 JUDGE HOBERG: No. That's fine.

1 MR. BRUDVIK: Oh, all right. To my right
2 is Ron Laqua, manager of Halstad Telephone Company
3 and HTC Services. Dave Dunning, manager of Polar
4 Communications and Polar Telecom, Inc., their
5 subsidiary. Eileen Bodamer is a consultant for
6 Polar. Bill Binek's behind me, but Tom Maroney is
7 plant manager for Halstad Telephone Company, and
8 Joe Schuele is a consultant for Halstad Telephone
9 Company.

10 JUDGE HOBERG: Thank you, Mr. Brudvik.
11 Mr. Binek, please.

12 MR. BINEK: My name is William Binek. I'm
13 counsel for the Public Service Commission, and with
14 me is Patrick Fahn, a public utility analyst with
15 the Commission.

16 JUDGE HOBERG: Thank you, Mr. Binek. And
17 you've informed me that due to circumstances Mr.
18 Fahn may be asking some of the questions here.

19 MR. BINEK: Yes. My throat's about shot
20 already. So if we do have very many questions, I
21 would like to have Mr. Fahn ask those questions.

22 JUDGE HOBERG: Okay. Thank you, Mr.
23 Binek. And our court reporter today is Stephanie
24 Smith. The complaint was served on the respondents
25 in May, a notice of hearing and specification of

1 issues was sent to the respondents in June. Is
2 there any reason to question whether proper notice
3 of this hearing has been given?

4 MR. BRUDVIK: No.

5 MR. DURICK: None here.

6 JUDGE HOBERG: Okay. Hearing none, I also
7 should note that a prehearing conference was held
8 in this matter on August 25th.

9 Here's the hearing procedure we'll follow
10 today. I'll first call on Midcontinent to present
11 its case by calling witnesses and presenting
12 evidence as it may choose. At the prehearing
13 conference, Mr. Durick, you indicated you have one
14 witness. Is that still true?

15 MR. DURICK: That's correct, Mr. Hearing
16 Examiner.

17 JUDGE HOBERG: Okay. And, of course, that
18 witness will be subject to direct examination,
19 cross-examination, then I may have some questions,
20 and then I'll allow both sides to ask questions
21 again of the witness. And upon completion of
22 Midcontinent's presentation the respondents may
23 present a case if they choose to do so, and you've
24 indicated that you're likely to call five
25 witnesses, Mr. Brudvik; is that still true?

1 MR. BRUDVIK: Possibly.

2 JUDGE HOBERG: Possibly, yeah. Okay.
3 It'll be the same procedure there then, direct,
4 cross, questions by me, and such further questions
5 as are necessary.

6 I'd just like to caution -- or I guess
7 advise counsel and the witnesses that acronyms
8 should be spelled out for me and the meaning
9 clearly explained, at least initially.

10 I won't be reaching a decision on this
11 matter today. We're recording these proceedings by
12 court reporter and tape recording, and I'll review
13 the evidence later. We've talked a little bit
14 about filing closing written briefs and proposed
15 findings of fact, et cetera.

16 Anyway, after all of the evidence and the
17 matter is closed, I'll review that, and I'm charged
18 with issuing a recommended decision to the Public
19 Service Commission, which will then issue a final
20 decision on this matter. The PSC may accept,
21 reject or modify my recommendation.

22 If a party doesn't agree with the final
23 decision of the PSC, they may have appeal rights or
24 other rights under the Administrative Agencies
25 Practices Act or Article 69-02 of the North Dakota

1 Century Code. The expense of transcribing these
2 proceedings, if necessary, will be borne by the
3 party appealing the decision.

4 It's pretty clear to me today that the
5 burden of proof is on the complainant,
6 Midcontinent, to prove by the greater weight of the
7 evidence that the discrimination alleged under
8 49-21-24 is proven.

9 Any questions about procedures today, Mr.
10 Durick?

11 MR. DURICK: None.

12 JUDGE HOBERG: Mr. Brudvik?

13 MR. BRUDVIK: None, Your Honor.

14 JUDGE HOBERG: Okay. Did you want to
15 begin with an opening statement, Mr. Durick?

16 MR. DURICK: I don't believe so. I think
17 we'll just start with the witnesses, unless you
18 would like one.

19 JUDGE HOBERG: Did you want an opening?

20 MR. BRUDVIK: No. I think we filed
21 pretrial briefs, and I think that outlines the
22 positions of the parties.

23 JUDGE HOBERG: And I appreciated those.
24 They were very helpful. Mr. Durick, why don't you
25 call your first witness, please.

1 MR. DURICK: Very good. Our first witness
2 is Mary Lohnes.

3 JUDGE HOBERG: I am required by law to
4 tell you, as I tell all witnesses at administrative
5 proceedings, that the maximum penalty for perjury
6 in this state is a Class C Felony, punishable by a
7 maximum 5 years imprisonment, \$5,000 fine, or both.

8 (Witness sworn.)

9 JUDGE HOBERG: Thank you. Mr. Durick,
10 please.

11 MR. DURICK: Thank you.

12 MARY LOHNES,

13 being first duly sworn, was examined and testified
14 as follows:

15 DIRECT EXAMINATION

16 BY MR. DURICK:

17 Q. Mary, can you give your name and address to
18 the court reporter, please?

19 A. Mary Lohnes. My business address is 5001
20 West 41st Street in Sioux Falls, South Dakota, with
21 Midcontinent Communications.

22 JUDGE HOBERG: How do you spell your last
23 name?

24 THE WITNESS: L-o-h-n-e-s.

25 Q. (MR. DURICK CONTINUING) I think we'll

1 start by defining what LNP is, local number
2 portability, if you could just give us a brief
3 definition of that.

4 A. Local number portability allows a customer
5 the ability to take his phone number between
6 carriers.

7 Q. Okay. And I think we'll -- the next thing
8 we're going to do is talk a little bit about the
9 parties. Obviously you work for Midcontinent
10 Communications, and why don't you tell us what your
11 educational background is and your employment
12 history, if you would.

13 A. Certainly. I have a business
14 administration degree with emphasis in
15 organizational behavior and management. I got that
16 degree at Sioux Falls College in Sioux Falls, South
17 Dakota. I've been with Midcontinent since 1991.
18 I've been there 13 years, if my math is right. I
19 began working with Midcontinent in the sales
20 department doing reporting and administrative work
21 in the sales group, promoted into the long distance
22 department as the product manager of long distance.

23 With the 1996 Act and the entrance into
24 local service I became part of the team, which
25 worked on bringing local service as a product into

1 Midcontinent. With that I worked with our staff in
2 processing orders and taking care of any trouble
3 tickets and assisted in regulatory areas. In 2001
4 I became the regulatory affairs manager, and I take
5 care of escalated problems that we might have in
6 the telephone service group.

7 Q. All right. And can you tell us -- just
8 give us a brief description of Midcontinent and
9 what its business is, Midcontinent Communications?

10 A. Midcontinent Communications is the
11 formation of two companies, Midcontinent Cable,
12 which is our cable TV. Has been in North Dakota/
13 South Dakota areas for years. I don't remember the
14 date or the year that they began business. We
15 merged the cable company along with Midco
16 Communications, the telephone company, to form one
17 company, Midcontinent Communications.

18 Q. Okay. Now --

19 JUDGE HOBERG: Mr. Durick, why don't you
20 move the mike over there. I'm picking you up, but
21 it would be clearer if you --

22 Q. (MR. DURICK CONTINUING) Okay. We're
23 concerned with a matter in the eastern part of the
24 United States and a number of parties, the two
25 respondents in this case, are Midcontinent --

1 excuse me, Polar Telecom, Inc, and HTC Services,
2 Inc., and there's also going to be some testimony
3 about Qwest. I'd like to define those parties'
4 relationship in the area that we're talking about.
5 First with Qwest, as I understand it, Qwest is an
6 ILEC, which is an acronym, and can you tell us what
7 that means and what Qwest -- part Qwest plays in
8 this particular proceeding?

9 A. ILEC is incumbent local exchange carrier,
10 incumbent meaning they were the first ones there.
11 A history a little bit on Qwest, they are an RBOC,
12 a regional Bell operating company. Many number of
13 years ago with the divestiture of AT&T and the Bell
14 Companies, with the formation of other Bell
15 operating companies, of which Northwestern Bell was
16 one. Through the ages Northwestern Bell became
17 U S West, U S West became Qwest. Qwest then is the
18 originating -- the original local exchange carrier
19 in the communities of Hillsboro, Mayville,
20 Portland.

21 Polar and Halstad Communications are now
22 CLECs or competitive local exchange carriers in
23 those communities. Midcontinent is also a CLEC,
24 and we are looking to do competitive business in
25 those same communities.

1 Q. So that covers Qwest and Midcontinent and
2 Polar Telecom. Did you tell us what they were?

3 A. Yes.

4 Q. Okay. And Halstad or HTC Services. Okay.
5 I've -- I'd now like to get into some terms that
6 we're going to be using in this procedure to
7 describe the telephone service in the area we're
8 talking about. I wonder if you could tell us what
9 a rate center is in the telecommunications
10 business.

11 A. Certainly. A rate center is the
12 geographic point from which a call is centered.
13 It's measured on distance, assigned to an NXX.
14 When you become a facilities-based carrier, you
15 make application for an NXX or a prefix as part of
16 your phone number, and the rate center is the
17 assigned location for that NXX.

18 Q. Now, there are some other terms -- we
19 talked rate center, and can you now tell us what a
20 local calling center area is?

21 A. The local calling area is that area
22 assigned to that NXX which has no toll charges.
23 You can pick up your phone and make a call from one
24 party to another party without any toll charges
25 assessed to that call.



1 Q. Okay. And we're going to be talking -- in
2 addition to a local calling area, we're going to be
3 talking about an EAS, I believe it is, extended
4 area service.

5 A. Extended area service.

6 Q. Can you explain to us what that is?

7 A. You're assigned a local calling area for
8 your NXX. Sometimes based on the community, the
9 needs of the customers in those communities, you
10 may want to extend your assigned calling area and
11 you make application to extend it. There's a lot
12 of work that goes into doing that. It's not just a
13 simple we're going to bring that little town into
14 our local calling area. You have to do some
15 analysis on costing and if it's cost-effective to
16 do that, but it's a matter of extending your local
17 calling area beyond the assigned boundaries.

18 Q. Okay. There's also reference made to an
19 exchange. Can you tell us what an exchange is?

20 A. Exchange is the same as the local calling
21 area. It's assigned local calling area service.

22 Q. And I think in your discussion you talked
23 about Qwest being a facilities-based carrier. Can
24 you just tell us what that would be?

25 A. When you're facilities based, you're using

1 your own network versus being a resold carrier
2 where you make arrangements with a facility-based
3 carrier to use their network, lease it, rent it.

4 MR. DURICK: All right. I'm going to mark
5 an exhibit here. C1, is that all right for --

6 JUDGE HOBERG: Yeah. He's marked his R1
7 through whatever and yours can be C1.

8 MR. DURICK: Okay. I'll mark this as C1.

9 Q. (MR. DURICK CONTINUING) I'm showing you
10 what I've marked --

11 MR. BRUDVIK: Excuse me, Pat. That's not
12 my 1. What's that? This is C1 here?

13 MR. DURICK: This one right here.

14 Q. (MR. DURICK CONTINUING) So I'm showing
15 you what I have marked as Exhibit C1, and I wonder
16 if you could just describe to us --

17 JUDGE HOBERG: Does Mr. Binek have copies?
18 I need one, too.

19 Q. (MR. DURICK CONTINUING) If you could,
20 describe for us what is on Exhibit C1.

21 A. C1 is an illustrative map of the local
22 calling areas and exchange areas for the Mayville/
23 Hillsboro area of North Dakota.

24 Q. And you have marked -- or there is marked
25 on there, I take it, exchange boundaries. The red

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1 is Halstad, the blue is Polar Telecom, and the
2 black is Qwest; is that correct?

3 A. That's correct. That's what I understand
4 the map to show.

5 Q. Okay. This is not meant to be to scale;
6 is that right?

7 A. Correct. It's just for illustrative
8 purposes in our discussions.

9 Q. And the locations themselves, the city
10 locations, have a color code. Can you tell us
11 basically what that color code is?

12 A. Yes. The color green is to indicate those
13 territories that we've identified to be serviced by
14 Halstad, Polar and Qwest, the areas in blue are
15 those communities that we've identified to be
16 serviced by Polar, and the red are those
17 communities we've identified to be serviced by
18 Halstad.

19 MR. DURICK: We intend to use this for
20 illustrative purposes only, and I'd move for the
21 introduction of what I've marked as C1, Mr. Hearing
22 Examiner.

23 MR. BRUDVIK: May I cross for purposes of
24 laying a foundation, not really for an objection,
25 but we think it's maybe not totally accurate.

1 JUDGE HOBERG: Well, I mean, that's --
2 that would be the subject of cross and purposes of
3 a further exhibit, but --

4 MR. BRUDVIK: I think we could clarify it
5 real quick.

6 JUDGE HOBERG: All right.

7 MR. BRUDVIK: All right. Mary, do you
8 have this in front of you?

9 THE WITNESS: Yes, I do.

10 MR. BRUDVIK: Okay. Now you have
11 identified in the red box the local calling area
12 for Halstad or HTC Services, I believe; right?

13 THE WITNESS: Correct.

14 MR. BRUDVIK: Is it -- are you intending
15 to show by this document that a Shelly or a Halstad
16 call would be a local call to Mayville?

17 THE WITNESS: That's our understanding.

18 MR. BRUDVIK: Oh, okay. So if -- if that
19 is not correct, you think that those are -- you
20 don't know that those are long distance calls?

21 THE WITNESS: I do not.

22 MR. BRUDVIK: Okay. I think -- Mr.
23 Hearing Officer, I think the document is fine, it's
24 very helpful, we were hoping we'd have something
25 like this, but it is a little misleading because

1 for the record, Shelly and Halstad calls are local
2 to Hillsboro but not Mayville.

3 JUDGE HOBERG: Well, that may be testimony
4 that's given by other witnesses.

5 MR. BRUDVIK: All right. Just so that we
6 clarify that at this point because I think it is
7 otherwise a good example, very illustrative.

8 JUDGE HOBERG: Mr. Binek, any objection?

9 MR. BINEK: No.

10 JUDGE HOBERG: I'll admit Exhibit C1.

11 MR. DURICK: Thank you.

12 Q. (MR. DURICK CONTINUING) We have talked
13 then -- you differentiated for us and why don't you
14 summarize one more time the difference between a
15 local calling area and extended area service, which
16 is an acronym, EAS, I believe.

17 A. Certainly. Local calling, if we were to
18 look at Hillsboro on this map, would be the calls
19 that fall within the immediate black box, which
20 would be the Qwest local calling area, and I'm
21 going to use Qwest as my example. If Qwest were
22 wanting to bring the Mayville/Portland community
23 into their local calling area, that would be an
24 extended area service. They're extending their
25 local calling area to include a community that was

1 not a part of their assigned local calling.

2 Q. Okay. You have defined for us what LNP
3 means, local number portability, and I'd like to
4 just hone in on it for a moment. I wonder if you
5 could tell us why LNP is important to a
6 telecommunications carrier such as Midcontinent.

7 A. Local number portability provides the
8 ability for a customer to take his phone number
9 from one company to another company. It creates
10 fair competition under the rules of the Act. Many
11 customers have lived with their phone numbers
12 forever, and the residential, the consumer
13 customers many times just simply don't want to give
14 them up, especially the senior citizens we've
15 found. They become attached to their phone number.
16 The business community, the telephone number
17 becomes their lifeline. It's on their letterhead,
18 it's on their business cards, many times it's on
19 their vehicles. So for them to have to change a
20 phone number is almost an impossibility. So to
21 make competition fair, there's local number
22 portability so the business person can choose the
23 carrier that best fits and can handle his services
24 best.

25 Q. Okay. Are you familiar with statistics

1 for Midcontinent in their telephone service as to
2 how many applicants would request local number
3 portability, requests that their number be changed
4 with them when they change carriers?

5 A. We periodically look at data like that
6 simply because we have NXXs for those areas where
7 we have our own facilities and we need to keep an
8 eye on the exhaustion of those NXXs. So we do look
9 at that data. Recent figures show that of all new
10 customers coming to Midcontinent, 60-some
11 percent -- I think it was like 62 or 63 percent of
12 the customers were choosing to carry their number
13 with them. Now that's all customers. If we could
14 sort that out and find those customers that were
15 coming to us from another carrier, they already
16 have a phone number, we believe that that number
17 would jump much higher into the 90 percentile. The
18 60 percent includes all those customers who maybe
19 have never had service.

20 Q. Can you tell us what the usual process is
21 in Midcontinent for requesting local number
22 portability?

23 A. In those exchanges where we have been
24 doing business with Qwest and there may be a new
25 CLEC in the area, we simply contact that carrier

1 and get information on how to exchange order
2 processing, contact information, you know, who do
3 we talk about if there's a hangup with the order,
4 who do we talk about with trouble tickets. There
5 is no need for an agreement. We just simply
6 communicate with phone calls, e-mails, faxes and
7 how to work the process.

8 Q. Okay. I take it that Midcontinent deals
9 with other carriers other than Polar and HTC as in
10 this case in the local number portability area.

11 A. Correct.

12 Q. What has Midcontinent's experience been
13 with carriers with respect to requests for LNP?

14 MR. BRUDVIK: I'm going to object to the
15 relevance of the question.

16 JUDGE HOBERG: Mr. Durick, how is it
17 relevant?

18 MR. DURICK: I think this goes to what the
19 industry understands the process to be with respect
20 to LNP and shows that it's a very clear process and
21 there isn't misunderstanding with how it works in
22 the majority of the carriers that Midcontinent
23 deals with. I think it's relevant for that
24 purpose.

25 JUDGE HOBERG: I'll allow the question.

1 You can respond.

2 THE WITNESS: In those exchanges where
3 Qwest is the incumbent local carrier, we have had
4 no problem in setting up local number portability.

5 Q. (MR. DURICK CONTINUING) Do you have
6 interconnection agreements with other carriers that
7 address local number portability, or is that
8 necessary?

9 A. It's not necessary.

10 Q. Okay. Maybe we can stop here and talk
11 about a couple of definitions, too. You talked
12 about NXX. Can you tell us what you're referring
13 to when you say NXX?

14 A. It's the prefix part of your phone number.
15 First you have your area code, which is known as
16 the NPA, and then you have an NXX, which is your
17 next three digits of your seven-digit telephone
18 number.

19 Q. Okay. Now I also talked about an
20 interconnection agreement. Can you tell us what an
21 interconnection agreement is?

22 A. That's an agreement that we establish with
23 another telephone company so that we could connect
24 to their facilities and exchange traffic with them.

25 Q. Now there -- the answer mentions that

1 there were some negotiations between Midcontinent
2 and Polar and HTC with respect to an
3 interconnection agreement. Can you tell me why, if
4 there is a reason why, you were negotiating with
5 Polar and HTC on an interconnection agreement?

6 A. Midcontinent's initial request to Polar
7 and HTC was we wanted to be a resold carrier and
8 wanted to establish portability which would take
9 the NXX to the Qwest switch because we're reselling
10 through Qwest. Through many of our discussions we
11 found that there were some issues or concerns that
12 Polar and HTC had with that and wondered if we
13 could circumvent some of those issues by
14 establishing an interconnection agreement between
15 our parties. So we began discussions on seeing
16 what we could do to work together.

17 Q. Now we've been talking about Polar and
18 HTC. Is my understanding -- and maybe this is
19 repetitious, but Mayville/Portland is a Polar site,
20 where they have their competitive local exchange
21 carrier in the Mayville/Portland area; is that
22 correct?

23 A. Correct.

24 Q. And HTC is in the Hillsboro area; is that
25 correct?

1 A. Correct.

2 Q. Can you tell us Midcontinent's approach to
3 entering a market such as Mayville/Portland or
4 Hillsboro for telephone service?

5 A. Midcontinent typically enters a market on
6 a resold basis first. It's the quickest way into
7 the market. It gives us an opportunity to see what
8 the customers' needs are before we establish or put
9 any expense into the possibility of establishing
10 our own facilities, or it also lets us see if there
11 are other options in which to provide service,
12 unbundled network elements, for example.

13 Q. Okay. Maybe -- you mentioned that
14 Midcontinent is a reseller. Can you explain to the
15 Hearing Examiner what a reseller is?

16 A. Certainly. A reseller leases the network,
17 the switching, everything basically from the
18 incumbent carrier. Basically Midcontinent bills
19 the customer, is about all that we're really
20 responsible for. The network is a part of the
21 incumbent.

22 Q. So at the present time Midcontinent
23 doesn't have facilities of its own in either
24 Hillsboro or Mayville/Portland; is that correct?

25 A. Correct.

1 Q. Now, with respect to this matter, did you
2 take some action to request local number
3 portability from Polar and HTC?

4 A. Yes, we did. Our initial request was back
5 in December of 2002 where we sent them a letter as
6 a bona fide request for local number portability.

7 Q. Okay. I'm going to show you what I have
8 marked as Exhibit Nos. C2 and C3. I'd ask if you
9 could take a look at those and identify those as
10 the letters that were sent out, and I'll provide
11 copies.

12 A. Yes. These are the letters that I sent to
13 the companies. One was sent to Mr. Ken Fischer at
14 Polar Telecommunications, the other was sent to Ron
15 Laqua at Halstad Telephone Company.

16 MR. DURICK: All right. I see where these
17 have got the wrong exhibit number on the top.

18 MR. BRUDVIK: I've got them.

19 MR. BINEK: Which exhibit is 2 and which
20 is 3?

21 MR. DURICK: C2 is -- which one is C2?

22 THE WITNESS: Polar.

23 MR. DURICK: C2 is Polar and C3 is the
24 letter to HTC or Halstad; is that correct?

25 THE WITNESS: Correct.

1 MR. DURICK: I'd move, Your Honor, for the
2 introduction of Exhibit Nos. C2 and C3.

3 MR. BRUDVIK: No objection.

4 JUDGE HOBERG: Mr. Binek, any objection?

5 MR. BINEK: No objection.

6 JUDGE HOBERG: C2 and C3 are admitted.

7 Q. (MR. DURICK CONTINUING) And if you
8 recall, was there a response to Exhibits C2 and C3?

9 A. Yes. I don't recall the date exactly, but
10 I believe it was somewhere like December 7th that I
11 received one response and about the 20th that I
12 received the other response, both indicating that
13 they'd received my letter and were going to be
14 looking into it further and get back in contact
15 with us.

16 JUDGE HOBERG: Was that an oral response?

17 THE WITNESS: No. Written.

18 MR. DURICK: I'm going to mark as exhibits
19 C4 and C5 the letters that I will ask you to
20 identify. C4 is the letter from Mr. Dunning and C5
21 is a letter from Mr. Fischer.

22 Q. (MR. DURICK CONTINUING) Can you identify
23 Exhibits C4 and C5?

24 MR. BRUDVIK: C4 is from Laqua at Halstad,
25 Pat.

1 MR. DURICK: What's that?

2 MR. BRUDVIK: C4 is from Laqua at Halstad.

3 THE WITNESS: C4 is the letter that I
4 received on January 2nd from David Dunning at Polar
5 Telecom, and C5 is the letter that I received on --
6 written on December 20th from Ken Fischer at Polar
7 Communications.

8 MR. DURICK: Just change them if yours are
9 marked wrong.

10 MR. BRUDVIK: Can we go off the record for
11 just a moment?

12 (Discussion had off the record.)

13 Q. (MR. DURICK CONTINUING) Okay. C4 is the
14 letter from Mr. Dunning; is that correct?

15 A. Yes.

16 Q. C5 is then the letter from Mr. Laqua?

17 A. So do you want -- Mr. Durick, do you want
18 this one to be remarked? This is the one from Mr.
19 Fischer.

20 Q. Correct. C5 and --

21 A. That one's 5 now.

22 Q. C4 we'll have as the letter from -- the
23 December 20th letter from Mr. Fischer, and C5 is
24 the letter then from Mr. Dunning?

25 JUDGE HOBERG: What's the date of the

1 Dunning letter?

2 MR. BRUDVIK: Don't you want the Halstad
3 letter?

4 JUDGE HOBERG: Wait a minute. Let's go
5 off the record here and get this straightened out.

6 (Discussion had off the record.)

7 JUDGE HOBERG: Let's go back on the
8 record. Mr. Durick, please.

9 MR. DURICK: I want to get Mr. Binek a
10 copy, also. All right. Then --

11 JUDGE HOBERG: You're offering these?

12 MR. DURICK: Yes, I'm going to offer
13 those, Your Honor.

14 MR. BRUDVIK: No objection.

15 MR. BINEK: No objection.

16 JUDGE HOBERG: Okay. Exhibits C4 and C5
17 are admitted.

18 Q. (MR. DURICK CONTINUING) So you wrote to
19 both organizations asking them for local number
20 portability --

21 A. Yes.

22 Q. -- and they responded to you?

23 A. Correct.

24 Q. And what were those responses, just a --

25 A. They acknowledged receipt of my December

1 3rd letter requesting local number portability and
2 that they were going to be looking into it further
3 with their staffs and getting back in contact with
4 me.

5 Q. Okay. And then did you subsequently
6 receive more detailed responses?

7 A. Yes, I did.

8 Q. Okay. And let me make sure that we -- do
9 you remember the dates for those?

10 A. I don't recall.

11 JUDGE HOBERG: Let's go off the record.

12 (Off the record.)

13 JUDGE HOBERG: Let's go back on.

14 Q. (MR. DURICK CONTINUING) Okay. I'm
15 showing you first a letter dated January 3rd of
16 2003, that would be marked as Exhibit No. 6, and
17 ask if you could identify that for us.

18 A. January 3rd letter is from Ron Laqua of
19 HTC Communications regarding the number
20 portability, again acknowledging receipt of my
21 December 3rd request. He went on to clarify the
22 ownership of the companies, explained who Halstad
23 Telephone is and who HTC is, and that future
24 correspondence I should direct to HTC Services. He
25 then went on to address --

1 JUDGE HOBERG: Wait a minute now. We just
2 need to know what the document is at this point.

3 THE WITNESS: Okay.

4 MR. BRUDVIK: We have no objection.

5 JUDGE HOBERG: No objection?

6 MR. BINEK: No.

7 MR. DURICK: I'd move for the introduction
8 of C6 then.

9 JUDGE HOBERG: Did you get a copy, Mr.
10 Binek?

11 MR. BINEK: Yes.

12 JUDGE HOBERG: C6 is admitted.

13 Q. (MR. DURICK CONTINUING) And now can you
14 tell us -- just summarize for us what the response
15 was.

16 A. Certainly. The response was again a
17 followup to my letter requesting local number
18 portability. He clarified the companies, Halstad
19 Telephone and HTC, and that I should be working
20 with HTC on the local number portability issue.
21 Then he went on to share some of his concerns with
22 local number portability as it's related to his
23 company.

24 Q. All right. Did you then have further
25 negotiations with both carriers?

1 A. Yes, we did. We had a number of letter
2 correspondence going back and forth, e-mails, phone
3 calls. We had conference calls over several weeks
4 and months.

5 Q. (MR. DURICK CONTINUING) Okay. With
6 respect to Polar I'm showing you what has been
7 marked as Exhibit No. C7 and would ask if you could
8 identify that document, please.

9 A. This is a letter dated January 2nd from
10 David Dunning of Polar Telecom.

11 Q. And that's in response to -- or that's a
12 followup to the letter that you previously received
13 from Polar?

14 A. Correct.

15 MR. DURICK: Okay. I'd move for the
16 introduction of C7.

17 JUDGE HOBERG: Any objection?

18 MR. BRUDVIK: No objection.

19 MR. BINEK: No.

20 JUDGE HOBERG: C7's admitted.

21 Q. (MR. DURICK CONTINUING) And can you then
22 summarize for us what negotiations might have taken
23 place from that point forward with respect to local
24 number portability?

25 A. Certainly. In the January 2nd letter Mr.

1 Dunning again -- he also expressed some of his
2 concerns with number portability, and from that we
3 continued to converse with letters, e-mails,
4 conference calls on how we could make portability
5 happen.

6 Q. All right. And did you ever get a
7 response that local number portability would, in
8 fact, be provided?

9 A. There were a couple of instances where we
10 were advised that unless we could match calling
11 areas with their companies -- because we're a
12 resold carrier of Qwest, Qwest's local service area
13 does not match the local service areas of Polar
14 Telecom or of HTC Services. So their concern was
15 that these local calling areas needed to match, and
16 until we could make that happen, that they were
17 reluctant or would not be providing us local number
18 portability.

19 Q. Okay. And did you get counsel involved in
20 this process?

21 A. Yes, we did. I had had a couple of
22 conversations with Mr. Pat Fahn here at the PSC, I
23 had talked with the president of Qwest in North
24 Dakota, I had had conversations with our attorney
25 on how we should proceed with our desire to have

1 number portability in those exchanges.

2 Q. Did Mr. Harrington correspond, if you
3 know, with Polar and HTC?

4 A. Yes. There were a number of letters from
5 Mr. Harrington on behalf of Midcontinent.

6 Q. I'm going to show you what I have marked
7 as Exhibit No. 7 --

8 JUDGE HOBERG: 8.

9 Q. (MR. DURICK CONTINUING) -- C8 and ask if
10 you can identify that for the record.

11 A. C8 is a letter dated February 24th. It's
12 from J.G. Harrington, counsel of Midcontinent,
13 addressed to David Dunning at Polar Communications.

14 MR. BRUDVIK: Just a minute. I'm not
15 finding it here.

16 MR. DURICK: Tab 17.

17 MR. BRUDVIK: 17. Okay.

18 Q. (MR. DURICK CONTINUING) And you
19 understand that was a letter from your counsel
20 to -- can you identify the recipients again?

21 A. It was from J.G. Harrington, counsel of
22 Midcontinent, addressed to David Dunning of Polar
23 Communications.

24 MR. DURICK: Okay. I move for the
25 introduction of Exhibit C8.

1 MR. BRUDVIK: No objection.

2 MR. BINEK: No objection.

3 JUDGE HOBERG: Exhibit C8's admitted.

4 Q. (MR. DURICK CONTINUING) And are you aware
5 of a response to that particular letter?

6 A. I'm aware that they responded. I don't
7 recall what it --

8 Q. Okay. I'm showing you what I have marked
9 as Exhibit No. 9 and ask that you -- C9 actually,
10 and ask that you take a look at that and identify
11 it for us, if you would.

12 MR. BRUDVIK: Where is it in here, Pat?

13 MR. HARRINGTON: March 3rd letter.

14 MR. BRUDVIK: Which tab?

15 MR. HARRINGTON: 16.

16 Q. (MR. DURICK CONTINUING) And do you
17 recognize that as a response to the letter from
18 your counsel, Mr. Harrington?

19 A. Yes, I do.

20 MR. DURICK: We'd move for the
21 introduction of Exhibit No. C9.

22 MR. BRUDVIK: No objection.

23 MR. BINEK: No objection.

24 JUDGE HOBERG: C9's admitted.

25 Q. (MR. DURICK CONTINUING) Now with respect

1 to Exhibit C9, in that letter is there a position
2 of both Polar and HTC with respect to your request
3 for number portability?

4 A. Yes. There's two particular statements in
5 this letter that were important to us, and I'll
6 quickly read it. Number one they say, "Per Polar's
7 letter dated January 7th, 2004, Polar is already
8 perfecting porting under its interconnection
9 arrangements with Qwest." And on point number two,
10 "HTC intends to meet its federal requirements to
11 implement number portability by May 24th, 2004."

12 Q. Okay. So with respect to Polar then, as I
13 understand it, they've advised you that they were
14 doing number portability with Qwest as of that
15 date; is that correct?

16 A. Correct.

17 Q. And is that letter signed by a
18 representative of Polar?

19 A. Yes, it is.

20 Q. And who is that representative?

21 A. Mr. Ron Laqua, the general manager of HTC
22 Services.

23 Q. Now with respect to HTC, as I take it, the
24 letter advises you that HTC plans on implementing
25 local number portability with wireless carriers; is

1 that correct?

