

1 STATE OF NORTH DAKOTA
2 PUBLIC SERVICE COMMISSION
3
4 Midcontinent Communications/ Case No.
5 North Dakota Telephone Company PU-05-451
6 Rural Exemption Investigation
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12 TRANSCRIPT OF
13 HEARING
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18 Taken At
19 State Capitol
20 600 East Boulevard
21 Bismarck, North Dakota
22 January 23, 2006
23
24 BEFORE JUDGE AL WAHL
25 -- HEARING OFFICER --

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COMMISSIONER SUSAN E. WEFALD
COMMISSIONER KEVIN CRAMER

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1 (The proceedings herein were had and made
2 of record, commencing at 10:05 a.m., Monday,
3 January 23, 2006, as follows:)

4 JUDGE WAHL: Good morning. I'm Al Wahl,
5 the administrative law judge designated by the
6 Office of Administrative Hearings pursuant to the
7 request of the North Dakota Public Service
8 Commission to act as the procedural hearing officer
9 for the matter of a hearing as an inquiry pursuant
10 to 47 USC Section 251(f)(1)(a) to determine whether
11 to terminate the exemption of North Dakota
12 Telephone Company from providing its services for
13 resale.

14 Before proceeding with the hearing, I will
15 ask the commissioners for their comments and any

16 directions for the hearing. Commission president
17 Tony Clark.

18 COMMISSIONER CLARK: Thank you, Mr.
19 Hearing Officer. Just welcome to everyone. This
20 is the first one of these 251(f) hearings that the
21 Commission has heard, so we understand that there's
22 always some precedent that's being set when we do
23 hear one of these cases, so just look forward to
24 each side's presentation.

25 JUDGE WAHL: Commissioner Wefald.

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9

1 COMMISSIONER WEFALD: Yes. Good morning.
2 I have participated in a rural exemption hearing in
3 the past in regard to Western Wireless coming
4 before the Commission and asking about the rural
5 exemption, so some of the issues are familiar to
6 me, although there's always new issues in a case.
7 And I've read all the information that's been
8 presented on the record, and it is helpful to get
9 those back-and-forth comments from the different
10 parties before we start the hearing because then
11 the Commission has a pretty good idea of what the
12 issues are that it needs to determine during this
13 hearing. So thank you for your advance testimony
14 that you've already provided to the Commission.
15 It's been very helpful and I'm looking forward to
16 getting a full record today.

17 JUDGE WAHL: Commissioner Cramer.

18 COMMISSIONER CRAMER: Thank you. And good
Page 8

19 morning to everyone, welcome, look forward to a
20 very informative hearing this morning and thank you
21 all for being here. It's great to see so many
22 people. I know we know it's very important and
23 interesting and, as Commissioner Clark said,
24 precedent setting, but looking forward to a good
25 day.

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10

1 JUDGE WAHL: Thank you, Commissioners.
2 The record will show that it is a little after
3 10:00 a.m., January 23, 2006, the time and the date
4 noticed for a hearing as an inquiry to determine
5 whether to terminate North Dakota Telephone
6 Company's exemption from providing its services for
7 resale.

8 On May 12, 2005, Midcontinent
9 Communications, sometimes referred to as
10 Midcontinent, made a bona fide request under 47 USC
11 Section 251(c) for a wholesale resold services for
12 the Devils Lake, North Dakota, exchange from North
13 Dakota Telephone Company, sometimes referred to as
14 NDTC. By notice of bona fide request for services
15 dated July 15, 2005, Midcontinent notified the
16 Commission of its bona fide request.

17 NDTC claims that under 47 USC Section
18 251(f) it is exempt from the requirement that
19 incumbent local exchange carriers must offer for
20 resale the telecommunications services that it

21 provides to retail subscribers.
22 Midcontinent requests that the Commission
23 conduct an inquiry to determine whether to
24 terminate NDTC's exemption from providing services
25 for resale.

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11

1 The Public Service Commission has duly
2 issued its notice -- issued and published its
3 Notice of Hearing and its Notice of Rescheduled
4 Hearing.
5 The issues to be considered and determined
6 upon this hearing are, first, whether the request
7 of Midcontinent is unduly economically burdensome;
8 second, whether the request of Midcontinent is
9 technically feasible; third, whether the request of
10 Midcontinent is consistent with 47 USC Section 254
11 other than subsections (b)(7) and (c)(1)(D)
12 thereof; and, fourth, the implementation schedule
13 for compliance with the request should the
14 exemption be terminated.

15 Mr. Durick, will you and co-counsel please
16 state your appearance for the record.

17 MR. DURICK: Yes. I'm Pat Durick of
18 Pearce & Durick for Midcontinent Communications.

19 MR. HARRINGTON: J.G. Harrington of Dow,
20 Lohnes & Albertson for Midcontinent Communications.

21 JUDGE WAHL: Mr. Negaard.

22 MR. NEGAARD: Yes, Your Honor. My name is
23 Don Negaard with the Pringle & Herigstad law firm

24 in Minot, North Dakota, appearing for North Dakota
25 Telephone Company.

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12

1 MR. MOORMAN: Thomas J. Moorman appearing
2 on behalf of North Dakota Telephone Company, Woods
3 & Aitken, L.L.P., Washington, D.C.

4 JUDGE WAHL: Mr. Binek, please.

5 MR. BINEK: My name is William Binek. I'm
6 counsel for the Public Service Commission. With me
7 is Patrick Fahn, a public utility analyst in the
8 Public Utilities Division of the Commission. The
9 Commission staff is appearing today as Commission
10 advisers. Staff is not taking an advocacy position
11 in this proceeding.

12 JUDGE WAHL: All right. Mr. Durick, when
13 you're ready.

14 MR. DURICK: Thank you, Your Honor.
15 Commissioner Clark, Commissioners Wefald and
16 Cramer. To begin with, Mr. J.G. Harrington would
17 like to just make a short opening statement what we
18 intend to do and then we'll proceed with witnesses,
19 Mary Lohnes, Warren Fischer and Timothy Gates.

20 MR. HARRINGTON: Commissioners, Judge
21 Wahl, with Pat Durick, I represent Midcontinent
22 Communications in this proceeding. We are just
23 about at the ten-year anniversary of the passage of
24 the Telecommunications Act of 1996. It was enacted
25 into law on February 2nd, 1996.

1 In that statute Congress decided that
2 local telephone competition was in the public
3 interest. This was not a recommendation or a
4 presumption. It was a determination that consumers
5 would benefit and it was implemented by specific
6 statutory provisions.

7 Midcontinent is one of the companies that
8 has taken advantage of that determination to bring
9 competition in local telephone service to consumers
10 in North and South Dakota, including in markets
11 where many people thought competition would never
12 happen. To facilitate the development of
13 competition, the Act created a series of
14 obligations for incumbent telephone companies. It
15 also created a narrow exemption from those
16 obligations for rural telephone companies, which
17 apply to only some of the carrier's obligations.
18 Rural telephone companies still have to provide
19 interconnection under Section 251(a) of the
20 Communications Act and dialing parity, number
21 portability and reciprocal compensation under
22 Section 251(b). The exemption covers only the
23 obligations specific to incumbents under Section
24 251(c).

25 The exemption is not immutable, though.

1 Section 251(f) provides two ways to end that.
2 First, a competitor can show by a preponderance of
3 the evidence that lifting the exemption will not
4 create an undue burden on the incumbent and that
5 it's not technically infeasible or, second, the
6 incumbent can end the exemption by its own actions
7 when it enters the cable television business. Once
8 either of these tests is met, the exemption must be
9 lifted. The statute does not require or permit any
10 other requirements.

11 In this case the evidence will show that
12 lifting the rural exemption will not pose any undue
13 burden on North Dakota Telephone. Midcontinent's
14 expert witnesses have demonstrated that wholesale
15 resale will pose little or no financial burden on
16 North Dakota Telephone and there is no technical
17 reason why North Dakota Telephone cannot provide
18 wholesale resale.

19 Further, Midcontinent's experience with
20 other telephone companies in the Dakotas shows that
21 resale can be implemented promptly with little
22 difficulty. In the absence of a financial impact,
23 there also will not be any impact on universal
24 service.

25 In practical terms, North Dakota Telephone

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1 does not challenge these showings, does not provide

2 its own financial analysis to contradict
3 Midcontinent's evidence. It is not argued that
4 Midcontinent's request cannot be implemented.
5 Thus, if you accord any weight at all to
6 Midcontinent's testimony, the first test under
7 Section 251(f) has been met and the rural exemption
8 must be lifted.

9 North Dakota Telephone's response is to
10 admit that the exemption should be lifted, but for
11 a different reason and on a much different
12 schedule. North Dakota Telephone now says that
13 it's planning to offer video service in early 2007,
14 which would lift the exemption automatically.
15 Rather than acting now, North Dakota Telephone says
16 the Commission should simply wait.

17 There are two things wrong with North
18 Dakota Telephone's theory. First, if the first
19 test under Section 251 is met, there's no reason to
20 wait. The statute is clear on this point. All
21 Midcontinent needs to do is show by a preponderance
22 of the evidence that the requirements within the
23 exemption have been met and the exemption must be
24 lifted.

25 Second, if the Commission were to adopt

□

1 North Dakota Telephone's theory, North Dakota
2 Telephone would be afforded a significant
3 competitive advantage. Once the exemption was
4 lifted by operation of law, it likely would be a

5 year or more before Midcontinent could offer resold
6 service in Devils Lake while North Dakota Telephone
7 would be able to offer its customers a complete
8 bundle of services as soon as it finished its video
9 network. This competitive balance would be bad not
10 just for Midcontinent, but also for consumers in
11 Devils Lake. There is no reason to make them wait
12 until 2008 for the competition that Congress said
13 they could have in 1996. For these reasons we ask
14 you to grant our petition.

15 JUDGE WAHL: Mr. Negaard, will you make an
16 opening statement at this time?

17 MR. NEGAARD: Yes, Your Honor, I will.
18 Good morning, Judge Wahl.

19 JUDGE WAHL: Good morning.

20 MR. NEGAARD: Good morning, Commission
21 President Clark. Good morning, Commissioner
22 Wefald. Good morning, Commissioner Cramer. As I
23 indicated, Don Negaard with the Pringle & Herigstad
24 law firm this morning. One gentleman that got
25 overlooked is Scott Knudsvig. He's one of my

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1 partners in the Pringle & Herigstad law firm. He's
2 with me this morning.

3 For the record, I want it noted that Mr.
4 Moorman originally appeared and was admitted for
5 the purpose of this proceeding with the Kraskin,
6 Moorman & Cosson Law firm and that firm was

7 dissolved by mutual assent on January 1st of this
8 year. And so for the record, Mr. Moorman is now
9 with the Washington, D.C., firm Woods & Aitken
10 located in Washington.

11 Appearing with me today is David Dircks.
12 Mr. Dircks is the general manager of North Dakota
13 Telephone Company. He will testify on behalf of
14 that company today. In the audience today are a
15 number of the members of the board of directors of
16 North Dakota Telephone Company. Another witness
17 who appears today on behalf of North Dakota
18 Telephone is Douglas Meredith. Mr. Meredith is the
19 director of economics and policy at John
20 Staurulakis, Incorporated, a long-time telephone
21 communications consulting firm, and he will be
22 testifying today on their behalf.

23 This case involves a rural exemption
24 granted to North Dakota Telephone Company and other
25 rural companies by Congress in the

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18

1 Telecommunications Act of 1996. This is the first
2 time this Commission has been asked to remove a
3 rural exemption in this context for a North Dakota
4 company. It's a new process in the state and it's
5 obviously the first time that North Dakota
6 Telephone has had to face this issue. We have
7 confidence that this Commission will take its role
8 seriously, will study the issues and render a
9 careful decision as it has been in the past.

10 Your role is to hear the evidence in this
11 case as it relates to the Devils Lake exchange of
12 North Dakota Telephone Company, make a decision in
13 this matter based on the evidence, and only the
14 evidence presented here, on the issues previously
15 designated by this Commission for this hearing.

16 Midcontinent has the burden of proof in
17 this matter. They have to prove to you that the
18 rural exemption of North Dakota Telephone Company
19 for providing wholesale resale of its
20 telecommunications services should be lifted. This
21 is solely your function. It's not my function.
22 And your function is to determine if that burden
23 has been met. At the end of the day there will be
24 no facilities-based evidence on the impact of North
25 Dakota Telephone Company in Devils Lake, and the

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19

1 evidence will only be on that particular exchange.
2 If you determine that Midcontinent has not
3 met its burden of proof, then Midcontinent can
4 compete in other ways that are available to it. If
5 you determine that Midcontinent has met its burden
6 of proof, then you need to establish an
7 implementation schedule for the Devils Lake
8 exchange that will allow the parties the
9 opportunity to negotiate in good faith for a
10 business arrangement, an interconnection agreement,
11 if you will, that will contain the terms and

12 conditions of this unique arrangement in North
13 Dakota. That schedule would need to determine a
14 rational schedule based on the authority that this
15 Commission has under state and federal law.

16 The testimony has been prefiled. I think
17 taking Judge Wahl's lead that we try to expedite
18 the hearing today, and thank you for being here to
19 hear this case and to hear the evidence and make
20 your decision. Thank you.

21 JUDGE WAHL: Mr. Binek, will you make an
22 opening statement?

23 MR. BINEK: No.

24 JUDGE WAHL: Mr. Durick, you may proceed
25 when you're ready.

□

20

1 MR. DURICK: Thank you, Your Honor. We
2 call Mary Lohnes as the first witness for
3 Midcontinent.

4 JUDGE WAHL: Miss Lohnes, you can go ahead
5 and have a seat in the witness --

6 MR. DURICK: Do you want her to be sworn
7 here?

8 JUDGE WAHL: I'll do that. Let her be
9 seated. It's easier, quicker.

10 Miss Lohnes, your testimony is required to
11 be under oath, as I'm sure you're well aware, and
12 I'm required by law to advise you regarding perjury
13 before administering the oath. Perjury is a false
14 statement of material fact which you do not believe

15 to be true; in other words, of course, generally
16 speaking, a lie. In North Dakota perjury is a
17 Class C felony, punishable by a fine up to \$5,000,
18 imprisonment for a period of up to five years, or
19 both. will you raise your right hand, please.

20 (Witness sworn.)

21 JUDGE WAHL: Mr. Durick.

22 MR. DURICK: Thank you, Your Honor.

23 MARY LOHNES,

24 being first duly sworn, was examined and testified
25 as follows:

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21

1 DIRECT EXAMINATION

2 BY MR. DURICK:

3 Q. Mary, there has been testimony prefiled in
4 this particular matter. Do you have a copy of your
5 testimony before you?

6 A. The direct testimony?

7 Q. Yes, the direct testimony.

8 A. Yes, I do.

9 Q. We're going to mark the direct testimony
10 of Miss Lohnes as Exhibit P1, and that's Docket No.
11 50 for the Commission. Miss Lohnes, do you also
12 have your rebuttal testimony before you?

13 A. Yes, I do.

14 Q. Okay. And we're going to mark that for
15 the Commission as P2, and that's Docket No. 61,
16 just to keep the record straight. Miss Lohnes, I'm

17 going to show you the two exhibits that we have
18 that are attached to your rebuttal testimony, the
19 first one being the letter from myself dated May
20 12th, 2005, with an attachment. Can you identify
21 that as Exhibit A to your rebuttal testimony?

22 A. Yes, it is.

23 Q. Okay. And I've marked that as P3. And
24 I'm marking as P4 the Exhibit B to your rebuttal
25 testimony, and I'm just wondering if you could

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22

1 identify that for the Commission and for Judge
2 Wahl.

3 A. Yes. These are various articles which we
4 found.

5 Q. Okay. Now, I would like to ask you, you
6 have reviewed your direct and your rebuttal
7 testimony, have you?

8 A. Yes, I have.

9 Q. And under oath today, is that still your
10 testimony before this Commission?

11 A. Yes, it is.

12 MR. DURICK: Okay. At this point we'd
13 move for the introduction into evidence of Exhibits
14 P3 and P4, the two exhibits to Miss Lohnes's direct
15 and rebuttal testimony, and we would --

16 JUDGE WAHL: Mr. Negaard.

17 MR. NEGAARD: And I have the assurance of
18 counsel those are the same exhibits that were
19 included in the prefiled testimony?

