

**STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION**

MIDCONTINENT COMMUNICATIONS,
A SOUTH DAKOTA PARTNERSHIP,
COMPLAINANT

VS.

NORTH DAKOTA TELEPHONE COMPANY,
RESPONDENT

)
)
)
)
) Case No. PU-05-451
)
)
)
)
)
)

REBUTTAL TESTIMONY OF TIMOTHY J GATES

On Behalf Of

MIDCONTINENT COMMUNICATIONS

January 16, 2006

TABLE OF CONTENTS

I. INTRODUCTION.....	1
II. PURPOSE OF TESTIMONY	1
III. BURDEN OF PROOF.....	2
IV. CONDITIONS FOR TERMINATION OF THE EXEMPTION.....	3
V. TIMETABLE FOR IMPLEMENTATION.....	9

I. INTRODUCTION

Q. PLEASE STATE YOUR NAME AND ADDRESS FOR THE RECORD.

A. My name is Timothy J Gates. My business address is QSI Consulting, 819
Huntington Drive, Highlands Ranch, Colorado 80126.

**Q. ARE YOU THE SAME TIMOTHY GATES WHO FILED DIRECT
TESTIMONY IN THIS PROCEEDING ON BEHALF OF
MIDCONTINENT?**

A. Yes.

II. PURPOSE OF TESTIMONY

Q. WHAT IS THE PURPOSE OF YOUR REBUTTAL TESTIMONY?

A. The purpose of my testimony is to respond to some of the statements and
characterizations of the North Dakota Telephone Company ("NDTC") witnesses
in this proceeding. Specifically, I will respond to some of the comments made by
Mr. Douglas Duncan Meredith of John Staurulakis, Inc. ("JSI") and Mr. David
Dircks on behalf of NDTC.

**Q. WHAT ARE SOME OF THE ISSUES YOU WILL ADDRESS IN YOUR
REBUTTAL TESTIMONY?**

A. At several places in Mr. Meredith's testimony he recommends that the
Commission deny Midcontinent's request to terminate the rural exemption for
NDTC. (See Meredith Reply at 7 and 16) Mr. Dircks also opposes the request
by Midcontinent to terminate the exemption. (See Dircks Reply at 10) It appears

25 that the premise of NDTC's refusal to allow resale is that it wants to be offering
26 video before any competitive entry by Midcontinent. For instance, Mr. Dircks
27 states, "NDTC believes it can be successful competing with Midcontinent when
28 both have triple play services." (*Id.*) NDTC also argues that the proposed
29 implementation schedule is too short, and, in any case, should only be considered
30 if Commission orders termination of the exemption. I will address these and other
31 statements in this rebuttal testimony.

32 **III. BURDEN OF PROOF**

33

34 **Q. AT PAGE 5 OF MR. MEREDITH'S TESTIMONY HE STATES THAT**
35 **"MIDCONTINENT HAS THE BURDEN OF PROOF IN THIS**
36 **PROCEEDING." DO YOU AGREE?**

37 **A.** Yes, but NDTC also has obligations. For instance, NDTC should not withhold
38 information necessary for Midcontinent to prove its case or that NDTC can simply
39 ignore Midcontinent's calculations.

40 **Q. HAS NDTC REFUSED TO PROVIDE INFORMATION NECESSARY FOR**
41 **MIDCONTINENT TO MAKE ITS CASE?**

42 **A.** NDTC did provide some information in response to discovery, but it was
43 incomplete and lacked details that would have allowed Midcontinent to directly
44 calculate NDTC's revenues subject to resale or the wholesale discount. As a
45 consequence, and as discussed in Mr. Fischer's direct testimony, some
46 assumptions had to be made. (See Fischer Direct at 9-11.)