2 A. Correct.

3 Q. And what do you understand from that
4 statement?

5 A. That their intent is to begin providing
6 number portability in their exchange on May 24th of
7 2004.

8 Q. Okay. And is there a difference between
9 local number portability with respect to wire line
10 carriers and wireless carriers?

11 A. There is because wireless carriers have
12 different rate centers, and theirs becomes a more
13 complex porting situation.

14 Q. It's more complex to do wireless porting
15 than wire line porting?

16 A. Correct. There are -- the rate center
17 issues is quite different from wire line.

18 Q. And can you tell us again why that -- you
19 said the rate centers are different?

20 A. I don't know that I have a clear
21 understanding of the wireless industry, but I'm
22 sure everyone knows from maybe having owned a
23 cellular phone that you can have a home calling
24 area much larger than what you may have with your
25 land line phone.

1 Q. Okay. Now did Midcontinent ever have a
2 specific number that it attempted to port with
3 Polar Telecom?

4 A. Yes. We did have one customer who
5 indicated that he would like to port his number
6 over to Midcontinent, and we did process an order
7 for that.

8 Q. Okay. And you're familiar with the
9 pleadings in this matter, the complaint. There was
10 a document attached to the complaint, and that's
11 LSR Jeopardy. Are you familiar with that?

12 A. Yes, I am.

13 Q. Does that particular document reflect what
14 happened to Midcontinent's request to port a
15 specific number?

16 A. I believe it does.

17 MR. DURICK: I'd ask -- I don't know that
18 we need to mark it or not, but the -- I would move
19 for the introduction into evidence of the Exhibit
20 A, I believe, to the complaint, which is a jeopardy
21 notice.

22 JUDGE HOBERG: Let's mark it so we have it
23 easily identified.

24 MR. DURICK: Sure. I'll mark that then as
25 Exhibit No. --

1 JUDGE HOBERG: C10.

2 MR. DURICK: -- C10.

3 MR. DURICK: The back of the exhibit I've
4 got is not intended. It's just the front that is
5 marked as Exhibit C10.

6 Q. (MR. DURICK CONTINUING) Can you identify
7 C10 as the request that you made through Qwest for
8 local number portability?

9 A. Yes. This would be what we received from
10 Qwest in regard to our order.

11 Q. Can you tell us what that document
12 reflects?

13 A. It's advising Midcontinent that our order
14 to port a number was put into jeopardy. The
15 comments on there are -- is that the order was
16 rejected by Polar with a comment that the request
17 to port number 788-4037 is being denied at the time
18 due to rate center mismatch.

19 JUDGE HOBERG: Do you have a copy of that,
20 Mr. Binek?

21 MR. BINEK: I do. I've got a copy of it.

22 MR. DURICK: Do you have a copy?

23 JUDGE HOBERG: Yes. Yeah, I've got it.
24 Were you offering C10?

25 MR. DURICK: Excuse me.

1 JUDGE HOBERG: Did you offer C10?

2 MR. DURICK: I'm offering C10, yes.

3 MR. BRUDVIK: No objection.

4 MR. BINEK: No objection.

5 JUDGE HOBERG: C10's admitted.

6 Q. (MR. DURICK CONTINUING) What are
7 Midcontinent's plans for the -- for the Mayville/
8 Portland and the Hillsboro areas at the present
9 time? Let me rephrase that. Do you have any
10 current plans without LNP to go into the Mayville/
11 Portland or the Hillsboro markets?

12 A. What we can do for telephone service in
13 those communities right now is very limited because
14 the majority of the customers, as I stated earlier,
15 have a desire to port their telephone number.
16 Without that ability our ability to gain any
17 telephone customers in those exchanges is very
18 small.

19 Q. I believe you testified before that it was
20 close to 90 percent of the people with numbers
21 would want to port them --

22 A. Correct.

23 Q. -- if they were going to go to your
24 service?

25 JUDGE HOBERG: As long as we're back to

1 that, I put a question mark on my -- I hate to
2 interrupt now, but tell me again why this -- I
3 didn't get the distinction between the 62 and 63
4 and the 90.

5 THE WITNESS: The 60 percent is of all
6 customers. There's a number of people who have
7 never had telephone service before that move into a
8 community and need to establish phone service. So
9 they fell into that first group of data gathering
10 on whether we're porting a number or not.

11 JUDGE HOBERG: And that was 62 or 63?

12 THE WITNESS: Correct. We don't have good
13 statistics to tell us what the take is on those who
14 have existing numbers and want to port that number
15 over, but we know just from dealing with the
16 customers, taking those orders, that that number
17 would be closer to the 90-plus percentile.

18 JUDGE HOBERG: So the 90 percent you're
19 somewhat speculating on is of all of your
20 customers?

21 THE WITNESS: Of all customers who have
22 had telephone service somewhere and want to bring
23 their service to Midcontinent bringing a telephone
24 number with them.

25 JUDGE HOBERG: Thank you. Mr. Durick.

1 Q. (MR. DURICK CONTINUING) They want to
2 switch carriers, in other words.

3 A. Correct, and keep their number.

4 Q. And if you can't offer them that number
5 portability, as I understand it, it's difficult for
6 you to go into a market and get a share of that
7 market; is that correct?

8 A. Correct.

9 MR. DURICK: I don't have anything else,
10 Your Honor.

11 JUDGE HOBERG: Thank you, Mr. Durick. Mr.
12 Brudvik.

13 **CROSS-EXAMINATION**

14 **BY MR. BRUDVIK:**

15 Q. Let's just follow up on that, if we could
16 for a minute. By the statements that you've made
17 you recognize that in Mayville and Hillsboro the
18 CLECs have substantially penetrated Qwest's
19 customers.

20 A. We would assume that.

21 Q. And you must agree that because they have
22 done that, they are offering a superior product?

23 A. We wouldn't know that.

24 Q. And they brought this product into those
25 communities at great cost because they're

1 facilities-based companies, aren't they?

2 A. They are facilities, but I wouldn't know
3 what their costs are.

4 Q. And Midco has no such costs. You have no
5 investment, per se.

6 A. For facilities --

7 Q. Yes.

8 A. -- for telephone service, no.

9 Q. And when you enter into a resale agreement
10 with Qwest, is there upfront money? Do you have to
11 give them a substantial amount of money to have the
12 rights to do that?

13 A. Not that I'm aware of, but I don't deal
14 with the finances.

15 Q. You just enter into a contract and start
16 buying their services at wholesale. That's what
17 resale is; right?

18 A. Correct.

19 Q. You indicated initially that your
20 background is in management, personnel, that type
21 of thing?

22 A. That was my education.

23 Q. Okay. And you have no technical training?

24 A. I do not.

25 Q. So if in the process of negotiating the

1 issues involved in this case there were issues of
2 infrastructure, routing --

3 A. Correct.

4 Q. -- those types of things, you were not the
5 person that could answer those questions?

6 A. Correct.

7 Q. And did you have someone else in Midco
8 that was made available to our consultants?

9 A. Yes. We had our switch manager.

10 Q. Who was that?

11 A. Mr. Pete Skorczewski.

12 Q. Okay. And he was the one that they talked
13 to about that?

14 A. Yes.

15 JUDGE HOBERG: Could you spell his name
16 for us, please?

17 THE WITNESS: Oh, boy.
18 S-k-o-r-c-z-e-w-s-k-i, I think.

19 JUDGE HOBERG: And it was Pete.

20 THE WITNESS: Pete.

21 JUDGE HOBERG: Thank you.

22 Q. (MR. BRUDVIK CONTINUING) And you are --
23 you indicated early on that in this particular
24 situation involving the Mayville and Portland
25 exchanges where you are asking for number

1 portability, that they have an extended calling
2 area that's larger than the Qwest area that you
3 have.

4 A. That was my understanding.

5 Q. And you have no ability on your own to
6 have a larger calling area?

7 A. We could do extended area service by going
8 to those other communities and see if we could
9 arrange an agreement for extended area service.

10 Q. So there would be the necessity of some
11 type of agreement between your company and Polar
12 and Midco -- or --

13 A. Correct.

14 Q. -- Polar and Halstad. I'm sorry.

15 A. Correct.

16 Q. I think you also indicated that you have
17 had other LNP -- you had success getting LNP in
18 other communities.

19 A. Yes.

20 Q. Is there any other community that you have
21 successfully ported numbers that had the calling
22 area differential that exists in this town?

23 A. There is one.

24 Q. Where is that?

25 A. In the northern hills area in South

1 Dakota.

2 Q. And that is -- all right. Let me ask you
3 this about that: In that area are there
4 terminating access charges that have resulted from
5 the different calling areas?

6 A. I don't know. Again, I don't get involved
7 with the finances.

8 Q. Okay. So you don't know that the -- the
9 company that ported the number has agreed to accept
10 those charges? You don't know that?

11 A. I don't know that.

12 Q. Okay. Other than that particular
13 situation, you have not encountered this in any
14 other of your --

15 A. We have not.

16 Q. -- resold situations?

17 A. We have not.

18 Q. And your interconnection agreement with
19 Qwest, I believe, is a statewide agreement; is it
20 not?

21 A. Correct.

22 Q. You don't have a separate one for each
23 Qwest switch?

24 A. Correct.

25 Q. You were asked by Mr. Durick about the

1 process of negotiation, and you indicated at some
2 point that -- that Midco did send a proposed form
3 of interconnection agreement to Polar and Halstad.

4 A. Correct.

5 Q. That was, I believe, sometime in July or
6 August of '03; is that right?

7 A. I don't recall the date, but that sounds
8 about right. I think it was mid August maybe.

9 Q. You had indicated that you were
10 representing to Polar and Halstad that you were a
11 reseller of Qwest and that was the basis for your
12 request, for --

13 A. Our initial request, yes.

14 Q. And are you aware that the interconnection
15 agreement that was sent then was actually a
16 facilities-based agreement?

17 A. It was to discuss all possible ways of
18 providing services with their companies. It could
19 have included resold, it could have included
20 unbundled network elements.

21 Q. But the agreement itself was a facilities-
22 based agreement?

23 A. I don't recall that.

24 Q. So you can understand -- if it was a
25 facilities-based agreement that was sent to Polar

1 and Halstad, when it -- at the time you were asking
2 for a port of resold services, you can understand
3 the confusion that might arise.

4 A. No. Because our request was to have local
5 number portability as a resold provider of Qwest.
6 That was our initial intent and remained to be our
7 intent, but through the discussions we said we
8 still want to be able to port under resold, but if
9 we can work out another arrangement, we're happy to
10 look at that and discuss those possibilities.

11 Q. And by the act of sending the
12 interconnection agreement and by what you're
13 telling me now, you did understand that there had
14 to be some type of agreement between you and the
15 two companies?

16 A. If we were going to interconnect with
17 them, certainly, but to have local number
18 portability, no.

19 Q. Then why would they -- why would you send
20 an interconnection agreement to them?

21 A. Because if we were going to interconnect
22 our companies, you have to have that agreement, but
23 to have local number portability on the resold
24 side, which is what our request was, that agreement
25 is not necessary.

1 Q. So did you abandon the resale number
2 porting request when you sent the interconnection
3 agreement asking for a facilities based?

4 A. We did not. And I believe it's in one of
5 Mr. Harrington's letters reiterating that that was
6 still our desire, was to begin porting as soon as
7 possible.

8 Q. Can you understand the confusion that
9 might exist here?

10 A. From my point, no.

11 Q. Okay. Well, think about it for a minute.

12 A. Yeah, I did. I have been --

13 Q. You're asking for resold -- to port to a
14 resold, and then you send a facilities-based
15 agreement. Doesn't that --

16 A. We've been --

17 Q. Isn't that --

18 A. -- for a year-and-a-half.

19 Q. -- a little confusing?

20 MR. HARRINGTON: Asked and answered.

21 Q. (MR. BRUDVIK CONTINUING) So you can
22 understand that because of -- and I think it's
23 solely because of the uniqueness of the calling
24 area differential here, isn't it?

25 A. That that's --

1 Q. That's the problem.

2 A. -- the center of debate, yes.

3 Q. Yes. And that is why this situation, I
4 think, is unique to any other situation that you've
5 had.

6 JUDGE HOBERG: Is that a question?

7 Q. (MR. BRUDVIK CONTINUING) Isn't it unique
8 to any other situation?

9 A. Yes, it is.

10 Q. And initially when you sent the December
11 2nd letter to Halstad and Polar, you did send those
12 letters to the parent company, did you not,
13 requesting with a bona fide request?

14 A. I sent it to the companies that I thought
15 were the companies that had the facilities -- or
16 that had the services in those communities.

17 Q. But, in fact, the ones providing the CLECs
18 were subsidiary corporations of those parent
19 companies?

20 A. They notified me at a later date of the
21 correct company names.

22 Q. And when you received the responses which
23 were identified as Exhibits 6 and 7 -- 6 is the
24 January 2nd letter from Dave Dunning back to you,
25 and 7 is the January 3rd letter from John Laqua

1 back to you -- they indicated very clearly in those
2 letters that they were going to be willing to work
3 with you and provide you with local number
4 portability, did they not?

5 A. Correct.

6 Q. All right. In your complaint you indicate
7 that Polar -- or let me start with Halstad. HTC
8 Services is discriminating against Midco because
9 they intend to offer local number portability to
10 some other company in the future.

11 A. Correct.

12 Q. When the complaint was drawn, Halstad
13 Telephone was not porting numbers to any other
14 carrier; is that correct?

15 A. I wouldn't know.

16 Q. You wouldn't know. And at the time the
17 complaint was drawn, Halstad Telephone Company had
18 no interconnection agreement with any other
19 potential CLEC in their Hillsboro exchange.

20 A. I wouldn't know.

21 Q. Okay. You indicated that -- and attached
22 to the complaint actually was a copy of a request
23 for number portability from Midco to Polar that was
24 rejected.

25 A. Yes.

1 Q. That's Exhibit C10; is that correct?

2 A. I don't have that copy. Okay. Correct.

3 Q. The request from -- did Midco make this
4 request directly to Polar?

5 A. The way porting works with a resold
6 arrangement is we submit our orders to Qwest
7 because they're our switch provider more or less.

8 Q. So the request has to come from Qwest to
9 Polar?

10 A. From the switch.

11 Q. And then Polar responds to Qwest?

12 A. Correct.

13 Q. So in any situation where there's a number
14 porting made, Polar is an indispensable party to
15 that process, is it not?

16 JUDGE HOBERG: Do you mean Qwest?

17 THE WITNESS: I don't know if I understand
18 your question.

19 Q. (MR. BRUDVIK CONTINUING) You cannot make
20 a direct request -- as a reseller you cannot make a
21 direct request to a competitive number for a number
22 port. You have to make it through Qwest.

23 A. It goes through Qwest. Correct.

24 Q. And I think in your complaint also the
25 basis for your discrimination complaint against

1 Polar was that Polar was at the time the complaint
2 was filed porting numbers to Qwest.

3 A. Based on the letter in Exhibit C9 we
4 believed that that was true.

5 Q. If that was not true, if Polar has never
6 ported a number to Qwest, you don't know that?

7 A. Correct.

8 Q. There is some confusion, I think, between
9 lawyers and discussions and that sort of thing as
10 to what exact calling area you are expecting to get
11 out of this. Are you going to ask Polar or Halstad
12 for their larger calling area?

13 MR. DURICK: I guess I'd object to this as
14 being irrelevant on the issue in the matter, Mr.
15 Hearing Examiner.

16 JUDGE HOBERG: How is it relevant, Mr.
17 Brudvik?

18 MR. BRUDVIK: Pardon?

19 JUDGE HOBERG: How is it relevant?

20 MR. BRUDVIK: I think it's relevant
21 because they have said that we've stalled and
22 delayed and by that process we're discriminating,
23 and I think the fact of the matter is that there
24 are just tremendous and complex issues here that
25 we've been trying to work through. This is one of

1 them. What are they looking for?

2 MR. DURICK: That's not -- excuse me.

3 JUDGE HOBERG: Go ahead.

4 MR. DURICK: That's not an issue. The
5 issue is portability. What we're going to do with
6 it and what our customers are going to want
7 afterwards is our problem. If we're going to grant
8 them extended area service or what kind of service
9 they're going to get once the number is ported,
10 that doesn't have anything to do with whether the
11 number should be ported.

12 JUDGE HOBERG: Seems to me like it's a
13 related economic issue. You can respond.

14 THE WITNESS: The question again?

15 Q. (MR. BRUDVIK CONTINUING) The question
16 was: Are you by this process expecting to have the
17 larger calling areas of Polar and Halstad, the
18 extended areas?

19 A. That's a decision that needs to be made by
20 my management, and I haven't been advised of such a
21 decision.

22 Q. Would it also be a decision that would
23 need to be negotiated with Polar and Halstad?

24 A. If it involves an EAS arrangement, yes, it
25 would.

1 Q. In your marketing in these two towns are
2 you marketing that extended area to potential
3 customers?

4 A. No.

5 MR. BINEK: Was the answer no?

6 THE WITNESS: No.

7 Q. (MR. BRUDVIK CONTINUING) And with respect
8 to the question of terminating access, bill and
9 keep, toll, that's not your area?

10 A. Correct.

11 MR. BRUDVIK: Could we have just maybe a
12 five-minute recess?

13 JUDGE HOBERG: Yeah. Let's take a ten-
14 minute recess.

15 MR. BRUDVIK: All right. Thank you.

16 (Recess taken.)

17 JUDGE HOBERG: Okay. We're back from a
18 short recess, and we still have Ms. Lohnes on the
19 stand, and, Mr. Brudvik, did you have some more
20 questions of the witness?

21 MR. BRUDVIK: Just a couple of questions,
22 if I may.

23 Q. (MR. BRUDVIK CONTINUING) You said, Mary,
24 that one of the fundamental reasons why you need
25 local number portability in these communities is

1 because the customers require it. I think you had
2 a 90 percent figure there or something.

3 A. Correct.

4 Q. What was that, 90 percent of the people
5 did what?

6 A. We have found that 90 percent of the
7 customers who are wanting to come to Midcontinent
8 for their phone service want to be able to bring
9 their telephone number from their previous carrier
10 with them to Midcontinent.

11 Q. And you also know that in these two
12 communities where Polar went into Mayville and
13 Halstad went into Hillsboro, they created a new
14 NXX, prefix, did they not?

15 A. Correct.

16 Q. And they were substantially successful in
17 those of both towns?

18 A. I wouldn't know.

19 Q. Well, you did say earlier that you know
20 that they had substantial penetration in the two
21 towns.

22 A. I don't think I did, but --

23 Q. That's why you want their numbers, isn't
24 it?

25 A. No. We need numbers to be able to bring

1 customers to our --

2 Q. Well, be that as it may, Halstad and Polar
3 did not see the same rationale that you did. They
4 went in and forced their customers to change
5 numbers and substantially penetrated the markets;
6 is that correct?

7 A. I wouldn't know.

8 Q. You don't know. You know that they
9 changed their prefixes. You know that anyone who
10 went from Qwest to Polar in Mayville or Qwest to
11 Halstad in Hillsboro had to get a new number, a new
12 prefix.

13 A. I would assume that because they did not
14 have number portability available.

15 Q. And I think you said at one point that you
16 do not port numbers from a wireless carrier because
17 they have a larger what -- tell me again what you
18 said about the wireless.

19 A. We port numbers with wireless carriers. I
20 just know that the rate center concerns with
21 wireless is different than the rate center concerns
22 of wire line.

23 Q. Okay. And the reason is?

24 A. Because wireless carriers have different
25 regulations.

1 Q. And they also have different rate centers,
2 isn't that what you said, larger rate centers?

3 A. They're larger.

4 Q. Larger rate centers. And in essence in
5 this case Halstad and Polar have a larger rate
6 center, calling area, as well, don't they?

7 A. Larger rate center than Qwest, yes.

8 Q. So wouldn't the same rationale apply? The
9 porting is made more difficult because the rate
10 centers are not the same?

11 MR. DURICK: I'm going to object to the
12 question here as being ambiguous and that the
13 attorney is confusing rate centers and local
14 calling areas and extended area service, and I
15 don't think the question is clear.

16 JUDGE HOBERG: Do you understand the
17 question?

18 THE WITNESS: I do and I don't. I --

19 JUDGE HOBERG: Do you want to rephrase it,
20 Mr. Brudvik?

21 Q. (MR. BRUDVIK CONTINUING) The rate
22 center -- the fact that porting numbers with a
23 cellular company is difficult is because there are
24 different rate centers.

25 A. Correct.

1 Q. All right. And if the rate centers in
2 Mayville and Hillsboro were the same as Qwest's,
3 there would be no problem porting numbers.

4 A. The issue isn't being able to port a
5 number because of a rate center. Midcontinent has
6 been asking for porting into the resold exchange of
7 Qwest.

8 MR. BRUDVIK: I think that's all I have.

9 JUDGE HOBERG: Mr. Binek, did you have
10 some questions?

11 MR. BINEK: I have a couple.

12 **EXAMINATION**

13 **BY MR. BINEK:**

14 Q. First of all, there was some testimony
15 earlier about an interconnection agreement that, as
16 I understood it, Midcontinent sent to Polar or HTC,
17 or both.

18 A. Correct.

19 Q. What was the purpose for that
20 interconnection agreement?

21 A. Our intent was and always has been that we
22 wanted to provide service in those communities as a
23 resold carrier of Qwest Communications. Through
24 our discussions and having issues with their local
25 service area being different from the local service

—

1 area of Qwest and having a difficult time working
2 through those issues, we thought maybe by working
3 through an interconnection agreement between the
4 companies we could get into the heart of those
5 issues.

6 Q. Okay. And with an interconnection
7 agreement you would have provided service as a
8 facilities based; is that the thought?

9 A. Midcontinent provisions services to
10 customers in all different flavors, and through the
11 interconnection agreement we were looking at what
12 options do we have available to us through their
13 companies. Could we do resold through their
14 companies, could we do UNE, unbundled network
15 element, through their companies, or do we have to
16 establish our own facilities?

17 Q. For facilities -- first of all, do you
18 have authority from the Public Service Commission
19 to provide facilities-based service?

20 A. In those communities, no.

21 Q. Okay. In order to provide
22 facilities-based services --

23 A. I'll retract that. I believe we do. We
24 have a PC&N that has been approved by the
25 Commission for all the Qwest exchanges, so that

1 would be those communities.

2 Q. Okay. In order to provide
3 facilities-based service does Midco have to own the
4 facilities?

5 A. I believe so.

6 Q. I mean, can you lease facilities from
7 another carrier to provide the facilities or do you
8 have to actually own them?

9 A. You could lease them and it becomes known
10 as unbundled network elements. You're leasing
11 network from another provider.

12 Q. Okay. Can you lease the entire network
13 that is needed from another provider in order to
14 provide facilities-based service?

15 A. Yes, you could.

16 MR. BINEK: I think Mr. Fahn also has some
17 questions. I'd like to have him ask the questions.

18 JUDGE HOBERG: Okay. Mr. Fahn.

19 MR. FAHN: I'm going to use Exhibit 1.
20 It's kind of a guide.

21 JUDGE HOBERG: C1?

22 MR. FAHN: Exhibit 1.

23 **EXAMINATION**

24 **BY MR. FAHN:**

25 Q. Are you familiar with the prefixes for the

1 different towns listed on the diagram?

2 A. I need to excuse myself a moment. I've
3 got a nosebleed.

4 JUDGE HOBERG: Okay. Let's take a brief
5 recess here.

6 (Recess taken.)

7 JUDGE HOBERG: Okay. We're back on the
8 after a short recess to take care of a -- was that
9 a technical difficulty?

10 THE WITNESS: Thank you.

11 JUDGE HOBERG: Mr. Durick, you added
12 something to C1 during the --

13 MR. DURICK: Right. We have stipulated, I
14 believe, to add to Exhibit C1 a listing of area
15 codes that -- prefixes, excuse me, not area codes,
16 but prefixes that show the prefixes for the various
17 exchanges, and we've stipulated to add that as C1-A
18 to Exhibit C1.

19 JUDGE HOBERG: Everyone's agreed to that?

20 MR. BRUDVIK: One moment, Your Honor.
21 Well, it appears that maybe it needs some
22 amplification again, but do you want us just to do
23 that when we do it, or can we just go off the
24 record and discuss it right now?

25 JUDGE HOBERG: Let's go off the record and

1 discuss it.

2 (Discussion had off the record.)

3 JUDGE HOBERG: Okay. We're back on the
4 record, and we've added a corrected version of C1-A
5 to Exhibit C1. Okay. Mr. -- and that's -- that's
6 stipulated that that can be part of C1?

7 MR. BRUDVIK: Yes, Your Honor.

8 MR. DURICK: So stipulated.

9 JUDGE HOBERG: Okay. Mr. Fahn then, you
10 have some questions?

11 MR. FAHN: Sure.

12 Q. (MR. FAHN CONTINUING) My question was
13 whether you were -- the first question was whether
14 you're familiar with the prefixes for the towns
15 that show on the diagram.

16 A. Yes.

17 Q. Let's start with an easy one, hopefully.
18 HTC. Now the area in red is the area that you show
19 is served by HTC?

20 A. Correct.

21 Q. Do you -- what is the -- HTC's prefix for
22 Mayville/Portland?

23 A. For Mayville/Portland it looks like it's
24 636.

25 Q. Halstad's -- HTC's prefix for Mayville?

1 A. 788. I'm not sure if I'm reading this
2 chart correctly.

3 JUDGE HOBERG: Well, it's a chart that you
4 provided, so how do you read it?

5 THE WITNESS: I read it that HTC's prefix
6 in Hillsboro -- or are you talking about Mayville?
7 I'm sorry.

8 Q. (MR. FAHN CONTINUING) Mayville.

9 A. In Mayville HTC's prefix is 636.

10 Q. Okay. When I look at the chart, it looks
11 like that's Halstad's prefix for Hillsboro -- or
12 HTC's prefix for Hillsboro. Could we clarify that?

13 A. It's their prefix in Hillsboro which is
14 part of the calling area into Mayville/Portland.
15 So that's why I identified it as their prefix in
16 Mayville/Portland.

17 Q. So Halstad's prefix or HTC's prefix, 636,
18 would be for that whole area circled in red?

19 A. That's the way I understand it.

20 Q. Okay. Then is that -- then for Polar, the
21 area circled in blue, is there one prefix for that
22 whole area, as well?

23 A. Is there one prefix?

24 Q. Does Polar have one prefix for all the
25 towns in that area circled in blue?

1 A. Yes. They have a prefix of 788.

2 Q. 788. Okay. So Clifford -- the Polar
3 customers in Clifford would have a prefix of 788?

4 A. That's the way I understand it.

5 Q. Okay. How about the Polar customers in
6 Finley? Would they have a different prefix?

7 A. I'm not sure.

8 Q. Then you wouldn't know the prefixes for
9 any of the towns outside of that blue circle that
10 are served by Polar?

11 A. I do not.

12 Q. Okay. Can you tell me on Exhibit C1-A,
13 there were two numbers that were added on the
14 right. One is prefix number 456. Can you tell me
15 what the other number is?

16 A. 836.

17 MR. BRUDVIK: 886.

18 THE WITNESS: 886.

19 MR. BRUDVIK: My fault.

20 Q. (MR. FAHN CONTINUING) 886. And that
21 number should be -- let's see. Whose prefix is the
22 prefix 456?

23 A. I don't know. Those numbers were added by
24 the petitioners, and so I'm not sure whose it is.

25 Q. Then you wouldn't know whose prefix 886

1 is?

2 A. I do not.

3 Q. Okay. Do you see it anywhere else on the
4 chart? No, I guess not. Do you know whether that
5 prefix, 456, is for Hillsboro?

6 A. It appears that it is.

7 Q. It appears to be. But you don't know for
8 sure?

9 A. I do not.

10 MR. FAHN: Okay. I don't think I have any
11 other questions.

12 JUDGE HOBERG: You don't have any other
13 questions. Okay. I think I have a couple
14 questions here.

15 **EXAMINATION**

16 **BY JUDGE HOBERG:**

17 Q. Did you say that you have gotten LNP from
18 other CLECs?

19 A. Yes, we have.

20 Q. In other states or --

21 A. Yes.

22 Q. Did you get an LNP with that South Dakota
23 one that you were comparing to the respondents in
24 this one?

25 A. Yes, we did.

1 Q. Did you have an interconnection with them?

2 A. We do not.

3 Q. Did you have interconnection agreements
4 with any other CLECs from whom you've got LNP?

5 A. Yes, we do. But we didn't get those
6 interconnection agreements in order to get LNP.

7 Q. So there were no terms and conditions in
8 the interconnection agreement that related to LNP?

9 A. Not that I recall.

10 Q. There might have been then?

11 A. Not -- I don't believe that there are, but
12 I don't want to swear that there isn't.

13 Q. Okay. So you're telling me then the LNP
14 is -- your ability to obtain that had nothing to do
15 with the interconnection agreement then?

16 A. Correct. Do not need an interconnection
17 agreement to obtain local number portability.

18 Q. Okay. Do you see the difficulty -- I
19 mean, you've been in negotiations over this for a
20 long, long time.

21 A. Correct.

22 Q. How do you see the difficulty in reaching
23 an agreement on this, as being technical or
24 economic?

25 A. I believe it's more of an economic issue.

1 Q. Why would that be?

2 A. I believe that the companies are concerned
3 about access, revenues --

4 Q. And why would that be?

5 A. -- and toll revenues.

6 Q. Do you have an understanding why they
7 might be concerned about that?

8 A. Yeah. Yes.

9 Q. What is that understanding?

10 A. That for outgoing calls that would be
11 placed by our customers there are toll charges
12 involved as well as terminating access charges, and
13 someone has to pay those. The question is who's
14 paying.

15 Q. What is Midco's expectation in that
16 regard?

17 A. I don't know. I don't get involved with
18 the financial decisions.

19 Q. Did you say that you're aware that Qwest
20 has an interconnection agreement with the
21 respondents in this matter?

22 A. Yes. They stated that in one of their
23 letters to us.

24 Q. And they are currently getting LNP?

25 A. According to their letter.

1 Q. Did the respondents make any kind of offer
2 to Midco in regard to terms and conditions
3 regarding portability?

4 A. That they would offer us number
5 portability if we could work out the issues with
6 termination access.

7 Q. The economic issues?

8 A. Yes.

9 JUDGE HOBERG: Okay. Mr. Brudvik, did you
10 have any further questions? No. I'm sorry, Mr.
11 Durick, do you have any questions?

12 MR. DURICK: A few questions, yes.

13 **REDIRECT EXAMINATION**

14 **BY MR. DURICK:**

15 Q. As a followup to that, who would we have
16 to work out questions on termination charges and
17 those things with?

18 A. With Qwest.

19 Q. So it's not a question of working out
20 something with Midcontinent then. It's a question
21 of working out something with Qwest; is that true?

22 A. Correct.

23 Q. Okay. I'm showing you what I have marked
24 as Exhibit No. C11, and I'd ask if you can identify
25 that for me, please.

1 A. This is a letter to Mr. David Dunning from
2 J.G. Harrington, counsel of Midcontinent.

3 Q. Okay. And I'm showing you Exhibit No.
4 C12.

5 JUDGE HOBERG: Wait a minute. Why does
6 this have three pages?

7 MR. DURICK: Excuse me?

8 MR. HARRINGTON: Did I give you an extra
9 page? Oh, it's just the bcc.

10 JUDGE HOBERG: Yeah.

11 MR. DURICK: There's nothing on the third
12 page?

13 JUDGE HOBERG: Not much. It's the bcc. I
14 don't understand why it needed to be three pages,
15 but I guess --

16 MR. BRUDVIK: I think that's the signature
17 page of the March 3rd letter.

18 JUDGE HOBERG: Anyway, okay.

19 MR. HARRINGTON: We can omit the bcc if
20 you'd like.

21 JUDGE HOBERG: That's all right.

22 Q. (MR. DURICK CONTINUING) I'm showing you
23 what's been marked as Exhibit No. C12.

24 A. It is a letter dated August 18th to Mr.
25 Ron Laqua from Mr. Harrington.

1 Q. Okay. Do those letters address the
2 question of local number portability as it is
3 related to an interconnection agreement?