20 MR. DURICK: Yes.
21 JUDGE WAHL: I have no objection, Your
22 Honor.
23 JUDGE WAHL: Mr. Binek.
24 MR. BINEK: No objection.
25 JUDGE WAHL: Exhibits P3 and P4 are

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23

1 received. I'm assuming that counsel is stipulating
2 to the admission of the direct and rebuttal
3 testimony.
4 MR. DURICK: That's the assumption I'm
5 making, Your Honor.
6 JUDGE WAHL: Yes.
7 MR. NEGAARD: Yes, Your Honor.
8 JUDGE WAHL: Mr. Binek. We're going to
9 offer the exhibits to the testimony and address
10 those, and the prefiled testimony will be received
11 pursuant to counsel's stipulation. Go ahead, Mr.
12 Durick.
13 MR. DURICK: Thank you. At that point we
14 would pass the witness, Your Honor.
15 JUDGE WAHL: Mr. Negaard.
16 CROSS-EXAMINATION
17 BY MR. NEGAARD:
18 Q. Good morning, Miss Lohnes.
19 A. Good morning.
20 Q. In your testimony you mention the
21 possibility of a company cherry-picking customers.

22 Are you referencing video programming, cable
23 television or telecommunications when you talk
24 about that? I believe it's on page 4, line 6 of
25 your testimony.

□

24

1 COMMISSIONER WEFALD: Excuse me, Judge
2 wahl. Could I have just a moment to get my
3 paperwork -- could he repeat again exactly which
4 exhibits are -- what documents are the exhibits
5 we're going to be referring to with this witness?
6 And I have everything here, I just need to pull it
7 together so that I have it.

8 MR. DURICK: Exhibit P3 would be Exhibit A
9 to the rebuttal testimony of Miss Lohnes.

10 COMMISSIONER WEFALD: And that's document
11 number?

12 MR. DURICK: That is document number 61.

13 COMMISSIONER WEFALD: 61. Okay. Thank
14 you.

15 MR. DURICK: And P4 is Exhibit A to the
16 rebuttal testimony, which is docket 61.

17 COMMISSIONER WEFALD: All right. And
18 that's also in docket 61? That includes this?

19 MR. DURICK: Yes.

20 COMMISSIONER WEFALD: And then there was
21 another item.

22 COMMISSIONER CRAMER: 50. That's the
23 direct testimony.

24 MR. DURICK: 50 is the direct testimony,
Page 22

25 and that's Exhibit No. 1.

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25

1 COMMISSIONER WEFALD: All right. Thank
2 you.
3 Q. (MR. NEGAARD CONTINUING) And I apologize,
4 Miss Lohnes. I said page 4. Page 5, lines 6 and
5 7.
6 A. I found it. Thank you.
7 Q. When you talked about cherry picking, the
8 question was, are you referencing video or
9 telecommunications?
10 A. Telecommunications.
11 Q. Okay. Are you aware that North Dakota
12 Telephone Company is under tariff, files their
13 rates under tariff?
14 A. I am not aware.
15 Q. Okay. And does Midcontinent have a
16 monopoly on cable television services in Devils
17 Lake today?
18 A. I don't know that.
19 Q. Do you know of any other cable television
20 provider in Devils Lake?
21 A. I do not.
22 Q. Do you know of any other companies other
23 than North Dakota Telephone providing
24 telecommunications services in Devils Lake?
25 A. I am not aware of any others.

□

26

1 Q. Have you heard of western wireless, which
2 has now taken on a new name in the state, that
3 they're operating in the state, wireless carrier?

4 A. Yes.

5 Q. Okay. And you've heard of Verizon
6 wireless?

7 A. Yes.

8 Q. And you're aware that they're operating in
9 the state?

10 A. Yes.

11 Q. So if they're operating in the state in
12 the Devils Lake area, there are other competitors
13 for telecommunications business in the area, aren't
14 there?

15 A. I'm not aware that they're in Devils Lake.

16 Q. Okay. Is Midcontinent a member of the
17 cooperative purchasing organization that you
18 mention in your testimony? I refer to your
19 rebuttal testimony, page 4, lines 20-21.

20 A. Yes, we are a member of that.

21 Q. You are a member of that cooperative --

22 A. Yes.

23 Q. -- purchasing association?

24 A. Yes.

25 Q. Are you familiar with the pricing that's

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1 offered through that association?

2 A. I am not.

3 Q. Without discussing the content of any
4 discussions, how many days -- how much time have
5 the parties, Midcontinent and North Dakota
6 Telephone, spent negotiating the terms and
7 conditions of an interconnection agreement?

8 A. Discussing an interconnection agreement,
9 none.

10 MR. NEGAARD: I don't have anything
11 further. Thank you.

12 JUDGE WAHL: Mr. Binek?

13 MR. BINEK: I have no questions of this
14 witness.

15 JUDGE WAHL: Questions from the
16 Commission. Commissioner Clark.

17 EXAMINATION

18 BY COMMISSIONER CLARK:

19 Q. I do have one. In your initial testimony
20 you talk about the amount of time that it's taken
21 in the past to handle commercial agreements for
22 resale, and I think you stated less than three
23 months is typical. Have you gone through
24 interconnection agreements in other --
25 interconnection arbitration proceedings, 251-, 252-

□

1 type proceedings, in other states that you've been
2 active in?

3 A. Not for arbitration.
4 Q. Have you had other 251(f) exemptions
5 litigated in proceedings like this in other states?
6 A. No, we have not.
7 COMMISSIONER CLARK: That's all the
8 questions I have.
9 JUDGE WAHL: Commissioner Wefald.
10 COMMISSIONER WEFALD: I have no questions
11 at this time.
12 JUDGE WAHL: Commissioner Cramer.
13 COMMISSIONER CRAMER: I have none. Thank
14 you.
15 JUDGE WAHL: All right. Followup, Mr.
16 Durick.
17 MR. DURICK: Thank you, Judge Wahl.
18 REDIRECT EXAMINATION
19 BY MR. DURICK:
20 Q. Miss Lohnes, does Midcontinent consider
21 satellite television offerings to be competition to
22 the cable television offerings?
23 A. Yes, we do.
24 Q. And are there satellites that offer
25 services in Devils Lake, as near as you know?

□

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1 A. Not that I'm aware of, but there could be.
2 Q. DirectTV is a nationwide service, is it?
3 MR. NEGAARD: Your Honor, it's been asked
4 and answered, I believe.
5 JUDGE WAHL: Sustained.

6 Q. (MR. DURICK CONTINUING) What are the
7 satellite companies that offer services in the
8 United States?

9 A. In the United States, DirectTV. I'm not
10 familiar with them.

11 MR. DURICK: Okay. I have no further
12 questions of the witness.

13 JUDGE WAHL: Mr. Negaard.

14 MR. NEGAARD: No, Your Honor. I have
15 nothing further. Thank you.

16 JUDGE WAHL: Mr. Binek.

17 EXAMINATION

18 BY MR. BINEK:

19 Q. A question. In your direct testimony at
20 the bottom of line -- page 4, lines 24 and 25, you
21 talk about long-term agreements. What is your
22 familiarity with these long-term agreements? What
23 do you mean?

24 A. We have experienced in some communities
25 where our competitors will go out to their customer

□

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1 base and visit with their customers and have them
2 sign long-term agreements with their company --
3 exclusive agreements for telephone, cable.

4 Q. What is the length -- normally what is the
5 length of these long-term agreements that you're
6 familiar with?

7 A. We've seen them anywhere from one to four

8 years.

9 Q. Okay. Thank you. Did I understand you
10 correctly that you haven't -- I think the question
11 was regarding -- and it was Commissioner Clark
12 asking -- about proceedings in other states. Did
13 you say that there have been no -- had there been
14 exemption requests in other states or not?

15 A. Not that Midcontinent has been in.

16 Q. So this is the first time that
17 Midcontinent has asked that the exemption be
18 lifted?

19 A. Correct.

20 Q. Getting back to these long-term contracts,
21 does Midcontinent enter into any long-term
22 contracts?

23 A. For the residential services, telephone
24 services, we do not.

25 Q. What about cable television?

□

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1 A. We do not for cable, either.

2 MR. BINEK: Thank you.

3 JUDGE WAHL: Any further questions from
4 the commissioners? Followup? I'm sorry.
5 Commissioner Clark.

6 FURTHER EXAMINATION

7 BY COMMISSIONER CLARK:

8 Q. I do have just one. Of the communities
9 that Midcontinent serves telecommunications
10 services to, how many of them are not -- ballpark

11 now -- how many of them are not Qwest exchanges?
12 A. I work with telephone services.
13 Q. Mm-hmm.
14 A. In North Dakota I don't think we have any
15 that we're in with telephone right now.
16 Q. Okay. Other states?
17 A. In South Dakota we are in two communities.
18 Q. Are those both -- would they both be
19 classified as rural carriers?
20 A. Yes.
21 COMMISSIONER CLARK: Thank you.
22 JUDGE WAHL: Commissioner Wefald.
23 EXAMINATION
24 BY COMMISSIONER WEFALD:
25 Q. Yes. This goes back to the question Mr.

□

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1 Negaard had for you on the bottom of page 4 of your
2 rebuttal testimony, and I need to have you repeat
3 the answer because I'm not sure if I caught your
4 answer when you responded to his question. Do you
5 belong to this National Cable Television
6 Cooperative --
7 A. Yes, we do.
8 Q. -- Midcontinent?
9 A. Yes.
10 COMMISSIONER WEFALD: Okay. Thank you.
11 JUDGE WAHL: Any further questions from
12 the Commission? Followup, Mr. Durick?

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13 MR. DURICK: I have nothing.
14 JUDGE WAHL: Mr. Negaard, anything further
15 for this witness?
16 MR. NEGAARD: Just one question.
17 RE CROSS-EXAMINATION
18 BY MR. NEGAARD:
19 Q. Are you aware of or have any evidence that
20 North Dakota Telephone has been trying to sign
21 their customers up to long-term commitments for
22 telecommunications services?
23 A. I'm not aware of it.
24 MR. NEGAARD: Okay. Thank you.
25 JUDGE WAHL: Mr. Binek, anything further?

□

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1 MR. BINEK: No.
2 JUDGE WAHL: Anything further from the
3 Commission?
4 COMMISSIONER CLARK: No.
5 JUDGE WAHL: Mr. Durick, anything further
6 for this witness?
7 MR. DURICK: Nothing further, Your Honor.
8 JUDGE WAHL: All right. Thank you very
9 much, Miss Lohnes.
10 MR. DURICK: Midcontinent will call Warren
11 Fischer as our next witness. Mr. Fischer, would
12 you come up and be seated and be sworn?
13 JUDGE WAHL: Mr. Fischer, as you heard me
14 advise the previous witness and as I'm sure you're
15 well aware, your testimony is required to be under

16 oath. In North Dakota I'm advised to -- I'm
17 required to advise you regarding perjury before
18 administering the oath. Perjury is a false
19 statement of material fact which you do not believe
20 to be true; in other words, generally speaking, a
21 lie. In North Dakota perjury is a Class C felony,
22 punishable by a fine up to \$5,000, imprisonment for
23 a period of up to five years, or both. Will you
24 raise your right hand, please?
25 (Witness sworn.)

□

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1 JUDGE WAHL: Mr. Durick.
2 MR. DURICK: Thank you.
3 WARREN R. FISCHER,
4 being first duly sworn, was examined and testified
5 as follows:
6 DIRECT EXAMINATION
7 BY MR. DURICK:
8 Q. I'm going to mark as Exhibit P5 the direct
9 testimony of Mr. Fischer, which is Docket No. 52,
10 and I'm going to mark as Exhibit P6 the reply --
11 excuse me -- the rebuttal testimony of Mr. Fischer,
12 which is 62 on the docket.
13 Mr. Fischer, I'm showing you what has been
14 marked as Exhibit No. P7, and that has been
15 identified as Exhibit WRF-1 to your direct
16 testimony, and I'm going to mark as Exhibit P8 what
17 is marked as Exhibit WRF-2 to your direct

18 testimony, and P6 is going to be WRF-3 to your --
19 not P6. I'm sorry.

20 JUDGE WAHL: No, no. P9.

21 Q. (MR. DURICK CONTINUING) P9. And I'm
22 going to mark as Exhibit P10 Exhibit WRF-4 to your
23 direct testimony. I would ask if you would look at
24 those exhibits and tell me whether I have correctly
25 identified them.

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35

1 A. They are correctly identified.

2 Q. And you have, I take it, reviewed your
3 direct testimony and rebuttal testimony which has
4 been filed in this particular action.

5 A. I have reviewed it.

6 Q. And I'd like to ask you if that direct and
7 rebuttal testimony is your testimony under oath
8 here this morning. If those questions were asked,
9 would your responses be the same?

10 A. They would be the same.

11 MR. DURICK: We'll pass this witness, Your
12 Honor.

13 JUDGE WAHL: Are you going to offer your
14 exhibits, Mr. Durick?

15 MR. DURICK: Yes, and I'd offer the
16 exhibits.

17 JUDGE WAHL: P7 through 10, inclusive?

18 MR. DURICK: Yes.

19 JUDGE WAHL: All right. Mr. Negaard, do
20 you have those exhibits or do you need to look at

21 them?

22 MR. NEGAARD: If I have counsel's
23 assurance that those are the same exhibits that
24 were filed with prefiled testimony, we would have
25 no objection.

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1 MR. DURICK: Within the realm of human
2 error, I would represent that they are the same.
3 They're certainly meant to be the same.

4 MR. NEGAARD: I have no objection, Your
5 Honor.

6 JUDGE WAHL: Exhibits P7 through P10,
7 inclusive, are each received. Anything -- no, I'm
8 sorry. You did pass the witness, Mr. Durick. Mr.
9 Negaard, cross-exam.

10 COMMISSIONER WEFALD: I have a question,
11 please.

12 JUDGE WAHL: Commissioner Wefald.

13 COMMISSIONER WEFALD: Yes. I have the
14 testimony. If you could go more slowly through the
15 specific exhibits, though, that you're asking the
16 Commission to refer to, that would be helpful,
17 because we have a whole --

18 MR. DURICK: Certainly.

19 COMMISSIONER WEFALD: We have quite a pile
20 of exhibits here and I need to know which ones I'm
21 supposed to be referring to.

22 MR. DURICK: WRF-1 would be Exhibit P7.

23 WRF-2 would be Exhibit P8. WRF-3 would be Exhibit
24 9. And WRF-4 would be Exhibit 10.
25 COMMISSIONER WEFALD: Thank you. And

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1 those WRF-1, 2 and 3 and 4, are they attached to
2 the December 21, 2005, direct testimony?
3 MR. DURICK: Direct testimony, yes,
4 Commissioner Wefald.
5 COMMISSIONER WEFALD: Thank you.
6 JUDGE WAHL: Anything further,
7 Commissioner Wefald?
8 COMMISSIONER WEFALD: No. That helps me.
9 Thank you.
10 JUDGE WAHL: Mr. Negaard, when you're
11 ready.
12 CROSS-EXAMINATION
13 BY MR. NEGAARD:
14 Q. Good morning, Mr. Fischer.
15 A. Good morning.
16 Q. It's my understanding that you're not
17 testifying today that you have computed a discount
18 rate specific to this particular exchange or
19 application; is that correct?
20 A. I'm sorry. Your question was whether or
21 not I computed a discount rate that's specific to
22 Devils Lake?
23 Q. Yes.
24 A. No, I have not.
25 Q. And you propounded some discovery in this

1 matter and you received the information you had
2 requested; is that correct?

3 A. Eventually we did, but not all the
4 information we initially requested.

5 Q. Okay. But you did get the information
6 that you had requested prior to filing testimony in
7 this case; is that correct?

8 A. Yes, we did receive the information that
9 we had mutually agreed upon would be acceptable to
10 both parties.

11 Q. And as far as you know, at this point
12 there's no outstanding issues with respect to
13 anything you've asked for that you didn't receive?

14 A. Yes, there's no further issues.

15 MR. NEGAARD: Thank you. I have nothing
16 further.

17 JUDGE WAHL: Mr. Binek.

18 MR. BINEK: No questions at this time.

19 JUDGE WAHL: Questions from the
20 Commission, please. Commissioner Clark.

21 EXAMINATION

22 BY COMMISSIONER CLARK:

23 Q. I do have one. If the Commission were to
24 terminate the 251(f) exemption in this proceeding,
25 then in any subsequent interconnection discussions

1 between the two companies, is that the point at
2 which you would anticipate discussions about
3 pricing of those elements that are to be resold?
4 Is that where that would happen?