IV. CONDITIONS FOR TERMINATION OF THE EXEMPTION

Q. MR. DIRCKS SUGGESTS AT PAGE 10 OF HIS TESTIMONY THAT "NDTC BELIEVES IT CAN BE SUCCESSFUL COMPETING WITH MIDCONTINENT WHEN BOTH HAVE TRIPLE PLAYS." IS THAT REASON FOR THE COMMISSION TO DENY MIDCONTINENT'S REQUEST?

A. No. I can see why NDTC would prefer to delay competition until it can offer all services that its potential competitors would offer. Such a result would make it easier for NDTC to retain its customers in the face of competition. Not being ready for competition, however, is not a good reason to delay the benefits of competition.

Q. MR. DIRCKS STATED THAT "CUSTOMERS ARE HAPPY WITH OUR SERVICE." (DIRCKS REPLY AT 4) ASSUMING THAT CLAIM IS TRUE, IS THAT A REASON TO DENY MIDCONTINENT'S REQUEST TO TERMINATE THE EXEMPTION?

A. No. Competition is beneficial even to customers who are happy with their current providers because it creates incentives for competitors to improve their services and lower their prices. Indeed, Mr. Dircks stated at page one of his testimony that "NDTC understands fully that advancing competition has been stated to be a public interest objective."

Q. MR. MEREDITH MAKES SOME GENERAL STATEMENTS AT PAGE 10 OF HIS TESTIMONY SUGGESTING THAT YOUR STATEMENT

71 **THAT "COMPETITION WILL PROVIDE INCENTIVES FOR NDTC TO**
72 **OFFER NEW AND BETTER SERVICES AND TO OPERATE MORE**
73 **EFFICIENTLY" IS NOT SUPPORTED BY EVIDENCE. PLEASE**
74 **RESPOND.**

75 A. This statement is accepted by most, if not all, mainstream economists.
76 Competition provides incentives to provide better and more efficient services so
77 as to retain customers in the face of competition. We see this every day when we
78 shop for commodities or specialized products. Manufacturers and producers work
79 hard to differentiate their products and services so as to attract and keep their
80 customers and market share. They also are diligent in managing their operations
81 and expenses so as to provide the most efficient cost structure to maximize
82 profits.

83 If Mr. Meredith's intends to suggest that NDTC is already as efficient and
84 responsive as it could ever be, then I would disagree. There is always room to
85 improve on operations and efficiencies. While I have no specific insight into
86 NDTC's operations, it could be that employee scheduling could be refined,
87 overtime minimized, new and more efficient electronics deployed for transport, or
88 any other number of improvements in network or human resource management. I
89 think it is a mistake for any company or organization to believe that they can't do
90 any better than they are today.

91 **Q. IF NDTC WERE ALREADY OPERATING AT TOP EFFICIENCY,**
92 **WOULD THAT BE A REASON TO DENY MIDCONTINENT'S**
93 **REQUEST TO TERMINATE THE EXEMPTION?**

94 A. No. The issues for this Commission to consider do not include whether NDTC is
95 efficient or inefficient. Nevertheless, I'm sure the Commission recognizes the
96 important market discipline that competitive entry provides. That market
97 discipline will benefit NDTC, consumers and the economy of the State.

98 **Q. MR. MEREDITH REFERS TO THE EXISTENCE OF WIRELESS**
99 **SERVICE AS EVIDENCE OF COMPETITION. PLEASE COMMENT.**

100 A. Wireless is an important service in today's communications market. There is a
101 small segment of today's society (perhaps as much as 5 percent) that has decided
102 to rely entirely on wireless service and no longer subscribe to wireline service.
103 Wireless pricing plans are also responsible for reducing long-distance rates in the
104 last few years. Nevertheless, for the vast majority of businesses and consumers,
105 wireless is a complement to and not a substitute for wireline service.