4 A. Yes, it does.

5 MR. DURICK: I'd move for the introduction
6 of the two exhibits, C11 and 12.

7 JUDGE HOBERG: Are they the same letter?

8 MR. HARRINGTON: Two different people.

9 MR. DURICK: Two different people, yeah.
10 It's basically the same letter, two people.

11 MR. BRUDVIK: It's identical text, two
12 different addressees.

13 JUDGE HOBERG: No objection, Mr. Brudvik?

14 MR. BRUDVIK: No.

15 JUDGE HOBERG: Mr. Binek?

16 MR. BINEK: No.

17 JUDGE HOBERG: C11 and C12 are admitted.

18 Q. (MR. DURICK CONTINUING) If you could
19 summarize the second paragraph of that letter
20 talking about the relationship between an
21 interconnection agreement and local number
22 portability, please.

23 MR. BRUDVIK: I guess I'm going to object.
24 The letter was authored by Mr. Harrington. I think
25 he's asking Mary what thought processes Mr.

1 Harrington put into drafting the letter. I'm not
2 sure what the question is.

3 JUDGE HOBERG: I don't think that was the
4 question. The question was to summarize it, but
5 are you just going to read from a portion of the
6 letter you especially want me to note? Is that
7 what you're going to do?

8 MR. DURICK: I'd request that the second
9 paragraph of the letter be noted.

10 JUDGE HOBERG: Okay.

11 MR. BRUDVIK: Well, the document speaks
12 for itself.

13 JUDGE HOBERG: We can do that then. The
14 document can speak for itself then.

15 MR. BRUDVIK: Yeah.

16 Q. (MR. DURICK CONTINUING) Okay. Mary, do
17 you know of any -- let me rephrase that. Did
18 either Polar or HTC ever raise the issue that it
19 was technically not possible to do number
20 portability?

21 A. No, they did not.

22 Q. They did not?

23 A. They never indicated that they could not
24 technically provide number portability.

25 Q. And do you know any reason why they

1 wouldn't be able to provide number portability?

2 A. No. I know of no reason.

3 Q. Did anyone from Polar or HTC ever ask to
4 speak to a technical representative of
5 Midcontinent?

6 A. Yes.

7 Q. And who was that?

8 A. Pete Skorczewski.

9 Q. Okay. We've discussed that already?

10 A. Yes.

11 Q. Any -- any contacts other than that
12 discussion that you know of?

13 A. Not that I recall.

14 MR. DURICK: I have no further questions
15 of this witness.

16 JUDGE HOBERG: Thank you. Mr. Brudvik?

17 MR. BRUDVIK: Yeah.

18 **REXCROSS-EXAMINATION**

19 **BY MR. BRUDVIK:**

20 Q. Just to continue along that same line,
21 Mary, you said that Polar and Halstad never
22 indicated they could not give LNP because of
23 technical reasons.

24 A. Correct.

25 Q. They never said that they couldn't give it

1 to you, either, did they? They have always
2 maintained that you could get LNP pending the
3 resolution of these issues with Qwest.

4 A. That we could have LNP, but there was
5 always an attachment that something else had to be
6 satisfied before we could have it.

7 Q. And in terms of any discussion of the
8 technical aspects of the switching and routing,
9 those are out of your area?

10 A. Correct.

11 Q. You did say, however -- the first question
12 Mr. Durick asked you -- you said that you needed to
13 work this out with Qwest. Something had to be
14 worked out with Qwest.

15 A. Access charges.

16 Q. The issues had to be worked out with
17 Qwest?

18 A. Terminating access.

19 Q. And was it Midcontinent's thought along
20 those lines that that was something that Polar and
21 Halstad had to do? It wasn't your problem; it was
22 their problem?

23 A. Correct.

24 Q. So you say give us LNP.

25 A. Yes.

1 Q. And we say you've got a reseller that we
2 have to deal with, and you say that's your problem,
3 not ours.

4 A. We simply want to have the ability to port
5 numbers into the exchange area of Qwest.

6 Q. Wouldn't Midco be in a better position to
7 negotiate or get those questions answered than
8 Polar or Halstad?

9 MR. DURICK: I'll object to that as being
10 irrelevant to any issue in the matter.

11 MR. BRUDVIK: I think it's very relevant,
12 Your Honor, because what it boils down to is they
13 say we want local number portability, we say we
14 have to work out some of these technicalities, and
15 they say that's your problem, not ours.

16 JUDGE HOBERG: Well, Qwest isn't here.
17 You're asking her if Midco is in a better position
18 than Qwest.

19 MR. BRUDVIK: To negotiate with Qwest.

20 JUDGE HOBERG: Well, you can respond if
21 you have a response.

22 THE WITNESS: I don't think that we are.

23 MR. BRUDVIK: That's all I have.

24 JUDGE HOBERG: Mr. Binek, anything
25 further?

1 MR. BINEK: I have nothing further.

2 JUDGE HOBERG: Mr. Durick, anything
3 further?

4 **REDIRECT EXAMINATION**

5 **BY MR. DURICK:**

6 Q. Just to clarify, as a reseller you have
7 requested local number portability as a reseller
8 from other carriers; is that correct?

9 A. We have.

10 Q. And you've received local number
11 portability; is that correct?

12 A. We have.

13 MR. DURICK: And as far as you know, the
14 law -- well, I won't ask that. I have no further
15 questions.

16 JUDGE HOBERG: Anything further of this
17 witness?

18 MR. BRUDVIK: Just to clarify that one
19 point, Mary.

20 **RE-CROSS-EXAMINATION**

21 **BY MR. BRUDVIK:**

22 Q. The only other situation where you had a
23 company with a different calling area was the South
24 Dakota case you referred to. That's the only other
25 time that you have gotten LNP where their calling

1 areas were different.

2 MR. DURICK: Again, I'll object that he's
3 using terms that are not correct. He's not
4 distinguishing calling area from extended area
5 service. The testimony on the South Dakota was an
6 extended area service, not a calling area.

7 MR. BRUDVIK: That's what we have, is an
8 extended area agreement with different switches.
9 It's the same thing.

10 JUDGE HOBERG: So what's the question
11 again?

12 Q. (MR. BRUDVIK CONTINUING) The question is
13 that is the only other -- that she testified to --
14 that is the only other situation where Midco has
15 requested and received LNP where the calling areas
16 were different between the competitive exchange
17 carrier and the incumbent exchange carrier.

18 JUDGE HOBERG: In other words, similar to
19 this?

20 MR. BRUDVIK: Yes.

21 JUDGE HOBERG: Is that true?

22 THE WITNESS: Within the incumbent's area,
23 within a Qwest area, that's correct.

24 MR. BRUDVIK: Okay.

25 JUDGE HOBERG: Okay. Thank you. Oh, Mr.

1 Fahh, did you have another question?

2 MR. FAHN: I do, for clarification.

3 **FURTHER EXAMINATION**

4 **BY MR. FAHN:**

5 Q. On -- again on Exhibit C1, do you know,
6 does Qwest serve Galesburg or Clifford? I want to
7 find a town that Qwest isn't serving. Let's just
8 say that Qwest does not serve Galesburg.

9 A. Okay.

10 Q. Okay. If you wanted local number
11 portability, if a customer had a Galesburg prefix
12 and it was Polar, I guess, Polar's prefix, would
13 you have to go to Qwest to get local number
14 portability for that customer in Galesburg?

15 A. Under today's situation I could not port
16 Galesburg into Hillsboro.

17 Q. Who would you go to to get the number
18 ported?

19 A. I would have to go to Polar Telecom --

20 Q. Polar?

21 A. -- and arrange an agreement with them.

22 Q. So the only time you have to go to Qwest
23 is when it's one of their exchanges or one of their
24 prefixes --

25 A. Correct.

1 Q. -- that the customer has for their
2 telephone number?

3 A. Correct.

4 **FURTHER EXAMINATION**

5 **BY JUDGE HOBERG:**

6 Q. And that's what you did for that one
7 attachment, Exhibit A, to the complaint. You went
8 to Qwest because it was in their area.

9 A. State that again.

10 Q. Is that what you did in trying to get the
11 LNP for the one that's an attachment to the
12 complaint on that jeopardy notification message,
13 you went to Qwest? Was that in Qwest's area?

14 A. On the jeopardy notification, yes. We
15 make the request through Qwest to port the number.

16 Q. Okay. Well, you wouldn't go to anybody
17 because you're a reseller from Qwest.

18 A. When you're a reseller of Qwest, you go to
19 Qwest.

20 Q. You could only go through Qwest then;
21 right?

22 A. Correct.

23 JUDGE HOBERG: Any other questions?

24 MR. DURICK: If I could follow up on that
25 question a little bit.

REDIRECT EXAMINATION

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BY MR. DURICK:

Q. What prefix was the number that you attempted to port in that particular case?

A. What's the exhibit number?

MR. BRUDVIK: 10.

MR. BINEK: That's the exhibit that's attached to the complaint. I don't think that there was a separate --

MR. BRUDVIK: Yeah. You introduced it as a separate.

MR. DURICK: Yeah, I did.

THE WITNESS: Okay. The prefix on that one was 788.

Q. (MR. DURICK CONTINUING) And the 788 number is a number for Polar; correct?

A. Correct.

Q. It's a Polar prefix?

A. Correct.

Q. So what you're asking is you're asking Qwest to go to Polar and port that number to their exchange so that you can use it and provide your resold service; is that correct?

A. Correct.

Q. And the reason you have to do that is

1 because you're a reseller of Qwest in that
2 particular market.

3 A. Right.

4 Q. So Qwest makes the request to port the
5 number to themselves and that's resold to you.

6 A. Right.

7 MR. DURICK: Okay. I have no further
8 questions.

9 JUDGE HOBERG: Anything else of this
10 witness?

11 MR. BRUDVIK: No.

12 JUDGE HOBERG: Thank you. You may step
13 down.

14 MR. DURICK: Could we just have a minute
15 or so here to --

16 JUDGE HOBERG: Okay.

17 (Off the record.)

18 MR. DURICK: We will rest then with our
19 case.

20 JUDGE HOBERG: Okay. You don't have any
21 other witnesses to call, Mr. Durick?

22 MR. DURICK: No, we do not.

23 JUDGE HOBERG: Mr. Brudvik, are you going
24 to call any witnesses?

25 MR. BRUDVIK: Yes, we are.

1 JUDGE HOBERG: Do you have one that's
2 reasonably short that you'd like to call.

3 MR. BRUDVIK: Reasonably short?

4 JUDGE HOBERG: I guess it doesn't matter.
5 We can take a witness and --

6 MR. BRUDVIK: Yeah, I do. I want to take
7 just about five minutes, if I could. Would that be
8 all right?

9 JUDGE HOBERG: A recess you mean?

10 MR. BRUDVIK: Yeah. Just a five-minute
11 recess.

12 JUDGE HOBERG: Sure.

13 MR. BRUDVIK: Thank you. I just want to
14 figure out who goes first here.

15 JUDGE HOBERG: Okay. We'll stand in
16 recess for five minutes.

17 (Recess taken.)

18 JUDGE HOBERG: Okay. We're back from a
19 recess again. Mr. Brudvik, how do you want to
20 proceed here?

21 MR. BRUDVIK: I'm going to call Eileen
22 Bodamer to the stand, please.

23 MR. DURICK: Just for the record, if I
24 might, Mr. Harrington is going to handle the
25 cross-examination of these witnesses.

1 JUDGE HOBERG: Okay.

2 MR. BRUDVIK: And before we get into her
3 testimony, Your Honor, I guess as a matter of
4 procedure I am going to move to dismiss the
5 plaintiff's complaint on the grounds that they have
6 failed to sustain their burden of proof of
7 establishing under that statute that there is
8 discrimination.

9 JUDGE HOBERG: Okay. I'll take that
10 motion under advisement. I'm not going to dismiss
11 it right here. I want to hear some more testimony.

12 MR. BRUDVIK: All right. Thank you, Your
13 Honor. State your -- have you been sworn in?

14 JUDGE HOBERG: No. That's right. You
15 haven't been sworn in. You heard the admonition I
16 gave earlier in regard to perjury?

17 MS. BODAMER: Yes, I did.

18 (Witness sworn.)

19 JUDGE HOBERG: Thank you.

20 EILEEN BODAMER,
21 being first duly sworn, was examined and testified
22 as follows:

23 DIRECT EXAMINATION

24 BY MR. BRUDVIK:

25 Q. State your full name for the record,

1 please.

2 A. Eileen Bodamer.

3 Q. And where do you live?

4 A. Alpharetta, Georgia.

5 JUDGE HOBERG: Can you spell your last
6 name for me, please?

7 THE WITNESS: B-o-d-a-m-e-r.

8 JUDGE HOBERG: Thank you.

9 Q. (MR. BRUDVIK CONTINUING) And what is your
10 current position?

11 A. I'm a principal in Cronin Communications,
12 a consulting firm.

13 Q. And what do they consult in, what areas?

14 A. Telecommunication services primarily,
15 along with cable television, business planning,
16 refinancing.

17 Q. Okay. What's your education and
18 background leading up to --

19 A. I have an electrical engineering degree,
20 and I've worked at telephone companies in Upstate
21 New York, and I've been a consultant for over ten
22 years now.

23 Q. Okay. And you have experience with the
24 provisions of the Telecommunications Act of 1996?

25 A. Yes.

1 Q. And do you have experience in the areas of
2 local number portability?

3 A. Correct, yes.

4 Q. And you have experience in the areas of
5 ILEC, CLEC relationships?

6 A. Yes.

7 Q. Mary Lohnes gave a layman's definition of
8 local number portability; is that basically
9 correct?

10 A. Fundamentally, yes.

11 Q. Okay. Do you have anything to add to
12 that?

13 A. Not at this point. The definition of
14 number portability is moving your number from one
15 telecommunications provider to another.

16 Q. And that is required under the
17 Telecommunications Act, as far as you know?

18 A. Right.

19 Q. Is there any conditions that might limit
20 the ability to do that?

21 A. There are technical and financial issues
22 that hinder the seamless portability of numbers
23 that I think the Telecommunications Act envisioned.

24 Q. And you heard the testimony of Mary
25 Lohnes?

1 A. Yes, I did.

2 Q. You were present in court at that time?

3 A. The whole time, yes.

4 Q. And you're familiar with the -- you are a
5 consultant -- I should ask you this: You are a
6 consultant in this case for whom?

7 A. Polar.

8 Q. So they retained you as their consultant
9 to give them advice and counsel on this request for
10 local number portability from Midcontinent?

11 A. Correct.

12 Q. As well as other matters, I assume.

13 A. Primarily this one in my case.

14 Q. And so have you made a study of the -- of
15 the Mayville, Hillsboro calling areas, the extended
16 calling areas and the different aspects that are
17 contained in the map, Exhibit C1?

18 A. I am familiar with the Hillsboro issue. I
19 am very familiar with the Mayville issue since that
20 is a Polar specific issue, and that's where I put
21 my attention on Polar's behalf.

22 Q. And if you heard the testimony of Mary
23 Lohnes, she testified that Midcontinent made a
24 request for local number portability to Polar and
25 Halstad.

1 A. Correct.

2 Q. I think her testimony was that she
3 recognized -- and I -- if I misstate her testimony,
4 I assume it will be objected to, but she said that
5 there were issues that would involve their
6 reseller, Qwest, in connection with number
7 portability?

8 A. They are a reseller of Qwest. Their
9 underlying provider is Qwest.

10 Q. Yes. And she said that there were issues
11 in connection with this that would necessarily
12 involve Qwest.

13 A. Yes. That was the inference.

14 Q. And then I believe in the last little bit
15 of testimony she gave she said that was our
16 problem, not Midco's.

17 A. I was unclear as to whose -- oh, our
18 problem, Polar's?

19 Q. Yeah.

20 A. Yeah. That was what I gathered from that.

21 Q. Now I guess to put it about as simply as I
22 can, why can't we just give them local number
23 portability?

24 A. Because local number portability in and of
25 itself is not like I dream of Jeannie, you blink

1 your eyes and it just happens. There's a
2 fundamental expectation that all customers will be
3 allowed to continue to complete calls to a ported
4 number. Porting the number if calls cannot be
5 completed is not porting, and in the situation
6 we're talking about we have a community that has
7 now an expanded calling area with the ability for
8 not just the CLEC but independent telephone
9 companies that are connected with the CLEC
10 communities to get local EAS calling in areas which
11 otherwise were toll.

12 When the number -- any of the numbers were
13 to be ported out of the CLEC switch into any third-
14 party switch, whether it's Qwest or a Midco switch
15 or someone else, we have a situation where the
16 network would be unable to complete the calls. The
17 telephone companies that would go off hook to make
18 these calls would essentially be looking for local
19 trunking. Local trunking does not exist in some of
20 these communities to the Qwest switch.

21 Q. You're not saying that they couldn't --

22 A. What I'm saying is that the network would
23 attempt to complete the call on a local basis and
24 fail.

25 Q. Were these issues that were discussed with

1 Polar's technical people?

2 A. Correct.

3 Q. Why were they not getting resolved?

4 A. With our technical people?

5 Q. With theirs. You were negotiating for

6 Polar, Halstad had their own people, but

7 together -- the negotiations, as I understand it,

8 from fairly early on were kind of joint

9 negotiations between Polar --

10 A. Correct.

11 Q. -- and Halstad negotiating together on

12 this number portability.

13 A. Very early on we recognized that we had

14 shared issues, and so with Midco's concurrence we

15 consolidated the discussions for Polar and Halstad,

16 and we had discussions with Midco for months

17 regarding this issue.

18 Q. Where did it break down?

19 A. Well, fundamental difference in where the

20 responsibility lay. Midco to us had

21 mischaracterized this as a customer education issue

22 for outbound calls from Qwest to our subscribers.

23 Our issue was how would our subscribers be able to

24 complete calls to these ported out numbers. Today

25 they enjoy local calling to those, and NXX -- in

1 fact, that was one of the drivers behind not
2 participating in Qwest's porting, so that we could
3 expand the calling options for these customers.

4 Q. And was there some discrepancy in their
5 presentation to you as to whether they were a
6 reseller wanting ported numbers as a reseller or as
7 a facility-based company?

8 A. At one point in our conversations they
9 indicated that they were in fact going to be
10 facilities based in the communities we served,
11 which to us justified the continuing discussions
12 for interconnection agreement.

13 Q. Which would require an interconnection
14 agreement?

15 A. Sure.

16 Q. All right. If they were simply a reseller
17 with the uniqueness of this situation with
18 different calling areas, would there still need to
19 be some kind of a meeting of the minds or agreement
20 or something?

21 A. There has to be small A agreement on how
22 calls would be completed and who will pay for them.

23 Q. Okay. So we're not -- we're not married
24 to the term "interconnection agreement" in that
25 regard.

1 A. No. And ultimately EAS agreement probably
2 would have sufficed in terms of -- you know, I
3 think as Mary mentioned in her testimony.

4 Q. But there had to be something?

5 A. Yes.

6 Q. Now at some point in time -- and for the
7 benefit of the hearing judge and counsel, I think
8 it was attached as a portion of our conclusory
9 paragraph in our pretrial brief, but there was some
10 discussion of the conditions under which LNP could
11 be given. Are you familiar with that?

12 A. That we could support LNP.

13 Q. And was that your work product that led
14 into that?

15 A. Ultimately. We tried to boil it down to
16 how we could compromise to give Midco what they
17 were asking for.

18 Q. As we sit here today, what are the
19 stumbling blocks for giving number portability to
20 Midco?

21 A. I don't recall the actual wording on the
22 three bullet points. Fundamentally we have to have
23 the ability for customers who call into that
24 network on a local basis to either directly or
25 indirectly have their networks connected with the

1 network of Qwest in the two exchanges in question.
2 That's a technical issue. Our engineers have
3 subsequently indicated that we have potential work-
4 arounds for at least that issue.

5 The second issue, of course, then becomes
6 the financial aspect, which is if we find a way to
7 route these calls into Qwest on a local basis, will
8 Qwest respect them as local calls and subject them
9 to reciprocal compensation, or will they impose
10 their own definition of "local" on those calls and
11 subject us to the extremely high access rates.

12 Q. I think we need to talk about Exhibit C1
13 and C1-A, just for purposes of maybe trying to
14 explain because I'm not sure it has been yet.
15 Polar is a facilities-based competitive exchange
16 carrier. It's a competing telephone company in
17 Mayville with their own switch --

18 A. Correct.

19 Q. -- is that a fair statement?

20 A. Yes.

21 Q. So in the towns of Mayville/Portland there
22 are two companies sitting there with their own
23 hardware.

24 A. Correct.

25 Q. Polar and Qwest.

1 A. Qwest.

2 Q. In Hillsboro there are two competing
3 telephone companies, Qwest and Halstad Telephone.

4 A. Correct.

5 Q. When a calls goes from a Polar 788 caller
6 to a Halstad -- or Hillsboro 636 caller, and those
7 are the prefixes for Polar and Halstad, where does
8 that call go?

9 A. Over local trunks between the two
10 providers.

11 Q. Okay. And in layman's terms we got our
12 own line between the two towns.

13 A. Right. Direct connect is what we use.

14 Q. At the same time Qwest has a line -- has
15 always had a line between the two towns.

16 A. Qwest has a line between Mayville and
17 Qwest-Mayville and between Hillsboro and Qwest-
18 Hillsboro.

19 Q. Yes.

20 A. Yes.

21 Q. But if you picture it, you've got two
22 lines going down the highway, one's yours, one's
23 theirs.

24 A. Right, correct.

25 Q. And Halstad has a line going down the

1 highway from Hillsboro to Halstad, connecting
2 Hillsboro to Halstad.

3 A. Yes.

4 Q. And Polar has a line going down the
5 highway connecting Mayville and Clifford/Galesburg;
6 is that right?

7 A. Correct.

8 Q. Okay. The problem then becomes if a
9 Mayville/Portland Qwest customer, someone with a
10 786 prefix, wants to call Hillsboro, where does
11 that call go?

12 A. To my understanding, it goes to Qwest's
13 toll tandem and gets terminated via whatever the
14 underlying toll provider of that service would be.

15 Q. And in layman's terms that's a long
16 distance call?

17 A. Correct. And in the reverse it's also a
18 long distance call.

19 Q. Yeah. If a Halstad customer calls
20 Hillsboro on the 636, it's a free call?

21 A. Correct.

22 Q. If a Hillsboro Qwest customer calls
23 Halstad, it's a long distance call?

24 A. Correct. One is local, one is not.

25 Q. So with that in mind, if what we're

1 talking about here is what happens if on the one
2 hand we port a number to Midco, Midco -- the Midco
3 788 number in Mayville wants to call a 636 number
4 in Hillsboro, where is that call going to go?

5 A. Well, first off, we can't port the number
6 to Midco. We would be porting it to Qwest. Midco
7 doesn't have a place for us to port the number
8 to --

9 MR. HARRINGTON: Objection. That's not
10 responsive to the question.

11 THE WITNESS: And --

12 JUDGE HOBERG: Wait a second, wait a
13 second. I'm not sure it wasn't, but --

14 MR. HARRINGTON: He asked a question about
15 a particular kind of port, and she said that -- her
16 answer was not about the port. It was saying the
17 port can't be done. I don't see how it's
18 responsive.

19 JUDGE HOBERG: Would you read the
20 question, please?

21 (Record read as requested.)

22 JUDGE HOBERG: Yeah. I don't think it was
23 responsive. Can you respond just to where that
24 call is going to go?

25 THE WITNESS: If the number gets ported to

1 Midco, it will go however the underlying switch
2 provider sets it up to be completed as either local
3 or toll, depending on their facilities.

4 JUDGE HOBERG: Okay.

5 Q. (MR. BRUDVIK CONTINUING) And in this case
6 the underlying provider is Qwest?

7 A. To my understanding.

8 Q. And do we know that Qwest has already told
9 us that's going to be a long distance call for that
10 individual?

11 A. At this time, yes.

12 Q. All right. So that -- if that individual
13 wants a Midco number -- or a Polar number, 788
14 number, he knows that if he's making those calls,
15 they're going to go down the Qwest lines and pay
16 long distance the same as any Qwest customer will
17 be, as far as we know?

18 A. As far as we know. I don't know what the
19 customer will know.

20 Q. And that's -- that does not result in any
21 cost to Polar or Halstad when it terminates -- the
22 call terminates at one of our customers.

23 A. No, it does not.

24 Q. What happens on the other side? If one of
25 our customers in Hillsboro, 636, wants to call a

1 788 number that's been ported to a Midco customer,
2 where is that call going to go?

3 A. We don't know at this point.

4 Q. Okay.

5 A. Presumably -- I don't know.

6 Q. Okay. If it went on the Qwest line, what
7 happened? What is the consequence to Halstad or
8 its customer?

9 A. The question is once it's delivered to
10 Qwest what would we be charged for that call, and
11 Qwest has given us conflicting information on that
12 at best, and to my knowledge, they will bill us as
13 an access call if it were toll from our customer.

14 Q. So when you say it's an access call, that
15 means that Halstad Telephone Company is going to
16 get a bill from Qwest --

17 A. Correct.

18 Q. -- when that individual, our 636 customer,
19 calls that 788 number?

20 A. Correct.

21 Q. And that's called terminating access?

22 A. Correct.

23 Q. And at this point what would be the --
24 what would be an alternative to a terminating
25 access arrangement with a competitive company?

1 A. Treating it as EAS and subjecting it to
2 reciprocal compensation.

3 Q. And talk about reciprocal compensation?

4 A. Reciprocal compensation is a rate that
5 basically purports to keep the terminating carrier
6 whole for his costs of completing the call on
7 behalf of the company that transmitted the call to
8 him. It's based on a very specifically defined
9 economic basis, and it's reciprocal, meaning both
10 companies agree to charge each other the same rate.

11 Q. And that -- that agreement for either
12 terminating access or reciprocal comp has to come
13 from Qwest?

14 A. Has to -- if they are the underlying
15 provider.

16 Q. In this case, in our case.

17 A. Correct, yes.

18 Q. And have we made it clear to Midco in any
19 fashion that if Qwest would agree to treat it as
20 reciprocal comp, that there should be no problem
21 with --

22 A. We have indicated that we can address the
23 network issues if we can resolve that portion of
24 the concern. Yes.

25 Q. So that's the only issue that's out there

1 at this point, as far as you know?

2 A. Yes.

3 Q. And that would require -- we have an
4 interconnection agreement -- Polar and Halstad both
5 have interconnection agreements with Qwest?

6 A. For Qwest competition, yes.

7 Q. Right. Would this require some kind of
8 amendment to that agreement?

9 A. Amendment of memorandum of understanding
10 and interpretation.

11 Q. Were you involved throughout the
12 negotiations with Midco?

13 A. Yes.

14 Q. Was there any time when you were told
15 unequivocally by Midco that negotiations were to be
16 terminated and that they were going to go to court?

17 A. No.

18 Q. Did we ever at any time tell them that we
19 were no longer willing to negotiate with them?

20 A. No.

21 Q. Did you feel up until the time we were
22 sued that we were making progress towards an
23 agreement?

24 A. No.

25 Q. You didn't think we were?

1 A. No.

2 Q. For what reason?

3 A. Because the basis for the -- the basis for
4 the discussions kept shifting. First they were a
5 reseller, then they had a switch. Then they backed
6 away from saying they had a switch, and at some
7 point I personally started to question whether
8 there was good-faith productive discussions
9 transpiring.

10 MR. BRUDVIK: That's all I have.

11 JUDGE HOBERG: Thank you, Mr. Brudvik.
12 Mr. Harrington.

13 MR. HARRINGTON: Thank you very much.

14 **CROSS-EXAMINATION**

15 **BY MR. HARRINGTON:**

16 Q. I'm going to ask you some questions that
17 it's possible are better answered by your
18 principal, and if that's the case, please tell me
19 so.

20 A. By my who?

21 Q. Your client.

22 A. Okay.

23 Q. But in the interest of trying to get
24 through things, we'll see how much you can answer
25 and how much you can't.

1 A. I'll do the best I can.

2 Q. All right. You indicated you're familiar
3 with the 1996 Act and with the portability
4 requirements under that?

5 A. Mm-hmm. Yes, sir.

6 Q. Are you familiar with the FCC rules that
7 govern number portability, as well?

8 A. To a limited extent.

9 Q. Are you aware of any exemptions under the
10 FCC's number portability rules that allow you to
11 not provide portability upon request?

12 A. I understand that there are exemptions in
13 there. Yes.

14 Q. Are there procedures by which one can
15 obtain those exemptions in the FCC rules?

16 A. To my knowledge, yes.

17 Q. To your knowledge, has Polar ever sought
18 to use those procedures at the FCC?

19 A. No, they have not.

20 Q. Do those procedures contemplate exemptions
21 for financial issues from the FCC?

22 A. I cannot speak to that.

23 Q. Which issues do you know of that those
24 exemption procedures cover?

25 A. I do not have any direct knowledge.

1 Q. That's fair. So earlier, though, you
2 testified that the conditions that can limit
3 portability would be technical and financial
4 issues.

5 A. Correct.

6 Q. That means that your statement in that
7 regard was not based on the FCC rules?

8 A. No.

9 Q. What was it based on?

10 A. Based on practical -- what I'm seeing in
11 the industry as companies -- clients of mine
12 attempting to produce number portability.

13 Q. Did those clients seek exemptions from the
14 FCC?

15 A. Several of them ultimately did, yes.

16 Q. Oh, so Polar didn't, though?

17 A. No.

18 Q. I'd like to talk a little bit about the
19 trunking issues you were discussing, and I guess
20 the first question I'm going to ask, just so that I
21 can be clear on this, in the situation -- say a
22 call from Hillsboro to Mayville/Portland -- I guess
23 it doesn't really matter which direction, but in
24 these situations that you were talking about on
25 direct testimony, the cost of a call to a Polar

1 customer in these cases where Qwest and Halstad
2 serve the place where you're calling depends not on
3 the location of the party being called but on what
4 carrier serves the party being called; is that
5 correct?

6 A. I don't understand the question. When you
7 refer to Hillsboro customer, which customer?

8 Q. In a situation where a customer is calling
9 from --

10 JUDGE HOBERG: Whose customer is it?

11 Q. (MR. HARRINGTON CONTINUING) A Polar
12 customer.

13 A. A Polar customer in?

14 Q. In Mayville/Portland is making a call to
15 Hillsboro.

16 A. Right.

17 Q. If that customer calls an HTC customer,
18 it's treated as a local call.

19 A. Correct.

20 Q. If that customer calls a Qwest customer in
21 Hillsboro, it is treated as a toll call?

22 A. Correct.

23 Q. So the cost of the call to the customer
24 does not depend on the location being called but on
25 the carrier serving that customer; is that correct?

1 A. Correct.

2 Q. Isn't that an unusual arrangement?

3 A. I thought so. However, no, it is not.

4 Q. For instance, if I'm making calls as a
5 Qwest customer, are you aware of a situation where
6 Qwest does that?

7 A. No. I don't know Qwest.

8 Q. When you say you don't think it's unusual
9 now, how many examples of this do you know of in
10 the country?

11 A. Three of my clients I found out are doing
12 just this sort of thing.

13 Q. To your knowledge, did Polar or Halstad
14 ask the Commission for permission to have
15 differential rates for calls to customers of
16 different carriers?

17 A. No, they did not.

18 Q. Did they file their EAS agreement, to your
19 knowledge, with the PSC?

20 A. No, they did not.

21 Q. They never -- to your knowledge, they
22 never told the PSC about this arrangement?

23 A. Not to my knowledge.

24 Q. Do you think it gives them a competitive
25 advantage as compared to Qwest in those markets?

1 A. Presumably, yes.

2 Q. Do you think that's why they did it?

3 A. They're filling a void, yes.

4 Q. They're filling a void. Okay. Prior to
5 entering into the EAS arrangement, did they charge
6 toll for the calls then to those places?