5 A. I think it should occur no later than that
6 discussion and that there should be no delay in
7 implementing a certain pricing in terms of the
8 conclusion of some sort of negotiation period. I
9 think the Commission can set an interim rate
10 subject to true-up after that period of time has
11 elapsed.

12 Q. In setting a pricing, though, it's not an
13 insignificant-type proceeding, is it? I haven't
14 sat through a lot of them, but I have the most
15 recent Qwest UNE case where you're trying to
16 calculate TELRIC-type rates, and I know before that
17 some of the initial interconnection disputes that
18 this Commission heard, which was prior to my time,
19 they weren't small proceedings, either. How much
20 precedent do you believe the Commission has to
21 build on to be able to do something, the two
22 parties negotiating to get something rather quickly
23 resolved as opposed to a more protracted-type
24 proceeding from your experiences? Because we are
25 dealing with a company we haven't dealt with before

□

1 and certainly have a totally different cost

2 structure than, say, Qwest.
 3 A. I think because this is limited to resale,
 4 a lot of the pricing issues are much more limited.
 5 You're not dealing with unbundled element networks
 6 and all of the other issues that surround -- really
 7 determining what correct rates for each one of
 8 those elements. When dealing with total service
 9 resale, I think you can adopt an existing rate,
 10 let's say, for Qwest that's currently in effect
 11 subject to true-up or you can pick something lower,
 12 and what you'll find is, at least from financial
 13 impact that we've calculated, even if you were to
 14 pick a rate that's half of that, the financial
 15 impact on the company is going to be significantly
 16 less obviously because the discount is that much
 17 less and, therefore, its revenue stream will not be
 18 as impacted as it might be with a higher discount
 19 rate.

20 Q. But you don't anticipate getting into
 21 individual network element pricing?

22 A. From my understanding, this proceeding is
 23 strictly limited to resale, and that's what
 24 Midcontinent has requested.

25 COMMISSIONER CLARK: Thank you. That's

□

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1 all I have.

2 JUDGE WAHL: Commissioner wefald.

3 EXAMINATION

4 BY COMMISSIONER WEFALD:

5 Q. I have a question on page 17, table 5.

6 A. Excuse me. Of my direct testimony?

7 Q. Yes. I've gone through your tables up to
8 this point in the testimony and I understand them
9 and what the figures represent, and then I come to
10 table 5 and there is a new number. It talks about
11 the potential of what it cost. And I understand
12 the figures that you're using in the first column,
13 2004 revenue per line, and I understand the figures
14 in 2004 revenue per line subject to resale, and I
15 understand the figures in the line potential
16 revenue loss via resale, but what I don't
17 understand is why the first number, 45.72, under
18 potential avoided cost in that column is different
19 than the potential revenue loss via resale in the
20 previous column, and then you have a number net
21 loss via resale in the last column, which I believe
22 is the potential avoided cost subtracted from the
23 potential revenue loss. It's the only number that
24 is different in those two -- in those last three
25 columns, so if you can explain to me why it is

□

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1 different.

2 A. Sure. If you give me just a moment here.

3 Q. Okay.

4 A. If I can turn you back to the detail
5 within Exhibit WRF-2 or P8, that might help explain
6 where that number comes from.

7 Q. Okay.

8 A. Specifically it would be page 3 of 8.

9 Q. Page 3. It will take me a minute now to
10 find this. Page 3 of 8. I have that.

11 A. At the very top, the very first line of
12 that particular spreadsheet, it deals with local
13 network access revenue, which is primarily the
14 local exchange revenue as well as other features
15 that are associated with the provision of local
16 service. In the column to the far right that's
17 labeled "note," what I've assumed in this analysis
18 is that with an avoided cost discount percentage,
19 the actual cost savings may not be applicable to
20 services that are considered features, call
21 waiting, caller ID, three-way calling. So we have
22 factored back into the analysis that there would be
23 some true revenue loss from providing those
24 services under total service resale as opposed to
25 local exchange or some of the other services where

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1 the avoided costs should mitigate any revenue loss.

2 Q. All right. So the difference between
3 49.86 and 45.72 is the fact that there is no cost
4 savings on features?

5 A. Because -- and that's primarily due to the
6 fact that the costs for providing features is
7 typically very small and that the companies
8 typically have a very large markup on them because

9 they're not considered regulated services.

10 COMMISSIONER WEFALD: Thank you. All
11 right. That explains that. I have no other
12 questions at this time.

13 JUDGE WAHL: Commissioner Cramer.

14 COMMISSIONER CRAMER: None. Thank you.

15 JUDGE WAHL: Follow up, Mr. Durick.

16 MR. DURICK: Thank you, Your Honor. I
17 have a few questions.

18 REDIRECT EXAMINATION

19 BY MR. DURICK:

20 Q. Mr. Fischer, in your analysis you made
21 some assumptions that I understand were made when
22 you didn't have exact figures from North Dakota
23 Telephone Company; is that correct?

24 A. That is correct.

25 Q. Okay. And were those assumptions based on

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1 reasonable estimates from the industry?

2 A. Yes, they were.

3 Q. Let me ask you, if you had the exact
4 figures from North Dakota Telephone Company, would
5 that change your opinion that the --

6 MR. NEGAARD: Your Honor, this is outside
7 the scope of any cross-examination of this witness.

8 JUDGE WAHL: The objection is overruled.

9 Let me just quickly state for counsel that this is
10 not a trial. I understand the Rules of Evidence
11 apply, no question about that, but that being said,

12 as an administrative hearing, our purpose here is
13 to gather the information, to collect as much
14 information as will conceivably benefit the
15 Commission and its staff. So, accordingly, you
16 will find me rather, shall we say, flexible about
17 the Rules of Evidence. The objection is overruled
18 and, Mr. Durick, you may proceed.

19 MR. DURICK: Okay.

20 Q. (MR. DURICK CONTINUING) Let me start
21 over. If you had the exact figures for North
22 Dakota Telephone Company for some of the
23 assumptions that you made in your analysis, in your
24 opinion, would that change your ultimate conclusion
25 that the effect of a resale agreement here would be

□

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1 de minimis as far as its financial impact on North
2 Dakota Telephone Company?

3 A. No, it would not, and for the simple
4 reason that the absolute dollars that are at risk
5 here are very small to begin with. The Devils Lake
6 exchange is only a small portion of the total
7 company's operations, and the assumptions that
8 we've modeled here, the various penetration rates
9 or assumed discount rates, all point back to the
10 same thing, that the total dollars that are at risk
11 here are very small. So whether you -- the
12 ultimate discount rate that is appropriate for
13 North Dakota Telecom is significantly higher or

14 lower than what we've assumed in our analysis, the
15 absolute financial impact is going to be
16 de minimis.

17 MR. DURICK: I have no further questions
18 of the witness.

19 JUDGE WAHL: Mr. Negaard.

20 RECROSS-EXAMINATION

21 BY MR. NEGAARD:

22 Q. Following up on that, you did not try to
23 calculate any companywide discount for North Dakota
24 Telephone that would be appropriate for resale
25 wholesale services, did you?

□

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1 A. I'm sorry. Could you clarify your
2 question, please?

3 Q. And I'm sorry if I didn't state it well.
4 You did not calculate any companywide discount rate
5 that would be appropriate for North Dakota
6 Telephone for resale wholesale services, did you?

7 A. We did not calculate a rate specific to
8 North Dakota Telephone.

9 MR. NEGAARD: I don't have anything
10 further.

11 JUDGE WAHL: Mr. Binek.

12 EXAMINATION

13 BY MR. BINEK:

14 Q. One clarifying question getting back to
15 Mr. Negaard's question. The calculations that you
16 made were specific to the Devils Lake exchange; is

17 that correct?

18 A. Yes, the financial calculations we made
19 were specific to the Devils Lake exchange.

20 MR. BINEK: That's all I have.

21 JUDGE WAHL: Any further questions from
22 the Commission? If not, Mr. Durick, any followup?

23 MR. DURICK: No followup, Your Honor.

24 JUDGE WAHL: All right. Thank you very
25 much, Mr. Fischer.

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1 MR. DURICK: Midcontinent would call Mr.
2 Timothy Gates.

3 JUDGE WAHL: Mr. Gates, as I'm sure you're
4 well aware, your testimony is required to be under
5 oath and I'm required by law to advise you
6 regarding perjury before administering the oath.
7 Perjury is a false statement of material fact which
8 you do not believe to be true; in other words,
9 generally speaking, a lie. In North Dakota perjury
10 is a Class C felony, punishable by a fine up to
11 \$5,000, imprisonment for a period of up to five
12 years, or both. Will you raise your right hand,
13 please?

14 (Witness sworn.)

15 JUDGE WAHL: Mr. Durick.

16 MR. DURICK: Thank you, Your Honor.

17 TIMOTHY GATES,
18 being first duly sworn, was examined and testified

19 as follows:

20 DIRECT EXAMINATION

21 BY MR. DURICK:

22 Q. For the record, I'm going to mark as
23 Exhibit P11 the direct testimony of Mr. Gates,
24 which occurs at Docket No. 51, and the rebuttal
25 testimony of Mr. Gates as P12, and that appears as

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1 Docket No. 60. And, Mr. Gates, I am going to mark
2 as Exhibit No. 13 what has been identified as
3 Exhibit TJG-1 to your direct testimony. I'd ask
4 you just to identify that as the exhibit to your
5 direct testimony.

6 A. Yes, this is a copy of the exhibit to my
7 testimony.

8 Q. Very good. And, Mr. Gates, I take it you
9 have reviewed your direct and rebuttal prefiled
10 testimony in this matter.

11 A. I have.

12 Q. And if you were asked those questions in
13 your direct and rebuttal testimony today under
14 oath, your answers would be the same?

15 A. Yes, they would.

16 MR. DURICK: Thank you. We pass the
17 witness, Your Honor.

18 JUDGE WAHL: Are you going to offer your
19 exhibits, Mr. Durick?

20 MR. DURICK: Yes, I'm going to offer the
21 exhibits, Your Honor.

22 MR. NEGAARD: I'm sorry. And what was the
23 exhibit number for the direct testimony?

24 JUDGE WAHL: Direct was P11.

25 MR. DURICK: That's 51 of the docket, and

□

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1 the rebuttal is P12 and it's 60 in the docket.

2 MR. NEGAARD: Okay. Your Honor, we do
3 have an objection based upon the lines of Mr.
4 Gates' testimony. The basis for that, Your Honor,
5 is the same objection that Midcontinent made to Mr.
6 Meredith's reply testimony. Mr. Gates' testimony
7 beginning at page 4 begins a discussion prefaced
8 with, "I'm not a lawyer, but this is what the law
9 says." Mr. Meredith responded to this discussion
10 in his reply testimony and Midcontinent asked to
11 have Mr. Meredith's testimony stricken from the
12 record.

13 Your Honor, before we get to Mr.
14 Meredith's testimony, it's important that this
15 issue be resolved because if Mr. Meredith can't
16 testify what the law says, Mr. Gates, likewise,
17 should not be able to testify what the law is. And
18 we would ask that those portions of Mr. Gates'
19 testimony be stricken from the record because he's
20 not an attorney. And might I point the Court to
21 Rule 702, North Dakota Rules of Evidence, testimony
22 by experts. The witness has said that he's not an
23 expert, he's not an attorney, yet goes on to

24 testify what he believes Congress meant or said
25 when it passed certain portions of the '96

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1 Telecommunications Act. We'd ask it be stricken on
2 those grounds, Your Honor. And if the Court rules
3 that way, we can get line and page number as a cite
4 for those particular quotes from this witness.

5 MR. DURICK: Your Honor, Mr. Harrington
6 will address that issue.

7 JUDGE WAHL: Mr. Harrington.

8 MR. HARRINGTON: First, I don't think that
9 it's appropriate to rule on the motion until we're
10 given the exact line and page numbers because it's
11 particularly significant to know what they are
12 first. I don't think it's appropriate to make a
13 motion without identifying particular portions that
14 should be stricken. That's what we did in our
15 motion. We identified specific page and line
16 numbers.

17 That said, if I understand the line and
18 page numbers that are being proposed to be stricken
19 at this point, there's a significant distinction
20 between Mr. Gates' testimony and the testimony of
21 Mr. Meredith. Mr. Gates is quoting language from
22 the statute and language from orders of the FCC.
23 For instance, on page 6 from lines 117 to 135, that
24 consists almost entirely of quotations from the FCC
25 and those are purely descriptive of what was done,

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1 and that's typical of what's in Mr. Gates'
2 testimony.
3 Mr. Meredith, by contrast, does not merely
4 quote statutory provisions, but proposes a specific
5 interpretation without quoting anything else. He
6 specifically describes what he believes is the
7 correct interaction between Section 251(f), a
8 provision concerning scheduling, and Section 252 of
9 the Communications Act, which concerns arbitrations
10 and negotiations. That's a much different
11 situation from what you find in Mr. Gates'
12 testimony. That distinction is quite significant.
13 Mr. Gates is merely reporting facts that are easily
14 verifiable. Mr. Meredith is proposing
15 interpretations which are outside the scope of his
16 expertise as he describes it himself.
17 One other thing I think I should say, to
18 the extent that our motion to strike is denied, we
19 have an expectation that we'll be able to
20 cross-examine Mr. Meredith directly on what he has
21 said, and we've not expected there should be any
22 objections permitted on the grounds that he's not a
23 lawyer.
24 JUDGE WAHL: Your response -- do I take
25 it, Mr. Harrington, you're addressing, also, NDTc's

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1 response to Midcontinent's motion?

2 MR. HARRINGTON: Yes. My understanding is
3 that you had hoped to deal with both at the same
4 time.

5 MR. NEGAARD: Your Honor, if they insist
6 on line and page number, page 7, line 139 through
7 150, the witness talks about what Congress meant
8 when it passed the 1996 Telecommunications Act.
9 This particular witness was not a member of
10 Congress at the time, he's not an attorney. For
11 him to testify that this is what Congress meant
12 when it passed a particular act is equally as
13 offensive as the testimony being complained of by
14 Midcontinent. And, again, page 8, line 170, he
15 talks about the facts and the law on the issues.

16 COMMISSIONER WEFALD: Is this on the
17 January 16th or on the --

18 JUDGE WAHL: December 21st, 2005.

19 COMMISSIONER WEFALD: 21. Thank you. It
20 would help to distinguish between the two as you're
21 going through.

22 MR. NEGAARD: I apologize. It's Mr.
23 Gates' direct testimony filed December 21st, 2005,
24 line -- as I indicated, page 8, line 170 and again
25 page 10 on line 215, Mr. Gates says "Congress

□

1 wanted and expected." Again, this witness -- the
2 same offensive type of testimony that's being

3 complained of by Midcontinent. This particular
4 witness wasn't a member of Congress. He talks
5 about the Act's goal on line 218 and 219. So there
6 are four lines on page 10 of that direct
7 testimony.

8 On page 12, line 255, this witness, "Yes.
9 The Act and the FCC's local competition order
10 contemplates" and then goes on and talks about that
11 through line 257. So in response to the objection
12 that we weren't articulate enough in page number
13 and line number, that's our response, Your Honor.

14 MR. HARRINGTON: Your Honor --

15 JUDGE WAHL: All right. Counsel, the
16 objection is overruled. That is, North Dakota
17 Telephone Company's objection to the testimony of
18 Timothy J. Gates is overruled. The motion by
19 Midcontinent Communications to strike certain
20 testimony of a witness who will be later called to
21 testify on behalf of NDTC is denied.