106 Comparing landline local exchange service to wireless service would be
107 similar to comparing the functionality received from a car and a motorcycle. The
108 car and motorcycle both provide transportation, have disk brakes, dual exhaust,
109 halogen headlights, windshields, turn signals, stereos, seating for additional
110 passenger, storage for belongings, and get similar mileage. One could even argue
111 that they cost the same depending upon the model purchased and how they are
112 equipped. Indeed, one could argue that the motorcycle even provides features and
113 characteristics that the car does not.¹ In fact, I would have to admit that I "could"
114 replace my car with a motorcycle; but "would" I? No.

115 **Q. WHY IS THE DISTINCTION BETWEEN "COULD" AND "WOULD"**

¹ Motorcycles provide that "open air" experience, are more maneuverable, have a tighter turning radius, stop quicker and accelerate faster, etc.

IMPORTANT TO YOUR ANALYSIS?

A. If someone asked me if I “could” replace my car with a motorcycle, I would have to answer yes. It would be technically possible to sell my car and replace it with a motorcycle. Technically, there is no reason why I could not replace my car with a motorcycle. But, because the car and motorcycle provide different kinds of transportation for different situations, I would never get rid of my car and rely solely on my motorcycle. Instead, I would prefer to have both.

This is similar to the comparison of landline local exchange service and wireless service. One could technically replace landline local service with wireless service, but because wireless services provide different kinds of functionality for different situations, very few businesses would actually disconnect their landline service and rely solely upon wireless service. Indeed, like the motorcycle scenario, businesses with the means to do so would likely prefer both.

While wireless service can provide many of the features of wireline service, it does not meet all the standards for what consumers expect from wireline telephone service. For instance, when you pick up your phone at your office you expect to receive dialtone and when the call completes you expect a high quality connection. Wireless service is famous for variable quality of service based on the technology deployed and the extent of deployment. Dropped or clipped calls are very common and, for customers of any single provider, reliable service is not available in many parts of the state (which parts may differ by

provider).² Further, it would be difficult or impossible for a business to replace its dial-up or broadband Internet connection on the landline with a wireless counterpart.

Q. IF COMPETITION EXISTS FROM OTHER SOURCES IN NDTC'S SERVING TERRITORY, IS THAT REASON FOR THIS COMMISSION TO DENY MIDCONTINENT'S REQUEST TO TERMINATE THE EXEMPTION?

A. No. To the contrary, if NDTC is already facing competition, the addition of one more competitor, especially a total resale competitor, would have little marginal impact on NDTC. In other words, NDTC already would be attempting to streamline and groom its operations. That is not to say, however, that consumers, who would benefit from additional alternative providers, would not benefit.

Q. DO THE STATEMENTS FROM NDTC'S WITNESSES DISCUSSED ABOVE HAVE ANY RELEVANCE TO THE COMMISSION'S CRITERIA FOR TERMINATING THE RURAL EXEMPTION?

A. No. NDTC's main objections – NDTC isn't currently offering the same services as Midcontinent; NDTC is already operating efficiently; NDTC's customers are happy with its service; NDTC already has competition from wireless and Internet service providers – do not address the criteria that the Commission has identified. Those criteria are

1. Whether the request of Midcontinent is unduly economically burdensome.
2. Whether the request of Midcontinent is technically feasible.

² The manual for my wireless phone directs the customer to "move to a higher elevation, to a window or open space" when a call is dropped or you can't make a network connection. One does not have to suffer

159 3. Whether the request of Midcontinent is consistent with 47 U.S.C. § 254
160 (other than subsections (b)(7) and (c)(1)(D) thereof).

161 4. The implementation schedule for compliance with the request should the
162 exemption be terminated.³

163 **Q. PLEASE SUMMARIZE YOUR POSITION ON EACH OF THE CRITERIA**
164 **ABOVE.**

165 A. As to item number one, it is clear the total service resale is not unduly
166 economically burdensome. Based on theory alone, one could reach this
167 conclusion, but Mr. Fischer's analysis shows, even with aggressive assumptions,
168 that Midcontinent's resale of NDTC's services will have only a minimal impact.
169 That impact is certainly not unduly economically burdensome.