7 A. They handled the calls as toll. Whether
8 they charged them depended on whether they were the
9 carrier or not.

10 Q. All right. Now you discussed how the
11 trunking arrangements work and indicated at one
12 point that calls can be complete today under the
13 current trunking arrangements. Trunking
14 arrangements can be changed, can't they?

15 A. Sure.

16 Q. How long does it take?

17 A. Depends on what the arrangement is going
18 to be.

19 Q. Changing from local to toll.

20 A. Changing from local to toll?

21 Q. Yeah. Deciding to route these calls over
22 toll trunks instead of local.

23 A. That could be lengthy, actually, if you
24 don't have local trunks in place to handle the
25 calls.

1 Q. No. Changing from local to toll, not the
2 other direction.

3 A. Oh, the other direction is not as
4 difficult. No.

5 Q. Days, weeks?

6 A. I don't know. I'm not a technician.

7 Q. Less than six months?

8 A. Presumably, if the facilities are there.

9 Q. And are you familiar with the
10 correspondence between the parties?

11 A. Mm-hmm.

12 JUDGE HOBERG: Is that a yes?

13 THE WITNESS: Yes, I'm sorry. Yes.

14 Q. (MR. HARRINGTON CONTINUING) You're aware
15 then in your review of that correspondence that
16 there were indications that porting could be made
17 available in as little as 30 days once financial
18 issues were resolved?

19 A. I don't recall that, but I take it at face
20 value.

21 Q. Any reason to think that would be wrong?

22 A. Based on the history of this?

23 Q. Based on what you know.

24 A. I can't answer that question. I'm sorry.

25 Q. I'll ask someone else then.

1 A. Yeah.

2 Q. Now, earlier you also discussed the
3 situation when a call is going from a customer
4 who's ported -- going to a customer who is ported
5 to Midcontinent, and you indicated that Polar would
6 be required to pay access charges on those calls
7 from its customers to a ported Midco customer on
8 the Qwest switch.

9 A. I believe I said that we have gotten mixed
10 information back from Qwest regarding the
11 application of those charges.

12 Q. And then you went on to say that you
13 believed it was likely to be access -- terminating
14 access.

15 A. Based on my conversation, yes.

16 Q. Right. So that's a cost to Polar?

17 A. Correct.

18 Q. Now that same customer who's been ported
19 from -- to Midco who is in the Qwest facilities,
20 when that customer makes a call that previously was
21 under the EAS agreement, would Polar receive access
22 revenues for those calls?

23 A. Depending on the routing of the call.

24 Q. We're going through the Qwest switch. The
25 Qwest switch routes those as toll you testified;

1 isn't that correct?

2 A. If the Qwest switch routes them to a
3 carrier -- a toll carrier and they come in on toll
4 trunks, yes, that is correct.

5 Q. But that is the assumption of your
6 testimony, also, is it not?

7 A. (Nods head.)

8 Q. Right. So, in other words, there would be
9 additional costs to Polar, but there would also be
10 additional actions revenues based on the
11 assumptions in your testimony.

12 A. Presumably, yes.

13 MR. HARRINGTON: I'd like to mark an
14 exhibit for identification, which I guess is going
15 to be No. 13.

16 JUDGE HOBERG: Well, this is -- yeah, I
17 guess it would be.

18 MR. HARRINGTON: 13. You seem like the
19 best witness to do this one with.

20 MR. BRUDVIK: What number is it in your --

21 MR. HARRINGTON: It's not in that list.

22 MR. BRUDVIK: I don't have it?

23 MR. HARRINGTON: But I have many copies.

24 Q. (MR. HARRINGTON CONTINUING) We've been
25 having some trouble all through this discussion

1 about definitions, and I wanted to take the
2 opportunity to make sure everyone was on the same
3 page as to what the terms meant. So what I'd like
4 you to do -- we'll do this with each definition --
5 is look at the definition, I guess read it aloud
6 for the record for the moment, and then --

7 JUDGE HOBERG: She doesn't need to read it
8 aloud. We have it here.

9 Q. (MR. HARRINGTON CONTINUING) And then to
10 the extent you believe the definition is incorrect
11 in some way, shape or form -- if it's correct, of
12 course just say it's correct. If you think it's
13 incorrect in some way, shape or form, please
14 describe how it should be changed to make it
15 correct. That way we can use terms that are
16 common.

17 A. Okay.

18 MR. BRUDVIK: I guess I'm going to -- it's
19 novel. I'm going to object, I guess. Mary talked
20 about these things. I think you can ask the
21 witness what their definitions may be if it's
22 different than what she said, but to shove a
23 document in front of her with definitions and say
24 what's wrong with it or what's right with it, I
25 don't think it's appropriate, Your Honor.

1 MR. HARRINGTON: Your Honor, she's
2 testifying as an expert in the areas that we've
3 been talking about here, and I think it's a good
4 way to make sure we're all talking about things in
5 the same way and make sure that the respondents are
6 understanding these terms the same way we are. In
7 all honesty, that seems to be one of the problems
8 in this case, that they use terms differently than
9 are used in the rules.

10 JUDGE HOBERG: And, moreover, I mean, it's
11 easier than going back and having to read back what
12 she read or what she gave as a definition. I mean,
13 once we have the whole transcript I can do that
14 more easily, but I don't see any problem with this.

15 MR. BRUDVIK: I don't have a problem with
16 it per se, but I don't want to be tied to these
17 definitions if we're going to talk about these
18 concepts in another -- in another way or another
19 scenario, you know, as ah-hah, this is your
20 definition. It's not her definition.

21 JUDGE HOBERG: Well, their witness gave a
22 definition of it. We'll consider that, of course,
23 as part of the record. He's merely going to ask
24 her if she agrees with these definitions. If she
25 doesn't, she can say what -- so let's --

1 MR. HARRINGTON: I'm not -- I believe
2 these definitions are accurate, but to the extent
3 that you believe they are not, I want to have an
4 explanation so that we know.

5 JUDGE HOBERG: So before we get into
6 whatever differences there are, are you offering
7 C13?

8 MR. HARRINGTON: For the moment only for
9 identification. I plan to offer it into evidence
10 once we have any changes with those changes, if
11 that's acceptable.

12 JUDGE HOBERG: Well, the changes are going
13 to come through her testimony, aren't they? You're
14 offering them now as apparently your client's
15 definitions.

16 MR. HARRINGTON: Well, as I said, for the
17 moment it was for identification, and if -- it
18 seems to me it's more productive for the record to
19 have the end result rather than the beginning.

20 MR. BRUDVIK: If you're going to be
21 asking -- if you're asking her to qualify or expand
22 on these, then are we going to write those in and
23 introduce that exhibit?

24 MR. HARRINGTON: Yes.

25 MR. BRUDVIK: I mean, we could take a

1 couple hours and work off that one. I don't know.

2 MR. HARRINGTON: There are four terms.
3 There are not very many. I mean, I'll offer it
4 into evidence if that's what you would prefer.

5 JUDGE HOBERG: I would prefer that.

6 MR. HARRINGTON: Then we'll offer it into
7 evidence.

8 MR. BRUDVIK: With that understanding, I
9 have no objection.

10 MR. BINEK: What is the document number?

11 JUDGE HOBERG: C13.

12 MR. BINEK: I have no objection.

13 JUDGE HOBERG: Okay. I'll admit C13. Mr.
14 Harrington.

15 MR. HARRINGTON: Thank you.

16 Q. (MR. HARRINGTON CONTINUING) Would you
17 turn to the first definition for rate center?

18 A. Yes.

19 Q. Is there anything you would amend of that
20 definition to say differently?

21 A. Not at this time, no.

22 Q. Turn to the second definition for rate
23 area. I'll ask the same question.

24 A. I can't speak on -- this definition I'm
25 not comfortable with. No.

1 Q. Meaning you're not comfortable commenting
2 on it or --

3 A. I've not heard of the "rate area"
4 routinely used. I've seen exchange area.

5 Q. How would you define "exchange area"?

6 A. This definition -- well, an exchange area
7 is an area associated with an NXX code, and that's
8 where I would end the definition.

9 Q. Would you turn to the next definition?
10 "Local calling area," would you amend that
11 definition in any way?

12 A. No. I think that's fairly
13 self-explanatory.

14 Q. And then the definition of "extended area
15 service," would you amend that definition in any
16 way?

17 A. In the case at hand there is no difference
18 between local calling area and extended area
19 service. We have routinely used those
20 interchangeably.

21 Q. All right. Let's turn to discussions of
22 local calling areas. Can you explain how the local
23 calling area used by another carrier affects the
24 charges that a carrier charges its own customers?

25 MR. BRUDVIK: I didn't hear the question.

1 I'm sorry.

2 Q. (MR. HARRINGTON CONTINUING) Can you
3 explain how the local calling area used by one
4 carrier would affect the charges that another
5 carrier would have to its own customers?

6 A. Okay. So --

7 Q. Is there any requirement that you would
8 honor somebody else's local calling area? Let me
9 ask it differently.

10 A. There could be, yes.

11 Q. In this particular case is there any
12 requirement that Polar honor Qwest's local calling
13 area, that Qwest honor Polar's?

14 A. We have -- I don't understand. I'm sorry.
15 I'm just not understanding the question, J.G.

16 Q. I'll ask it differently then.

17 A. Please.

18 Q. When a carrier decides what its local
19 calling area is, does that carrier have to pay
20 attention to the local calling areas of any other
21 carriers, or can it just decide what it thinks the
22 local calling area should be?

23 A. It's a two-part question and --

24 Q. Well, I guess answer the first part then.

25 A. If a carrier decides what its local

1 calling area needs to be, it has to make
2 arrangements with the carriers with whom it wants
3 to share that local calling area. That's a
4 separate issue about what local calling areas that
5 carrier may or may not himself support.

6 Q. When you're saying that, you're talking
7 about two-way. You're suggesting that, for
8 instance, if someone wants to include town A and
9 town B -- if carrier A wants to include town 1 and
10 town 2 in its local calling area or its customers
11 in town 1, what you're saying is if it's going to
12 be mutual, that is if town 2 customers can call
13 town 1, there has to be agreement between the
14 carriers.

15 A. Yes.

16 Q. Okay. Now if carrier A just decides --
17 well, I should say this: Can carrier A just decide
18 on its own without any other carrier involvement
19 that its customers in town 1 can call other
20 customers in town 2 as local calls?

21 A. Depends on the situation.

22 Q. Are you suggesting that other carrier
23 approval is required?

24 A. In some instances. It's case-by-case
25 basis. I've seen it both ways.

1 Q. Would that be a matter of state law?

2 A. I guess. I don't know. I'm not a lawyer.
3 I don't know.

4 Q. To your knowledge, in North Dakota was
5 there any reason why a carrier has to ask another
6 carrier's permission to change its local calling
7 area --

8 A. I don't --

9 Q. -- for its own customers?

10 A. I don't know.

11 Q. How does -- I'm trying to ask this
12 question so we don't go through asking it four
13 times, so I'll ask it. Does the local calling area
14 used by another carrier for outbound calls have any
15 effect as a matter of requirements on the charges
16 that that carrier imposes for inbound calls?

17 A. Are you talking about a one-way EAS local
18 call?

19 Q. You can use that as an example.

20 A. A carrier will complete calls based on
21 whether the call is deemed local or toll. How the
22 calls come back into the network presumably have
23 the same issue. If it comes in as a local call, it
24 would be treated as a local call. If it comes in
25 as a toll call, it should be treated as a toll

1 call.

2 Q. Let's just say for argument's sake -- this
3 probably isn't really far off from what may be
4 happening in the real world actually. Let's just
5 say for argument's sake that Qwest decided that it
6 was going to offer free calling to everybody in
7 North Dakota from its customers.

8 A. Okay.

9 Q. Would that require Qwest to treat incoming
10 calls as subject to reciprocal compensation, or
11 would it still be able to charge access on calls
12 that came from outside the previously designated
13 local calling areas, in your view?

14 A. Depends on what actions Qwest took in
15 order to adopt this statewide local calling.

16 Q. Say it just changed its prices, did not
17 change any of its local calling areas on its rate
18 max?

19 A. Okay. Let's just say, hey, guess what,
20 everyone's is free.

21 Q. All intrastate toll is subsumed within
22 this price.

23 A. It's all local.

24 Q. From the perspective of the customer, yes,
25 it's all local?

1 A. Okay. And then your question is?

2 Q. Qwest does not change its local calling
3 areas on its map, so it's still --

4 MR. BRUDVIK: I guess I'm questioning the
5 relevance of the line of questioning, Your Honor.
6 He's losing me somewhere.

7 MR. HARRINGTON: The relevance of this
8 line of questioning is really pretty simple. That
9 Polar and HTC have both argued that they have
10 economic burdens that are caused by the porting
11 that Midco wants. Those economic burdens are
12 caused by their choices of how they've made
13 arrangements with each other. They're not caused
14 by something Midco has done. They're caused by
15 their decision to not charge access for these
16 calls. So I'm trying to establish the extent to
17 which carriers are entitled to change their local
18 calling areas, to pick the local calling areas they
19 want to, to charge customers the way they want to,
20 and that's what this is relevant to. I'm almost
21 done with this discussion anyway.

22 JUDGE HOBERG: You can proceed.

23 Q. (MR. HARRINGTON CONTINUING) Back to the
24 hypothetical which I'll restate. Qwest decides to
25 change its calling plans, the charges it makes to

1 its customers, and say that you can call anyone in
2 North Dakota. We will not count the minutes, we
3 won't do any of those things. It will essentially
4 look like a local call to you. It does not change
5 the local calling areas on its maps, however, and
6 as a consequence still wants to collect terminating
7 access on calls made into Qwest. As an aside,
8 Qwest also pays terminating access when a call is
9 made to a Polar or Halstad customer from Fargo.

10 A. Okay. So the Fargo call, which is now
11 deemed by Qwest to be local, is still paid for the
12 terminating component by Qwest.

13 Q. Right. Qwest still pays terminating
14 access and also still charges terminating access on
15 a call from Mayville to Fargo.

16 A. So in your hypothetical what we're really
17 saying is an end-user calling plan.

18 Q. Right.

19 A. Okay. I'm following you.

20 Q. So the question is: Did the end-user
21 calling plans, sort of customer facing elements of
22 what you do, have any effect at all on what a
23 carrier has to pay other carriers in its inter-
24 carrier relations?

25 A. In your example, no. That's an end-user

1 customer pricing decision.

2 Q. And the carriers are free to make
3 arrangements among themselves. If Qwest and -- if
4 Qwest and Polar would reach an EAS arrangement,
5 there would be no problem doing that.

6 A. Correct. If Polar and Qwest had shared
7 interests, Qwest didn't want to pay access, sure.
8 Carriers do that.

9 Q. I may be almost done with you. To your
10 knowledge, under the FCC's rules as you understand
11 them, is number portability limited to a particular
12 type of carrier?

13 A. Not to my knowledge.

14 Q. Under the FCC's rules is there a rule that
15 requires an interconnection agreement, to your
16 knowledge, for number portability?

17 A. I'm not sure on land line. I know on
18 wireless they had specific rules.

19 Q. And do you know what the wireless rules
20 were?

21 A. The wireless rules were no interconnection
22 was required.

23 Q. I just want to confirm this. I believe
24 that you said this in your direct, but I want to be
25 clear on it. The prehearing brief lists three

1 conditions at the end on page 12.

2 A. Okay.

3 Q. It's Polar and Halstad's prehearing brief.
4 And I believe on your direct testimony you
5 indicated that the first of those two conditions
6 were not in your view a barrier to provision of
7 number portability by Polar -- Polar and Halstad.
8 I can pull out the brief and read them to you, if
9 you'd like.

10 A. Could you, because I'm very vague on what
11 the first two items were.

12 Q. Or your counsel can.

13 MR. BRUDVIK: I'll do it.

14 MR. HARRINGTON: Thank you.

15 Q. (MR. HARRINGTON CONTINUING) Do you have
16 them in front of you now?

17 A. I do.

18 Q. All right. I believe during your direct
19 testimony -- I just wanted to be clear on this --
20 that you indicated that the first two conditions,
21 the physical connection being established and that
22 Halstad Telephone Company and Polar
23 Telecommunications Corporation be permitted to
24 establish local facilities, that those were either
25 satisfied already or would be not difficult to

1 satisfy on -- by Polar and Halstad.

2 A. The first condition since Midco is using
3 Qwest is satisfied. We have an interconnection
4 agreement in the corresponding interconnection
5 trunks. The second condition would require a work-
6 around within our networks.

7 Q. You testified that that was feasible?

8 A. Sure. Feasible.

9 MR. HARRINGTON: I have nothing further.
10 Thank you.

11 JUDGE HOBERG: Did you mean technically
12 feasible?

13 THE WITNESS: We think we have a way to
14 make it work, yes, technically.

15 MR. DURICK: That's good lawyering to
16 finish up right at noon.

17 JUDGE HOBERG: Well, except that we have
18 Mr. Binek left.

19 MR. HARRINGTON: I did my best.

20 JUDGE HOBERG: Mr. Binek or Mr. Fahn, do
21 you have some questions of this witness?

22 MR. BINEK: He's thinking.

23 JUDGE HOBERG: Or do you want to save them
24 till after lunch?

25 MR. FAHN: I guess are you the witness

1 that would help me clarify all the EAS arrangements
2 and all the prefixes?

3 THE WITNESS: Yeah. I think -- I believe
4 I can help on that.

5 MR. FAHN: Okay. I guess I can maybe do
6 this rather quickly.

7 JUDGE HOBERG: Are you sure? How many
8 questions do you have? Well, let's just wait till
9 after lunch.

10 MR. FAHN: Okay.

11 JUDGE HOBERG: Let's take a luncheon
12 recess here.

13 (Recessed at 12:03 p.m. to 1:16 p.m., the
14 same day.)

15 JUDGE HOBERG: Okay. It's about 1:15. I
16 think where we left off was Mr. Fahn was going to
17 do some questioning of Ms. --

18 THE WITNESS: Bodamer.

19 JUDGE HOBERG: -- Bodamer. Mr. Fahn.

20 MR. FAHN: Yes.

21 **EXAMINATION**

22 **BY MR. FAHN:**

23 Q. I just have a few questions about the
24 extended area service routes.

25 A. Okay.

1 Q. Now let's talk about Polar Telecom, the
2 CLEC.

3 A. Got it.

4 Q. Okay. Does Polar Telecom provide extended
5 area service from Mayville to Hatton?

6 A. Yes.

7 Q. And that service is a two-way service?

8 A. Correct.

9 Q. Okay. Does Polar Telecom provide extended
10 area service from Mayville to Clifford or
11 Galesburg?

12 A. Galesburg, yes.

13 Q. To Galesburg?

14 A. And that's also two-way.

15 Q. Okay. Does Clifford -- does Polar Telecom
16 provide any extended area service to Clifford?

17 A. Not to my knowledge.

18 MR. BRUDVIK: It's one exchange.

19 MR. FAHN: Oh, that's right.

20 JUDGE HOBERG: Wait a minute. She's
21 testifying here now.

22 THE WITNESS: Clifford/Galesburg is one
23 exchange, so, yes, we do.

24 Q. (MR. FAHN CONTINUING) Are there any other
25 extended area services provided by Polar Telecom on

1 the towns listed on Exhibit C1?

2 A. Hatton.

3 Q. Mayville to Hatton we talked about
4 already.

5 A. Hillsboro, and then, of course, Qwest
6 Mayville/Portland.

7 Q. Mayville to Hillsboro is provided, as
8 well?

9 A. Yes.

10 Q. And that's two-way?

11 A. Correct.

12 Q. Okay. And Polar Telecom owns its own
13 facility -- transport facility from Mayville to
14 Hillsboro?

15 A. Yes.

16 Q. And from Mayville to Galesburg or is it
17 then -- is that a continuation from Hillsboro on to
18 Galesburg?

19 A. Oh, I don't know. It's our facility.
20 It's Polar's facility, I should say.

21 Q. Okay. Does Polar Telecom own any other
22 transport facility besides those two?

23 A. Well, they have a transport facility to
24 Qwest in Mayville.

25 Q. Mayville to --

1 A. Mayville to Mayville.

2 Q. Oh, just Mayville to Mayville. Yeah.

3 A. And they have a transport facility to
4 Hatton.

5 Q. Mayville to Hatton?

6 A. Yes. And when I say "they have," it's a
7 combination of lease/own. They are responsible for
8 it.

9 Q. Okay. Any others?

10 A. Not to my knowledge.

11 Q. Then let's talk about HTC, the CLEC.

12 A. Okay.

13 Q. Are you able to answer questions about
14 that company?

15 A. I believe so.

16 Q. Okay. Does HTC provide any EAS from
17 Hillsboro to Mayville?

18 A. Yes.

19 Q. And that's two-way?

20 A. Two-way to the Polar Telecom exchange at
21 Mayville.

22 Q. Switch -- to the Polar Telecom switch?

23 A. Correct. Not to Qwest customers served in
24 Mayville.

25 Q. Okay. Does -- do they provide EAS between

1 Hillsboro and Hatton?

2 A. No.

3 Q. Hillsboro and Halstad?

4 A. Yes.

5 Q. Two-way?

6 A. Yes.

7 Q. And Hillsboro to Shelly?

8 A. Yes.

9 Q. And then I suppose Halstad and Shelly have
10 EAS between the two -- between those two exchanges?

11 A. It's, yes, two-way.

12 Q. Okay. Now, does HTC own any of its own
13 transport facilities?

14 A. I cannot comment on that.

15 MR. FAHN: Thank you. That's it.

16 JUDGE HOBERG: Mr. Binek?

17 MR. BINEK: Yeah. I have a couple of
18 questions I'd like to ask.

19 **EXAMINATION**

20 **BY MR. BINEK:**

21 Q. Under Polar's EAS service, if a call is
22 made by a Polar customer from Mayville to a Qwest
23 customer in Hillsboro, does Qwest collect a
24 terminating access?

25 A. From a Mayville Polar customer to

1 Hillsboro is a toll call, so, yes.

2 Q. A Polar customer in Mayville to a Polar
3 customer in Hillsboro is a local call --

4 A. Correct.

5 Q. -- but a call to a Qwest customer is a
6 toll call?

7 MR. BRUDVIK: Did you say Polar customer?

8 THE WITNESS: No, no. He's talking about
9 Mayville. Mayville to Hillsboro, CLEC to CLEC, is
10 a local call.

11 Q. (MR. BINEK CONTINUING) Okay. So it would
12 be what, an HTC customer in Hillsboro that would
13 have a free call, but if it's a Qwest customer, the
14 call goes to -- it's a toll call?

15 A. Correct. It goes to the end user's
16 designated toll provider.

17 Q. If Midcontinent wanted to enter into an
18 agreement with Polar for resale of
19 telecommunication service in the Mayville exchange
20 but didn't want the EAS service, could they do
21 that?

22 A. Not under our existing configuration. No.

23 Q. Why not?

24 A. It's not an optional subscription. It is
25 what you get when you purchase the service -- when

1 an end user purchases the service.

2 Q. You said for an end user.

3 A. Customer.

4 Q. But Midcontinent doesn't have a choice
5 because of the way Polar has configured its system;
6 is that right?

7 A. If -- if I'm understanding your
8 question --

9 Q. If Midcontinent wants to resell --

10 A. Polar.

11 Q. -- Polar service --

12 A. Then their subscribers would get the same
13 calling area that Polar's own subscribers would
14 get.

15 Q. Okay. But Midcontinent can't elect to --
16 say they just wanted -- they want to enter into an
17 agreement with Polar in Mayville just to serve the
18 Mayville customers. They feel that there are
19 enough Mayville customers who don't want EAS and
20 that they can provide a competitive service that
21 way. Can they -- can they do that?

22 A. Not today, no.

23 Q. And the reason they can't do that is
24 because of the way Polar's system is configured.

25 A. Polar's customers get a specific calling

1 capability, the ones we've just discussed, and as a
2 reseller Midco would get the benefit or the
3 limitations of whatever is offered to our own end
4 users -- Polar's own end users.

5 MR. BINEK: I have no further questions.

6 JUDGE HOBERG: Nothing further? I think I
7 have a couple here.

8 **EXAMINATION**

9 **BY JUDGE HOBERG:**

10 Q. You indicated that if this sort of LPN
11 was -- LNP was to be provided to Midco, there would
12 be a cost issue. Isn't that really something that
13 could be passed on to the customer?

14 A. (Shakes head.)

15 Q. Why not?

16 A. I guess ultimately it may be passed on to
17 the customer. I don't know what the scale of the
18 cost is.

19 Q. You don't know what?

20 A. I don't know what the scale of the cost
21 would be or whether it would trigger a change to
22 the customer for his rates.

23 Q. So if I understand the sum and substance
24 of your testimony, you disagree somewhat with the
25 previous witness. You believe this is not only an

1 economic issue, but it's also a technical issue?

2 A. Correct.

3 Q. Tell me again why you think it's a
4 technical issue.

5 A. It's a technical issue in that once a
6 number is ported, calls must still be completed
7 between two networks, and at least two of the
8 providers who currently have local calling area
9 into the CLECs do not have local trunking to Qwest.

10 Q. But that's not really a technical issue,
11 is it? I mean, it can be done.

12 A. Oh, it's -- my definition of a technical
13 issue is an issue that needs to be resolved for the
14 technical aspects of it. Correct. It can be done.

15 Q. Okay.

16 A. It's feasible.

17 JUDGE HOBERG: Mr. Brudvik, do you have
18 any further questions?

19 MR. BRUDVIK: Yes, I do. We had over the
20 lunch hour distributed a revision to Exhibit C1,
21 which I would like to offer, called C1-B.

22 JUDGE HOBERG: Okay. Is this a
23 replacement or a substitute for C1 or --

24 MR. BRUDVIK: Well, I think it's better
25 than C1.

1 JUDGE HOBERG: It's better than C1.

2 MR. BRUDVIK: I guess what we did.

3 MR. HARRINGTON: Your Honor, we're
4 insulted.

5 JUDGE HOBERG: It's not colored-coded,
6 though.

7 MR. BRUDVIK: The one that's up there has
8 got some colors on it, but we did write in the --
9 if I may, the exchange prefixes, and we drew in
10 lines for routes of telephone lines.

11 JUDGE HOBERG: Okay. What are we going to
12 mark this as, C1-B?

13 MR. BRUDVIK: I can mark it as a
14 respondent's exhibit or --

15 JUDGE HOBERG: Why don't you mark it as a
16 respondent's exhibit.

17 MR. HARRINGTON: Yes, I think that would
18 be better.

19 MR. BRUDVIK: All right. I'll mark it as
20 Exhibit R --

21 JUDGE HOBERG: I believe this is your
22 first one. You haven't offered any exhibits yet,
23 have you, Mr. Brudvik?

24 MR. BRUDVIK: No, I haven't.

25 JUDGE HOBERG: And you had marked some

1 before the hearing started; right?

2 MR. BRUDVIK: Yep.

3 JUDGE HOBERG: Where are you on that then
4 so that we can --

5 MR. BRUDVIK: I'm not so sure I remember.
6 I'm going to mark it R13. We'll offer R13.

7 JUDGE HOBERG: I didn't get a copy of
8 that.

9 MR. BRUDVIK: I'm going to give you one
10 right now, as long as they let me introduce it.

11 JUDGE HOBERG: Well, you can offer and
12 they can object, but I want to see it.

13 MR. BRUDVIK: I'm offering it. Yeah.

14 MR. HARRINGTON: I guess I would like to
15 see if we can reserve the right to object until we
16 have an idea what the exhibit actually means.

17 JUDGE HOBERG: Okay.

18 MR. BRUDVIK: Fine.

19 MR. HARRINGTON: I'm not convinced we will
20 object. I just want to make sure I understand it
21 before I --

22 MR. BRUDVIK: Well, I intend to go into it
23 a little bit, if I may.

24 JUDGE HOBERG: Go ahead.

25 MR. BRUDVIK: And may I approach the

1 witness?

2 JUDGE HOBERG: Yes.

3 REDIRECT EXAMINATION

4 BY MR. BRUDVIK:

5 Q. Okay. This is -- this is kind of a
6 revision of their C1. Is that -- do you recognize
7 that?

8 A. Yes, I do.

9 Q. You've got the original one in front of
10 you, also?

11 A. I do.

12 Q. Now in this one we did -- one thing we did
13 is write prefixes for all the different telephone
14 exchange areas; is that correct?

15 A. Yes.

16 Q. And so when there is a prefix there, that
17 is an identified exchange area?

18 A. Yes.

19 Q. And we also then -- we reduced the calling
20 area for the Hillsboro/Halstad Telephone Company
21 636 exchange to just Halstad and Shelly; do you see
22 that --

23 A. Yes, I do.

24 Q. -- as well. And then that's their own,
25 and then you testified they also have an extended

1 area service agreement with Polar 788 numbers in
2 Hillsboro.

3 A. They do, yes.

4 Q. So if you look at the exhibit between
5 Mayville and Hillsboro, I have two lines. One says
6 P/HTC local and one says Q-toll?

7 A. Yes.

8 MR. HARRINGTON: May I ask an explanatory
9 question, because I'm not so sure I understood what
10 you just said. The calling area for Halstad, you
11 said it only included Halstad and Shelly, but it
12 looks like the line is intended to include
13 Hillsboro. Am I misreading it?

14 MR. BRUDVIK: The Hillsboro 636 -- I'm
15 sorry. You can go ahead.

16 THE WITNESS: Yes, that is correct, what
17 you're saying.

18 MR. HARRINGTON: Okay. Thank you.

19 Q. (MR. BRUDVIK CONTINUING) So in essence
20 there's two lines -- two phone lines, Polar's and
21 Qwest's, going between Hillsboro and Mayville/
22 Portland.

23 A. Yes.

24 Q. And Polar also has a line from its 788
25 number to Clifford/Galesburg?

1 A. Yes.

2 Q. And just -- I'm not sure that it was
3 explained, but Clifford/Galesburg is a telephone
4 exchange owned by the parent cooperative, Polar
5 Communications.

6 A. Correct.

7 Q. And Shelly and Halstad are exchanges owned
8 by the parent, Halstad Telephone Company?

9 A. Correct.

10 Q. The only exchanges owned by the
11 subsidiaries are Polar Telecom in Mayville/Portland
12 and Halstad Telephone -- HTC Services in Hillsboro?

13 A. Correct.

14 Q. Now, I want to ask you a question or two
15 about routing. Can you explain what we mean when
16 we say "routing"?

17 A. "Routing" means the path a call takes to
18 be completed.

19 Q. All right. And if a Polar 788 customer
20 calls a Hillsboro 636 customer, how is that call
21 routed?

22 A. Over direct trunks between those two
23 switch providers.

24 MR. HARRINGTON: May I ask how this is
25 different than the direct testimony that we heard

1 this morning on this topic or how it connects to
2 the cross that was asked? Because we didn't ask
3 any questions about how the calls were actually
4 routed during cross-examination. I would object on
5 the grounds it's beyond the scope of cross.

6 JUDGE HOBERG: Overruled. You can
7 proceed.

8 MR. BRUDVIK: Thank you, Your Honor.

9 Q. (MR. BRUDVIK CONTINUING) A Qwest customer
10 in Mayville that calls Hillsboro on 436 -- from 786
11 to 436 is routed on which line?

12 A. Qwest customer in Mayville who is calling
13 Hillsboro 636?

14 Q. No. 436.

15 A. Hillsboro 436 is a Qwest-to-Qwest call. I
16 do not know if that's local or toll. Oh, it's a
17 toll call.

18 Q. All right. Now, in -- you also indicated
19 in Mayville/Portland there are -- their lines
20 between -- Polar's 788 and Qwest's 786 in Mayville
21 are also linked, are they not?

22 A. Correct.

23 Q. And the same thing in Hillsboro, 636, 436.

24 A. Correct.

25 Q. All right. And on direct examination you

1 testified that a ported -- if we ported a 788
2 number in Mayville to Midco and they called a 636
3 number in Hillsboro, that number would be routed
4 through the Qwest line as a toll call?