22 The reasons, just briefly for the record,
23 for my rulings is that I read both the motion and
24 the testimony objected to, that is, the motion of
25 Midcontinent and the testimony of Mr. Meredith

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1 objected to. I had from NDTC its response to that
2 motion and the reference to the testimony of Mr.
3 Gates which it now objects to. I've read that.
4 I've read the Alaska case. I read parts of the

5 code. It seems to me that the law and technology
6 are intertwined and interconnected in these cases.
7 I think it's hard to consider the law without the
8 technology and without its -- I agree, I think it
9 was NDTC pointed out -- its practical application.
10 So I think the testimony of the expert
11 witnesses in terms of the law -- not for its
12 interpretation, but for its application -- is
13 relevant and permissible. Second, the Public
14 Service Commission is an agency of experts in
15 itself with expert staff. I think it's unlikely
16 that erroneous expert testimony as to the
17 application of the law will mislead the Commission
18 or its staff. Finally, for the third reason for
19 the denial of the objection -- or the overruling of
20 the objection and the denial of the motion is, as I
21 have said, this is an administrative hearing, and
22 although the Rules of Evidence are certainly
23 applicable, they should be applied flexibly with
24 the idea of bringing in as much evidence as can be
25 reasonably gathered and as reasonably relevant for

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1 the consideration of the agency and for the record
2 for the courts on appeal.

3 Counsel -- Mr. Negaard, anything further
4 for the record with regard to your objection?

5 MR. NEGAARD: Nothing, Your Honor.

6 JUDGE WAHL: Mr. Harrington, anything
7 further for the record with regard to your motion?

8 MR. HARRINGTON: Not at this time, Your
9 Honor.
10 JUDGE WAHL: All right. Okay. Mr.
11 Negaard, you have not otherwise responded to
12 Exhibits -- I'm sorry -- to Exhibit P13?
13 MR. NEGAARD: Your Honor, I argued the
14 motion. I appreciate your time. Mr. Moorman is
15 going to handle the cross-examination and the
16 exhibits on this witness.
17 JUDGE WAHL: But I don't take it you were
18 objecting to P13.
19 MR. NEGAARD: No, Your Honor, we're not.
20 JUDGE WAHL: All right. So Exhibit P13 is
21 received. Mr. Moorman, when you're ready.
22 MR. MOORMAN: Thank you, Your Honor.
23 CROSS-EXAMINATION
24 BY MR. MOORMAN:
25 Q. Mr. Gates, my name is Tom Moorman. I'll

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1 be cross-examining you this morning.
2 A. Good morning.
3 Q. Good morning. How are you?
4 A. Good. Thank you.
5 Q. Mr. Gates, I just want to make sure I
6 understand your background. Do you have a degree
7 in economics?
8 A. I have a master's degree from Willamette
9 University and it had economics courses, but it is

10 not a master's of economics.

11 Q. So your response is you do not -- do you
12 have a degree in economics?

13 A. I guess the answer technically would be
14 no.

15 Q. To the best of your knowledge, has
16 Midcontinent ever requested Section 251(b)(1)
17 retail resale of NDTc?

18 MR. DURICK: I guess I would object, Your
19 Honor, at this point. It's beyond the scope of the
20 direct and I don't know that this witness would
21 have any knowledge of that, so on foundation and
22 outside the scope of the direct.

23 JUDGE WAHL: Goes to the weight of his
24 testimony, doesn't it, Mr. Durick? Mr. Moorman?

25 MR. MOORMAN: Well, it goes to his

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1 testimony. He also talks about the various levels
2 of interconnection obligations in his testimony. I
3 can find that cite.

4 JUDGE WAHL: The objection is overruled.
5 You may proceed.

6 Q. (MR. MOORMAN CONTINUING) To the best of
7 your knowledge.

8 A. I don't know. I would defer that to Miss
9 Lohnes.

10 Q. Were you ever a United States
11 Representative at the time or during the passage of
12 the 1996 revisions to the Communications Act of

13 1934, as amended?

14 A. No.

15 Q. Were you ever a U.S. Senator during that
16 same time period when Congress was reviewing the
17 1996 and ultimately passing the 1996 revisions to
18 the Communications Act of 1934, as amended?

19 A. No, I was not.

20 Q. To the best of your knowledge, do
21 resellers typically brand the service they resell
22 of another ILEC, for example, in their own name?

23 A. Are we talking just generally --

24 Q. Yes.

25 A. -- resellers? It could be long distance

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1 or any sort of resale even commodities?

2 Q. Let's get specific. Local resale. Does a
3 resale -- reseller typically brand that service in
4 their own name?

5 A. Sure.

6 Q. And assuming for sake of argument that
7 Midcontinent resells NDTC's service, to the best of
8 your knowledge, will Midcontinent be branding that
9 local service in its own name?

10 A. I don't know what the intentions of the
11 company are with respect to that service, but -- I
12 guess I would have to defer that.

13 Q. To the best of your knowledge, would it
14 also be true that Midcontinent would be telling

15 customers that the local dial tone service would be
16 provided by North Dakota Telephone Company?

17 A. I don't know what the company is going to
18 say to its customers. I think that's probably
19 something that they will decide and determine if
20 and when they get approval from this Commission to
21 provide service in Devils Lake, but I don't have
22 any information about their business plans.

23 Q. Turning to your rebuttal testimony, if you
24 would, for just one moment. On page 3 -- and I
25 apologize if my line numbers are different from

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1 yours, it could be a function of PDF or when I
2 printed it out.

3 A. Well, the good news is I've numbered all
4 the lines sequentially, so hopefully that avoids
5 that problem.

6 Q. Very good. But at lines 66 to 68, you
7 state, and I quote, Indeed, Mr. Dircks stated at
8 page one of his testimony that, quote, NDTC
9 understands fully that advancing competition has
10 been stated to be a public interest objective. Is
11 that what you stated on those lines in your
12 testimony?

13 A. Yes, it is.

14 Q. Mr. Gates, were you referring to Mr.
15 Dircks' testimony at page 1, lines 21 to 22, when
16 you were quoting?

17 A. I don't have his testimony with me, but if
Page 54

18 you could show me, I would be happy to look at it.

19 MR. MOORMAN: May I approach the witness,

20 Your Honor?

21 JUDGE WAHL: You may.

22 Q. (MR. MOORMAN CONTINUING) Let me reask you

23 the question, if I could. Were you referring when

24 you stated -- on lines 66 through 68 you had a

25 quote from Mr. Dircks' testimony that stated, "NDTC

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1 understands fully that advancing competition has

2 been stated to be a public interest objective." Is

3 that the same line that you find in the document

4 before you, which is Mr. Dircks' prefiled

5 testimony, on page 1, lines 21 to 22?

6 A. Yes, it is.

7 Q. And, Mr. Gates, doesn't Mr. Dircks go on

8 to state, and I'm looking at lines 23 through --

9 23, page 1, to top of page 2, line 2, that in

10 addition to the line that you quoted, Mr. Dircks

11 states, NDTC does not quarrel with the objective

12 provided the competition is fair and that other

13 public interest objectives are not made second

14 class citizens to such competition"? Is that what

15 he states?

16 A. That's what it states, but I believe the

17 company's actions belie the statement, but that's a

18 correct quote.

19 Q. On your rebuttal testimony -- I just want

20 to make sure that I understand your testimony today
21 -- on lines 85 to 90, which was on my page 4, your
22 statements on page 86 through 90 are all caveated
23 by the statement, "while I have no specific insight
24 into NDTC's operations"; is that correct?
25 A. Yes. You said page, but you meant line;

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1 correct?
2 Q. Page 4. I'm sorry. If I wasn't specific,
3 page 4 --
4 A. Yes.
5 Q. -- lines 85 through 90.
6 A. And the qualification that I made? I'm
7 sorry.
8 Q. Your observations on 86 -- lines 86
9 through 90 are all subject to the general
10 observation you made or statement, "while I have no
11 specific insight into NDTC's operations"; is that a
12 correct reading of your testimony?
13 A. Yes, it is.
14 Q. Mr. Gates, you were here this morning when
15 Mr. Fischer was on the stand; correct?
16 A. Yes, I was.
17 Q. To the best of your knowledge, has the
18 North Dakota Commission ever established a
19 wholesale resale discount percentage for NDTC?
20 A. Not for NDTC, but certainly for Qwest. We
21 went through those proceedings and we've certainly
22 done it dozens and dozens of times all over the

23 country, so it's not a new process.

24 Q. So for North Dakota you were familiar that
25 they've established it for Qwest?

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1 A. Yes.

2 Q. Has -- to the best of your knowledge then,
3 has the North Dakota Commission ever established a
4 wholesale resale discount rate for the North Dakota
5 Telephone Company's Devils Lake exchange?

6 A. No, I don't believe it has. It would be a
7 simple matter, but they haven't done it yet.

8 MR. MOORMAN: I have nothing further at
9 this time.

10 JUDGE WAHL: Mr. Binek.

11 MR. BINEK: I don't believe I have any
12 questions. We have no questions.

13 JUDGE WAHL: Commissioner Clark.

14 EXAMINATION

15 BY COMMISSIONER CLARK:

16 Q. I do have one. If in setting wholesale
17 retail rates, how would you approach doing that
18 differently for a company like NDTC, which is now
19 North Dakota's only fully tariffed and
20 rate-of-return regulated company versus, say, a
21 Qwest, who is price capped by statute or, you know,
22 carriers that are -- I guess most carriers probably
23 around the country are price capped today.
24 Approaching that, how would you do it differently?

25 A. I don't think, Mr. Chairman, that the fact

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1 that they're regulated one way or another would
2 make any difference in the rules. The FCC rules,
3 51.607, specifically identifies the USOA accounts
4 that are to be considered in making that
5 calculation, and the formula Mr. Fischer has
6 already put in place. It would just be a simple
7 matter of changing out some of the inputs if we
8 find that the actual NDTC inputs are different.

9 Q. So those are tracked in the same accounts,
10 whether it's a price-capped company --

11 A. Yes.

12 Q. -- or a rate-of-return company, either
13 federally or state?

14 A. Yes.

15 COMMISSIONER CLARK: Thank you. That's
16 all I have.

17 JUDGE WAHL: Commissioner Wefald.

18 EXAMINATION

19 BY COMMISSIONER WEFALD:

20 Q. On the bottom of page 19 is where
21 Midcontinent addresses the public interest issue
22 that the Commission needs to consider in this case,
23 and this is page 19 on the December 21, 2005,
24 testimony. First, can you tell me, is this the
25 only place where you address the public interest

1 issue in your testimony, or will I find other
2 public interest testimony in other parts of your
3 testimony, as well? This is the only place I
4 spotted it, but I'm just wondering if I missed
5 something.

6 A. I think it's sprinkled throughout,
7 Commissioner, and it's in my rebuttable and I
8 believe it may be referenced generally in the
9 testimonies of the other witnesses because I think
10 it's a commonly held belief that competition is
11 good for society and good for consumers. But if I
12 could, initially you mentioned that the Commission
13 must consider the public interest issues. I think
14 the Commission should, but according to the
15 standard that we have in the statute and in your
16 notice of hearing, public interest really is not
17 addressed other than perhaps to reference universal
18 service, which I think is hugely a public interest
19 issue. But I agree with you personally and
20 professionally that public interest is key to your
21 decisionmaking process, and I do believe that the
22 public interest will benefit from this competition
23 even though it's only total service resale. But
24 this is the focus in my testimony where I address
25 it directly, but I think there are other references

1 to that, the benefits and the efficiencies and
2 those other kind of intangible benefits to the
3 public interest.

4 Q. The main one that you identify in that
5 section that I just referred to at the bottom of
6 page 19 and the top of page 20 is, "The most
7 obvious benefit of competition -- even from resale
8 -- is the availability of alternative offerings
9 for consumers."

10 A. Yes.

11 Q. Did you provide any other additional
12 information, did you say, in your rebuttal about
13 that issue?

14 A. Yes. If you look at page 3 of my
15 rebuttal, there on lines, say, 55 through 59, I
16 talk about the fact that North Dakota Tel would
17 prefer a delay until it's ready to compete, but, of
18 course, that isn't the standard that this
19 Commission is reviewing. And I believe that it
20 would be a mistake to deny customers the benefits
21 of competition simply because the incumbent wants
22 to prepare even more for the advent of
23 competition. For instance, Your Honor, the RBOCs,
24 the Regional Bell Operating Companies, didn't have
25 ten years to prepare for competition and they seem

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1 to have done quite well in the industry. And I
2 just think it's time for consumers everywhere,
3 including Devils Lake, to have an alternative

4 choice, even if it's just total service resale, so
5 the service quality is the same and a lot of the
6 features will be the same necessarily since they
7 will be reselling the North Dakota Tel service. At
8 least consumers have the opportunity to exercise a
9 choice, and I think that will be beneficial for
10 lots of reasons that I discuss in my testimony, and
11 I talk further about the benefits of competition on
12 this page.

13 Q. In terms of the -- indirectly in your
14 testimony and in some others there has been kind of
15 the size of the companies. Describe the size of
16 Midcontinent in comparison to the size of North
17 Dakota Telephone Company.

18 A. I could try to do that. I think I tried
19 in my direct right in the beginning.

20 Q. All right. Why don't you point me to
21 where that is.

22 A. Let me show you where that is. On page 3
23 of my direct --

24 Q. Mm-hmm.

25 A. -- which I guess is document 51, I note

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1 that Midcontinent is a diversified company and it
2 serves more than 200 communities in North and South
3 Dakota. I looked at a service territory map of the
4 two states --

5 Q. Yes.

6 A. -- and there were little dots wherever
7 they served, and I was quite impressed that it
8 seemed to cover both states pretty completely. So
9 Midcontinent is investing in North Dakota -- not
10 only reselling, but investing and they have
11 employees and they have a commitment to the state,
12 which is good. And I said the company is over 60
13 years old.

14 I looked on the North Dakota Tel website,
15 which is a great website, I enjoyed it. Today
16 there is a picture of a little boy with a big fish,
17 and it's very local, very good, very informative.
18 And there is a history there and it talks about the
19 various acquisitions and mergers, but I don't have
20 a feeling of the relative size in terms of revenues
21 or customers.

22 Q. Between the two companies?

23 A. No, I don't.

24 Q. Do you think there's any relevance for the
25 Commission looking at that?

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1 A. Not really, because, after all, North
2 Dakota Tel is the incumbent, they're established,
3 they have their customer relationships, and this is
4 total service resale. So in essence Midcontinent
5 will be doing the retailing function for North
6 Dakota Tel. So the harm is de minimis, as Mr.
7 Fischer showed --

8 Q. Yes.

9 A. -- in materials of revenues and customer
10 impact. The benefits are significant, but the
11 impact on North Dakota Tel is de minimis. So the
12 fact that Midcontinent might be bigger -- and I'm
13 not saying it is, I just don't know -- would have
14 no impact on your decision, I don't believe, to
15 either grant or deny the request for termination of
16 the exemption.

17 COMMISSIONER WEFALD: Thank you.

18 JUDGE WAHL: Commissioner Cramer.

19 COMMISSIONER CRAMER: I don't have any.

20 JUDGE WAHL: Commissioner Clark.

21 COMMISSIONER CLARK: I do have one.

22 FURTHER EXAMINATION

23 BY COMMISSIONER CLARK:

24 Q. If the termination was -- or if the
25 exemption was terminated and Midcontinent and North

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1 Dakota Tel can't come to terms through their own
2 informal discussions about total -- the total
3 wholesale retail rate, what happens then? Is it a
4 252 proceeding? Is that what it goes to? Or kind
5 of run through, as you understand it, the steps
6 that happen if the termination is granted.

7 A. Okay. And, again, as we all know, I'm not
8 a lawyer.

9 Q. Right. We established that.

10 COMMISSIONER WEFALD: We established

11 that.

12 THE WITNESS: We established that, haven't
13 we? What I understand is, based on 251(f), if this
14 exemption is lifted, then this Commission has the
15 responsibility to establish a schedule, and I in my
16 testimony suggest that you establish a schedule,
17 whether it's 90 days as we suggest or some other
18 amount of time, require the parties to come in and
19 report to the Commission or its staff on a monthly
20 basis as to the progress. The Rule 51.6-07
21 identifies all of the accounts that are to be
22 considered in calculating a resale -- or wholesale
23 resale discount, so there's not much of a dispute
24 there. The only dispute would be whether the
25 inputs are accurate.