170 As to item number two, based on almost 10 years of experience since the
171 passage of the Telecommunications Act of 1996, we know that resale is
172 technically feasible. To the extent NDTC has limited experience with resale,
173 Midcontinent has offered to share their experience and systems expertise to aid
174 NDTC.

175 The third item relates to the preservation and advancement of universal
176 service. Given the minimal impact calculated by Mr. Fischer, we know that
177 terminating the exemption to allow for resale will not harm universal service in
178 Devils Lake. All parties to this case recognize the benefits that competition can
179 bring to society.

these inconveniences with a traditional wireline phone.

³ See Commission's Notice of Hearing dated July 28, 2005, at page one.

The final item is the timetable for implementation. That is discussed below.

V. TIMETABLE FOR IMPLEMENTATION

Q. AS NOTED ABOVE, THERE IS A DISPUTE AS TO THE TIMETABLE FOR IMPLEMENTATION. IS THIS A LEGAL ARGUMENT?

A. Midcontinent's proposal relies upon factual experience in the industry and is not a legal argument. As noted above, the criterion is "The implementation schedule for compliance with the request should the exemption be terminated." This is a matter of fact and policy, not law. The most logical approach, once the exemption is terminated, is for the two companies to enter into good faith efforts to get a resale agreement in place and operational. That does not mean that we start from the beginning with yet another bona fide request because Midcontinent already made its request in mid-2005. Recall that Midcontinent is not negotiating standard interconnection issues, collocation, UNEs or UNE rates, just a resale agreement with a wholesale discount -- the calculation of which we have been doing for years.

Mr. Meredith seems to suggest that even if Midcontinent did submit another bona fide request that NDTC would not agree to the request and that even after the negotiations failed that yet another set of hearings would be held. (See, for instance, Meredith Reply at 8) While this is not surprising, given the incentives of NDTC to keep competitors out, it is not in the public interest. Forcing the parties to engage in yet another round of negotiations with no likely

change in result is wasteful for Midcontinent and the Commission. Only NDTC would benefit from such an approach.

Q. BUT DIDN'T MR. MEREDITH TESTIFY AT PAGE 8 OF HIS REPLY THAT "NDTC WOULD NOT BE OPPOSED TO HAVING THE COMMISSION ORDER THE PARTIES TO CONDUCT NEGOTIATIONS ON THE PROPER BUSINESS TERMS AND CONDITIONS FOR A RESALE AGREEMENT WITH A WHOLESALE DISCOUNT SPECIFIC TO THE DEVILS LAKE EXCHANGE"?

A. Midcontinent already has tried this approach and it is unlikely that NDTC will change its positions the second time around. This proposal – to start over – is consistent with NDTC's position in this case to delay any possible entry – even by total service resale – until NDTC has its fiber in place and is capable of offering video. Mr. Meredith's suggestion that the companies once again negotiate terms and conditions – for another 135 days – before a party could seek arbitration would unnecessarily delay Midcontinent's participation in the Devils Lake exchange.

Q. WHAT IS YOUR RECOMMENDATION TO THE COMMISSION REGARDING THE TIMETABLE FOR IMPLEMENTATION SHOULD THE EXEMPTION BE TERMINATED?

A. I recommend that the Commission order the parties to commence discussions on implementation of a resale agreement immediately upon release of its Order in this proceeding, using the agreement proposed by Midcontinent in its first letter to NDTC as the template. The Commission should order the parties to provide

226 monthly reports to the Commission on their progress toward getting this
227 agreement in place, and allow the Commission Staff to mediate any disagreements
228 along the way. With this direction from the Commission, and assistance from the
229 Staff if needed, I'm confident the parties can have an agreement in place
230 promptly.

231 **Q. DOES THIS CONCLUDE YOUR TESTIMONY?**

232 **A.** Yes, it does.

233