5 A. Correct.

6 Q. It's also possible, is it not, that that
7 call could be routed from the Mayville -- the
8 exchange Polar 788 to Polar 788 and down the free
9 trunk to Hillsboro?

10 A. You mean from the Mayville customer who's
11 in Qwest's?

12 Q. Yes. It's technically possible.

13 A. True, technically possible.

14 Q. So throughout this diagram there are ways
15 that calls could be routed that would not be toll
16 calls through Qwest.

17 A. Correct.

18 Q. And the reason we have to go through Qwest
19 is because we have -- both Polar and Halstad have
20 interconnection agreements with Qwest.

21 A. In your example the reason we have to go
22 through Qwest is because Qwest owns one of the
23 customers.

24 Q. And so were those some of the issues that
25 were still on the table, the routing issues, when

1 these negotiations broke off?

2 A. That was one of the issues that we were
3 discussing, yes, how calls would be routed between
4 the parties.

5 Q. And that's an important issue?

6 A. We thought so, yes.

7 MR. BRUDVIK: That's all I have.

8 JUDGE HOBERG: Thank you, Mr. Brudvik.
9 Anything further, Mr. Harrington?

10 MR. HARRINGTON: Yeah, just a little
11 recross.

12 **RECROSS-EXAMINATION**

13 **BY MR. HARRINGTON:**

14 Q. Looking at the R13, when we were
15 discussing the definitions during
16 cross-examination, you indicated that there was no
17 difference in this case between the EAS and local
18 calling areas.

19 A. Correct.

20 Q. Reading the revised -- revisions you're
21 proposing to make to this, it would appear that in
22 fact there are differences between the local
23 calling areas and EAS because the Halstad local
24 calling area does not extend to Mayville, but the
25 EAS does; is that correct?

1 A. They're the same thing for us.

2 Q. Then why is the line drawn so that it does
3 not include Mayville anymore?

4 A. I don't know which line you're looking at.

5 Q. There's a line -- previously there was a
6 trapezoid on its side.

7 A. Which was Hillsboro?

8 Q. The Halstad, Shelly, the red one.

9 A. Oh, okay. I've got that one.

10 Q. Halstad, Shelly were the two on the right.
11 You have crossed out two-and-a-half sides, give or
12 take.

13 A. Correct.

14 Q. And you have inserted a bent line that
15 goes between Hillsboro and Mayville/Portland and
16 indicated that's the actual boundary of the local
17 calling area for Halstad?

18 A. Correct.

19 Q. But -- and you've also testified that
20 there's EAS between Hillsboro and Mayville/Portland
21 for Polar and Halstad. So that suggests the local
22 calling area and EAS area are different. It's
23 mandatory EAS; correct?

24 A. Well, no. That would suggest that the
25 diagram is misleading. They have local calling,

1 whether you call it EAS or local, in the exchanges
2 we've discussed at length. I don't know how you're
3 reading this diagram. I just saw it myself, so --

4 Q. I thought it was prepared by respondents.

5 A. No. This was your diagram that was just
6 edited.

7 Q. C13.

8 A. C13?

9 Q. R13. I'm sorry. R13?

10 A. R13 is your diagram just recently altered
11 by --

12 Q. By respondents.

13 A. Right.

14 Q. Right. So it's being offered by
15 respondents, and it appears to show the local
16 calling area for Halstad is not including Mayville/
17 Portland, and I'm trying to understand how that
18 reconciles with your earlier testimony.

19 A. Okay. Halstad, the exchange -- the 456
20 exchange? When you say "Halstad," do you mean
21 Halstad Telephone Company?

22 Q. Halstad Telephone Company and HTC -- the
23 local calling area for HTC for Hillsboro.

24 A. Okay. The local calling area for HTC for
25 Hillsboro includes Mayville/Portland, Shelly and

1 Halstad.

2 Q. Then why have you placed a line between
3 Hillsboro and Mayville/Portland on R13?

4 A. Because -- I don't know. I didn't do this
5 diagram.

6 JUDGE HOBERG: So are you saying that it's
7 inaccurate then?

8 THE WITNESS: I think it is.

9 MR. BRUDVIK: Could we go off the record?

10 JUDGE HOBERG: Okay. We can go off the
11 record.

12 MR. HARRINGTON: I would rather not go off
13 the record for a minute.

14 JUDGE HOBERG: All right. Mr. Brudvik.

15 THE WITNESS: If we were to correct this
16 diagram -- may I or --

17 JUDGE HOBERG: If what?

18 THE WITNESS: If we correct this diagram,
19 the line that we're discussing that sort of takes a
20 jag really should go up and include part of
21 Mayville/Portland to the extent that it is within
22 our local calling area for Halstad.

23 JUDGE HOBERG: As the original C1 did, you
24 mean?

25 THE WITNESS: As the revised version of

1 this did.

2 JUDGE HOBERG: The revised version --

3 THE WITNESS: The C1-A.

4 Q. (MR. HARRINGTON CONTINUING) If we were to
5 look at C1, the colored diagram, my understanding
6 of what you're saying is that for Hillsboro the
7 local calling area depicted on that diagram is
8 correct.

9 A. Where Hillsboro only calls Hillsboro is
10 local?

11 Q. Where the red Halstad local calling area
12 shown on that for Hillsboro is the local calling
13 area.

14 A. Not all the time, no. That's why I can't
15 answer the question.

16 MR. BRUDVIK: Your Honor, we can explain
17 this. The witness perhaps cannot.

18 JUDGE HOBERG: Who can?

19 MR. HARRINGTON: Your Honor, I'm going to
20 have to object to the admission of this exhibit
21 because the witness can't explain it, and at this
22 point I think it adds -- honestly, without that
23 line I have no objection to this exhibit, but that
24 line and her testimony are adverse to each other.
25 They don't say the same thing; and, frankly, this

1 is illustrative of some of the problems we've had
2 throughout this, that we don't know what they mean
3 by EAS or local calling area, and we have exactly
4 this issue here. So for the moment I have to
5 object to the admission of this exhibit.

6 MR. BRUDVIK: Our next witness will be
7 able to explain it.

8 JUDGE HOBERG: So you're withdrawing R13
9 until your next witness; is that right?

10 MR. BRUDVIK: I guess so.

11 JUDGE HOBERG: Are you going to substitute
12 it with something else or --

13 MR. BRUDVIK: No. We'll put it right back
14 in because we can explain it. I know the question,
15 and I don't think that Eileen understands the
16 question, but --

17 JUDGE HOBERG: Okay. We'll reserve it
18 until your next witness then.

19 MR. HARRINGTON: I have no further
20 questions then.

21 JUDGE HOBERG: I haven't admitted it yet.
22 No further questions. Any further questions of
23 this witness, Mr. Binek?

24 MR. BINEK: Yes.

25

FURTHER EXAMINATION

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BY MR. BINEK:

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Q. I guess I was a little bit confused by your response to Mr. Brudvik's last question in redirect where you explained the call from a Polar customer -- he was talking about the routing, and as I understood what you said was that a call from a Polar customer to -- were you talking about a Qwest customer in Hillsboro being routed through Polar's trunks?

11

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A. I think the question -- if I recall the question, it was a Qwest Mayville customer who calls Hillsboro and how would that call be routed.

14

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Q. Okay. And you said that could be routed and that -- I guess I'm still really confused. Why would -- why would that call -- is that a way for a call to be a local call? Was that the purpose?

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A. I believe the intent of the question was to say hypothetically if Qwest routed that call to Polar, could Polar then turn around and route that call to Hillsboro. Did the physical routing exist that we could possibly do that were Qwest to hand that call to Polar as an indirect connection to Hillsboro.

25

Q. Okay. I guess I'm still kind of confused.

1 that 900 calls should be blocked. You can tell it
2 911 calls should be routed to, you know, a certain
3 PCEP as opposed to a different PCEP. So that
4 technology does occasionally exist.

5 Q. Can it be used in the situation that we're
6 discussing today to solve the problem?

7 A. As a line class code? No. Because that
8 is not -- the customer's access to certain
9 telephone numbering patterns is not driven by his
10 line class code, where he chooses to subscribe to.
11 In the case we're talking about here that's totally
12 governed by the ever changing ownership of the
13 different end points of a call.

14 Q. Okay. The other question I had is: Does
15 Mayville have extended area service to Shelly?

16 A. No.

17 MR. FAHN: Okay. Thank you.

18 **FURTHER EXAMINATION**

19 **BY JUDGE HOBERG:**

20 Q. Doesn't it depend on who the call is
21 originating from?

22 A. No, it doesn't. No, it does not.

23 JUDGE HOBERG: Okay. Any further
24 questions of this witness?

25 MR. BRUDVIK: We have none.

1 JUDGE HOBERG: No?

2 MR. HARRINGTON: No.

3 JUDGE HOBERG: Thank you. You're free to
4 return to Georgia.

5 MR. BRUDVIK: Oh, yeah. That's right.

6 JUDGE HOBERG: Just for the record, we
7 don't anticipate recalling this witness?

8 MR. BRUDVIK: No.

9 MR. HARRINGTON: No reason to think that
10 we'd want to call her.

11 MR. BRUDVIK: All right. However you guys
12 figure it out, you can go.

13 JUDGE HOBERG: Just a moment. Who are you
14 calling?

15 MR. BRUDVIK: Joe Schuele, S-c-h-u-e-l-e.

16 JUDGE HOBERG: Okay. Mr. Schuele, did you
17 hear the admonition I gave earlier in regard to
18 perjury?

19 MR. SCHUELE: Yes.

20 (Witness sworn.)

21 JUDGE HOBERG: Thank you. Mr. Brudvik,
22 please.

23 **JOE SCHUELE,**

24 being first duly sworn, was examined and testified
25 as follows:

DIRECT EXAMINATION

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BY MR. BRUDVIK:

Q. State your name for the record, please.

A. I'm sorry?

Q. Give me your name for the record.

A. My name is Joe Schuele, S-c-h-u-e-l-e.

Q. And where do you live, sir?

A. I live in Westminster, Colorado.

Q. And what is your current position?

A. My current position is assistant director of regulatory affairs for Martin Group, which is a consulting firm.

Q. And in what areas do they consult?

A. Martin Group consults in engineering, billing, operations and also regulatory affairs. I specialize in regulatory affairs, assisting clients with matters of interconnection, intercarrier compensation, universal service, other regulatory issues.

Q. Okay. And what's your education and background?

A. I have a Master's degree in economics from the University of Nebraska. Prior to my position at Martin Group up until 2001 I worked -- I managed legislative and regulatory affairs for the Lincoln

1 Telephone Company in Lincoln, Nebraska, and its
2 successors. Prior to that I spent about 10 years
3 on the research staff of the Nebraska legislature.

4 Q. And in connection with your work have you
5 had experience with competitive local exchange
6 carrier situations under the Telecommunications
7 Act?

8 A. Yes, I have.

9 Q. And you represent who in this case?

10 A. I am a consultant to HTC Services.

11 Q. And how long have you been their
12 consultant?

13 A. I've been consulting with HTC for about
14 two-and-a-half years.

15 Q. And were you involved then in the
16 consulting work on the Polar/Halstad extended area
17 service and the LNP request in this case?

18 A. I was involved in the LNP request. Yes.

19 Q. Okay. So that's how you got into this?

20 A. Yes.

21 Q. Now, before we go any further, I want to
22 talk about the infamous R13 exhibit. There were
23 questions raised -- questions raised about extended
24 area service calling areas, and I want to just make
25 this, hopefully, clear. Halstad Telephone Company

1 owns Halstad; is that correct?

2 A. Yes.

3 Q. The parent company owns the Halstad
4 exchange?

5 A. Yes.

6 Q. Shelly is also owned by the parent
7 company?

8 A. Yes.

9 Q. They have always had free calling between
10 the two of them?

11 A. To my knowledge they have, yes.

12 Q. Before HTC Services went into Hillsboro as
13 a CLEC, there was no toll-free calling to Hillsboro
14 from Halstad.

15 A. Not that I'm aware of. No.

16 Q. When Hillsboro -- Halstad, HTC Services,
17 went into Hillsboro, they established a free
18 calling area between Halstad, Shelly and Hillsboro.

19 A. That's correct.

20 Q. Okay. But the line that you see, the
21 diagonal line that's drawn up to Shelly and between
22 Mayville/Portland and Hillsboro; do you see that
23 line?

24 A. Yes.

25 Q. Okay. The purpose of that line is to say

1 that that is the extent of that particular calling
2 area?

3 A. Well, you're talking about the line that
4 is drawn between the Hillsboro box and the
5 Mayville/Portland box?

6 Q. Yes. And then diagonally up to Shelly.

7 A. Right. Well, I didn't draw that line, but
8 I think the intent was to distinguish the -- the
9 exhibit as presented by Midcontinent refers over
10 here in the key to exchange boundaries, and I think
11 the reason for drawing that line was to make it
12 clear that while some Hillsboro customers -- while
13 HTC's Hillsboro customers can call Polar's Mayville
14 customers on an extended area calling basis, there
15 is no -- there is no HTC exchange in Mayville.
16 They don't own any facilities in Mayville, they
17 don't operate in Mayville. So to us it was
18 troublesome to see that defined as being part of
19 Halstad's exchange. Rather, I believe what the
20 attempt was to clarify that it's not part of
21 Halstad's property, either CLEC or ILEC, but there
22 is a calling -- there is an extended area calling
23 arrangement.

24 Q. But it also intended to show that a
25 Halstad or Shelly customer does not get a free call

1 to Mayville?

2 A. Correct.

3 Q. That's why the line is drawn?

4 A. Correct. Those would be the two reasons
5 for the line, in my opinion.

6 Q. Nor does the Clifford/Galesburg customer
7 through Polar get a free call to Hillsboro.

8 A. Correct.

9 Q. All right. Thank you. There was some
10 discussion on direct examination by Mary Lohnes
11 about wireless to wire line LNP. Do you recall
12 that discussion?

13 A. I recall that discussion. Yes.

14 Q. And she indicated that there was no
15 requirement for an interconnection agreement in
16 those situations?

17 A. Right. I would say that the FCC has
18 deemed that there is no -- in an interconnection
19 agreement there's not a prerequisite in those
20 instances for LNP.

21 Q. She also talked about the difference in
22 the rate centers, if I remember right?

23 A. I believe so, yes.

24 Q. Why does that make a difference?

25 A. Well, throughout -- prior to the November

1 10th order -- a few months prior to the November
2 10th FCC order requiring -- generally requiring
3 wire line to wireless LNP with some limitations,
4 prior to that order there were several months of
5 disagreement among those two factions of the
6 industry as to whether wire line carriers really
7 had to honor LNP requests from wireless carriers.
8 There was a period of several months when those two
9 sectors of the industry went back and forth on that
10 issue, and one of those issues was the disparity in
11 the local calling scopes that generally exist
12 between wireless and wire line carriers.

13 In most cases a wireless customer in most
14 cases will have a larger local calling area; in
15 other words, by local calling area I mean the
16 calling within a region that's included in their
17 monthly charge and doesn't cost them extra.
18 Generally they will have a larger local calling
19 area than a wire line customer, and that was one of
20 the issues that was -- that was one of the points
21 of contention in that dispute among those sectors
22 of the industry.

23 The FCC resolved that issue to some extent
24 to the extent that -- saying that wire line
25 carriers with some limitations must port to

1 wireless carriers under certain conditions and
2 resolved that issue to some degree. The issue that
3 the FCC did not address but rather postponed to a
4 further rulemaking was the issue of what happens
5 when a customer with a smaller wire line local
6 calling area wants -- or, excuse me, when a
7 customer with a wireless number wants to port that
8 from the larger local calling area to the smaller
9 local calling area, and the FCC left that issue
10 unresolved saying that there were several issues it
11 needed to examine, several determinations to be
12 made, among them, who's responsible for the cost
13 of -- of resolving that disparity between the
14 calling areas.

15 Q. And the rationale for their analysis of
16 requiring further rulemaking, does that have any
17 application to our situation where we have a wire
18 line company with a larger calling area?

19 A. I think it goes to the point of -- I don't
20 think it absolves us of an obligation to port
21 numbers to Midcontinent, and we've made it very
22 clear that we don't take this order and say because
23 of what the FCC says here, we don't have to engage
24 in LNP. I'm saying with the FCC deferring that
25 issue to further rulemaking I feel validates it as

1 a very important issue. When a customer wants to
2 take a number that is associated with a larger
3 local calling area to a carrier that has a smaller
4 local calling area, that is -- that's a significant
5 issue that the FCC is still examining. We're not
6 saying that -- that it is 100 percent on point in
7 this case, but I think it validates it as a
8 significant issue that needs to be resolved between
9 the parties before LNP can take place.

10 Q. Does it validate the issue to the extent
11 that there should be some type of agreement or
12 meeting of the minds in terms of routing and that
13 sort of thing?

14 A. Yes. I believe it speaks to the issue
15 that absent some type of an agreement that will
16 resolve that disparity between the calling areas it
17 makes LNP very difficult.

18 Q. And you remember the testimony of Mary
19 Lohnes that there was one other example that she
20 could think of in this immediate area where there
21 was two different calling areas and a porting
22 situation. Do you recall that testimony, a South
23 Dakota case?

24 A. I believe I do.

25 Q. What, if anything, do you know about that

1 case?

2 A. I am familiar with a -- I'm familiar with
3 a competitive carrier in South Dakota which offered
4 an expanded local calling area to its customers in
5 a particular region, regardless of whether they
6 were calling their own customers or whether they
7 were calling Qwest customers or regardless of who
8 they were calling offered that as extended area
9 service, included in their monthly rate. I'm aware
10 of a carrier that did that.

11 Q. Is that the carrier she was referring to?

12 A. I don't know. I'm -- I'm assuming it
13 could be.

14 Q. All right. What happened in that case?

15 A. Well, in that case this carrier that
16 extended this offering to its customers, even
17 though they're not collecting toll charges from
18 their customers, they are responsible for the
19 payment of terminating access to the carriers whose
20 switch is terminating those calls.

21 I regard that as a bad business decision
22 and an unfortunate situation that that carrier has
23 placed itself in. That was a situation that both
24 HTC Services and Polar Telecom were very careful
25 not to place themselves in. They did not offer any

1 extended area calling without first making
2 arrangements with the carrier on the terminating
3 end to treat that traffic as local and subject it
4 not to access charges but to reciprocal
5 compensation.

6 Q. So the lesson that we could take from that
7 is that it's vitally important that our
8 companies -- knowing full well that we have a duty
9 to and are willing to extend LNP, we have to
10 resolve those issues?

11 A. I believe that those issues need to be
12 resolved in order for -- otherwise the two carriers
13 in question, the two respondents, would find
14 themselves in a position of paying full terminating
15 access charges on calls that are treated as local
16 to the customer, and that's a situation that
17 carriers are not -- are not generally subject to
18 and, in my opinion, carriers would make a very bad
19 decision to place themselves in that situation
20 voluntarily.

21 Q. Would that give a competitive advantage to
22 the person purchasing resold services which
23 wouldn't have to pay the terminating access?

24 A. Well, that's not -- I'm not sure I
25 understand the question.

1 Q. Well, I'll withdraw the question. You
2 were involved in the negotiations with Midco
3 throughout?

4 A. With the exception of some conversations
5 that took place between only Polar and
6 Midcontinent. I was involved in all conversations
7 that took place between both the respondents and
8 Midcontinent.

9 Q. And the allegation against Halstad is that
10 they are now discriminating because they might
11 discriminate in the future; is that correct?

12 A. That's my understanding.

13 Q. To your knowledge, has Halstad ever ported
14 a number to a wireless carrier?

15 A. No. My understanding is Halstad -- while
16 Halstad has had correspondence from wireless
17 carriers requesting local number portability in
18 general, they have not had any requested port
19 specific numbers. My understanding is also that if
20 HTC is asked to port a specific number to any
21 wireless carrier, we would -- we would be sure to
22 resolve the same issues that are at issue here, the
23 issue of reciprocal compensation, what charges
24 those calls are subject to. We would treat -- we
25 would ask the same questions and ask to resolve the

1 same issues with that wireless carrier prior to
2 porting that number that we have asked of
3 Midcontinent.

4 Q. So we wouldn't be treating them any
5 differently?

6 A. No. We're not treating them any
7 differently than any other carrier.

8 Q. And it's my understanding wireless
9 carriers do not pay a terminating access charge.

10 A. They do not charge a terminating access
11 charge.

12 Q. Or charge, right.

13 A. In some instance they pay terminating
14 access if it crosses a regional boundary, but calls
15 terminated from a land line carrier to a wireless
16 carrier are sometimes subject to reciprocal
17 compensation, sometimes they are not. If there's
18 no agreement, we would call that a bill and keep
19 arrangement, but they are never -- zero percent of
20 the time are they ever subject to any type of full
21 tariff terminating access charge.

22 Q. Did you feel at any time that we had made
23 it clear to Midco, "we" meaning Halstad Telephone,
24 the person you represent -- did they ever make it
25 clear to Midco that we were not going to be able to

1 negotiate local number portability with them?

2 A. No. On the contrary. We felt that we
3 would be able to resolve these issues. We felt
4 that if we could simply resolve the rating and
5 routing issues and the issue of -- of what access
6 charges these -- how these would be treated for the
7 purpose of termination, that we would be able to
8 offer that, and we made it clear that we would do
9 our best to resolve these issues between them as
10 well as Qwest, which is also involved in that
11 equation.

12 Q. And you felt that Qwest was a necessary
13 and indispensable party to that?

14 A. Once we determined that we were talking
15 about calls between HTC and Qwest's switch, then,
16 yes, Qwest -- Qwest's cooperation in some manner or
17 another was going to be essential to resolving
18 those issues.

19 JUDGE HOBERG: Is that technical
20 cooperation or --

21 THE WITNESS: Well, it's both in the sense
22 that the economic issues and the technical issues
23 are not inseparable. The technical routing of the
24 calls is going to determine the charges that they
25 are subject to, and so there were both technical

1 and economic issues to resolve.

2 Q. (MR. BRUDVIK CONTINUING) To that end, I
3 think that Eileen testified that at this particular
4 point in time if we are able to successfully
5 negotiate with Qwest a reciprocal compensation
6 arrangement, there would be no obstacle to granting
7 LNP.

8 A. We feel that that is the last and major
9 remaining obstacle standing in the way of porting
10 numbers. Yes.

11 Q. And that rests solely within the domain of
12 Qwest?

13 A. Well, that's -- we need an understanding
14 with Qwest. Whether that's through their agreement
15 with Midcontinent or through some type of binding
16 statement on their part that they will treat those
17 calls as local, subject them either to reciprocal
18 compensation or to a bill-and-keep arrangement,
19 which is essentially reciprocal compensation at a
20 rate of zero, if they would do either of those
21 things, we feel that we would then be able to -- we
22 would be able to move past these issues, and we've
23 made that clear on a number of occasions.

24 Q. And according to Mary, once they made the
25 request for LNP, the obligation to resolve all of

1 those issues, she felt, fell into our laps; is that
2 right?

3 A. I -- I don't recall her answer to that
4 question specifically, but we -- we have done, in
5 my opinion, more than our share to try to resolve
6 those issues with Qwest. We have -- HTC has
7 contacted Qwest on numerous occasions to try to get
8 that issue resolved.

9 MR. BRUDVIK: Okay. That's all I have.
10 Thank you.

11 JUDGE HOBERG: Thank you, Mr. Brudvik.
12 Mr. Harrington, did you have some questions?

13 MR. HARRINGTON: A few.

14 **CROSS-EXAMINATION**

15 **BY MR. HARRINGTON:**

16 Q. I'd like to take a look at Exhibit C13,
17 please.

18 A. Is that the unaltered chart?

19 Q. No. C13 is the terms.

20 A. Oh, the terms. Okay.

21 Q. C as opposed to R.

22 A. I believe I have those. Okay. All right.

23 Q. Now Polar's earlier witness testified that
24 she was in agreement with the definitions of "rate
25 center" and "local calling area." Are you also in

1 agreement with those definitions?

2 A. Generally, yes.

3 Q. Any exceptions? Anything you think should
4 be changed in them?

5 A. Nothing that I would change at this time.

6 Q. You're familiar with the FCC's order on
7 November 10 on wire line/wireless porting?

8 A. Yes.

9 Q. You testified as to what they said on the
10 further notice proposed rulemaking portion of that
11 order?

12 A. I testified to one -- one issue that they
13 deferred, in my words, to the further notice of --
14 an unresolved issue.

15 MR. HARRINGTON: May I approach the
16 witness?

17 JUDGE HOBERG: Yes.

18 Q. (MR. HARRINGTON CONTINUING) I'm going to
19 represent to you that what I'm showing you is a
20 copy of that order. If you'd take a look at it for
21 a moment and make sure that it appears to you to be
22 a copy of the order.

23 A. Yes. That appears to be the copy of the
24 order.

25 Q. All right. Would you turn to the second

1 red tab, please?

2 MR. BRUDVIK: Could you --

3 Q. (MR. HARRINGTON CONTINUING) I should
4 actually ask -- I'm sorry. I'll ask you to turn a
5 little closer to give a little more explanation so
6 that you don't have the objection you're about to
7 have.

8 MR. BRUDVIK: Okay.

9 Q. (MR. HARRINGTON CONTINUING) In the table
10 of contents would you tell me where the further
11 notice proposed rulemaking starts?

12 A. Looks like it starts on paragraph 41.

13 Q. All right. And continues through?

14 A. Paragraph 51.

15 Q. Okay. Please turn to the second red tab
16 now.

17 MR. BRUDVIK: I'm not objecting, but have
18 we fully identified this document for the record?

19 MR. HARRINGTON: Sure. I'll be happy to.
20 The document is the FCC's Memorandum Opinion and
21 Order and Further Notice of Proposed Rulemaking in
22 the Matter of Telephone Number Portability and CTIA
23 Petitions for Declaratory Ruling on Wire Line/
24 Wireless Porting Issues, CC Docket No. 95-116,
25 adopted November 7th, 2003, released November 10th,

1 2003. The citation for purposes of people looking
2 for it is 18 FCC Record 23697.

3 Q. (MR. HARRINGTON CONTINUING) All right.
4 Would you turn to the second red tab again? And
5 would you read the first sentence of paragraph 42,
6 which is underlined?

7 A. "We seek comment on how to facilitate
8 wireless to wire line porting where there is a
9 mismatch between the rate center associated with
10 the wireless number and the rate center in which
11 the wireless carrier seeks to serve the customer."

12 Q. Now just a moment ago we discussed the
13 definition of "rate center" and "local calling
14 area." In your direct testimony you said that the
15 issue that was here was the same as the issue
16 before the FCC.

17 A. No, I didn't say that. I said that it had
18 some applicability to this issue, that there were
19 some similarities. I did not say it was the same.

20 Q. All right. Then are you contending that
21 the rate centers -- are you contending that the
22 rate centers are different in this case?

23 A. I'm contending that the local calling
24 areas are different.

25 Q. Please answer the question.

1 MR. BRUDVIK: He's answering the question.

2 JUDGE HOBERG: You can answer with a yes
3 or no first.

4 THE WITNESS: Okay. I'm saying that the
5 geographic point to which these rate centers are
6 associated is the same; the calling areas are
7 different.

8 Q. (MR. HARRINGTON CONTINUING) Okay. Is
9 there an exception in the FCC's rules, to your
10 knowledge, that permits carriers to not do
11 portability when the local calling areas do not
12 match?

13 A. I think that that was the very issue that
14 the FCC undertook in the order that we just
15 discussed.

16 Q. You read the -- you read the language a
17 few moments ago. Would you like to look at the
18 order and see if you can find a place where they
19 ask whether local calling area matching is
20 something that they should be considering in the
21 notice of proposed rulemaking?

22 A. I do believe they do take up that issue in
23 the further notice of proposed rulemaking, the
24 issue of calling areas between wireless carriers
25 and wire line carriers. I'm not saying that they

1 take up the issue of calling area disparities
2 between wire line carriers. I never said that.

3 Q. So you're not aware of an instances in
4 which FCC has ever granted a waiver or an exception
5 to its rules in a situation where the local calling
6 areas were different?

7 A. No. I believe the FCC has very specific
8 criteria for applying for an LNP waiver. I believe
9 that the crux of that language says that a carrier
10 must show that the -- that providing LNP would be
11 technically infeasible, or if technically feasible,
12 is unduly burdensome. Our position is that if we
13 can provide LNP and have these calls treated as
14 local and subject only to reciprocal compensation
15 and not terminating access charges, it's not unduly
16 burdensome. If we have to pay terminating access
17 charges on these calls, we would argue that is
18 unduly burdensome.

19 MR. HARRINGTON: May I approach the
20 witness again?

21 JUDGE HOBERG: You may.

22 Q. (MR. HARRINGTON CONTINUING) I'm showing
23 you a copy of the Code of Federal Regulations -- 47
24 Code of Federal Regulations, parts 40 to 69; is
25 that correct?

1 A. Yes.

2 Q. And I'm now showing you Section 52.23 of
3 rules, which is titled Deployment of Long-Term
4 Database Methods for Number Portability by LECs.
5 Look at --

6 MR. BRUDVIK: I guess I'm going to object,
7 Your Honor, to this line of questioning. He's
8 asking this witness to make interpretations of law.

9 JUDGE HOBERG: He hasn't yet.

10 MR. BRUDVIK: Well, he's going to.

11 JUDGE HOBERG: We don't know that.

12 MR. HARRINGTON: I will tell you exactly
13 what I'm going to ask. I'm going to ask the
14 witness to look at D, which is the waiver
15 provision -- you can examine it yourself if you'd
16 like -- and tell me where in the waiver provision
17 there's language that indicates anything but
18 technical feasibility is a basis for a waiver. Now
19 if counsel will concede that there isn't such a
20 provision, indeed I'll stop asking the question.

21 MR. BRUDVIK: Are you in the CFR?

22 MR. HARRINGTON: I'm in 47 CFR, Section
23 52.23, subsection D.

24 JUDGE HOBERG: You may proceed.

25 MR. BRUDVIK: Subsection what?

1 MR. HARRINGTON: D, as in dog, which
2 begins there.

3 THE WITNESS: Did you want me to read it?

4 Q. (MR. HARRINGTON CONTINUING) I'm asking
5 you if you can point me to a place in that
6 provision that says you can obtain a waiver because
7 of anything other than technical infeasibility?

8 A. I can't point to it in this section. I
9 believe the section on transitional number
10 portability and interim number portability has the
11 language that I referred to.

12 Q. Okay. Did we ask for interim number
13 portability? I'm sorry. Did we ask for interim
14 number portability?

15 A. I don't know.

16 Q. You were in these conversations, weren't
17 you? That was your testimony.

18 A. I don't recall whether we ever
19 discussed -- I believe we did discuss possible
20 interim solutions for number portability. We
21 discussed -- we discussed some options for interim
22 number portability, but I don't know -- I don't
23 know -- I cannot recall if Midcontinent
24 specifically requested interim number portability.

25 Q. All right.

1 A. But that is where the language says
2 that -- shows that it is not technically feasible,
3 or if technically feasible, is unduly burdensome.
4 That's where that language exists.

5 Q. Would that be Section 52.27.C?

6 A. Yes.

7 Q. And that is limited entirely to
8 transitional mechanisms of number portability?

9 A. That's correct.

10 Q. Thank you. So then your understanding is
11 that there is not a waiver available if you're
12 seeking permanent number portability for reasons of
13 economics?

14 A. Actually, there is -- there is a waiver
15 available through the state commission under what
16 is known as two percent provision. That is an
17 option for carriers to seek a waiver of certain
18 251-B obligations if they go to their state
19 commission and show that they are economically
20 burdensome.

21 Q. Has HTC applied for such a waiver?

22 A. No. And I think we made it clear that we
23 chose not to pursue a waiver because we felt that
24 if we could just simply resolve the issues of
25 whether it was subject to terminating access, that

1 a waiver would not be necessary, and if we could --

2 Q. Are you aware of a waiver ever being
3 granted to a CLEC?

4 A. I'm sorry?

5 Q. Are you aware of a waiver under Section
6 251.F.2, which is the provision you're referring to
7 for two percent carriers, ever being granted to a
8 CLEC?