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1 I've been involved in many of those
2 cases. They were usually bigger, though, and
3 included more issues than just the wholesale resale
4 discount. So I think this could be done very
5 efficiently. We have the template already done.
6 Mr. Fischer has that done. Midcontinent could turn
7 that over to North Dakota Tel, they could populate
8 it with their own very specific company-specific
9 information, which could be held in confidence, and
10 we will come up with a number. And we also have a
11 relevant FCC range between 17 and 25 percent. So
12 if this Commission wanted to, it could order the
13 Qwest rate of 16.1 percent on an interim basis or

14 pick a number between 17 and 25 percent based on
15 the FCC's orders, have those discounts in place
16 while we calculate the actual North Dakota
17 Telephone rate subject to refund and true-up. But
18 I don't see this as a complex matter or even a
19 difficult matter. I think we have the template.
20 North Dakota Tel has it, they can review it. It's
21 a spreadsheet. They can see all the assumptions.
22 Just a matter of populating it and hitting enter
23 and they come up with a number.
24 COMMISSIONER CLARK: That's all I have.
25 Thanks.

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1 JUDGE WAHL: Commissioner Wefald.
2 FURTHER EXAMINATION
3 BY COMMISSIONER WEFALD:
4 Q. Is it my understanding that your
5 interpretation of the implementation schedule is
6 based on the fact that when you filed with the
7 Commission this summer and asked for us to
8 determine the rural exemption, that you see the
9 clock starting to tick at that point as far as the
10 interconnection agreement requirement?
11 A. This is so -- well, yes and no. This is
12 so different from what we usually do in an
13 interconnection case, because in those cases we
14 come in and we're talking about TELRIC rates for
15 UNES and we identify all those unbundled network

16 elements. We're arguing about the interconnection
17 methods and where the point of interconnection is
18 going to be and who is responsible for the trunks
19 on this side of the POI and who's paying for the
20 trunks on this side of the POI. None of that
21 matters in this case. The only thing we're talking
22 about is total service resale. The interconnection
23 would be very simple -- I don't think that would be
24 a disputed issue -- and the rate is the only thing
25 we really need to come up with. And as far as the

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1 timetable?

2 Q. Yes. Because your timetable you asked
3 for --

4 A. 90 days.

5 Q. "The Commission should require North
6 Dakota Telephone Company to develop such an
7 agreement with Midcontinent within 30 days" -- I'm
8 on page 24 of your December 21 testimony -- "and to
9 provide resale within 60 days later, that is within
10 a total of 90 days after the Commission's order in
11 this proceeding." Then we got the information back
12 from North Dakota Telephone Company about their
13 proposed schedule. So I'm just wondering, is yours
14 -- your schedule within 90 days, does it have to
15 do with the interconnection agreement proceeding
16 and are you saying that yours would have started at
17 the -- when you filed the request for the
18 Commission about determining the exemption? Are

19 you determining setting the clock from that date
20 for both of your things? There was referral to
21 that in the North Dakota Telephone Company --

22 A. Yes.

23 Q. -- testimony and so I just need to
24 clarify, where did you get your dates? How are you
25 setting up the schedule?

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1 A. Thank you. I think that is a point of
2 confusion in the record, and we have completely
3 different perspectives here. I wasn't referring to
4 the interconnection, the 251(c) time frames.

5 Q. Oh, you weren't?

6 A. No, Your Honor, I was not. I was
7 referring simply to the actual time required to get
8 resale started between the two companies who agree
9 to set up a resale agreement.

10 Q. You don't see that you need an
11 interconnection agreement?

12 A. Only limited to the resale discount and
13 some of the billing issues. You know, a very
14 simple agreement. It's not the 500-, 600-page
15 interconnection agreements that we normally
16 consider. And as for the time frames --

17 Q. The time frames, yes, that are set up.

18 A. Mr. Meredith talks about that in his
19 testimony and the lawyers, I'm sure, will talk
20 about those time frames, but that's for an

21 arbitration where the parties haven't reached
22 agreement and go to arbitration, and that time
23 frame, I think, is significantly different than a
24 251(f) proceeding. Here we're simply asking for
25 you to consider termination of the rural exemption,

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1 and in that part of the statute, 251(f), it says
2 once you've made a decision on these issues, after
3 you've made the decision, then you set the
4 schedule. You set the schedule for implementing
5 resale. So once we're done with this hearing and
6 you issue an order, in that order hopefully will be
7 a period of time over which we will implement total
8 service resale in Devils Lake. And when I say
9 "we," excuse me, I mean Midcontinent. So that
10 arbitration time frame does not apply, in my
11 opinion.

12 COMMISSIONER WEFALD: All right. Thank
13 you.

14 JUDGE WAHL: Anything further from the
15 Commission?

16 JUDGE WAHL: Mr. Durick, followup?

17 MR. HARRINGTON: May we have one moment?

18 JUDGE WAHL: I'm sorry.

19 MR. DURICK: I have one question, Your
20 Honor.

21 REDIRECT EXAMINATION

22 BY MR. DURICK:

23 Q. Mr. Gates, I'm referring you to page 4 of
Page 68

24 your rebuttal testimony, and I'm referring you to
25 there in the context of the question asked by

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1 Commissioner Wefald on the public interest aspects
2 of this particular proceeding. And I note there --
3 I don't think that's been mentioned before, but
4 there you talk about the incentives inherent in
5 competition. Is that something that's also
6 addressed in the public interest?

7 A. Oh, absolutely. Once you have a
8 competitor in your midst, your whole perspective on
9 your business, of course, changes. And I talk in
10 my testimony about the efficiencies that I believe
11 any company facing competition would try to achieve
12 because you want to drive your costs down and your
13 revenues up. And from North Dakota Tel's
14 perspective, they want to maintain their customer
15 base, they want to keep their rates as high as they
16 can as long as they're just and reasonable as you
17 determine. But if you bring a competitor in, they
18 will probably look forward to someday having a
19 price reduction with respect to that competitor's
20 presence in the market, so they're going to try to
21 reduce their costs so they can maintain their
22 margins for their shareholders or the cooperatives
23 or the holding company, whoever that might be.

24 So the incentives are excellent. Not only
25 do they reduce their costs, but they try to provide

1 better customer service. And I'm not suggesting
2 that North Dakota Tel isn't providing great
3 service. I'm sure it probably is. But they will
4 have good incentives to do even better because they
5 want their customers to stay with them even in the
6 face of perhaps a rate increase or maybe they'll
7 have new services to offer in the future, such as
8 video in February of 2007, in which case they hope
9 their existing customers will take that service.

10 So with a competitor in their midst, yeah,
11 the benefits are great and all of those inure to
12 the consumer, because all those things that North
13 Dakota Tel will do, and any other company facing
14 competition, will ultimately benefit consumers by,
15 you know, more efficient provision of service,
16 better customer service, more offerings, reduced
17 prices. All of those things will benefit
18 consumers.

19 MR. DURICK: Thank you, Your Honor. I
20 have nothing further.

21 JUDGE WAHL: Mr. Moorman?

22 MR. MOORMAN: No questions.

23 JUDGE WAHL: Mr. Binek, anything further?

24 MR. BINEK: Yes, I do have some
25 questions.

1 EXAMINATION

2 BY MR. BINEK:

3 Q. Mr. Gates, you made a comment basically to
4 the effect that North Dakota Telephone Company
5 would like a delay in order to prepare for
6 competition. I think that's basically what you had
7 said.

8 A. Yes. I wasn't speaking for them. That's
9 kind of my impression of the testimony as I've read
10 it.

11 Q. If the rural exemption is not lifted and
12 assuming that North Dakota Tel does enter the cable
13 market in February 2007, that would automatically
14 terminate the exemption, of course. How long would
15 you estimate that it would take Midcontinent to
16 enter the telecommunications market under those
17 circumstances?

18 A. Once the exemption is lifted?

19 Q. Yes.

20 A. The timing would be the same. There's a
21 certain amount of time in which the companies need
22 to talk, exchange information, set up billing and
23 other operational situations, but easily within 90
24 days, assuming the companies cooperate and they
25 both want to achieve this goal, because, again,

□

1 we're talking about total service resale, not

2 talking about going in there and buying UNES or
3 unbundled loops or anything like that. It's really
4 just a billing issue.

5 Q. That leads to my next question. What
6 happens if the companies cannot agree? How is this
7 going to be resolved?

8 A. That really does require, I believe, a
9 legal interpretation I'm not qualified to provide.
10 I could guess.

11 Q. You are dealing with an interconnection
12 agreement, aren't you?

13 A. In essence, yes, a limited one for
14 purposes of just resale. But I don't believe -- I
15 suppose you could end up in a 251(c) type
16 interconnection hearing, but I don't think -- I
17 just would hope that wouldn't happen over just
18 total service resale.

19 Q. How have other states -- to your
20 knowledge, how have other states handled the
21 implementation issue?

22 A. The implementation issues have been very
23 simple for total service resale, and I have been
24 involved in many, many proceedings over the last 20
25 years or so that dealt with resale. Whether we're

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1 talking about long distance or local, a very, very
2 simple application, we've been doing it for years,
3 and Midcontinent has experience specifically with
4 this type of application and are very confident

5 they can get it done -- you know, they don't even
6 need 90 days, but certainly within 90 days it could
7 be done.

8 The problem is if the parties -- if North
9 Dakota Tel doesn't want to do it, then I guess the
10 companies such as Midcontinent have to exercise
11 their legal rights to come to this Commission to
12 kind of force the parties to cooperate, and that
13 could be done through a 251(c) proceeding, which
14 could take an awful long time and a lot of
15 resources.

16 Q. So you don't really -- if I'm hearing you
17 right, you don't really disagree with what North
18 Dakota Telephone Company has stated in their
19 filings that this matter could go into an
20 arbitration proceeding?

21 A. I really do disagree with what they are
22 saying. This proceeding can end quickly and we can
23 have total service resale in Devils Lake very, very
24 quickly, certainly within 90 days.

25 Q. I agree that it could end quickly, but if

□

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1 the parties cannot agree, don't you basically end
2 up in an arbitration situation?

3 A. I guess if North Dakota Tel chooses to
4 ignore this Commission's order and not implement
5 total service resale, then I would think this
6 Commission could act to enforce its order. I don't

7 think we have to go to arbitration simply because
8 North Dakota Tel ignores this Commission's order.
9 I think this Commission has the authority to
10 enforce it.

11 Q. well, let's just say, for example, that
12 North Dakota Tel does not agree with the discount
13 that you propose -- that neither party can agree on
14 a discount rate, how would this Commission be able
15 to arbitrarily set a discount rate when they don't
16 have any evidence presented?

17 A. well, I don't think it would be arbitrary
18 in any case. we've already got the model, and the
19 companies can talk about the model if they
20 disagree, but this is something we've been doing
21 since 1996, doing these wholesale discount models,
22 and based on this FCC rule it's very
23 straightforward. So if Midcontinent and North
24 Dakota Tel could not agree on some inputs or they
25 couldn't agree on the final number -- I suggested

□

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1 that the parties report to the Commission monthly
2 on the progress. If we stop making progress, then
3 this Commission could have a one-day hearing for
4 the limited purpose of addressing that model and
5 the inputs and then reach a decision and say, you
6 know, it's not 16.1, it's really 12.2 or some
7 finding, but this Commission can ultimately make
8 that decision. we're talking about accounting
9 numbers and spreadsheets, and we would finish that

10 hearing much quicker than we will finish this
11 hearing.

12 Q. Are there other states that have
13 terminated a rural exemption and had to determine
14 and implement an implementation schedule?

15 A. I don't remember an implementation
16 schedule. I know there are some states that have
17 terminated the exemption. I think, for instance,
18 Alaska has in the past, but I don't recall the
19 implementation. But I guess it would be -- excuse
20 me.

21 Q. I'm sorry. This whole case, does it
22 really boil down to which company gets to be able
23 to offer this -- I forget the term -- three play or
24 something like that?

25 A. Triple play.

□

82

1 Q. -- triple play service in Devils Lake? Is
2 that what it really boils down to, is who can get
3 there first?

4 A. I'm not certain if that's what this whole
5 case revolves around. It sounds that way when you
6 read Mr. Dircks' testimony. It sounds like he
7 would prefer to wait until they are offering video,
8 and from his perspective he wants to operate, you
9 know, on a level playing field. I hate to use that
10 phrase, we've overused it so much. But I believe
11 that's their position, and I can understand that.

12 But that's not the standard. That's not the
13 standard this Commission has to review in deciding
14 whether to terminate that exemption, but I think
15 that's why we're seeing the push-back, why we don't
16 have an agreement.

17 MR. BINEK: I have no further questions.

18 JUDGE WAHL: Any further questions from
19 the Commission? Commissioner Clark.

20 FURTHER EXAMINATION

21 BY COMMISSIONER CLARK:

22 Q. I do have some just following up on Mr.
23 Binek's question. If the purpose of this
24 proceeding is really just a jockeying for timing on
25 entry into each other's markets, doesn't North

□

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1 Dakota Tel under the Act have some ability within
2 its own control to delay that time frame? I mean,
3 just looking at the Act, once the termination would
4 be granted -- the rural termination, then I assume
5 you would have to make a -- Midcontinent would have
6 to make a request to start negotiations and then
7 it's not until at least what, 135 days after that
8 that Midcontinent could even petition the
9 Commission and that would be if North Dakota Tel
10 just on its own decided not to enter into
11 discussions, and then they've got a certain amount
12 of time to respond after that, and then even then
13 the Commission has what, nine months to decide the
14 case.

15 A. I don't see that schedule. I don't think
16 that schedule applies in this case. We have a
17 termination of the exemption, which you decide, but
18 then the next issue is the implementation
19 timetable. It doesn't say now you start all over
20 again at day one and do negotiations for 135 days
21 and then you have hearings and a final order. It
22 doesn't say that. It says you decide whether or
23 not that is terminated and then you set the
24 implementation schedule for the service.
25 Now, if Midcontinent was asking for

□

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1 unbundled network elements, interconnection,
2 collocation, TELRIC pricing, you know, all of those
3 things, it might take a long time to get through
4 all of that, and you might need another proceeding
5 to get through some of those difficult issues. But
6 in this case when we're talking about simply
7 lifting the exemption for total service resale, I
8 think you issue your order and then you set the
9 implementation schedule based on how long you think
10 it will take to implement total service resale, not
11 start the clock all over again.

12 Q. But isn't resale included under 251
13 interconnection just the same as other -- isn't it
14 just as eligible for 252 arbitration as any
15 other --

16 A. It is one of those --

17 Q. -- service under the Act?

18 A. It is one of those services, yes, so I
19 suppose the answer would be yes, but I don't think
20 we have to go that route.

21 COMMISSIONER CLARK: That's all the
22 questions I have. Thank you.

23 JUDGE WAHL: Commissioner Wefald.

24

25

□

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1 FURTHER EXAMINATION

2 BY COMMISSIONER WEFALD:

3 Q. Let's just set up another scenario here.
4 Okay. My understanding is that it's required to
5 give -- that your company is able automatically to
6 compete when North Dakota Telephone Company starts
7 to offer cable services. Is that correct?

8 A. Yes, that's my understanding.

9 Q. They're able to provide telephone service
10 at that time?

11 A. Yes.

12 Q. At that -- let's say both companies
13 decided to wait till then. All right. At that
14 moment when North Dakota Telephone Company offers
15 -- makes a cable offering in its community, then
16 would you need to go through the process of
17 establishing a discount rate for -- is it wholesale
18 retail? what is it called?

19 A. wholesale discount.

20 Q. wholesale discount?
21 A. wholesale retail discount.
22 Q. wholesale retail discount --
23 A. Yes.
24 Q. -- at that time, or are you not required
25 to do that at that time?

□

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1 A. You could at that time if there's a
2 dispute. The companies could agree. Wouldn't that
3 be nice? The companies could agree and avoid all
4 of the arbitration and the litigation.
5 Q. My question is, does that have to be done
6 regardless of whether we start now to determine
7 what that wholesale -- tell me the correct wording
8 of that again.
9 A. wholesale discount.
10 Q. -- the wholesale discount? Is it a matter
11 of -- at some point that has to happen, whether it
12 happens, let's say, if the -- if the rural
13 exemption is terminated, we would need to address
14 that issue then, or it has to be addressed at the
15 time you would be able to go in without getting the
16 rural exemption. It has to be addressed
17 regardless?
18 A. Yes, you're absolutely correct, either now
19 or we can wait and do it later, but it has to be
20 addressed, and our position is consumers shouldn't
21 have to wait.

22 Q. And you would like to have it done because
23 if you have to wait until you're able to go in when
24 they offer competition to have that done, then it
25 could stretch out several more months -- it could

□

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1 stretch out several more months at that point to
2 determine what the wholesale discount is?