9 MR. BRUDVIK: I object.

10 THE WITNESS: I'm not aware that they have
11 or have not been, but they are a carrier that
12 serves less than two percent of the nation's action
13 lines. The section does not distinguish between
14 CLECs and ILECs. It's a 251-B obligation that
15 applies to both CLECs and ILECs.

16 Q. (MR. HARRINGTON CONTINUING) I'd like to
17 turn to the question of terminating access. The
18 previous witness testified that in a situation
19 where you do not have an EAS agreement and you're
20 not otherwise in the local calling area that Polar
21 or Halstad -- she was talking about Polar, but I
22 believe you listed Halstad, as well -- would pay
23 terminating access for calls that would run through
24 the Qwest switch and also would receive terminating
25 access for calls coming from the ported customer

1 to, in your case, Halstad. Do you agree with that?

2 A. I agree that could be the case.

3 Q. What would make you think it wouldn't be
4 the case?

5 A. Well, it may not be the case if there's --
6 if there is some arrangement under which they did
7 not charge terminating access.

8 Q. There is no such an arrangement between
9 Halstad and Qwest now, between Mayville and
10 Hillsboro.

11 A. Correct.

12 Q. So, in other words, HTC would receive
13 terminating access on calls that went to its
14 customers from a resold customer?

15 A. To answer your question more directly,
16 absent any special circumstances or arrangements,
17 that would be my understanding.

18 Q. Now you were discussing what you believe
19 was the example that Mary Lohnes used during her
20 testimony of another carrier that had local calling
21 areas that were different. Do you recall that
22 testimony on your part?

23 A. Yes.

24 Q. And you indicated that you thought that
25 that company had made a bad business decision

1 because it had not entered into an appropriate EAS
2 agreement with everyone to whom it terminated calls
3 and had to pay terminating access; is that a fair
4 characterization?

5 A. A fair characterization. Personally I
6 would have either limited the extended area calling
7 to CLEC customers, or I would have entered into
8 those type of agreements. I would not have offered
9 that to my customers without first doing one or the
10 other.

11 Q. And you further testified, if I'm correct,
12 that Halstad entered into an agreement to avoid
13 that problem.

14 A. Halstad did not ever offer to its
15 customers extended area calling to any carrier with
16 whom it did not have those arrangements.

17 Q. I believe your testimony was that Polar
18 and Halstad were very careful to enter into an
19 agreement to avoid any of those problems; is that
20 correct?

21 A. That could be. I mean, my --

22 Q. But they didn't enter into an agreement
23 with everyone, did they?

24 A. That was my entire point, is that if they
25 didn't have those agreements with Qwest -- that's

1 who we're talking about -- because they didn't have
2 that agreement with Qwest, they didn't offer that
3 service to their customers. They didn't offer
4 free -- they didn't offer interexchange calling to
5 their customers not subject to toll charges to any
6 Qwest switch because they didn't have those
7 arrangements, and that was my whole point.

8 Q. Right. So your whole point was that they
9 entered into an agreement with one party and chose
10 not to enter into an agreement with another party
11 so they wouldn't offer that service?

12 A. I don't know that they chose not to enter
13 into an agreement with that other party. I think
14 that other party was not interested. They entered
15 into an agreement with the willing party to which
16 their customers were interested in having extended
17 area service.

18 Q. So now when Polar and HTC entered into
19 this agreement, did they have an expectation that
20 they would never provide number portability to a
21 third-party carrier?

22 A. I wasn't involved in the agreement between
23 the companies, so I don't know what they
24 contemplated at that time.

25 Q. All right. Let's have a hypothetical

1 here. Midcontinent decides what the heck, we'll
2 build a switch, put a switch into Hillsboro to
3 serve Mayville/Portland and Hillsboro and we'll be
4 fully facilities based, and Midcontinent makes a
5 request to Halstad for number portability on the
6 basis of that, fully facilities-based operation.

7 A. Yes.

8 Q. Midcontinent further says and, no, we're
9 not going to enter into your EAS arrangement like
10 the one that you have between Polar and HTC. We
11 don't think it's in our best interest to do so. Is
12 it your testimony that HTC in that circumstance
13 would be justified to say, no, we are not going to
14 provide number portability until we work out an EAS
15 arrangement that's satisfactory to us?

16 MR. BRUDVIK: I don't -- I'm not seeing
17 the relevance of the hypothetical here.

18 MR. HARRINGTON: I'm trying to establish
19 whether their objection is to resale or to somebody
20 not entering into an EAS agreement.

21 THE WITNESS: If Midcontinent installs its
22 own switch in the area, it is in control of whether
23 or not those calls would be treated as local and
24 whether or not those calls would be -- which is not
25 today, but in your hypothetical Midcontinent would

1 be in control -- would be able to make those
2 decisions for itself, which it can't today. So in
3 your hypothetical if Midcontinent said we are going
4 to -- we are not going to terminate calls from your
5 customers to our switch on a local basis on a
6 reciprocal compensation or billing key basis, we're
7 going to subject those to terminating access
8 charges, I think that HTC's decision would be then
9 to not extend extended area calling, quote,
10 unquote, free calling, to that switch, as they have
11 with Qwest.

12 Q. (MR. HARRINGTON CONTINUING) Now, my
13 question was: In that circumstance would HTC
14 refuse to port? So what's the answer to that
15 question?

16 A. No. I don't believe that would be a
17 reason to refuse to port.

18 Q. So in my hypothetical Midcontinent has
19 decided to build its own switch and to not have EAS
20 with -- between Mayville and Hillsboro, and you
21 concluded it would not be reasonable for HTC to
22 refuse to port. In this situation -- in this
23 situation the local calling area is the same,
24 Midcontinent has made a choice, to use your word,
25 to decide not to build a switch at this time with

1 the consequence that they know what the local
2 calling areas are going to look like and they're
3 not going to be the same as yours. What's the
4 difference between the situations?

5 A. The situation is it's never been made
6 clear to us -- it's never been clear to me in my
7 involvement in the negotiations whether there was
8 an expectation on Midcontinent's part or not to
9 have calls continue to be routed as local to those
10 numbers once they're ported to Midcontinent.

11 Q. You mean routed by HTC as local?

12 A. No. Received by the Qwest switch as
13 local.

14 Q. So we have the same negotiation except
15 that Midcontinent is providing its own switch, and
16 it tells you flat out, no, we're not going to
17 receive those as local. We're going to receive
18 those as toll. Your testimony a moment ago was
19 that you couldn't refuse portability in that
20 circumstance, that would be unreasonable. Is that
21 still your testimony?

22 A. I don't think that would be grounds for
23 refusing portability.

24 Q. Okay. Then why is it grounds for refusing
25 portability in the resale scenario?

1 A. Because it's never been clear to us what
2 Midcontinent's expectation is in terms of the
3 calling scope that its customers will have once
4 those numbers are ported. It's never been clear to
5 me whether the expectation is that that customer's
6 going to keep its extended local calling area or
7 lose its extended local calling area.

8 Q. You're talking about --

9 A. We're quite willing to let the customer
10 keep its expanded local calling area, extremely
11 willing to let them do that if those calls -- if we
12 know that those calls are not going to be subject
13 to full-blown terminating access charges. We can't
14 promise a commitment that you are unable to make.

15 Q. Which customer are you talking about here?
16 You're talking about the customer calling the
17 Midcontinent customer?

18 A. I'm talking about the customer that
19 changed providers. What is their -- what is going
20 to be both their outbound and their incoming
21 calling scope.

22 Q. Okay. Their outbound calling scope,
23 let's -- although I think this is hypothetical.
24 You seem to, so I'll make it a hypothetical. Let's
25 have a hypothetical that Midcontinent is going to

1 adopt the Qwest local calling area for outbound
2 calls, and as we know in a resale scenario Qwest is
3 going to treat for inbound calls local calling
4 areas the same way it treats its local customers.
5 Okay?

6 A. Qwest is going to treat which?

7 Q. Inbound the same way it treats its
8 customers, which is to say from Mayville to
9 Hillsboro, that would be a toll call.

10 A. Okay.

11 Q. How is that -- how is that different from
12 the perspective of saying yes or no to portability
13 from the situation where Midcontinent makes exactly
14 the same decisions using its own switch?

15 A. If Midcontinent makes exactly those same
16 decisions, then the terminating charges -- the
17 charges that these calls will be subject to and the
18 routing decisions that will be made are clear
19 because both of the decisionmaking parties are at
20 the table. We, on the other hand, have been
21 chasing those questions with Qwest now for some
22 time and we don't have a definitive answer. We
23 don't feel comfortable going forward with treating
24 these calls as local until we would have a
25 definitive answer from Qwest saying we will treat

1 them as local and not subject to the terminating
2 access charges.

3 Q. So let's assume the worst case scenario,
4 which I believe in your case would be terminating
5 access charges. Your view is that being charged
6 terminating access charges by Qwest justifies not
7 providing number portability to Midcontinent? Just
8 yes or no.

9 A. No.

10 Q. No, it doesn't. All right. Let's move on
11 to the question of what has actually happened with
12 porting. You indicated during your direct
13 testimony that Halstad has received requests from
14 wireless carriers to make porting available but has
15 never received a request for a specific number.

16 A. That's correct.

17 Q. Does that mean that Halstad has turned on
18 portability in its switch?

19 A. I believe so, but I'm not 100 percent
20 sure. I believe that the switch is LNP capable,
21 but I'm not certain of that.

22 Q. Now suppose that you get a porting request
23 from a wireless provider in Halstad -- I'm sorry,
24 Hillsboro. It's your testimony that Halstad would
25 say to the wireless carrier, no, even though a

1 switch is turned on for portability?

2 A. No. Our position would be we would ask
3 that wireless carrier to resolve the same issues
4 that we need to be resolved here. I never said
5 that we would say no to them. I said that we would
6 ask them to resolve -- we would not -- we would
7 want to resolve exactly these same issues. What
8 switch is it going to be routed to, what
9 termination charges is it going to be subject to?

10 Q. And the basis for that is under the rules
11 and the law as far as you know?

12 MR. BRUDVIK: I'm going to object to that.
13 He's asking this witness to cite legal conclusions,
14 which is not within his domain.

15 JUDGE HOBERG: No. He's just asking him
16 if he knows the basis in law for that.

17 MR. BRUDVIK: He's asking him to cite
18 chapter and verse.

19 JUDGE HOBERG: He can tell him he doesn't
20 know.

21 THE WITNESS: I will answer the question.
22 I believe that wire line to wireless LNP is subject
23 to some limitations.

24 Q. (MR. HARRINGTON CONTINUING) And they are?

25 A. They are where the switch -- where the

1 switch is located to which it's going to be routed.
2 I believe that has to be within the same LATA.

3 Q. Point of interconnection, would that be a
4 better way of putting it than switch?

5 A. Well, it -- point of interconnection, yes.
6 Okay. I believe there are some limitations. We
7 would -- my advice to HTC would be to make sure
8 that the requesting wireless carrier met all those
9 criteria, and the reason I would advise that is so
10 that we didn't run into a situation where we ported
11 the number thinking that we were following the
12 rules, being the good soldier, following the rules,
13 and then the number gets ported to a point of
14 interconnection, a switch that is difficult to
15 route the call to or routes the call to a switch to
16 which there are charges incurred that we were not
17 expecting. Those are the issues that we would want
18 to resolve with a wireless carrier.

19 Q. And again, are you aware of a provision of
20 the FCC's rules of the November 10th order that
21 says that financial reasons are a basis for not
22 providing portability when it's technically
23 feasible?

24 A. I'm just aware that the order places
25 certain limitations on the circumstances under

1 which you are required to port from -- to a
2 wireless carrier, and those limitations are in part
3 to try to avoid undue economic burdens on the LECs.

4 Q. That's in a case of transitional, not
5 permanent, though.

6 A. No. I'm saying that in my opinion the
7 November 10th order places some limitations on wire
8 line to wireless portability. In other words,
9 someone in San Antonio cannot say I've got a
10 wireless phone down here, I'd like my Bismarck
11 number applied to it. Those limitations are
12 designed to avoid unforeseen and unresolvable
13 economic and technical difficulties.

14 Q. Let's just limit ourselves to economic for
15 a moment.

16 A. Okay.

17 Q. Can you explain to me where or what
18 limitations there are in the order or the FCC's
19 rules that permit in wire line to wireless a
20 carrier to say, no, I'm not going to port right now
21 until you resolve this issue regarding how much my
22 revenue is going to be?

23 A. No. I think a carrier that -- a carrier
24 that wants an exemption from the wire line to
25 wireless LNP requirements, their recourse would be

1 to either file for a waiver with the FCC or file
2 with their state commission, which a number of them
3 have, to be exempted from the requirement for
4 reasons of undue economic burden.

5 Q. And as you testified earlier, you're not
6 aware of any CLEC that has filed for such a waiver?

7 A. I'm not aware that any CLEC has or has
8 not.

9 Q. I just want to make sure I'm clear on one
10 point here. Your testimony is that until these
11 issues are resolved, these financial issues, these
12 issues relating to how much Halstad has to pay to
13 terminate calls, that you will not provide number
14 portability to anyone; is that correct? I should
15 say that HTC will not. You personally won't be
16 providing it to anyone, I know that. That HTC will
17 not provide it to anyone.

18 A. I'm saying there are certain rating and
19 routing issues that must be made clear to HTC
20 before we would agree to port a number to any
21 carrier.

22 Q. Until those issues are resolved to HTC's
23 satisfaction your testimony is that number
24 portability will not be provided to any other
25 carrier?

1 A. I believe that's been -- I believe that's
2 been the practice, is to make sure -- is to try to
3 resolve any of those issues prior to porting a
4 number. I think that's what most carriers do. I
5 think to port a number without resolving those
6 issues is not a good business practice.

7 Q. Even if required by the rules?

8 A. I think the rules require you to try to
9 overcome those issues, which we've done. If we had
10 ignored the request, then we would absolutely have
11 engaged in bad-faith. We didn't do that, and we
12 have made every effort to resolve these issues.

13 Q. So it was a good-faith from the very start
14 to say we won't do this until the financial issue
15 is resolved even with the recognition the rules do
16 not actually permit you to do that?

17 A. The rules provide for -- there are avenues
18 for a waiver due to economic circumstances, whether
19 they be at the State or FCC. We chose not to
20 pursue them because we felt that they were
21 surmountable, and we engaged in negotiations with
22 the feeling that they were surmountable, but we
23 have not resolved them.

24 Q. I guess just one more question. These
25 issues in your view cannot be resolved unless Qwest

1 takes a specific action that you are aware of it
2 has declined to take in other conversations with
3 HTC. What makes you think that Qwest will ever do
4 that?

5 A. Our -- our correspondence with Qwest with
6 regard to terminating access charges on calls on
7 these particular routes right now is -- I would
8 call it not definitive. We think there is some
9 chance that they are going to be willing to treat
10 these inbound calls as local and subject them only
11 to reciprocal compensation, but we haven't gotten a
12 definitive answer from them on that question. So
13 in HTC's case we're not convinced that they have
14 said, no, we will never do this, but we also have
15 not -- despite our best efforts don't have a firm
16 answer from them that says, yes, we will treat them
17 as local, we will subject them only to reciprocal
18 compensation. So we have -- we continue to try to
19 resolve that issue with them in order to
20 accommodate Midcontinent's request.

21 Q. I'm sorry. It was not the last question.
22 When did HTC start talking to Qwest?

23 A. We started talking to Qwest about this
24 very early in the discussions. I can't name a
25 date, but we have had -- I can't say when we first

1 contacted Qwest on the issue.

2 Q. More than a year?

3 A. I'm going to have to defer because I
4 didn't directly talk to Qwest, and I don't know the
5 dates. I don't know the dates that --

6 Q. Who should I ask that question of? Is
7 there someone here I should ask that question of?

8 A. That could be. I don't know. But we have
9 had a -- we have had an ongoing discussion with
10 them for the last four or five weeks to -- rigorous
11 correspondence with Qwest to try to get a
12 definitive answer to that question, but we
13 contacted them much earlier than that, but the --
14 the latest round of correspondence with Qwest has
15 been going on for about four weeks.

16 Q. Have you ever exchanged EAS contract
17 language with them?

18 A. Have we exchanged EAS --

19 Q. Language for an EAS agreement?

20 JUDGE HOBERG: An EAS agreement?

21 MR. HARRINGTON: Yes.

22 THE WITNESS: We're not really seeking an
23 EAS agreement with them. We're simply seeking a
24 binding statement from them that they would not
25 subject, though, inbound calls to reciprocal

1 compensation. Whether they grant local calling on
2 an outbound basis is really between Midcontinent
3 and them. We don't really have -- because there
4 you have -- and let me explain. There you have a
5 customer that's very clearly making that choice, a
6 customer that's very clearly saying the expanded
7 local calling area is very important to me, I'm not
8 going to switch carriers because I don't want to
9 lose it.

10 In the case of the inbound calls you're
11 having parties that had no par in this that didn't
12 switch carriers, that didn't do anything different
13 that may lose their ability to call certain
14 numbers, certain customers if those calls are no
15 longer treated as local. That's why we're
16 trying -- that's why our emphasis is to resolve the
17 termination issue in addition to the outbound
18 issue, but the termination -- the inbound
19 termination issue is the key for us.

20 Q. (MR. HARRINGTON CONTINUING) And just to
21 be clear, the reason why customers would lose --
22 customers of Halstad or Polar would lose their
23 ability to make inbound calls to the other
24 carrier's exchange without toll charges would be
25 not that the terminating access charges exist but

1 that Polar or Halstad, depending on who served that
2 customer, would choose not to absorb those charges
3 and wouldn't start charging toll rates for those
4 calls.

5 A. Well, that they would choose not to take
6 the unprecedented step of offering -- of not
7 charging toll charges to treating calls on the
8 originating end as local that are subject to
9 terminating access on the other end. I'm not aware
10 that that practice is engaged in anywhere else in
11 North Dakota. I'm not aware that it's required
12 anywhere else. It would be an unprecedented step,
13 and it would be a bad business decision, in my
14 opinion.

15 Q. But they certainly could do it if they
16 wanted; right?

17 A. You could do it to the detriment of all of
18 your other ratepayers.

19 MR. HARRINGTON: I have no further
20 questions.

21 JUDGE HOBERG: Thank you, Mr. Harrington.
22 Let's take a ten-minute recess.

23 (Recess taken.)

24 JUDGE HOBERG: All right. We're back from
25 a short recess. I think, Mr. Binek, we were to you

1 for questions of this witness.

2 MR. BINEK: Yes. Thank you.

3 EXAMINATION

4 BY MR. BINEK:

5 Q. I guess I just would like maybe a little
6 bit of clarification. In the -- were you here when
7 I asked the last witness about the situation of
8 entering into an agreement -- Midcontinent entering
9 into an agreement for resale telecommunications
10 service but without the EAS? In the Halstad
11 situation could Midcontinent do that? Could they
12 be able to get an agreement with Halstad for
13 service, say, in Hillsboro without the extended
14 area service?

15 A. Well, the resale -- CLECs do have an
16 obligation to resale though not at a wholesale
17 discount. So I would say that HTC -- you're
18 referring to HTC, I think.

19 Q. Right.

20 A. I would say HTC has an obligation to
21 resell its services, although not at a wholesale
22 discount the way an ILEC would. They do have an
23 obligation to resell. The scope of those services
24 would be subject to whatever interconnection
25 agreement we -- in the case of resale you would

1 have to have an interconnection agreement. I think
2 everyone would agree on that. An interconnection
3 agreement would determine the scope of the services
4 that Midcontinent would receive in a resale
5 arrangement. I would say that absent some
6 provisions that say otherwise, the calling scope is
7 going to be the same, but it's not inconceivable
8 that you could draft an interconnection agreement
9 that would say, okay, we're reselling you local
10 service, but your customers don't have the expanded
11 local calling area. That would be conceivable, I
12 suppose.

13 Q. Feasible?

14 A. I would say that could be done. I'm not a
15 switch technician, but I would think that you could
16 do that.

17 MR. BINEK: Mr. Fahn has some questions,
18 as well. That was all that I had.

19 JUDGE HOBERG: Mr. Fahn.

20 **EXAMINATION**

21 **BY MR. FAHN:**

22 Q. Under the situation that Mr. Binek just
23 described, Midcontinent has an interconnection
24 agreement to resell just basic local service.
25 Leave out the EAS for now, kind of set it aside.

1 Is HTC concerned that -- one of its concerns still
2 is that it would be subject to access charges
3 because of calls made outside of the Hillsboro
4 exchange and coming into the Hillsboro exchange?

5 A. Well, if -- if Midcontinent chose to
6 request resale of HTC, then HTC in that case -- in
7 this case we're talking about HTC's switch, not
8 Qwest's switch, and HTC would have control over
9 what types of charges those calls -- how those
10 calls were treated for local or toll. So we
11 would -- we're talking about a different situation
12 in which Qwest is no longer in the picture, HTC is
13 the underlying switch provider, and we would have
14 some ability to resolve those issues. Yes, it
15 would be a concern, but it would be a concern that
16 was more within our control.

17 Q. So this seems like a workable situation
18 for -- for Midcontinent Communications to obtain
19 local number portability, is through a resale
20 agreement where they only were selling basic local
21 service?

22 A. Well, Mid -- if Midcontinent requests
23 resale of HTC, that's governed by the
24 interconnection obligations that CLECs are subject
25 to. So at that point you would have to negotiate

1 an interconnection agreement. I would say that it
2 could -- yes, it's feasible that we could
3 accommodate them that way.

4 Q. There would be no concern about access
5 charges?

6 A. Well, I'm not saying there wouldn't be a
7 concern. I'm saying those issues -- we would be in
8 a better position to resolve those issues because
9 we wouldn't be dependent on a decision by some
10 other party, some party that's not at the table.
11 In other words, if we're talking about -- if we're
12 talking about whether or not those calls -- whether
13 or not those customers would have -- would have
14 extended area service between Halstad Telephone
15 Company exchanges and HTC's switch, those issues
16 would need to be resolved, but we would not -- I
17 don't think they would be as difficult to resolve
18 because the underlying switch provider would be at
19 the negotiating table instead of -- instead of not
20 involved in the discussion.

21 MR. FAHN: Thank you. That's all I have.

22 JUDGE HOBERG: Okay. Nothing further?

23 **EXAMINATION**

24 **BY JUDGE HOBERG:**

25 Q. Okay. Just keeping in tradition with past

1 PSC's, how is Nebraska doing in football this year?
2 You don't have to answer that.

3 A. We're concentrating on academics these
4 days.

5 Q. That was just a joke?

6 A. N stands for knowledge, you know.

7 MR. HARRINGTON: That was under oath?

8 Q. (JUDGE HOBERG CONTINUING) Seriously, is
9 there anything that you're aware of or am I off
10 base here that for you to allow you to say, yeah,
11 we'll give you LNP but you're going to reimburse us
12 for terminal access charges, something like that?

13 A. I'm sorry. The question again?

14 Q. Is there a way you can provide LNP but
15 economically keep yourself whole by requiring that
16 somebody else pay for it?

17 A. Well, we were -- I mean, we were open to
18 any ideas -- during our negotiations with
19 Midcontinent we were more or less open to any types
20 of ideas that would -- that would address those
21 issues. Some type of -- some type of compensation
22 on their part would have been an option. We didn't
23 get into detailed discussions about that, but, yes,
24 that could be done. It seemed to us the most --
25 the most seamless way to make it happen and the

1 most common way to make it happen was to arrange
2 for the treatment of the calls as local rather than
3 terminating access, so that essentially there were
4 still costs there but that nobody would have to pay
5 out of pocket for them. You could simply get an
6 agreement between the switch providers to treat it
7 as local and subject only to reciprocal
8 compensation. We felt and we still feel that that
9 is the most common way and the most likely way to
10 resolve this issue as opposed to having the
11 terminating access charges assessed but somebody
12 writing a check to somebody else to cover them.

13 Q. But is that -- all this you're talking
14 about, is that really the PSC's business? Isn't
15 that a matter between -- a private matter between
16 the parties or the FCC's business? Is that really
17 the PSC's business?

18 A. Well, we certainly didn't choose to bring
19 this matter before the PSC, and this was why we
20 chose not to seek a waiver before the PSC because
21 we felt these were issues best resolved between the
22 parties, and we felt that we could -- we felt that
23 we were making some progress in resolving them, but
24 we do think that it's very important for the
25 Commission to understand what an unprecedented

1 situation a carrier would be put in if it was for
2 the first time told that it must treat calls as
3 local and yet they be subject to terminating access
4 at the terminating end. That is a very -- I would
5 call very dangerous policy that carriers want to
6 avoid.

7 JUDGE HOBERG: Thank you. Mr. Brudvik,
8 anything further of this witness?

9 MR. BRUDVIK: No questions.

10 JUDGE HOBERG: Anything further?

11 MR. HARRINGTON: Unfortunately, I do have
12 one further thing.

13 JUDGE HOBERG: One question?

14 MR. HARRINGTON: I'll try and keep it to
15 one.

16 **RE-CROSS-EXAMINATION**

17 **BY MR. HARRINGTON:**

18 Q. In response to the last question from the
19 Hearing Examiner -- I didn't have any questions
20 until then -- you said it would be an unprecedented
21 situation, and correct me if I say this wrong, to
22 require a carrier to charge customers for local
23 calls when it was paying terminating access?

24 A. To not be able to charge for those calls.
25 To not be able to assess some toll charges and yet

1 pay terminating access at the other end.

2 Q. There's no -- am I right in saying that
3 there's no regulatory barrier that would prevent
4 HTC from charging for these calls; it's merely the
5 choice that HTC has made to make these calls local
6 calls to that NXX?

7 A. I think the choice is made for them to
8 some degree, but what the customers's expectations
9 are I think would be extremely disruptive to
10 customers that didn't switch carriers, that didn't
11 change anything to have their ability to call other
12 customers altered.

13 Q. That occurs only because of the rate plans
14 that HTC has decided to offer; correct?

15 A. They are -- they enjoy those calling
16 privileges because of the rate plans we've chosen
17 to offer. Yes.

18 MR. HARRINGTON: Nothing further.

19 JUDGE HOBERG: Anything further?

20 MR. BRUDVIK: No questions.

21 JUDGE HOBERG: Thank you.

22 MR. BRUDVIK: I'm going to ask -- just to
23 kind of lay out the future, I've got both managers
24 here, and I'm going to ask them some questions.
25 We've been here a long time, so I'm going to limit

1 their testimony a little bit just to some of the
2 things that have been raised and do that, if I may.

3 JUDGE HOBERG: Yeah. I'll be glad to hear
4 from them, but, you know, we don't really need to
5 rehash unless they have some different --

6 MR. BRUDVIK: No. That's the idea.

7 JUDGE HOBERG: Okay.

8 MR. BRUDVIK: I'm going to call Dave
9 Dunning.

10 JUDGE HOBERG: Mr. Dunning, did you hear
11 the admonition I gave earlier in regard to perjury?

12 MR. DUNNING: I did.

13 (Witness sworn.)

14 JUDGE HOBERG: Thank you.

15 **DAVID DUNNING,**

16 being first duly sworn, was examined and testified
17 as follows:

18 **DIRECT EXAMINATION**

19 **BY MR. BRUDVIK:**

20 Q. Mr. Dunning, state your full name for the
21 record, please.

22 A. David Dunning.

23 Q. And you are the manager of Polar
24 Telecommunications?

25 A. I am the manager of Polar Communications

1 and CEO of Polar Communications. I'm the executive
2 vice president of Polar Telecom.

3 Q. Okay. And describe the relationship
4 between those two.

5 A. Polar Communications is a cooperative
6 head-quartered in Park River, North Dakota, and is
7 the parent company of Polar Telecom, which provides
8 competitive local exchange carrier service in the
9 Mayville/Portland exchange.

10 Q. Thank you. And maybe just by way of
11 background, what brought you to Mayville?

12 A. The community of Mayville in 1997
13 contacted us. We have served the community north
14 of Mayville and the community south of Mayville
15 since 1952 when our cooperative was established.
16 They contacted us in 1997 with their local
17 technology committee made up of local businessmen
18 and members of the college to provide dial-up
19 Internet access to the community. We did that and
20 it was very successful. They contacted us again
21 many times during the next several years, between
22 1997 and 2000, and asked us to bring full-speed,
23 facility-based modern telecommunications service to
24 the community. They also contacted Qwest and
25 Midcontinent at that time. Both parties declined

1 to do that. Polar Communications said that we
2 would step up to the plate and we did. We took a
3 community survey and we invested over four million
4 dollars in the community, and we were the first
5 ones to provide that service to the community.

6 Q. Okay. Initially before you came in with
7 full telephone and capable TV, you were the
8 Internet provider for a time?

9 A. Yes, we were. We were a dial-up Internet
10 provider in that community.

11 Q. And you were at the meeting in Mayville
12 when Mayville economic development people asked
13 Qwest for that service, and they said not now, not
14 ever, don't ask?

15 A. Yes, I was.

16 Q. And that's when they asked you to do it?

17 A. Yes.

18 Q. Midco is in Mayville and Hillsboro now as
19 a reseller of Qwest?

20 A. That's correct.

21 Q. And was that option available to you?

22 A. Yes, it was.

23 Q. Why didn't you take that option?

24 A. We don't feel that we could provide the
25 level of service that we want to to our customers

1 by providing that option. We felt like we needed
2 to rebuild the plant entirely, the plant being the
3 facilities of Qwest in that town, and just
4 reselling Qwest facilities we think is just
5 something they already have. So we don't enter
6 into that business. We either build new, modern
7 facilities or we don't go into the business, even
8 though there's more risk involved doing it the way
9 we did it.

10 Q. And at some point you must have had
11 discussions with Halstad Telephone as far as trying
12 to link up Hillsboro because at that time on
13 Qwest's lines those were long distance calls, were
14 they not?

15 A. As part of their request for a facilities-
16 based modern telecommunications company in the
17 Mayville/Portland community, the community
18 expressed to us through their community leaders a
19 desire to have toll-free calling in their school
20 district, which includes the Clifford/Galesburg
21 community, a community that our parent company
22 serves, and to their county seat, Hillsboro. They
23 had expressed that desire to other parties in the
24 past, including Qwest and Midcontinent, and they
25 had declined to do that. That's what they relayed

1 to us. We, of course, served the Clifford/
2 Galesburg communities, so we were able to do that.
3 We contacted Halstad and we made a business
4 arrangement with Halstad to do that.

5 Q. And you were involved when -- I mean, you
6 were the one that received the first communication,
7 I believe, from Mary Lohnes requesting local number
8 portability?

9 A. That's correct.

10 Q. And from the time you received that first
11 letter until the time that we got served with this
12 Public Service Commission discrimination complaint,
13 were you at all times in good faith willing to
14 enter into negotiations with Midco for local number
15 portability?

16 A. I think we're still in negotiations. We
17 were in negotiations for the last year-and-a-half
18 and making good-faith efforts, always contacting
19 them, even at times when they hadn't contacted us
20 for a number of months, and we were stunned that we
21 got a complaint to go in front of the Public
22 Service Commission when, in fact, we thought
23 negotiations were still open. Effectively we think
24 we're still at the table, but the other party
25 isn't.

1 Q. And we've reduced or eliminated the issues
2 that stand in the way to a relatively few or
3 possibly one; is that right?

4 A. That's correct.

5 Q. In the Midco complaint that they filed
6 with the PSC, paragraph five is the -- is one of
7 the allegations against Polar. It says, Polar is
8 providing local-number portability with Qwest in
9 the Mayville, North Dakota, exchange pursuant to
10 interconnection agreements with Qwest.

11 Do you remember about that allegation?

12 A. Yes.

13 Q. And to support that allegation they state
14 that Polar in a letter dated March -- March 3rd of
15 2004, I believe -- did you see a copy of that
16 letter, by the way?

17 MR. HARRINGTON: It's Exhibit C9.

18 MR. BRUDVIK: C9. Thank you.

19 Q. (MR. BRUDVIK CONTINUING) A letter --
20 Exhibit C9, did you see that letter?

21 A. Yes, I did. I'm familiar with it.

22 Q. The allegation -- I'll quote from Exhibit
23 C9. "Per Polar's letter dated January 7, 2004,
24 Polar is already performing porting under its
25 interconnection arrangements with Qwest."

1 That is the statement by you; is that
2 correct?

3 A. Yes, it is.

4 Q. And they are using that to support the
5 claim in the complaint that you are already --
6 you're discriminating against Midco because you're
7 already porting numbers to Qwest.

8 A. That's --

9 Q. That's the allegation?

10 A. That's their allegation.

11 Q. Is that true?

12 A. We are porting with Qwest 786 numbers per
13 our interconnection agreement with Qwest. We're
14 honoring the rate center that Qwest has. We are
15 not porting 788 numbers with the extended area
16 calling nor would we with Qwest until we clear up
17 the same questions that are outstanding with
18 Midcontinent.

19 Q. And you have never ported a 788 number to
20 Qwest?

21 A. No, we haven't.

22 Q. That was in addition to an allegation in
23 the complaint that you did reject a port request
24 from Qwest.

25 A. Yes, we did.

1 Q. And on what basis did you make that
2 rejection?

3 A. We rejected it on generally two bases.

4 JUDGE HOBERG: Just a second. Are you
5 talking about the one that's in the complaint to
6 Midco?

7 THE WITNESS: Yes, I am. It came from
8 Qwest, sir.

9 JUDGE HOBERG: Yeah. But it was through
10 Midco.

11 THE WITNESS: That's the only one we've
12 ever rejected, sir. We rejected that on two bases.
13 Number one, through our discussions that the rate
14 centers don't match and there's issues that haven't
15 been resolved. Number two, we were stunned to get
16 the request because we still were waiting for a
17 response from Midcontinent on our ongoing
18 negotiations to resolve those issues.

19 Q. (MR. BRUDVIK CONTINUING) Did you think it
20 was appropriate at that time to grant that port
21 when you hadn't resolved those issues?

22 A. No. We still had negotiations open. We
23 were negotiating in good faith with Midcontinent.
24 We didn't expect a -- a port request. I think they
25 probably assumed we would turn them down so they

1 could file a complaint.

2 Q. Do you think that was part of their long-
3 range plan, was to do that?

4 A. Appears to be.

5 MR. HARRINGTON: Your Honor, that calls
6 for speculation.

7 JUDGE HOBERG: Part of Midco's long-range
8 plans? I'll sustain.

9 Q. (MR. BRUDVIK CONTINUING) All right. But
10 I do note in C10 -- Exhibit 10 said the request is
11 being denied at this time.

12 A. Absolutely. And it'll be honored as soon
13 as we resolve the issues that we've discussed.

14 Q. So at the time that this request was made,
15 you felt that you were still negotiating in good
16 faith with Midco?

17 A. Yes.

18 Q. Did you ever, yourself, have conversations
19 or correspondence with Mary Lohnes?

20 A. I was on conference calls where Mary was
21 on several times in the beginning, and I had
22 written correspondence with Mary.

23 Q. Other than -- other than communicating
24 with Mary or their attorney, Mr. Harrington, was
25 there any other people that were involved in any of

1 this?

2 A. I believe early on Mr. Simmons was on a
3 phone call, as I remember, and also the gentleman
4 that they mentioned was on one of the first phone
5 calls this morning -- I forget his last name -- one
6 of their technical people. And then also we always
7 had our consultant, Eileen Bodamer, who just left,
8 and then Joe Schuele and the Halstad people
9 involved with the negotiations.

10 Q. And in connection with those negotiations
11 you felt it was important that there be some kind
12 of an agreement, did you not?

13 A. We have an agreement with Qwest that
14 spells out our obligations for local number
15 portability as part of our interconnection
16 agreement. There's outstanding issues here. We
17 don't feel it's appropriate that we should file
18 complaints and go in front of commissions. I think
19 we should sit across the table and negotiate in
20 good faith and come up with agreements that resolve
21 these issues.

22 Q. Are there -- are there economic reasons
23 why you're not giving number portability to Midco?

24 A. I think the economic and technical reasons
25 go hand in hand. Midcontinent's actions of

1 requesting number portability could result in
2 additional terminating access charges that would be
3 charged to us. I think they can be resolved, but
4 they're there. There's also technical reasons.
5 For instance, our Galesburg exchange doesn't have
6 any direct connection to Qwest.

7 Q. Is such an agreement possible with Midco
8 unless Qwest is a player in that?

9 A. I think Qwest has to be involved in this,
10 and subsequent to receiving that request we have
11 been working with Qwest diligently to resolve the
12 issue. We thought Midcontinent was, but apparently
13 they haven't been.

14 Q. And Midcontinent at some point did send a
15 proposed form and interconnection agreement, did
16 they not?

17 A. Yes, they did.

18 Q. So you felt that Midcontinent agreed with
19 you that some type of an agreement was necessary?

20 A. We were in the process of negotiations as
21 late as March of this year.

22 Q. I'm going to show you what's been marked
23 as Exhibit -- do you have a copy of this?

24 MR. HARRINGTON: Is that the same draft
25 that we sent?

1 MR. BRUDVIK: The draft, yeah. It's
2 marked as Exhibit R14. A lot of our exhibits
3 mirrored theirs, so our numbering is goofy because
4 I had some of the same ones they did, so --

5 JUDGE HOBERG: Oh, okay.

6 Q. (MR. BRUDVIK CONTINUING) What is that,
7 Dave?

8 A. I believe it -- it appears to me to be the
9 interconnection agreement that we were in
10 negotiations with Midcontinent.

11 MR. BRUDVIK: We'd offer that at this
12 time, Your Honor.

13 MR. HARRINGTON: Your Honor, may I have a
14 moment to examine it?

15 JUDGE HOBERG: Yes. Can I have a copy of
16 that, by the way. Mr. Brudvik, do you have a copy
17 for me?

18 MR. BRUDVIK: Yes, I do.

19 JUDGE HOBERG: Did you get one, Mr. Binek.

20 MR. HARRINGTON: Could we go off the
21 record for just a moment so I could just --

22 JUDGE HOBERG: Okay. We'll go off the
23 record.

24 (Discussion had off the record.)

25 JUDGE HOBERG: Back on the record.

1 Q. (MR. BRUDVIK CONTINUING) Mr. Dunning, we
2 have offered to introduce --

3 MR. BRUDVIK: No objection, I believe?

4 MR. HARRINGTON: No. No objection.

5 Q. (MR. BRUDVIK CONTINUING) -- an
6 interconnection agreement.

7 A. Yes, sir.

8 Q. And through our discussions it appears
9 this is probably a later version. The original
10 one, I believe, was sent to you by Mr. Harrington
11 on August 18th?

12 A. I'm sure it was.

13 MR. BRUDVIK: I think we have offered
14 that.

15 JUDGE HOBERG: I don't have it, though.
16 Has there been one marked for the record?

17 MR. BRUDVIK: Yep.

18 JUDGE HOBERG: Why don't you give that to
19 her then. Are you going through this now?

20 MR. BRUDVIK: No.

21 JUDGE HOBERG: Just give it to Stephanie,
22 please. Mr. Binek, do you have any objection?

23 MR. BINEK: No. I would like to have a
24 copy of whatever you've got at some point.

25 JUDGE HOBERG: Exhibit R14 is admitted.

1 Q. (MR. BRUDVIK CONTINUING) In any event,
2 that was a written agreement sent to us by their
3 attorney; is that correct?

4 A. Yes.

5 Q. And so we did --

6 MR. HARRINGTON: I'm sorry. Your question
7 is referring to this exhibit?

8 MR. BRUDVIK: Well, the prior version of
9 it.

10 MR. HARRINGTON: The original. Okay.
11 Thank you.

12 MR. BRUDVIK: The original version.

13 THE WITNESS: I believe Mr. Harrington
14 sent it.

15 Q. (MR. BRUDVIK CONTINUING) And apparently
16 over the next few months it went through some
17 vision and revision back and forth?

18 A. Yes.

19 Q. And do you think that agreement or some
20 type of agreement, whether it's an interconnection
21 agreement, is necessary and appropriate in this
22 case?

23 A. I think we need an agreement to resolve
24 the issues. Yes.

25 MR. BRUDVIK: That's all I have.

1 JUDGE HOBERG: Okay. Thank you, Mr.
2 Brudvik. Mr. Harrington.

3 MR. HARRINGTON: Sure.

4 CROSS-EXAMINATION

5 BY MR. HARRINGTON:

6 Q. Let's start with the agreement. The
7 version of the agreement that's been admitted into
8 evidence, that -- does it contain language that
9 reflects your company's position on the appropriate
10 treatment for calls -- for compensation for calls
11 and which party should be responsible for paying
12 that?

13 A. I don't know. I'd have to review it.

14 Q. Would you take a moment and take a look?

15 MR. BRUDVIK: He doesn't have it right
16 now.

17 MR. HARRINGTON: I'll let him look at my
18 copy.

19 JUDGE HOBERG: Why don't you give him the
20 one that's marked. Thank you.

21 THE WITNESS: Would you restate your
22 question?

23 Q. (MR. HARRINGTON CONTINUING) Does this
24 version reflect your company's position as to how
25 the issues you have described relating to

1 reciprocal compensation and terminating access
2 charges should be addressed?

3 A. I can't tell you without reviewing it at
4 length.

5 Q. Please take a moment to review it.

6 MR. BRUDVIK: Do you have a provision in
7 mind?

8 MR. HARRINGTON: Let's see.

9 THE WITNESS: Mr. Harrington, I have no
10 idea if this represents our company's position on
11 it or not. I believe this is represented -- this
12 is the one that was sent to us originally; right.

13 MR. BRUDVIK: Yes.

14 MR. HARRINGTON: I believe that is
15 incorrect, that this is a revision, and although I
16 realize this is off-the-record material, the e-mail
17 that was previously attached pretty clearly
18 indicates this was a version sent by your
19 consultant, not by us. So that's why I'm asking
20 this question.

21 JUDGE HOBERG: So let me get this -- see
22 if I understand this right. You submitted one on
23 August 18?

24 MR. HARRINGTON: Correct.

25 JUDGE HOBERG: And this is a revision

1 submitted by their consultant?

2 MR. HARRINGTON: Right. And I will ask
3 this question, but I'm fairly confident it's
4 correct, this is not the only revision. There were
5 back-and-forth rounds.

6 JUDGE HOBERG: Is that correct, Mr.
7 Dunning?

8 THE WITNESS: Pardon me, sir?

9 JUDGE HOBERG: Were there back-and-forth
10 revisions?

11 THE WITNESS: Yes, there were.

12 Q. (MR. HARRINGTON CONTINUING) I'm just
13 trying to establish that this represents the
14 position that you had at the time it was sent to
15 us.

16 A. Yeah, as far as I can tell from reading
17 this. This is a detailed document. I haven't seen
18 it in several months, so I don't know if it does or
19 not, but if our consultant sent this back to you,
20 Mr. Harrington, then I would believe it's our
21 position, if that satisfies you.

22 Q. That does satisfy me. Now during your
23 testimony you indicated that you thought that the
24 parties should sit across the table and work it
25 out. I think those are your exact words.

1 A. Yes, it is. And I still believe that.

2 Q. How long do you think the parties should
3 sit across the table and try to work something out
4 before they realize they won't work it out?

5 A. Well, I think there's times when parties
6 come to realization it's a tough issue and other
7 parties need to be brought, especially in this case
8 Qwest, and in my opinion it was Midcontinent's
9 responsibility to bring Qwest into the negotiations
10 so we could bring it to a closure. In the last
11 four or five weeks both Halstad and Polar have done
12 a pretty good job of communicating with Qwest, and
13 we may be able to bring this to a closure at some
14 point if we all get back to the table.

15 Q. Do you have a timetable for when you think
16 you'll be able to bring it to closure with Qwest?

17 A. Depends whether or not you're willing to
18 come back to the table.

19 Q. Why do you think that Midcontinent is a
20 relevant party to your conversations with Qwest
21 about what Qwest will charge you and you will
22 charge Qwest for calls between the two of you?

23 A. Because when we port that number to
24 Midcontinent through Qwest, you've chosen Qwest to
25 be your switch provider, and you're going to be the

1 causer of that expense, causer of the technical
2 difficulties and the economic difficulties. So I
3 would think you'd want to be involved in it so you
4 could serve the customers that you want to in those
5 areas and we could expedite it.

6 Q. But we're not actually necessarily a party
7 to it then. You just think it would be good for
8 us?

9 A. But by sitting back on your hands and not
10 calling Qwest, you're not accomplishing anything.
11 By being proactive with Polar in negotiations with
12 Qwest we can solve the problem.

13 Q. When did you first -- not in the context
14 of these conversations -- when did you first
15 approach Qwest about compensation between your
16 exchanges and their exchanges?

17 A. I don't have the date. I don't have even
18 a guess.

19 Q. Was it around the time you entered into
20 the EAS agreement with Halstad?

21 A. We did not talk to Qwest when we went into
22 an EAS agreement with Halstad.

23 Q. Your testimony earlier was that you were
24 approached by people in the town who wanted to have
25 service that was toll-free between the towns.

1 A. That's correct.

2 Q. So did you talk to Qwest at that time?

3 A. You know, I think we have over the years
4 had conversations with Qwest, and they've indicated
5 that they are not interested in additional EAS
6 agreements in the State of North Dakota. In fact,
7 I think in 1997 they canceled most of those
8 agreements. So we didn't deem it possible even to
9 get one. So we didn't pursue it. We did pursue it
10 with an independent telephone company that was
11 creating a competitive business that we knew would
12 be reasonable and want to do it.

13 Q. Thank you. You indicated also during your
14 testimony that there are technical issues relating
15 to providing portability in Galesburg because there
16 is not direct connection.

17 A. There is not a direct local connection
18 between the Galesburg remote and Qwest. However,
19 Polar could, as was indicated by our consultant
20 here, provide a work-around if we get back to the
21 table by routing that traffic up through our CLEC.

22 Q. Did Midcontinent ask for number
23 portability in Galesburg?

24 A. No, they didn't.

25 Q. Thank you. Let's talk -- let's go back to

1 the initial time of the discussions between the
2 parties. Your initial letter back -- substantive
3 letter -- there was a letter acknowledging receipt,
4 but your initial substantive letter dated January
5 2nd, I believe, Exhibit C7. Could you refer to
6 that letter, please?

7 A. C7?

8 Q. Yeah.

9 A. January 2nd, 2003, sir?

10 Q. Yes.

11 A. Yes, sir.

12 Q. Now it indicates in the letter that you
13 wanted Midcontinent to have its contact in the
14 future with Polar Telecom; correct?

15 A. Yes.

16 Q. Does the letter say reject the request
17 because we ask -- because Midcontinent asked the
18 wrong company, or does it just say talk to somebody
19 else -- or talk to you actually.

20 A. Yeah.

21 Q. Now you continue speaking to the company;
22 right? Midcontinent kept speaking to Polar?

23 A. Yes.

24 Q. And in those conversations you represented
25 Polar Telecom?

1 A. Yes.

2 Q. So there wasn't really any doubt who the
3 parties were in those discussions over a period of
4 a year and a quarter?

5 A. I'm not sure we're contending there was a
6 doubt.

7 Q. But the answer is no, that everyone had a
8 good idea who the parties were from your
9 perspective?

10 A. From my perspective -- which parties are
11 you referring to?

12 Q. That it was Polar Telecom?

13 A. And?

14 Q. Midcontinent.

15 A. You used a plural, parties. Who?

16 Q. Midcontinent was talking to Polar Telecom
17 about providing portability. I'm not going to ask
18 you about HTC because that's not your company.

19 A. All right. Yes. Midcontinent was talking
20 to Polar Telecom. Yes.

21 Q. All right. Now, you've indicated in
22 filings that Polar does not believe that there was
23 a bona fide request for number portability. Yes?

24 A. Yes, I think we did indicate that.

25 Q. What in your view are the minimum

1 requirements for bona fide request for portability?

2 A. I'm not an expert in that area, sir, but
3 originally we were confused about the request that
4 came to us in December of 2002. I think generally
5 now that our switch is capable of portability, I
6 don't think that's relevant anymore.

7 Q. All right. Let's turn to whether or not
8 you've been providing portability to Qwest. Your
9 testimony today and the interrogatory responses
10 that your company provided indicate that you were
11 not providing portability to Qwest, that Qwest
12 could not port numbers from Polar Telecom; is that
13 correct?

14 A. That's correct.

15 Q. Exhibit C9, which your counsel showed to
16 you earlier --

17 A. Yes.

18 Q. -- contains a paragraph in which you
19 indicate you are porting numbers to Qwest.

20 A. It says -- doesn't say that I'm porting
21 numbers to Qwest. It says --

22 Q. Please read it.

23 A. It says, "Polar is already performing
24 porting under its interconnection." It doesn't say
25 it would to or from. It just says "performing

1 porting." Porting from Qwest to Polar.

2 Q. Okay.

3 A. Doesn't say to Qwest.

4 Q. So here's the question then: Was that
5 intended to give Midcontinent the impression that
6 Polar was in fact porting numbers to Qwest or was
7 it intended --

8 A. No. What it was intended to do was to
9 tell Midcontinent that we are performing porting
10 with Qwest under our obligations in the
11 interconnection agreement during the discussions
12 with Midcontinent to establish an agreement on
13 number of portability between Midcontinent and
14 Polar Telecom.

15 Q. Does your interconnection agreement with
16 Qwest obligate you to port numbers from Qwest?

17 A. From Qwest?

18 Q. You said you're performing consistent with
19 your obligations.

20 A. It discusses.

21 Q. It discusses that. It's not an obligation
22 of yours. It's a right, isn't it?

23 A. I don't know what an obligation is in your
24 mind. In my mind when I have an agreement with
25 another party and it discusses it, that's an

1 obligation.

2 Q. I see. Does the interconnection agreement
3 with Qwest obligate you to provide porting to
4 Qwest, as well?

5 A. We would port a 786 number back to Qwest
6 to the Qwest customer, and that would be part of
7 our -- we would not port a 788 number till we
8 resolved the same issues that we have with
9 Midcontinent.

10 Q. Does your agreement contain that
11 restriction?

12 A. It addresses the Qwest rate center.

13 Q. Does your agreement contain the
14 restriction that they cannot port a 788 number to
15 Qwest?

16 A. It addresses the Qwest rate center.

17 MR. HARRINGTON: Your Honor, I'd ask him
18 to be responsive to the question, which is a yes or
19 no question.

20 THE WITNESS: I don't know that it does or
21 not.

22 Q. (MR. HARRINGTON CONTINUING) Did you
23 negotiate that agreement?

24 A. We adopted an agreement there. I don't
25 know there was much negotiations involved. We

1 adopted a statewide agreement that was available.

2 Q. I see. So if you adopted a statewide
3 agreement entered into by another carrier that does
4 not have the 786 or 788 NXX, how does the number
5 portability provision address the 786 and 788 NXXs?

6 A. Is -- as we've discussed today, Mr.
7 Harrington, the 788 portability to Qwest would
8 bring the same technical and economic problems that
9 it does to Midcontinent, and we would ask Qwest to
10 resolve those issues the same as we've asked
11 Midcontinent.

12 Q. Mr. Dunning, I'm trying not to be
13 impatient with you, but I've asked you given that
14 you've adopted an agreement from another carrier
15 that did not have those NXX codes how the agreement
16 addressed those questions, and you did not respond
17 to that question. Would you please answer that
18 question? If you'd like, I will ask it again.

19 JUDGE HOBERG: Do you understand the
20 question?

21 THE WITNESS: I don't quite understand
22 your question.

23 Q. (MR. HARRINGTON CONTINUING) All right.
24 You adopted an agreement from another carrier;
25 correct?

1 A. Yes.

2 Q. That another carrier had entered into with
3 Qwest?

4 A. Right.

5 Q. Wasn't Midcontinent by any chance, was it?

6 A. It was.

7 Q. Ah.

8 A. I believe we had the Midcontinent
9 agreement.

10 Q. Does that agreement -- does Midcontinent
11 have the 786 or 788 NXXs?

12 A. No.

13 Q. Then how would the agreement address
14 either 786 or 788 NXX codes?

15 A. Without the agreement in front of me I
16 really couldn't say, sir.

17 Q. So your earlier Qwest answer when you said
18 that it addressed the 786 NXX code, that answer was
19 incorrect?

20 A. As far as when I -- in our discussion of
21 the agreement and my reading it several months ago,
22 it addresses the Qwest rate center, which in our
23 opinion is 786. Qwest's calling area -- and we
24 honor that when we -- when Qwest ports a number to
25 us that is 786, we do not expand the calling area

1 on that number. We give them exactly the calling
2 area that they had when they -- when they were a
3 Qwest customer.

4 Q. So it doesn't address any of these
5 compensation issues you just talked about. You're
6 just saying we have a generic interconnection
7 agreement and we follow the terms of that
8 agreement.

9 A. Pardon me, sir?

10 Q. You're saying you have a generic
11 interconnection agreement and you follow the terms
12 of that agreement. You do not have a custom
13 negotiated agreement that addresses the financial
14 issues that you say must be addressed between
15 Midcontinent and Polar; is that correct?

16 A. That is correct.

17 Q. Thank you. How long have Polar and HTC
18 had an EAS agreement?

19 A. I'd have to look at the date of the
20 agreement, sir, but I --

21 Q. Ballpark.

22 A. Well, a ballpark would be February 2002.
23 That's when Polar began facilities-based service in
24 the Mayville/Portland community. So I suppose that
25 would be the relevant time frame.

1 Q. That's good enough. And I'm just going to
2 make sure I understand the terms of it. I think we
3 do understand them, but let's be clear on this.
4 When a Polar customer in Mayville makes a call to
5 an HTC customer in Hillsboro, what is that customer
6 charged?

7 A. When a Polar 788 customer calls an HTC 636
8 customer in the Hillsboro exchange, it is provided
9 to them as part of their local calling scope,
10 calling -- local service.

11 Q. What does HTC charge Polar for terminating
12 that call?

13 A. That's part of an extended area service
14 agreement between Polar and HTC Services.

15 Q. And what's the charge under that
16 agreement?

17 MR. BRUDVIK: I'm going to object to the
18 question, Your Honor. They've requested that
19 information and it's proprietary and confidential
20 and I don't think.

21 JUDGE HOBERG: Isn't the fact that there
22 is a charge relevant but the amount of the
23 charge -- I don't see how that's relevant to this
24 proceeding.

25 MR. HARRINGTON: Well, to the extent that

1 they're arguing that there's going to be a huge
2 financial burden on them from having to pay
3 terminating access, and if they're not willing to
4 tell us what the charge that they're paying to
5 Halstad --

6 JUDGE HOBERG: But the financial burden
7 isn't in question here, is it? We're going to try
8 and determine the exact amount of the financial
9 burden by --

10 MR. HARRINGTON: Well, I guess I'll say
11 this: I recognize that Polar and HTC have not put
12 any evidence in on that, so perhaps it is
13 irrelevant.

14 JUDGE HOBERG: Is irrelevant?

15 MR. HARRINGTON: Is irrelevant since they
16 haven't put any evidence in as to what the burden
17 would be.

18 JUDGE HOBERG: Yeah. I think it's
19 irrelevant.

20 Q. (MR. HARRINGTON CONTINUING) Okay. Why
21 did you enter into the EAS arrangement?

22 A. The community of Mayville --

23 JUDGE HOBERG: Hold it a second here.
24 This thing doesn't convert over. Okay. Let's go.

25 Q. (MR. HARRINGTON CONTINUING) Let me

1 rephrase the question because I think you answered
2 it already. Just tell me if I'm correct in
3 understanding it. You said in your earlier
4 testimony that you entered into the EAS arrangement
5 because of requests from the local communities to
6 get toll-free calling.

7 A. Sir, I'm not trying to avoid you. I'm
8 really hard of hearing, but --

9 Q. Oh, I'm sorry. I'll speak louder.

10 A. -- if your question is that we entered
11 into the EAS agreement between Mayville and
12 Hillsboro, and Hillsboro being defined as HTC
13 Services, because Hillsboro, North Dakota, is the
14 county seat for Mayville, North Dakota, and the
15 community asked us when we put our service in to do
16 that. We did not think that any other carrier
17 would offer that to us based on the history in the
18 telecommunications industry in North Dakota, the
19 other carrier being Qwest.

20 Q. Okay. Now this agreement's not required
21 by the Commission. This is not a mandatory EAS
22 that the Commission forced onto you?

23 A. No. We're two competitors.

24 Q. Has it been approved by the Commission?

25 A. No.

1 Q. You did not seek Commission approval?

2 A. No, we didn't. And we, I believe, talked
3 to the Commission staff and it may be a
4 misunderstanding, but in North Dakota it's our
5 understanding that those things do need to be filed
6 with the Commission. They do not approve them.
7 That's our understanding and it was our
8 understanding at the time.

9 Q. Has the Commission approved your policy of
10 charging different rates depending on which carrier
11 serves the customer being called?

12 A. The Commission, as far as I know, hasn't.
13 This is a CLEC situation.

14 Q. So, in other words, you didn't ask and so
15 they didn't say yes or no?

16 A. No.

17 Q. Do you think that this arrangement gives
18 you a competitive advantage competing against
19 Qwest?

20 A. Well, I think Qwest has the same
21 opportunity as me to make that extended area
22 service. They've had it for the years that they've
23 had that. They have been asked to do that, they
24 chose not to. We were asked to do that and we
25 chose to do it.

1 Q. And do you think it's an advantage to you
2 in competing with Qwest?

3 A. Absolutely. Because customers want
4 expanded area calling.

5 Q. Now in -- you provide cable service, as
6 well. You testified to that in your direct.

7 A. Yes, we do.

8 Q. In that community. Do you think providing
9 cable service and telephone service together as a
10 bundle gives you a competitive advantage over
11 Qwest?

12 A. The customers seem to like it. I would
13 imagine it does. I think what gives us a
14 competitive advantage over Qwest is we put four
15 million dollars in the community and a state-of
16 the-art telecommunications system that's capable of
17 providing the services we can provide.

18 Q. There can be multiple sources of
19 advantages, of course.

20 A. Sure.

21 Q. Do you think providing cable service and
22 telephone service gives you a competitive advantage
23 over Midcontinent?

24 A. No. They do the same thing. They
25 provide --

1 Q. But they can't provide it to your
2 customers without having the customers change
3 numbers; correct?

4 A. They can if they negotiate with us for
5 portability like we've tried to.

6 Q. No. Today. Today. Is that a competitive
7 advantage?

8 A. We can get an agreement by the end of
9 today.

10 Q. I'm sorry?

11 A. We can get an agreement by the end of
12 today.

13 JUDGE HOBERG: Well, assuming there is no
14 agreement, I think his question is.

15 Q. (MR. HARRINGTON CONTINUING) Are you an
16 optimistic man, Mr. Dunning?

17 A. Pardon me?

18 Q. Are you a very optimistic man, Mr.
19 Dunning?

20 A. Why, sure. Business is business.

21 MR. HARRINGTON: How could you answer no
22 to that question? Give me one moment. I'll see if
23 I have anything else. I believe that's all I have
24 for Mr. Dunning.

25 JUDGE HOBERG: Thank you, Mr. Harrington.

1 Mr. Binek, did you have any questions?

2 MR. BINEK: No.

3 JUDGE HOBERG: I don't have any questions,
4 either.

5 MR. BRUDVIK: No further questions.

6 JUDGE HOBERG: Thank you, Mr. Dunning.
7 You didn't have any more?

8 MR. BRUDVIK: No questions.

9 JUDGE HOBERG: Thank you.

10 MR. BRUDVIK: Call Ron Laqua.

11 MR. HARRINGTON: Actually, could I ask for
12 a short recess to call my travel agent?

13 JUDGE HOBERG: Sure. Let's take five
14 minutes, a very short recess.

15 (Recess taken.)

16 JUDGE HOBERG: Okay. We're back on the
17 record after a short recess, and we've briefly
18 discussed Exhibit R13, the redrafted C1, and Mr.
19 Harrington indicated that he withdrew his objection
20 to it. So we will admit R13, but, Mr. Brudvik, as
21 I understand it, somehow there's going to be some
22 cooperation. We're going to have a better version
23 or a substitute version of this?

24 MR. BRUDVIK: Yes, yes.

25 JUDGE HOBERG: Okay. Good. Okay. And

1 you're calling your next witness.

2 MR. BRUDVIK: Our last witness, Ron Laqua.

3 JUDGE HOBERG: Is that Mr. Laqua or Laqua.

4 MR. LAQUA: Laqua.

5 JUDGE HOBERG: I guess I should trust that
6 Mr. Brudvik would know better than I.

7 MR. LAQUA: Usually he does.

8 JUDGE HOBERG: Mr. Laqua, you heard
9 earlier the admonition I gave in regard to perjury?

10 MR. LAQUA: Yes.

11 (Witness sworn.)

12 JUDGE HOBERG: Thank you. Mr. Brudvik,
13 please.

14 **RONALD LAQUA,**

15 being first duly sworn, was examined and testified
16 as follows:

17 **DIRECT EXAMINATION**

18 **BY MR. BRUDVIK:**

19 Q. State your full name for the record,
20 please.

21 A. Ronald Laqua.

22 Q. And you are the manager of Halstad
23 Telephone Company?

24 A. Yes. And HTC Services.

25 Q. And Halstad Telephone Company is what?

1 A. Halstad Telephone Company is a cooperative
2 headquartered in Halstad, Minnesota.

3 Q. Which just had its 100th birthday?

4 A. 100th anniversary this year, yes.

5 Q. And HTC Services is what?

6 A. It's a fully-owned subsidiary of Halstad
7 Telephone. Its primary function is to provide CLEC
8 services in Hillsboro at the present time.

9 Q. And when did you go into Hillsboro as a
10 CLEC?

11 A. In 2000.

12 Q. Okay. So you were in Hillsboro operating
13 when Polar made the decision to go into Mayville;
14 is that correct?

15 A. I don't know when they made the decision,
16 but we were in there physically before Polar was in
17 there physically. Yes.

18 Q. And there was some discussion about the
19 communication between the companies and discussion
20 about a rule that -- there's a six-month rule, I
21 believe, that from the time an LNP request is made
22 until we're required to grant it under the rules.
23 Do you remember that discussion early on?

24 A. Yes, I do.

25 Q. I'm going to show you what's been marked

1 as Respondents' Exhibit R6. Do you recognize that?

2 A. Yes, I do.

3 Q. What is that?

4 A. It's a letter from myself to Mary Lohnes
5 of Midcontinent, and it is a letter that
6 attempts -- it's our attempt to keep us on that
7 six-month track.

8 Q. And the request was made December 2nd of
9 '02, I believe?

10 A. I don't recall that date.

11 Q. So we were at or near the deadline of the
12 technical six-month requirement?

13 A. We were approaching it.

14 MR. BRUDVIK: Offer this letter at this
15 time.

16 MR. HARRINGTON: No objection.

17 MR. BINEK: No.

18 JUDGE HOBERG: No objection. R6 is
19 admitted.

20 Q. (MR. BRUDVIK CONTINUING) And in the
21 letter you say that -- from May 27th you referred
22 to conversations back to March 12th; is that
23 correct?

24 A. Right.

25 Q. And you were still waiting to hear from

1 them?

2 A. Yes. We hadn't received any
3 correspondence since March 12th.

4 Q. Okay. And then I'm going to show you
5 what's been marked as Respondents' Exhibit R7. Do
6 you recognize that?

7 A. Yes, I do.

8 Q. What is that?

9 A. It's a letter from myself to the
10 attorney -- or Mr. Harrington, and it discusses --
11 clarifying just who the subsidiary is, what the
12 subsidiary's name is, and then we do get into some
13 of the points made in the prior letter.