3 A. It could.

4 Q. And it could have to come to the
5 Commission at that point for a decision?

6 A. It's possible. If they can't agree, it's
7 very possible.

8 COMMISSIONER WEFALD: Okay. Thank you.

9 JUDGE WAHL: Any other questions by the
10 Commission?

11 COMMISSIONER CRAMER: I have nothing.
12 Thanks.

13 JUDGE WAHL: Followup, Mr. Durick?

14 MR. DURICK: Nothing further, Your Honor.

15 JUDGE WAHL: Mr. Moorman, any followup?

16 MR. MOORMAN: Nothing further.

17 JUDGE WAHL: Mr. Binek?

18 MR. BINEK: Yes. I do have one --

19 hopefully just one more question.

20 JUDGE WAHL: I've never, ever heard that
21 to be true when said by a lawyer.

22 FURTHER EXAMINATION

23 BY MR. BINEK:

24 Q. I realize that you're not a lawyer --

25 COMMISSIONER CRAMER: Or a congressman.

□

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1 Q. (MR. BINEK CONTINUING) -- but when we're
2 talking about the termination of the exemption
3 under 251(f)(1)(b), where the statute talks about
4 -- it says, Upon termination of the exemption, a
5 state commission shall establish an implement
6 schedule for compliance with the request that is
7 consistent in time and manner with commission
8 regulation. What is consistent in time and manner
9 with commission regulations? Commission in this
10 instance referring to the FCC.

11 A. I don't know.

12 Q. Would you agree that that's a requirement
13 of the law, that any implement schedule that this
14 Commission would issue has to comply -- has to be
15 consistent in time and manner with FCC regulations
16 under the law?

17 A. I'm sure that's what it says, so I would
18 agree.

19 MR. BINEK: Thank you. I have nothing
20 further.

21 JUDGE WAHL: Anything further from the
22 Commission? Mr. Durick?

23 MR. DURICK: Nothing further, Your Honor.

24 JUDGE WAHL: Mr. Moorman?

25 MR. MOORMAN: Nothing further.

1 JUDGE WAHL: All right. Thank you very
2 much, Mr. Gates.
3 THE WITNESS: Thank you, Your Honor.
4 JUDGE WAHL: Commissioner Clark, we're
5 very close to the noon hour. Rather than have --
6 continue with another witness, would the Commission
7 recess or would the Commission keep going?
8 COMMISSIONER CLARK: Well, I guess it
9 would depend on where we head next. If it's
10 another long cross-examination, then I would say
11 probably break now. If now is convenient, great.
12 If not, let's press on a little more.
13 JUDGE WAHL: Mr. Durick.
14 MR. DURICK: It's convenient because we
15 don't have anything else. We just want to make
16 sure that our offer of Exhibits 1 through 13, I
17 believe, are accepted.
18 JUDGE WAHL: They were.
19 MR. DURICK: That's the last witness we
20 have, Your Honor.
21 JUDGE WAHL: Then I suggest, Commissioner,
22 we recess for lunch. When will the Commission
23 reconvene?
24 COMMISSIONER CLARK: One o'clock.
25 JUDGE WAHL: One o'clock. All right.

1 we'll be in recess until one o'clock.
2 (Noon recess taken at 11:49 a.m. to 1:05
3 p.m.)
4 JUDGE WAHL: Let's go back to work. we'll
5 be in session. Mr. Durick, you've rested, I
6 believe.
7 MR. DURICK: Yes, Your Honor.
8 JUDGE WAHL: Mr. Negaard, when you're
9 ready.
10 MR. NEGAARD: Your Honor, we would call
11 Mr. David Dircks to the stand, please.
12 JUDGE WAHL: All right. Mr. Dircks, if
13 you would just have a seat, be as comfortable as
14 you can. Mr. Dircks, as you have heard me advise
15 previous witnesses, your testimony is required to
16 be under oath and I'm required by law to advise you
17 regarding perjury before administering the oath.
18 Perjury is a false statement of material fact which
19 you do not believe to be true; in other words,
20 generally speaking, a lie. In North Dakota perjury
21 is a Class C felony, punishable by a fine up to
22 \$5,000, imprisonment for a period of up to five
23 years, or both. Will you raise your right hand,
24 please.
25 (Witness sworn.)

□

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1 JUDGE WAHL: Mr. Negaard.
2 MR. NEGAARD: Thank you, Your Honor.

3
4 being first duly sworn, was examined and testified
5 as follows:

6 DIRECT EXAMINATION

7 BY MR. NEGAARD:

8 Q. For the record, your name is David Dircks?

9 A. Yes.

10 Q. And your address, Mr. Dircks?

11 A. 2229 12th Avenue, Devils Lake, North
12 Dakota.

13 Q. Devils Lake. And your occupation?

14 A. I'm the general manager of North Dakota
15 Telephone Company.

16 Q. Okay. Previously, Mr. Dircks, on January
17 9th, we filed in this case, and it's in front of
18 you marked as R1, your prefiled testimony. Is
19 there anything in your testimony that, to your
20 knowledge, is incorrect or any corrections you wish
21 to make at this time?

22 A. No, sir.

23 Q. And it's true to the best of your
24 knowledge and belief?

25 A. Yes.

□

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1 MR. NEGAARD: We would offer Exhibit 1.

2 JUDGE WAHL: R1 is received pursuant to
3 stipulation of counsel.

4 Q. (MR. NEGAARD CONTINUING) Then moving on,
5 before you, marked as R2, is a letter dated May

6 12th, 2005, on behalf of Midcontinent
7 Communications to you as the manager; is that
8 correct?
9 A. Yes, it is.
10 Q. It was part of your testimony?
11 A. Yes.
12 MR. NEGAARD: We would offer R2.
13 JUDGE WAHL: Mr. Durick.
14 MR. DURICK: No objection, Your Honor.
15 JUDGE WAHL: Exhibit R2 is received.
16 MR. NEGAARD: And R3, a letter dated June
17 10th from yourself to Mr. Durick, which was
18 previously included in your testimony, we would
19 offer R3.
20 MR. DURICK: No objection.
21 JUDGE WAHL: R3 -- Exhibit R3 is
22 received.
23 Q. (MR. NEGAARD CONTINUING) R4 before you,
24 Mr. Dircks, is actually a three-page document
25 consisting of a copy of a help wanted ad and two

□

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1 pages of job description that was previously
2 prefiled; is that correct -- R4?
3 A. Yes.
4 MR. NEGAARD: We would offer R4.
5 JUDGE WAHL: Mr. Durick -- or I'm sorry.
6 MR. DURICK: Mr. Harrington will handle
7 this witness.

8 MR. HARRINGTON: No objection, Your Honor.
9 JUDGE WAHL: Excuse me. Exhibit R4 is
10 received.
11 Q. (MR. NEGAARD CONTINUING) Then R5, Mr.
12 Dircks, in front of you, is that a copy of your
13 newsletter to customers --
14 A. Yes, it is.
15 Q. -- from last summer?
16 MR. NEGAARD: And for the record -- excuse
17 me. I would offer R5.
18 JUDGE WAHL: Mr. Harrington.
19 MR. HARRINGTON: No objection.
20 JUDGE WAHL: Exhibit R5 is received.
21 MR. NEGAARD: And for the record it should
22 be noted that Mr. Dircks' testimony was previously
23 filed as Docket No. 56.
24 I have nothing further, Your Honor.
25 JUDGE WAHL: Mr. Harrington.

□

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1 MR. HARRINGTON: Thank you, Your Honor.
2 CROSS-EXAMINATION
3 BY MR. HARRINGTON:
4 Q. Mr. Dircks, I'm J.G. Harrington. How are
5 you this afternoon?
6 A. Good.
7 Q. I would like to start by talking a little
8 bit about North Dakota Telephone. North Dakota
9 Telephone serves Devils Lake, and where else does
10 it serve?

11 A. We have, I believe, 25 other exchanges.
12 we serve basically in the upper -- north central
13 part of North Dakota.

14 Q. And what proportion of your lines are in
15 Devils Lake?

16 A. We have a total of 18,000 access lines,
17 and I believe there's approximately 5,500 in Devils
18 Lake, including the rural.

19 Q. So a little bit under a third?

20 A. Yes.

21 Q. Now, NDTC was formed as the result of an
22 acquisition; is that right?

23 A. Yes, it was. It was formerly some GTE
24 property --

25 Q. Right.

□

95

1 A. -- that was purchased by three
2 cooperatives that surround that territory.

3 Q. And then it grew again in 1996; is that
4 correct?

5 A. Yes, it did. We acquired some more access
6 lines from Qwest.

7 Q. So the owners of your company thought that
8 it was a good idea to expand the number of lines
9 they served; they were doing well with what they
10 had?

11 A. Yeah, it was a good business decision I
12 thought, yeah.

13 Q. Let's talk a little bit about the owners.
14 Your owners are Polar Communications, Dakota
15 Central Telecom and United; is that right?
16 A. Yes.
17 Q. How many lines do those companies serve,
18 more or less? I know you won't have an exact
19 number.
20 A. I don't really have any idea.
21 Q. Are they individually larger than North
22 Dakota Telephone?
23 A. They're smaller, but together they're
24 probably larger than North Dakota Telephone
25 Company.

□

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1 Q. Do you have any idea of their combined
2 revenues?
3 A. No, I don't.
4 Q. Do any of those companies offer video
5 today?
6 A. I believe two of the owner companies do --
7 I know for sure. I'm not sure of the third.
8 MR. HARRINGTON: Mr. Durick is going to
9 pass out what I think will be marked as P --
10 JUDGE WAHL: P14, I'm guessing.
11 MR. HARRINGTON: P14, that is correct.
12 Yes. I'm sorry. I was trying to find my count and
13 I lost track.
14 Q. (MR. HARRINGTON CONTINUING) This exhibit
15 is web pages from each of the owners of North

16 Dakota Telecom. Mr. Dircks, would you review the
17 document that's been marked P14, please? Just let
18 me know when you're done.

19 A. I'm done.

20 Q. Does this document refresh your
21 recollection as to which of the companies that own
22 NDTc offer video?

23 A. North Dakota Central, yes.

24 Q. And Polar?

25 A. Polar, yes.

□

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1 Q. And United?

2 A. United was one I was not sure of.

3 Q. But this document -- in reviewing this
4 document, do you believe now that United does offer
5 video?

6 A. I did not see that on there.

7 Q. I refer you to the page --

8 A. Okay. Excuse me. Pardon me. I do see
9 it, yes.

10 MR. HARRINGTON: We'd like to offer this
11 document into evidence as an exhibit.

12 JUDGE WAHL: Mr. Negaard.

13 MR. NEGAARD: Your Honor, if I could. Mr.
14 Dircks, do you have any personal knowledge of this
15 information in these documents?

16 THE WITNESS: No.

17 MR. NEGAARD: Your Honor, I don't know

18 what foundation there is for introducing this
19 document.

20 JUDGE WAHL: Well, Mr. Harrington, he's
21 made a point, I think. Do you have any response?

22 MR. HARRINGTON: Yes. I think that first
23 it confirms things he said as to two of the
24 companies already and this is publicly available
25 information. I think that it's appropriate

□

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1 foundation certainly for at least two of the
2 companies and he's conceded that he believes based
3 on -- on the basis of reading this, his
4 recollection is the third company also offers
5 video.

6 MR. NEGAARD: This is the type of
7 information, Your Honor, that should have been
8 filed with rebuttal testimony, and we're seeing it
9 for the first time here. This witness has no
10 personal knowledge of it and there's no foundation
11 for it.

12 JUDGE WAHL: Well, except it's two
13 things. For the record, the objection is
14 overruled. My reasons for the ruling are as
15 follows: First, it's almost self-evident --
16 almost, and I -- you know, without getting in the
17 technicalities. Secondly, I'll receive -- the
18 Commission will receive the exhibit for the limited
19 purpose of considering the testimony of Mr.
20 Dircks. That is not for the information contained

21 in the exhibit except as acknowledged by Mr.

22 Dircks. Is that clear, Mr. Harrington?

23 MR. HARRINGTON: Yes.

24 JUDGE WAHL: Mr. Negaard, anything further

25 for the record?

□

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1 MR. NEGAARD: No, Your Honor.

2 JUDGE WAHL: All right. With that caveat,

3 the objection is overruled. Exhibit P14 is

4 received.

5 MR. HARRINGTON: Thank you, Your Honor.

6 Q. (MR. HARRINGTON CONTINUING) How long have

7 you been at North Dakota Telephone, Mr. Dircks?

8 A. I've been there since 1993 when the

9 company started.

10 Q. And before that where did you work?

11 A. I worked a number of years for Contel of

12 Minnesota and Contel of North Dakota before GTE

13 purchased the property.

14 Q. And how long have you been the general

15 manager?

16 A. Since 1993.

17 Q. Since the start?

18 A. Since the start, yes.

19 Q. I'd like to talk a little bit about the

20 financial situation of your company. Now, my

21 understanding from your deposition is that the

22 financials of North Dakota Telephone are

23 consolidated with a company called TPC, which is a
24 holding company.

25 A. Yes.

□

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1 Q. That's correct? TPC's only asset is North
2 Dakota Telephone Company's stock; is that right?

3 A. I believe so, yes.

4 Q. So the financials of TPC are essentially
5 the financials of North Dakota Telephone?

6 A. To the best of my knowledge, they are,
7 yes.

8 Q. Okay. That's fine. Now, in your
9 deposition you agreed that the equity in North
10 Dakota Telephone -- and I'm going to refer to North
11 Dakota Telephone and TPC as sort of the same thing
12 here given what you've said -- has grown in the
13 last four years from about 21.6 million to about
14 29.2 million.

15 A. That sounds right.

16 Q. Would you like to look at your deposition
17 to confirm that? We have a copy.

18 A. I've got a copy up here.

19 Q. That would be page 21, lines -- I'm sorry,
20 page 22, lines 7 through 11.

21 A. 7 through 11. Did you say page 22?

22 Q. Page 22 from the copy I have. We do
23 appear to have some pagination changes from place
24 to place in documents.

25 A. My page 22, those lines are talking about
Page 92

1 cell service.

2 Q. I apologize. We'll take a moment to find
3 out why the pages don't match up. Why don't you
4 skip ahead about four pages, the page on which the
5 phrase "no verbal response" appears and it's right
6 after that. Have you found that?

7 MR. NEGAARD: I'm sorry. Do we have a
8 page number?

9 MR. DURICK: I found it on page 22 on
10 yours, but it's not 22 on his.

11 MR. HARRINGTON: The copy he has
12 apparently has different pagination.

13 JUDGE WAHL: Mr. Harrington, why don't you
14 just take your copy up to the witness and show it
15 to him, please.

16 THE WITNESS: I've got the section you're
17 referring to.

18 MR. HARRINGTON: I'm going to have other
19 questions relating to the deposition so I'll
20 provide him with a copy.

21 JUDGE WAHL: Sure. Just take it and show
22 it to the witness.

23 THE WITNESS: 22?

24 MR. HARRINGTON: Yes.

25 Q. (MR. HARRINGTON CONTINUING) We're on page

1 22, lines -- starting at line 7.

2 A. Line 7?

3 Q. Right. The question I asked you, going

4 back to this, was, is it consistent with your

5 recollection that the equity has grown to 29.2

6 million approximately from 21.6 million

7 approximately between 2000 and 2004?

8 A. Yes.

9 Q. Okay. Are you familiar with your

10 company's annual reports to the Commission in a

11 general way?

12 A. I don't understand specifically, but I

13 know what you're referring to, yes.

14 Q. And over the years those reports have

15 shown the profits that North Dakota Telephone has

16 made; is that correct?

17 A. That's correct.

18 MR. HARRINGTON: I have here copies of the

19 annual reports for the last five years, and I'm

20 going to ask -- I'm sorry -- the last four years,

21 and I'm going to ask for the purposes of this

22 proceeding that the Commission take official notice

23 of them. I do not intend to enter them as

24 exhibits.

25 JUDGE WAHL: Official notice will be

□

1 taken.

2 Q. (MR. HARRINGTON CONTINUING) Is it --
3 subject to check, is it fair to say that over the
4 last five years those reports have shown profits in
5 the range of 3.4 to 4.3 million dollars on an
6 annual basis? Is that approximately the right
7 range?

8 A. Net profit or --

9 Q. Net profit, the bottom line.

10 A. I would have to look at them. If that's
11 what it says in there, that's what it says.

12 Q. So North Dakota Telephone is a profitable
13 company?

14 A. Yes, we are.

15 Q. I'd like to talk a little bit about
16 competition today for North Dakota Telephone. Do
17 you have any competition from other providers of
18 landline telephone service today?

19 A. Landline?

20 Q. Yeah. I'll ask about wireless next.

21 A. No.

22 Q. Has any other party asked North Dakota
23 Telephone for interconnection or for resale on the
24 landline side?

25 A. No, they haven't.

□

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1 Q. Let's talk a little bit about the wireless
2 side. Who are your wireless competitors?

3 A. Well, whichever ones are there. I'm not

4 sure. Verizon is one of them. Cellular One would
5 be another. Those are the only two that I'm
6 familiar with.

7 Q. Do you know of any customers that you've
8 lost to wireless service?

9 A. Yeah. I know of some, yes.

10 Q. Number in the tens, the hundreds?

11 A. They would be just in a few. Ten or less
12 that I personally know about. I wouldn't know
13 about the rest of them.

14 Q. Does North Dakota Telephone sell wireless
15 service?

16 A. We resell Verizon service through one of
17 our owner companies, United Telephone.

18 Q. About how many customers do you have in
19 Devils Lake for that?

20 A. I do not know.

21 Q. To your knowledge, does Midcontinent offer
22 wireless service?

23 A. Midcontinent?

24 Q. Yes.

25 A. I don't know if they do.

□

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1 Q. Okay. One of the things you talk about in
2 your testimony at some length is the notion of a
3 level playing field. I guess I'd like to start
4 with an understanding of what you mean by that.
5 You use the phrase at one point "fair
6 competition." What's your definition of "fair

7 competition"?

8 A. I think I probably discussed that in my
9 testimony, but also it was in some of your
10 testimony about a level playing field. That's
11 really all I'm asking for.

12 Q. I'd like you to summarize what you think
13 it means.

14 A. Give me a minute to think about that.

15 Q. Sure.

16 A. I guess just the basic summary of that
17 would be that -- using the example we have here
18 today is that, you know, we currently compete with
19 Midco for high-speed Internet services, and to me a
20 level playing field would be that we would be able
21 to offer video, too, at the same time that Midco
22 would like to offer telephone service.

23 Q. Now, is it reasonable to say, in your
24 view, that every competitor has advantages and
25 disadvantages?

□

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1 A. I wouldn't say it would be reasonable, but
2 I guess that's why we're here discussing it.

3 Q. You don't think it's true that every
4 competitor in a marketplace has some advantages and
5 some disadvantages compared to its competitors?

6 A. would you say that again?

7 Q. Okay. In a competitive market, is it your
8 view that each party in that market, each

9 competitor, has some advantages and some
10 disadvantages as compared to the other parties in
11 the market?

12 A. If I understand the question right, yes.

13 Q. So in a fair market you don't expect every
14 competitor to be exactly positioned the same way,
15 do you?

16 A. I'm not sure I understand the question.
17 In a fair market they can't be exactly, I'm sure,
18 but fair is fair.

19 Q. So do you think it's a fair market, for
20 instance, if you have some company like Mercedes
21 that offers expensive, very well-made automobiles
22 that have very good safety records whereas
23 Chevrolet might offer models that are less
24 expensive, not as luxurious, perhaps don't have as
25 good safety records? Is that a fair market?

□

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1 A. I don't know the answer to that.

2 Q. Is there something unfair about that
3 market, in your view?

4 A. I don't know anything about the automobile
5 industry.

6 Q. Okay. In your testimony on page 9, you
7 say that you expect to be in the video market
8 sometime after February 2007. In your view of
9 what's a fair market, would it be fair for
10 Midcontinent to have to wait until after you've
11 entered the video business to be able to start to

12 provide telephone service?

13 A. Would it be fair for Midcontinent to wait
14 till after we're in the video business?

15 Q. Mm-hmm.

16 A. No.

17 Q. Thank you. I'd like to turn to some of
18 the sort of specific issues about what constitutes
19 a level playing field. The first thing I would
20 like to talk about is access to capital. Who do
21 you get your capital from? Who do you borrow money
22 from when you need to borrow money?

23 A. We borrow our money from CoBank.

24 Q. And what's CoBank?

25 A. It's a -- mostly an agricultural lending

□

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1 firm, I think. They're headquartered in Denver,
2 Colorado.

3 Q. Is it a cooperative?

4 A. Yes.

5 Q. Is North Dakota Telephone a member of that
6 cooperative?

7 A. Yes.

8 Q. Now, as a cooperative, doesn't CoBank
9 return dividends back down to its members?

10 A. They do.

11 Q. And doesn't that have the effect of
12 lowering your cost of capital?

13 A. If they pay a dividend, it would, yes.

- 14 Q. Have they paid dividends recently?
- 15 A. I did not verify that before I came down
- 16 here, but they have paid dividends.
- 17 Q. They have paid dividends in the past?
- 18 A. Yes, they have.
- 19 Q. And if the business is run reasonably
- 20 well, you would have an expectation they would
- 21 continue to pay dividends?
- 22 A. Yes.
- 23 Q. That's, after all, one of the advantages
- 24 of a cooperative to its member; right?
- 25 A. Yes.

□

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- 1 Q. Is North Dakota Telephone eligible for
- 2 financing from the Rural Utilities Service?
- 3 A. We're eligible, yes. We would be
- 4 eligible.
- 5 Q. Can you describe that program for me?
- 6 A. No, I can't. We looked at three different
- 7 agencies when we were going to borrow some money
- 8 for this fiber project. They were one of them, and
- 9 we chose not to use them.
- 10 Q. Because CoBank was more advantageous?
- 11 A. We've dealt with them since the conception
- 12 of the company and we felt it was more
- 13 advantageous, yes.
- 14 Q. But you're familiar with the Rural
- 15 Utilities Service obviously?
- 16 A. Yes.

17 Q. That's a government program?
18 A. Yes.
19 Q. And it provides financing to rural
20 telephone companies among others?
21 A. Mm-hmm. Yes.
22 Q. Is that financing guaranteed by the
23 government?
24 A. I believe it is.
25 Q. Do you happen to know if cable companies

□

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1 have access to Rural Utilities Service capital?
2 A. No, I don't.
3 Q. And during your deposition one of the
4 other entities that was mentioned was the Rural
5 Telephone Finance Cooperative. Did you investigate
6 using that, as well, for your funding?
7 A. Yes, we did.
8 Q. And it's a coop like CoBank?
9 A. I'm not familiar with RTFC.
10 Q. But you did look at them?
11 A. Yes.
12 Q. And they were available to you?
13 A. They were.
14 Q. And so the reason you chose CoBank was the
15 relationship or because it was financially more
16 advantageous than the other choices, or something
17 else?
18 A. Both.

19 Q. Both. So it was both financially
20 advantageous and a relationship you already had?
21 A. Yes.
22 Q. I'd like to turn then to another issue
23 about level playing field, which is universal
24 service and the moneys you get from universal
25 service funding. And we're going to mark Exhibit

□

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1 P15. This exhibit consists of two parts, the first
2 part for which -- is actually the second two pages,
3 but which I'm going to ask the Commission to take
4 official notice, is a report generated by the
5 universal service website that the FCC runs that
6 shows the amounts of money that North Dakota
7 Telephone has received over the last several
8 years. The first page of the exhibit is an Excel
9 spreadsheet that takes those numbers and adds them
10 up.

11 JUDGE WAHL: I haven't heard it offered.

12 MR. HARRINGTON: I've asked for the
13 Commission to take official notice of the second
14 and third pages as a report from the FCC website.
15 That report was generated by putting in the
16 identification number for North Dakota Telephone
17 Company into a database which then produces the
18 amounts of money they've received.

19 MR. NEGAARD: Your Honor, I'm beginning to
20 wonder who the witness is here. Again, Your Honor,
21 this hearing was premised on filing testimony,

22 direct testimony, reply testimony, rebuttal
23 testimony. In the interest of fairness, Your
24 Honor, this obviously has been planned. This was
25 not thought up during the lunch hour. We were

□

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1 given absolutely no notice that there was going to
2 be any of these exhibits used. Your order
3 specifically said, Your Honor, that all exhibits
4 had to be filed by last Monday, and today we're
5 being inundated by more exhibits. We've been given
6 no notice of these exhibits. There's no foundation
7 for these exhibits. And now Mr. Harrington is
8 testifying in an attempt to establish some kind of
9 foundation. Your Honor, I insist that you follow
10 the order that you issued that said there would be
11 no late-filed exhibits.

12 MR. HARRINGTON: Let me --

13 JUDGE WAHL: Was that my order? Did I --

14 MR. NEGAARD: Yes, Your Honor, it was.

15 JUDGE WAHL: Did the prehearing order
16 specifically say that all exhibits had to be
17 filed? That's not my recollection, Mr. Negaard.
18 Now, I may be wrong.

19 well, Mr. Harrington, I refer you to the
20 second page of my order, which I think was
21 substantially taken from the proposed -- or the
22 agreement of the parties, but that order says that
23 all testimony and exhibits served and filed for the

24 hearing pursuant to this order shall be served and
25 filed electronically.

□

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1 MR. NEGAARD: Your Honor, if I might add,
2 also at the bottom of page 1, ordered that no other
3 or further filing of testimony or exhibits prior to
4 the hearing shall be permitted except as the
5 Commission may allow. Your Honor, I don't think
6 that this is following the spirit and intent of
7 your order that we be given notice of these
8 exhibits prior to the hearing so we could have an
9 orderly hearing.

10 JUDGE WAHL: Well, for the record and to
11 clarify, Mr. Negaard, this is my order, but it was
12 also, as my recollection serves me, substantially
13 the agreement of the parties. That is, I may have
14 changed the wording, but I thought this was
15 essentially the stipulation of the parties. In any
16 event, Mr. Harrington, it does say no other or
17 further filing of testimony or exhibits.

18 MR. HARRINGTON: Prior to the hearing.

19 JUDGE WAHL: Prior to the hearing, that's
20 true. All right. Go ahead.

21 MR. HARRINGTON: Your Honor, that is
22 exactly what I was going to say, prior to the
23 hearing. There's nothing in there that prohibits
24 the admission of exhibits at the hearing. And in
25 this particular case what we're asking the

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1 Commission to do is take official notice of FCC
2 materials that we could have put into the record in
3 a brief, they're official records of the FCC, and
4 then a demonstrative cover page that adds the
5 numbers up. If Mr. Negaard wants to object to them
6 being admitted to this hearing, there's no reason
7 we could not continue to put them in the brief
8 because they're official records that they could
9 acquire themselves just as easily as we did.

10 MR. NEGAARD: Your Honor, there's no
11 foundation for this document other than the
12 testimony.

13 MR. HARRINGTON: I'm going to be cross-
14 examining Mr. Dircks on this. If you would like me
15 to wait to ask for admission until after -- I did
16 not actually ask for admission yet. I merely said
17 -- noted that I wanted official notice taken.

18 MR. NEGAARD: The only foundation for
19 this, Your Honor, is total hearsay. The only
20 foundation for this is the testimony of one of the
21 attorneys for Midcontinent. Your Honor, if we
22 would have been given some notice on this -- I
23 don't think it follows the spirit and the intent of
24 your prehearing order, Your Honor.

25 MR. HARRINGTON: Perhaps I could ask Mr.

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1 Dircks some questions without at the moment
2 reference to the exhibit and we'll see where we go
3 from there.

4 JUDGE WAHL: Just a moment, please. Mr.
5 Negaard, let me say that it was not and is not my
6 recollection that no other exhibits could be
7 offered at the hearing for cross-examination.
8 That's not -- that's not my recollection of the
9 purpose of this order and I don't -- as I re-read
10 the prehearing order now, I don't read that to
11 exclude the filing of -- or the offering of
12 additional evidence -- of additional exhibits for
13 cross-examination or for, what it really amounts
14 to, rebuttal in the circumstances, I think. So
15 that part of the objection is overruled.

16 Mr. Harrington, I have a little trouble
17 with foundation. What I essentially have is your
18 say-so that this information is what it is. How is
19 the Commission to take official notice of this
20 information? It does so on your say-so that this
21 is a compilation or this is taken from the
22 website.

23 MR. HARRINGTON: Your Honor, this is
24 reproducible. All someone has to do is go to the
25 universal service website and put in the

□

1 appropriate code for North Dakota Telephone Company
2 and this information appears. It is part of the

3 official records of the FCC. I planned to ask Mr.
4 Dircks some questions about the extent to which --
5 and I still will regardless of the admission --
6 about the extent to which North Dakota Telephone
7 receives universal service funding, and I think
8 that will establish that North Dakota Telephone
9 receives a substantial amount of universal service
10 funding and that these numbers are consistent with
11 that.

12 JUDGE WAHL: All right. Mr. Harrington, I
13 accept your representation that this information is
14 reproducible and that it is what you represent it
15 is, namely, the official records of the FCC. And
16 on that basis Exhibit P15 is received. Mr.
17 Negaard, anything further for the record?

18 MR. NEGAARD: Yes, Your Honor. Even
19 government documents require self -- they require
20 authentication in order to be introduced under the
21 North Dakota rules.

22 JUDGE WAHL: Show me. I don't know that
23 that's -- that's about 803, about 8, maybe?

24 MR. NEGAARD: 901. I'm sorry, Your
25 Honor. 902, domestic documents produced under

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1 seal, document bearing a seal. In this case if
2 it's a U.S. Government document, if it bears the
3 official seal of the United States Government, it's
4 admissible.

5 JUDGE WAHL: Yeah, but it's not a
6 document, Mr. Negaard. It's information. It's
7 public information that is readily available. It
8 is available simply by using this URL, I take it.
9 MR. NEGAARD: Your Honor, recognizing that
10 you are probably not going to rule in my favor
11 since I can see that's where you're leaning, let me
12 just say that I believe it lacks foundation and it
13 lacks authentication and my objection can be
14 noted. Thank you.
15 JUDGE WAHL: Mr. Negaard, you may be
16 right, as a matter of fact, but that being said, I
17 think that -- I think -- I'm going to allow the
18 Commission to take official notice. I'm going to
19 accept P15. I'm going to receive P15 as the
20 exhibit. You may proceed, Mr. Harrington.
21 MR. HARRINGTON: Thank you, Your Honor.
22 Q. (MR. HARRINGTON CONTINUING) Mr. Dircks,
23 does North Dakota Telephone Company receive
24 universal service funding from the FCC or the FCC
25 programs?

□

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1 A. Yes, it does.
2 Q. Is it correct to say that you receive
3 interstate common line support?
4 A. Yes.
5 Q. Is it also correct to say you receive
6 support on the local switching support program?
7 A. Yes.

8 Q. It appears you don't receive funding for
9 high cost loops; is that correct?
10 A. Not on a constant basis, no, according to
11 this report.
12 Q. And do you have an idea yourself of
13 roughly how much money you get from the universal
14 service program -- high cost program on an annual
15 basis?
16 A. I believe in 2005 we received
17 approximately 1.7 million dollars from these
18 programs.
19 Q. Is that reasonably consistent with what
20 you've received in other years, within a fair
21 approximation?
22 A. I only looked at the last two years, but I
23 could say that would be reasonable.
24 Q. You've never gotten, say, 10 million
25 dollars?

□

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1 A. No.
2 Q. No such luck.
3 A. No.
4 Q. Now, you testified earlier that the
5 company as a whole has about 18,000 lines.
6 A. Yes.
7 Q. So roughly speaking, and I understand this
8 number is not exactly right, you're getting in
9 federal universal service support in any given year

10 somewhere between 95 and \$105 per line? Is that a
11 fair number?

12 A. Just calculating in my mind, yes.

13 Q. I was going to say a hundred, but I
14 realized the numbers didn't match quite. How much
15 do you charge for residential service in Devils
16 Lake right now on a monthly basis?

17 A. I believe it's \$13.12 -- will be.

18 Q. Will be. That reflects a rate increase
19 that was recently approved?

20 A. No.

21 Q. It does not reflect the 27?

22 A. No. We rebalanced our rates, so all the
23 rates in all of our towns will be the same. That's
24 what it will be, is 13.12.