14 JUDGE HOBERG: Do you have another copy,
15 Mr. Brudvik?

16 MR. BRUDVIK: I'm sorry.

17 Q. (MR. BRUDVIK CONTINUING) So this letter
18 was sent on June 30th. So we have a -- we have
19 March 12th, we don't have anything until the end of
20 May, and then it refers in here to a letter on June
21 16th and then your response June 30th; is that
22 correct?

23 A. Yes.

24 Q. And then --

25 JUDGE HOBERG: Are you offering R7?

1 MR. BRUDVIK: We offer that, Your Honor.

2 MR. HARRINGTON: No objection.

3 MR. BINEK: No objection.

4 JUDGE HOBERG: R7's admitted.

5 Q. (MR. BRUDVIK CONTINUING) I believe that
6 the plaintiffs introduced an Exhibit C11, which was
7 a letter addressed to both -- C12, I should say, is
8 a letter addressed to you from Mr. Harrington.
9 C12, do you recognize that letter?

10 A. Yes.

11 Q. Okay. So you wrote -- you wrote Mary a
12 letter in May saying we haven't heard from you
13 since March, and then you wrote a letter June 30th,
14 and then the next response you get is August 18th;
15 is that correct?

16 A. Yes.

17 MR. BRUDVIK: All right. Did we offer
18 that letter, Your Honor?

19 JUDGE HOBERG: C12 has already been
20 admitted. Yes.

21 Q. (MR. BRUDVIK CONTINUING) All right. Now
22 from that scenario or timetable of events, the
23 negotiations with Midco seemed to be timely and
24 labored or at least had a lot of dead spots in
25 them; is that a fair statement?

1 A. Yes. There were a lot of dead spots.

2 Q. And so in a lot of instances was it you
3 that was kind of trying to jump-start those
4 negotiations?

5 A. Well, I guess I can demonstrate that in my
6 May 2003 letter and perhaps in other cases, but I
7 think the May 27th letter is most obvious.

8 Q. All right. I'm going to just ask you a
9 couple more questions that have to do with the
10 complaint that was filed against you by Midco. In
11 that complaint they stated that Halstad Telephone
12 Service or HTC intends to implement LNP for
13 wireless carriers in the Hillsboro exchange by May
14 24th, 2004. Do you recall that allegation against
15 you?

16 A. Yes.

17 Q. And then in the letter that they referred
18 to, the March 3rd letter from Mr. -- Mr. Harrington
19 or your joint letter -- yours and Mr. Dunning's
20 joint letter to Mr. Harrington on March 3rd, you
21 indicated that HTC also -- you stated in there, HTC
22 intends to meet his federal requirements to
23 implement number portability by May 24th. Do you
24 recall making that statement?

25 A. Yes, I do.

1 Q. And the May 24th date was significant
2 because of what?

3 A. That was an FCC mandate.

4 Q. Okay. So there was nothing internal
5 in-house to telephone about that date, but that's
6 the third order of November of '03 that said that
7 all telephone companies would be required to port
8 numbers by March 24th of '03?

9 A. May 24th.

10 Q. May 24th?

11 A. Yeah. Of '04. That was my understanding.

12 Q. And was there ultimately an extension of
13 that May 24th deadline?

14 A. Not in North Dakota.

15 Q. Okay. There was in other jurisdictions?

16 A. In Minnesota there was.

17 Q. All right. And did you in fact port
18 numbers to wireless carriers by May of '04?

19 A. No. We've had no request.

20 Q. You have never ported a number to a
21 wireless carrier?

22 A. No, we have not.

23 Q. And I believe your consultant, Joe
24 Schuele, said that if such a request was made, you
25 would have much the same questions that you also

1 have of Midco?

2 A. We would.

3 Q. And that you had felt there would be some
4 things that needed to be worked out?

5 A. Yes.

6 Q. And you have never ported a number to any
7 other carrier?

8 A. No, we never have.

9 Q. And in -- for purposes of the Midco
10 request for LNP you feel that the issues of routing
11 and those things need to be resolved by some type
12 of agreement, whether it's an interconnection
13 agreement or something. You have to have some
14 meeting of the minds with any carrier that you're
15 going to be porting numbers to or from?

16 A. Yes. That's right.

17 MR. BRUDVIK: All right. That's all I
18 have.

19 JUDGE HOBERG: Thank you, Mr. Brudvik.
20 Mr. Harrington, please.

21 **CROSS-EXAMINATION**

22 **BY MR. HARRINGTON:**

23 Q. Let's start with just a couple of basic
24 questions. I'm pretty sure I know the answer to
25 this, but I'll just be clear. HTC Services is a

1 wholly owned subsidiary of Halstad Telephone
2 Company; right? That's what you testified.

3 A. Right.

4 Q. Actually, outside of the EAS agreement, is
5 there any relationship between the Polar entities
6 and the Halstad entities?

7 A. Oh, we have other relationships that don't
8 relate to the CLEC operations. Yes.

9 Q. Not under common ownership obviously?

10 A. Oh, no. We have -- in terms of ownership
11 there's absolutely no relationship. No.

12 Q. I didn't think so, but -- wouldn't have
13 made sense, but I wanted to be sure. Now let's
14 turn to your initial response to Midcontinent, the
15 substantive response on January 3rd of 2003.
16 That's Exhibit C6 if you want to refer to it.

17 A. Yes.

18 Q. Now, that letter indicates that the
19 correct company to send further correspondence to
20 is HTC Services; correct?

21 A. That's right.

22 Q. Doesn't say we reject your request because
23 you asked the wrong company.

24 A. No.

25 Q. And a question you're probably

1 anticipating since I asked Mr. Dunning the same
2 one, you continued discussions with Midcontinent
3 after those initial letters?

4 A. Oh, yes.

5 Q. And in your view was there any confusion
6 between the parties as to whether it was HTC
7 Services or Halstad Telephone Company that was
8 involved in those discussions?

9 A. No. Not after this letter, I don't
10 believe. A confusion on your part I don't know. I
11 can't answer that.

12 Q. But from your perspective you knew you
13 were representing HTC Services in those
14 discussions?

15 A. Oh, yes.

16 Q. And that was the party that was proposed
17 to have a draft interconnection agreement as a for-
18 instance?

19 A. Repeat that.

20 Q. That was the party that was proposed to
21 have the interconnection agreement with?

22 A. Yes.

23 Q. Okay. During your direct testimony you
24 indicated that there were a number of technical
25 challenges. I think those were your exact words;

1 is that right?

2 A. I don't know that we got into that. Did
3 we, in our -- in my direct testimony?

4 Q. Well, I'll ask it differently.

5 A. Okay.

6 Q. Do you think that there are any technical
7 issues other than what has been characterized by
8 respondents on occasion as a technical issue
9 relating to the compensation that we've been
10 discussing all day?

11 A. Other than what's been said -- you've
12 asked if it's anything other than what's been said.
13 I don't know that I can offer any more.

14 Q. That's okay. So from the purely technical
15 point of view, that is, if there were no money
16 involved, and I realize that's extremely
17 hypothetical, but if there were no money involved,
18 you could provide portability tomorrow?

19 A. Well, the question is --

20 Q. Or in short order.

21 A. Maybe not quite as fast as Mr. Dunning,
22 but the question we were dealing with for quite
23 some time is whether or not Midco was requesting
24 portability as a reseller of Qwest or if it was
25 going to be a facilities-based provider. So

1 technically, yes, we did have those issues. We
2 didn't know.

3 Q. My question was if you could turn
4 portability on in short order.

5 A. Yes.

6 Q. And what's the answer to that question?

7 A. Physically we could. Most likely, yes.

8 Q. Okay. Now you just -- your testimony
9 says -- said that there were what you characterized
10 as dead spots in the conversations between the
11 parties.

12 A. Yes.

13 Q. Under the FCC's rules, to your knowledge,
14 is there any requirement after making a request for
15 number portability that the requesting party have
16 any further conversations until the date
17 portability is necessary?

18 A. Well, I think just a natural course of
19 conducting business would suggest that we would
20 have to have some sort of response back from you.
21 We posed questions, we indicated some issues.
22 Without your responding to them we indicated we
23 couldn't move along.

24 Q. The issues you raised, though, were these
25 compensation issues we've been talking about all

1 day, weren't they?

2 A. I don't know that they were.

3 Q. What else were they?

4 A. Well, in the January 3rd letter we talked
5 about the issue of customer confusion, that --

6 Q. Was that resolved?

7 A. That was not resolved.

8 Q. Okay. And your customer confusion from
9 your perspective you're saying the customers will
10 not understand what the charges that are being
11 imposed on them are; is that correct?

12 A. Both Midcontinent's customers that it
13 would take or any of our existing customers.

14 Q. Now the confusion on your customer's part,
15 would that arise because you would feel you would
16 have to charge different amounts than you're
17 charging today?

18 A. It would arise because some of those
19 callers with our parent company would incur toll
20 charges that they hadn't incurred maybe even the
21 day before.

22 Q. And that's because you would charge those
23 toll charges?

24 A. No. We would not assess a toll charge.
25 It would be the carrier to which that call had pre-

1 subscribed.

2 Q. I guess I'm going to have to ask you a
3 switching issue.

4 A. Uh-oh.

5 MR. BRUDVIK: I think I'm going to just
6 object as to being outside the scope of the direct
7 examination.

8 MR. HARRINGTON: Well, no, it's not. It's
9 within the scope of his claim that they were going
10 to have to charge -- the customer is going to be
11 charged more by other carriers.

12 Q. (MR. HARRINGTON CONTINUING) Today when a
13 customer of Halstad on the -- I will get the
14 exchange correct. Hang on one moment -- on the 636
15 exchange -- yeah, 636 exchange calls Mayville on
16 the 788 exchange -- have I got this in the right
17 order? Yes. That call is routed from the switch
18 that's used for Hillsboro to the Polar switch from
19 Mayville, wherever it happens to be located. I
20 don't know where they're physically located.

21 A. Yes. I'm not going to be able to go very
22 far with the technical questions, but that's
23 basically --

24 Q. But to your understanding that's correct?

25 A. Yes.

1 Q. And what you're saying is that after
2 number portability was implemented if Midcontinent
3 moved a 788 number -- took a 788 number and for --
4 be a resale to Qwest, that the routing on the
5 switch used in Hillsboro would change
6 automatically?

7 A. That was my understanding.

8 Q. How would that happen?

9 A. Well, that customer would now be
10 subscribed to Qwest service and then subject to
11 Qwest's way of routing calls.

12 Q. The 636 customer, your 636 customer in
13 Hillsboro?

14 A. If I misunderstood your question, maybe
15 you need to restate it.

16 Q. That's why I was trying to use the
17 exchanges. You have a customer in Hillsboro on the
18 636 exchange.

19 A. Right.

20 Q. That customer was calling Jane Smith in
21 Mayville who had a 788 number. Jane decides to
22 move from Polar to Midcontinent. Midcontinent is
23 offering service via resale, the number is ported.

24 A. Yes.

25 Q. Your testimony was that the Hillsboro

1 customer calling Jane Smith would incur toll
2 charges unexpectedly, and I said does that mean
3 that the routing would automatically have been
4 changed by virtue of the number portability
5 happening, and that's still my question.

6 A. I would understand it to be changed
7 automatically. Yes.

8 JUDGE HOBERG: Because who changed it?

9 THE WITNESS: Nothing would have been
10 changed other than the end user, Jane, would have
11 now been prescribed to Midco service rather than
12 ours, and Midco using Qwest's switch would -- her
13 call would go through the Qwest switch and then out
14 from the Qwest switch on to a toll circuit.

15 Q. (MR. HARRINGTON CONTINUING) You're
16 talking about Jane's call as an outgoing call after
17 she switched from Polar to Midcontinent.

18 A. I'm sorry. You're asking about our
19 Hillsboro customer calling --

20 Q. Calling Jane Smith.

21 A. Yes. It would be now recorded in our
22 records as that being a Qwest customer or Midco,
23 doesn't really matter, and subject to go out on a
24 toll -- toll circuit, not a local circuit.

25 Q. But her actual charges for that call under

1 your tariff, for instance, you'd have to change
2 your tariff, wouldn't you?

3 A. No.

4 Q. Do you not have a tariff in North Dakota?

5 A. Not for -- we don't have a tariff for that
6 person's long distance unless that person took
7 Halstad long distance.

8 Q. Do you have a tariff for local?

9 A. Yes, we do.

10 Q. You have tariffs that say calls to 788 are
11 local from Hillsboro?

12 A. Presently, yes, we do.

13 Q. So if you didn't change your tariff, the
14 calls would still be local under your tariff. Yes?

15 A. Well, then that would be a case of our
16 having to change a tariff prior to receiving a port
17 request. It would have to have occurred -- if your
18 premise is correct, we would --

19 Q. And you'd also have to change the routing
20 of the call. You'd have to take the active step to
21 change the routing of the call, wouldn't you?

22 A. Mm-hmm.

23 Q. So unless you took the active step to
24 change the routing of the call, there wouldn't be a
25 toll charge on that for the customer.

1 A. But then the Mayville customer will not
2 have had Midco service.

3 Q. We're talking about the Hillsboro
4 customer.

5 A. Okay.

6 Q. You have to actively change the routing of
7 the call to the Mayville customer for toll to be
8 placed on a call.

9 A. Okay. If I can restate so I understand
10 the question. We're still talking about a
11 Hillsboro customer -- 636 customer of HTC
12 Services --

13 Q. Correct.

14 A. -- calling a -- a now Midco service.

15 Q. Right. On the 788 prefix.

16 A. And again your question? I'm sorry.

17 Q. To make that call a toll call for your
18 customer you have to change the routing of the call
19 in your switch, don't you?

20 A. We would have to. Yes.

21 Q. Thank you. Let me see. What else? Is it
22 your position that Midcontinent did not make a bona
23 fide request for number portability?

24 A. We were trying to get Midco to issue a
25 bona fide request. We understood at first -- well,

1 at first we didn't have an understanding as to
2 whether Midco was requesting resold service,
3 portability from us as a reseller of Qwest, and in
4 that case we should have gotten a request from
5 Qwest.

6 Q. In your view.

7 A. In our view. Or if Midco was coming to us
8 as a facility-based provider with its own switch.

9 Q. So the answer to the question is you do
10 not believe there's a bona fide request?

11 A. We were trying to identify one. No. At
12 first we couldn't identify that it was.

13 Q. Do you think there has been one?

14 A. You know, we were in such a state of
15 confusion that the interconnection agreement we
16 thought would finally clarify that.

17 Q. So you're saying you don't know?

18 A. I think perhaps in the course of
19 discussion of the interconnection agreement it may
20 have become evident.

21 Q. So today you think there was a bona fide
22 request? I just want a yes or no one way or the
23 other.

24 A. No.

25 Q. Okay. What are the elements of a bona

1 fide request from your perspective?

2 A. The elements of a bona fide request as I
3 would understand them, and I'm -- I'm a long time
4 away from having read anything on the issue, but it
5 would have been that the switch would have been
6 identified, who the serving switch was, and I think
7 eventually we got that identified, that it was
8 Qwest.

9 Q. Okay. So that element's satisfied?

10 A. Mm-hmm. So it was Qwest, and our
11 understanding would be that we would need to
12 receive that request from Qwest.

13 Q. Why do you think that?

14 A. Because it is in control of how those
15 calls are going to be handled up in Mayville.

16 Q. Are you aware of any FCC rule that says
17 that the request has to come from the carrier that
18 owns the switch?

19 A. I can't cite that. No.

20 Q. Then what was your reason for believing
21 that?

22 MR. BRUDVIK: I'm going to object. He's
23 asking this witness for legal conclusions.

24 JUDGE HOBERG: He did and he didn't know
25 the answer. Now he's asking if he had some other

1 reason.

2 THE WITNESS: We couldn't identify for the
3 longest time whether Midco was coming to us as a
4 facilities-based provider or as a reseller.

5 Q. (MR. HARRINGTON CONTINUING) Is it your
6 view then that it makes a difference?

7 A. We thought it did because the issue of who
8 was in control of handling the Mayville calls was
9 very much an issue.

10 Q. Is that an issue for a bona fide request
11 or an issue for the other things we've been
12 discussing today?

13 A. Well, knowing how the calls would be
14 handled, that's part of -- a bona fide request is
15 to have calls be handled in a certain way, and if
16 we didn't know who was going to be handling those
17 calls --

18 Q. But that's your -- your opinion and
19 it's -- and the basis for that opinion is that you
20 think that's how it should be or there's some other
21 basis?

22 A. That's how we thought it should be, and
23 that's why we have lawyers, I guess, because we
24 interpret different ways.

25 Q. Did you ask counsel?

1 MR. BRUDVIK: This is outside the scope of
2 direct examination --

3 MR. HARRINGTON: I'll withdraw it.

4 MR. BRUDVIK: -- and calculated to lead
5 nowhere. I object.

6 JUDGE HOBERG: He just withdrew it.

7 MR. HARRINGTON: I just withdrew it.

8 Q. (MR. HARRINGTON CONTINUING) Is it your
9 opinion an interconnection agreement is required
10 for number portability?

11 A. In which case? Involving which parties?

12 Q. Under the FCC's rules as you understand
13 them, is an interconnection agreement required for
14 portability between any set of carriers?

15 A. I understand there is. Yes.

16 Q. And who was those be who are required to
17 have an interconnection agreement?

18 A. Who would those be?

19 Q. Who are the carriers who are required to
20 have an interconnection agreement for number
21 portability?

22 A. Between an ILEC and CLEC, as I understand.

23 Q. Okay. I want to talk a little bit more
24 about the wireless portability issue, just to
25 confirm I understand the testimony. Previous

1 testimony indicated that you have received requests
2 from wireless providers to make portability
3 available. I'm not asking about requests for
4 specific numbers yet.

5 A. Yes. Yes. Both Halstad Telephone and HTC
6 Services.

7 Q. Yeah. I'm just talking about HTC
8 Services. You can tell me about the other one, but
9 I don't need to know. Did you consider all those
10 requests to be bona fide requests?

11 A. Not all of them.

12 Q. Did you have some that you thought were?

13 A. Were?

14 Q. Were bona fide requests?

15 A. Yes, I believe so. I have a little
16 confusion not being at my office to look at the
17 correspondence, whether it was toward Halstad
18 Telephone or HTC Services. So I have to --

19 Q. I understand. But you have not received
20 at this point any request for numbers to actually
21 be ported from wireless providers?

22 A. That's right.

23 Q. Have you informed any of the wireless
24 providers that if they ask you to port numbers,
25 that you're going to say not yet?

1 A. No.

2 Q. Really? Why is that?

3 A. We did inform them through -- through an
4 advocacy group in Minnesota that we were not
5 prepared to do so, and we did get a stay in
6 Minnesota.

7 Q. That's your rural ILEC business; isn't
8 that correct?

9 A. That's right.

10 Q. But as to HTC --

11 A. No.

12 Q. -- which is not in Minnesota, you've not
13 advised them that you will not port numbers?

14 A. No, we haven't.

15 Q. Do you think they're going to be surprised
16 when they come to you?

17 MR. BRUDVIK: That calls for pure
18 speculation, Your Honor.

19 JUDGE HOBERG: Sustained.

20 Q. (MR. HARRINGTON CONTINUING) So your
21 position is that until the terminating compensation
22 issues you've been raising are resolved you will
23 not provide porting to any party?

24 A. We'd want to have that resolved. Yes.

25 Q. And those issues really primarily relate

1 to Qwest; correct?

2 A. Primarily relate to Qwest. On the
3 wireless side the issues aren't nearly so strong or
4 evident that I'm aware of.

5 Q. So a wireless provider could resolve those
6 issues with you without having Qwest's involvement
7 at all?

8 A. Oh, I believe so. And that's -- we're not
9 talking apples and apples here, as I understand.

10 Q. When did you -- I'm going to -- I hope I'm
11 not confusing you and Mr. Dunning, but I don't
12 think I've asked you this question, and if I have,
13 I apologize. Not in the context of these
14 proceedings but since you began service in 2000,
15 when was the first time that HTC approached Qwest
16 concerning EAS issues?

17 A. HTC Services again you're asking?

18 Q. Yes.

19 A. I think we approached them regarding this
20 calling scope issue and terminating access, whether
21 it was an EAS issue or not, and that came later
22 during these negotiations.

23 Q. So not until these negotiations?

24 A. I don't recall that we did.

25 Q. Do you think that the local calling that

1 your customers have to Mayville customers gives you
2 a competitive advantage over Qwest?

3 A. Oh, I think so. Yes.

4 Q. Do you provide cable service?

5 A. Yes, we do.

6 Q. In Hillsboro?

7 A. Yep.

8 Q. Do you think that providing both cable
9 service and telephone service gives you a
10 competitive advantage over Qwest?

11 A. Yes.

12 Q. Do you think that providing cable service
13 and telephone service gives you a competitive
14 advantage over Midcontinent?

15 A. Midcontinent provides both, too.

16 Q. Would you answer the question, please?

17 A. No.

18 Q. You do not believe so?

19 A. No.

20 Q. Do you believe that Midcontinent would
21 have an easier time competing with you if it could
22 port numbers?

23 A. If it could port numbers?

24 Q. Yeah.

25 A. Whose numbers?

1 Q. Yours. Well, they're not yours, they're
2 not anyone's?

3 A. Probably so.

4 Q. Do you port numbers from Qwest in
5 Hillsboro?

6 A. No, I don't.

7 Q. Does your interconnection agreement
8 provide for portability?

9 A. Yes.

10 Q. Did you negotiate it with Qwest or was it
11 adopted?

12 A. It was adopted.

13 Q. Do you happen to know whose agreement you
14 adopted?

15 A. It was Midcontinent's.

16 Q. Popular. Okay. Just making sure I'm not
17 asking you questions I've already asked you since I
18 did ask them to Mr. Dunning. Why did you enter
19 into the EAS arrangement?

20 A. With?

21 Q. With Polar.

22 A. With Polar?

23 Q. Yes.

24 A. We wanted to provide an additional service
25 to our customers just the same as Polar did. We

1 saw that as an advantage for those customers in
2 that area. They'd been wanting expanded toll-free
3 calling for some time. No one else answered their
4 request for that, and we thought this was at least
5 one good way to do that with a party that we could
6 work with.

7 Q. Okay. I'm going to ask you a series of
8 questions that I asked Mr. Dunning. I suspect your
9 answers will be the same, but for the record I'd
10 like them. Your EAS agreement with Polar is
11 required by the Commission or not?

12 A. My answer's the same as Mr. Dunning's.

13 Q. That would be no?

14 A. No.

15 Q. Has it been approved by the Commission?

16 A. No.

17 Q. Has it been filed with the Commission?

18 A. No.

19 Q. Has the Commission approved your policy of
20 charging different rates depending on which carrier
21 serves the customer being called; that is, charging
22 a different rate if the customer is a Polar
23 customer or a Qwest customer in Mayville, the
24 receiving customer?

25 A. In Mayville.

1 Q. Yes. Has the Commission approved your
2 policy of charging your customers a different rate
3 depending on whether a call is terminated to a
4 Polar customer or a Qwest customer in Mayville?

5 A. We don't -- I -- I don't remember what Mr.
6 Dunning responded to, but I'm trying to remember --
7 we don't assess toll. That's a long-distance
8 carrier that assessed toll.

9 Q. Okay. So have they approved your policy
10 of making a local call if it's to a Polar customer
11 and a toll call if it's not?

12 A. No.

13 Q. Have you ever asked for their approval?

14 A. No. We figure that if we're adding a
15 service and a benefit to the people, that that's
16 not necessary. Plus we had understood that filing
17 of a tariff, at least back in the year 2000, was
18 not necessary with the PSC, although we did file
19 it.

20 MR. HARRINGTON: Your Honor, could I have
21 just one minute to confer?

22 JUDGE HOBERG: We'll just stay on the
23 record here.

24 MR. HARRINGTON: Your Honor, I have no
25 further questions, but I would like to ask you to

1 take administrative notice of the interconnection
2 agreement between Midcontinent and Qwest, which is
3 also apparently the interconnection agreement
4 between Halstad and Qwest and between Polar and
5 Qwest, because it provides information on the terms
6 of number portability.

7 JUDGE HOBERG: Well, do you have a copy of
8 that?

9 MR. HARRINGTON: We can provide a copy.
10 We don't have one with us. I was not aware that
11 they were using that agreement.

12 JUDGE HOBERG: Okay. Mr. Brudvik, he's
13 asked me to take official notice -- or
14 administrative notice of the interconnection
15 agreement between Midcontinent and Qwest.

16 MR. HARRINGTON: Because it's the same as
17 the interconnection agreement between Halstad and
18 Qwest and the interconnection agreement between
19 Polar and Qwest as the witness has testified.

20 MR. BRUDVIK: To take judicial notice?

21 JUDGE HOBERG: Official notice.

22 MR. HARRINGTON: Right, yes.

23 JUDGE HOBERG: In fact, it'll be on the
24 record by official --

25 MR. BRUDVIK: They haven't been

1 introduced, but they're --

2 MR. HARRINGTON: They haven't been
3 introduced, but they're a matter of public record
4 before the Commission and have been approved by the
5 Commission.

6 MR. BRUDVIK: I have no problem with that.

7 JUDGE HOBERG: I'd like you to provide me
8 with a copy of that.

9 MR. HARRINGTON: We'll provide you with a
10 copy, yes. I just thought it was simpler to do it
11 as one agreement than to give you both the --

12 JUDGE HOBERG: Okay. I'll take notice of
13 that.

14 MR. HARRINGTON: Thank you, Your Honor. I
15 have no further questions.

16 JUDGE HOBERG: By the way, as long as
17 we're providing documents, were you going to
18 provide a copy of the FCC order, the CC document,
19 No. 95-116.

20 MR. HARRINGTON: I will have a copy for
21 you today. I'll put a note here so I don't forget.

22 JUDGE HOBERG: Okay. I think I just have
23 one question, Mr. Laqua.

24

25

EXAMINATION

1

2 **BY JUDGE HOBERG:**

3 Q. As I understand it, you have basic
4 equipment or whatever is required in place to do
5 number porting for wireless carriers, and you've
6 had some general interest expressed by wireless
7 carriers, but you haven't actually ported or had a
8 request for a specific port of a number by a
9 wireless carrier; is that correct?

10 A. You're right on all three counts.

11 Q. So would you say that you then are
12 planning to port for wireless carriers?

13 A. We would be ready if asked.

14 Q. You're ready if asked?

15 A. Mm-hmm. We're physically ready. Yes.

16 JUDGE HOBERG: Okay. Mr. Binek, did you
17 have questions?

18 MR. BINEK: No.

19 JUDGE HOBERG: Anything further of this
20 witness?

21 MR. BRUDVIK: Just one, and this is truly
22 one.

23 **REDIRECT EXAMINATION**24 **BY MR. BRUDVIK:**

25 Q. The question about EAS -- the EAS

1 agreement between Polar and Halstad. If -- you
2 have never been requested by any other carrier to
3 have that agreement with any other carrier, have
4 you?

5 A. No, we have not.

6 Q. And if asked, would you be in a position
7 to either -- to grant that request?

8 A. Well, right now we're not -- to --

9 MR. BRUDVIK: I'll withdraw that last
10 question. You've never been asked by anyone else
11 to have one. That's all I wanted.

12 JUDGE HOBERG: Anything further of Mr.
13 Laqua?

14 MR. HARRINGTON: Nothing further.

15 JUDGE HOBERG: Thank you. You may step
16 down. Any other evidence or anything else to bring
17 to my attention?

18 MR. BRUDVIK: No. We're done. We're
19 done.

20 JUDGE HOBERG: So you're resting?

21 MR. BRUDVIK: We're resting.

22 JUDGE HOBERG: Anything in rebuttal from
23 Midco?

24 MR. HARRINGTON: No, Your Honor.

25 JUDGE HOBERG: Okay. Well, that's all the

1 evidence to bring to my attention?

2 MR. HARRINGTON: Yes, sir.

3 JUDGE HOBERG: Okay. At the prehearing
4 conference we discussed closing this matter, in
5 other words, filing of written briefs and proposed
6 findings of facts, conclusions of law and order,
7 and correct me if I'm wrong, but I believe we said
8 it would be complainant two weeks, respondent two
9 weeks after that, and then the complainant one week
10 for a reply; is that right? But that is contingent
11 upon whether or not there's a transcript.

12 MR. DURICK: That's correct.

13 JUDGE HOBERG: So at this time, Midco,
14 what are your wishes in regard to a transcript?

15 MR. HARRINGTON: We have -- I'm sorry.
16 I'm not familiar with how things --

17 JUDGE HOBERG: Let's go off the record and
18 discuss this.

19 (Discussion had off the record.)

20 JUDGE HOBERG: Okay. We're back on the
21 record. So we're going to have a transcript
22 prepared for this, and it's going to be about two
23 weeks, and then one week after the receipt of the
24 transcript Midco will supply their brief and
25 proposed findings of facts, conclusions of law and

1 order. You'll have two weeks then, Mr. Brudvik, to
2 file the respondents' briefs and proposed -- are
3 you going to be participating in any way in this?

4 MR. BINEK: No.

5 JUDGE HOBERG: And then you'll have a week
6 after that to do a reply.

7 MR. HARRINGTON: Your Honor, I would like
8 to suggest this while we were off the record, but
9 should we consider a date certain for the briefs
10 with the understanding of when the transcripts are
11 going to come rather than set the dates based on
12 when they actually arrive?

13 JUDGE HOBERG: Well, we don't know when
14 the transcript's coming.

15 MR. DURICK: Let's just do it that way.

16 MR. HARRINGTON: Okay. We'll do it your
17 way. Never mind.

18 JUDGE HOBERG: I mean, you know, if we're
19 a couple days off, it's --

20 MR. HARRINGTON: Yeah, that's fine.

21 MR. BRUDVIK: It's going to work.

22 JUDGE HOBERG: Okay. Anything else you
23 want to discuss before we close this hearing, at
24 least the evidentiary portion of the hearing?

25 MR. BRUDVIK: No.

1 MR. HARRINGTON: Nothing, Your Honor.

2 JUDGE HOBERG: Mr. Binek, anything --

3 MR. BRUDVIK: I would say -- let me just
4 say this: There is a period of two to four weeks
5 here that we're talking about in briefing, and we
6 would like to be able to continue to -- since --
7 this is off the record, I suppose?

8 JUDGE HOBERG: No. We're still on the
9 record.

10 MR. BRUDVIK: We would like to be able to
11 continue these negotiations if Midco is at all
12 interested, because I think we have made some
13 inquiries of Qwest and we're close to getting an
14 answer and that is -- maybe could be dispositive of
15 the whole issue.

16 JUDGE HOBERG: Settlement's always wise.

17 MR. BRUDVIK: Might dispose of the whole
18 briefing problem. So I just hope that that's still
19 a possibility with you folks because everything
20 kind of ceased when you sued us, and we'd like to
21 revisit some of those issues along the lines of
22 what we talked yesterday with the reciprocal comp.
23 So that would be okay if we could contact you
24 and --

25 MR. HARRINGTON: We're certainly open to

1 hearing proposals.

2 JUDGE HOBERG: I'm sure the Commission
3 would be willing to dismiss this complaint on the
4 basis of settlement, so --

5 MR. BRUDVIK: Very good.

6 JUDGE HOBERG: Okay. If there's nothing
7 else to bring to my attention, it's about 4:30, and
8 we'll close this hearing. Thank you.

9 (Concluded at 4:30 p.m., the same day.)

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1 CERTIFICATE OF COURT REPORTER

2
3 I, Stephanie A. Smith, a Registered
4 Professional Reporter,

5 DO HEREBY CERTIFY that I recorded in
6 shorthand the foregoing proceedings had and made of
7 record at the time and place hereinbefore
8 indicated.

9 I DO HEREBY FURTHER CERTIFY that the
10 foregoing typewritten pages contain an accurate
11 transcript of my shorthand notes then and there
12 taken.

13 Dated at Bismarck, North Dakota, this 20th
14 day of September, 2004.

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18 Stephanie A. Smith
19 Registered Professional Reporter
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