25 Q. Devils Lake prior to the rebalancing, what

□

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1 was the rate?

2 A. It was close to that.

3 Q. More or less?

4 A. I don't remember. I think it was a
5 27-cent difference, if I recall it right, less --
6 or more.

7 Q. Previously it was 27 cents less, so a
8 slight rate increase. So 13.12 a month over a year
9 is somewhere in the \$160 annual revenue per
10 residential line per year, is that right, give or
11 take?

12 A. I don't have a calculator. It sounds
Page 110

13 good.

14 Q. So if you're getting somewhere between 95
15 and \$110 per line from the federal universal
16 service program and 160, you're getting close to
17 two-thirds as much per line from universal service
18 as you do from your own customers; is that right?

19 A. Sounds right.

20 Q. Okay. Now, if Midcontinent offers resale
21 service in Devils Lake, to your knowledge, will
22 Midcontinent be eligible for any universal service
23 money of its own?

24 A. They would not be unless they started
25 offering facility-based service.

□

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1 Q. I'd like to turn to access revenues. Now,
2 your company receives a significant portion of its
3 revenue from access charges; is that correct?

4 A. Yes.

5 Q. And those come from long distance carriers
6 who are paying either to originate or terminate
7 calls in North Dakota Telephone's territory?

8 A. That's the majority of it, yes.

9 Q. Roughly what percentage of your revenues
10 come from access?

11 A. Without looking, I would say probably 60
12 percent.

13 Q. That's what I had. That would have been
14 about 10 million out of your 16 million dollars in

15 revenues last year?

16 A. I don't have a financial report with me,
17 but it sounds close.

18 Q. What's your permanent access rate for
19 intrastate traffic?

20 A. I'm not sure.

21 Q. Do you have a ballpark? I won't hold you
22 to an exact tenth-of-a-cent amount.

23 A. Intrastate?

24 Q. Intrastate.

25 A. I believe it's nine cents. I don't know.

□

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1 That's just a guess.

2 Q. Interstate, is that higher or lower?

3 A. It would be lower.

4 Q. And you charge subscriber line charge on
5 top of your residential service rate; right?

6 A. Yes.

7 Q. And what's that?

8 A. That's different for business and
9 residence. I think residential now is
10 six-something.

11 Q. Business is more?

12 A. Yes.

13 Q. About?

14 A. Some of these numbers escape me up here,
15 but I think it's in the \$9 range.

16 Q. And if Midcontinent gets to resell your
17 services, Midcontinent will -- will Midcontinent be

18 able to have access to any of those access revenues
19 of yours, or will those still be North Dakota
20 Telephone's revenues?

21 A. They would still be ours.

22 Q. Now, for the level playing field
23 discussion I'm interested in what you think ought
24 to be considered by the Commission in that
25 analysis. Is it your view that the only services

□

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1 that are relevant in this proceeding are North
2 Dakota Telephone's regulated services?

3 A. Yes.

4 Q. So you wouldn't include any other service
5 that North Dakota Telephone offers or might offer
6 in the future as relevant to this conversation?

7 A. My understanding is it's just our tariffed
8 services.

9 Q. So for the purposes of your level playing
10 field questions then, you think Midcontinent's
11 video services are relevant?

12 A. I'm not sure I understand.

13 Q. Well, in your testimony you argued that we
14 have a level playing field only to the extent that
15 you're able to offer the same services Midcontinent
16 offers. My question is, for the purposes of that
17 particular argument, are you saying that
18 Midcontinent's video services are relevant to the
19 question of whether there's a level playing field?

20 A. I don't know how to answer that.
21 Q. So are you saying something different in
22 your testimony then?
23 A. Point out my testimony to me, would you?
24 I'm confused.
25 Q. Oh, let's find it. Let's look -- let's

□

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1 look at page 3 of your testimony, starting at line
2 20. Now, at that point you argue -- and continue
3 on to page 4. At that point you say that you do
4 not believe it would be fair for Midcontinent to be
5 able to offer triple play a year before you're
6 offering the same thing yourself.
7 A. Yes.
8 Q. So for the purposes of this discussion you
9 think it's then relevant to consider video services
10 that are not regulated by the Commission?
11 A. I'm just at a loss for words.
12 Q. That's fine.
13 A. I don't know if I'm not understanding your
14 question or what.
15 Q. Well, let me try again one more time.
16 A. Okay.
17 Q. You've just told me that you don't think
18 it's appropriate for the Commission to consider any
19 services that are not regulated services. That was
20 your cross-examination testimony.
21 A. Yes.
22 Q. However, in your direct testimony -- your

23 reply testimony, you said that you thought that the
24 Commission ought to consider the ability of your
25 company to be in the video marketplace as a factor

□

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1 in determining when the rural exemption should be
2 lifted.

3 A. Yes.

4 Q. So for the purposes of your reply
5 testimony, you indicated that the Commission should
6 consider when the availability of video service and
7 a competition in video service; is that correct?

8 A. Yes.

9 Q. So would you care to revisit the answer to
10 the question about whether the Commission should
11 consider nonregulated services?

12 A. No. I'm not familiar with the law, I
13 guess, and I'm confused on my understanding of
14 this, but -- and I guess based on advice from our
15 legal counsel, I'm just trying to exercise my
16 rights of what's involved in this case by law.

17 Q. I see. Let's move on to one other
18 service. On page 5 of your testimony, and this is
19 at lines 4, 5 and 6, you indicate you do not offer
20 long distance service at North Dakota Telephone
21 Company; is that correct?

22 A. We offer it through a company that we're
23 part-owners in, North Dakota Long Distance.

24 Q. Who else owns the company?

25 A. There's ten companies in the state

□

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1 involved in that. We're one of them.

2 Q. How are the revenues from that company
3 allocated to its owners?

4 A. I believe it's by -- I have to verify this
5 for sure, but based on percentage of ownership.

6 Q. And percentage of ownership was determined
7 in what way; do you know?

8 A. Whatever -- however the board set it up.
9 Every company invested the same amount of money, so
10 the ownership was an equal percentage.

11 Q. Do each of the companies have roughly the
12 same number of lines?

13 A. No. There's some that have more than
14 others.

15 Q. To your knowledge, does your company fall
16 in the low end, the middle, the high end of that
17 group?

18 A. As far as ownership or --

19 Q. In terms of number of lines.

20 A. Oh, number of lines?

21 Q. Yeah.

22 A. Probably in the higher end.

23 MR. HARRINGTON: We're marking Exhibit
24 P16, if I'm still counting correctly. I'm not
25 asking to admit it yet. This exhibit is a page

1 from the North Dakota Telephone website.

2 MR. BINEK: What exhibit is this?

3 MR. HARRINGTON: This is P16 if I've
4 counted correctly. Judge Wahl seems to believe I
5 have.

6 Q. (MR. HARRINGTON CONTINUING) Now, I've
7 just represented this is a page from the North
8 Dakota Telephone website, but I'm going to ask you,
9 Mr. Dircks, is this a copy of the page from the
10 North Dakota Telephone website?

11 A. It looks like it.

12 Q. I'd like you to direct your attention to
13 what would be, if we were on the Internet, the
14 bottom left of the page, which is probably going to
15 show up on the second -- the bottom of the second
16 page and going on to the top of the third page on
17 the left-hand side on that handout. Have you found
18 that, Mr. Dircks?

19 A. Yeah.

20 Q. This is a description of what are called
21 the 1st Rate plans; is that correct?

22 A. Yes.

23 Q. What is included in the 1st Rate plans?

24 A. Would you like me to read this?

25 Q. You can read it or you can tell me from

1 your own knowledge as the general manager. Either
2 way.

3 A. Okay. Just have different rates for
4 different amounts of long distance minutes at a
5 certain price.

6 Q. So these are plans that include both local
7 and long distance service, or are they just long
8 distance?

9 A. Long distance. The first one includes
10 voice mail, I guess.

11 Q. Is there anything on that page that says
12 that it's offered -- that these plans are offered
13 by any company other than North Dakota Telephone?

14 A. I don't believe it does.

15 MR. HARRINGTON: I'd like to offer this
16 for admission.

17 JUDGE WAHL: Mr. Negaard.

18 MR. NEGAARD: Your Honor, I'm not going to
19 belabor the point. If I could just have a standing
20 objection based on your earlier order, Your Honor,
21 that's all I want.

22 JUDGE WAHL: You may, but with the
23 understanding, Mr. Negaard, you should not hesitate
24 to make your record. Exhibit P16 is received. The
25 objection is overruled. Exhibit P16 is received.

□

1 Q. (MR. HARRINGTON CONTINUING) I'd like to
2 move on to one of the other claims you make
3 concerning the notion of a level playing field, and

4 on page 10 of your testimony, and this is at lines
5 8 through 12, you discuss the requirement that NDTC
6 provide notice of price changes.

7 A. I haven't found it, but I know what you're
8 talking about.

9 Q. I'll give you a moment to take a look at
10 it.

11 A. Page what?

12 Q. Page 10, lines -- the question is line 6,
13 the response goes through line 12.

14 A. Okay.

15 Q. You're referring to the statutory
16 requirements that your company provide -- I think
17 it's 20 days notice on price increases; is that
18 correct? You just understand that you're required
19 by law to provide those notices?

20 A. To the Commission?

21 Q. To the Commission.

22 A. On our regulated services?

23 Q. Right.

24 A. I don't know that it's 20 days.

25 Q. Okay. That's fine. Now, that doesn't

□

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1 apply to your Internet service, does it?

2 A. No.

3 Q. You don't believe -- do you believe it
4 will apply to your video service?

5 A. No.

6 Q. Does it apply to your wireless resale
7 service?

8 A. No.

9 JUDGE WAHL: Mr. Harrington, the question
10 and the answer was really not clear for the
11 record. You don't believe that it will apply to
12 your video service and the answer was no?

13 MR. HARRINGTON: No. That's right.

14 Q. (MR. HARRINGTON CONTINUING) You don't
15 believe that the requirement you provide notice
16 will apply to your video services?

17 A. It's not regulated.

18 Q. And the same thing is true of your
19 wireless services that you offered by resale and
20 your Internet service?

21 A. Yes.

22 Q. So you can change the prices on any of
23 those services without notice to anyone except, of
24 course, your customer?

25 A. That's the way we understand the tariff,

□

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1 yes.

2 Q. And can you bundle those unregulated
3 services with your regulated services?

4 A. We could.

5 Q. And one more question in this area. Are
6 you aware that Midcontinent also is subject to the
7 requirement to provide notice of its price changes?

8 A. To?

9 Q. Notice of its price changes for regulated
10 services.

11 A. No.

12 Q. I'd like to turn to North Dakota Telephone
13 Company's plans to enter the video market. When
14 did you start considering entering the video
15 market?

16 A. I think my testimony states that we
17 started looking at replacing our facilities in
18 Devils Lake because they were old and depreciated
19 out, and I think in 2004 we started looking at a
20 way to either do that by copper or video since we
21 were going to do it anyway.

22 Q. That was about when in 2004? The first
23 part of the year, spring, summer, fall?

24 A. I would say fall, probably. I just don't
25 recall.

□

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1 Q. Back to your copper plant. It's
2 depreciated. It's still functional, though;
3 right? Telephone service still works in Devils
4 Lake?

5 A. Yes.

6 Q. And you're providing DSL over that plant
7 now, aren't you?

8 A. Mm-hmm. Yes, we are.

9 Q. So you don't actually need to upgrade to
10 continue to provide reliable phone service or high-

11 speed Internet to your customers?

12 A. Well, we wouldn't have had to, but, as I
13 said, the plant is aging, probably would cause some
14 future problems, and we just made a decision that
15 fiber would be the way to go because it has more
16 capacity and it's less maintenance for the future.

17 Q. But today everything works fine?

18 A. Today it does.

19 Q. Now, your testimony says on page 9, and
20 this is line 4, that you finalized your video
21 upgrade -- I'm sorry -- your fiber upgrade plans in
22 early 2005.

23 A. Which page again? Excuse me.

24 Q. Page 9, line 4.

25 A. Yes.

□

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1 Q. Can you be a little more precise?

2 A. Line 4?

3 Q. Yes.

4 A. I think we studied the difference between
5 fiber and copper and then plans were finalized in
6 early 2005. It was probably the February or March
7 time frame that the board approved to go ahead with
8 the fiber project.

9 Q. Okay. Now, during your deposition you
10 mentioned a study that was done on the question of
11 whether NDTTC should provide video programming. And
12 before I go any further, let me say, so Mr. Negaard
13 is aware of this, I do not intend to ask any

14 questions at all about the particular data in the
15 study. I know that was objected to during the
16 deposition and we're not going to go there. But I
17 want to talk to you a little bit about that study.

18 A. Where is --

19 Q. You talk about it starting -- actually
20 it's discussed starting on page 11, going to page
21 12 of your deposition.

22 A. 11 and 12.

23 Q. Mr. Negaard indicates during the
24 deposition that such a study was prepared and
25 indicates it's not going to be made available, and

□

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1 we're not asking for it now, but I have a couple
2 questions about it.

3 A. Okay. I haven't found it yet.

4 Q. Okay. It's -- the discussion starts on
5 page 11, line 21 of your deposition and continues
6 on to page 12, line 13 is the part that's actually
7 relevant. There's further discussion of why it
8 won't be made available, but that's not what I'm
9 asking about.

10 A. Other than we felt it was highly
11 proprietary, is that what you mean?

12 Q. We're not going to ask you about the
13 numbers in the study.

14 A. Okay.

15 Q. But I'd like to know when it was started.

16 when did you commission the study?

17 A. well, I think I previously stated that it
18 was done sometime in the fall, so I suppose in the
19 -- I don't know exactly sure when.

20 Q. Okay.

21 A. Sometime earlier that year.

22 Q. And when was that study completed? was it
23 completed prior to the decision in February or
24 March of 2005 to do the upgrade?

25 A. well, we did the study in order to take it

□

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1 to the board to get it approved, so, yes, I guess.

2 Q. And did that study conclude that it was
3 desirable for NDTC to enter the video market?

4 A. No.

5 Q. It concluded it was not desirable?

6 A. It didn't conclude that. It just
7 concluded that we decided to go with the fiber
8 rather than the copper cable.

9 Q. Now, the study is described in the
10 deposition as concerning whether or not you should
11 be involved in the video market in competition with
12 Midcontinent. You're saying that the description
13 in the deposition is incorrect?

14 A. We're talking again about that same page?

15 Q. Yes. Let me read to you. I think it
16 would be helpful.

17 A. Why don't you point it out to me.

18 Q. This is page 11, line 21, question by Mr.
Page 124

19 Durick, "The fifth item is a copy of any studies
20 done by North Dakota Telephone Company or
21 consultants on the subject of NDTC providing video
22 programming in competition with Midcontinent."
23 Then I'm going to skip to line 6 on page 12 because
24 the rest of it's not that relevant. Mr. Negaard:
25 "There is -- there is such a study." So my

□

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1 question is, are you telling me that that study
2 that's referred to there concluded it was not
3 desirable to enter video or that it was desirable
4 to enter video?

5 A. Well, I'm confused. There must be two
6 different studies. I think the study we're talking
7 about there is what the effect on the company would
8 be if they lost 10 percent of their access lines to
9 a facilities-based service. The video -- the study
10 here was just to --

11 Q. Mr. Dircks, I believe that that's not --
12 that there were in fact two studies and you're
13 correct in that regard. But I would refer you to
14 just before that, it's page 10 on the copy I have,
15 but in fact I think it's probably going to be -- it
16 may be page 10 on the copy you have, as well. And
17 Mr. Negaard says there's a study on
18 facilities-based competition, not on wholesale
19 resale and we believe it's highly proprietary,
20 confidential. So during your deposition there were

21 two different studies discussed, is that right, and
22 one was on -- one of those studies, as you've just
23 said, was on the effect of facilities-based
24 competition?

25 A. Right.

□

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1 Q. The second study was on competition in
2 video programming provided by your company with
3 Midcontinent; is that correct?

4 A. Yes, I guess it is.

5 Q. That second study you just told me was
6 completed before the decision to do the fiber
7 upgrade. That's correct?

8 A. Say it again.

9 Q. You just told me about five minutes ago
10 that the study on video programming, the second
11 study, was completed prior to the decision to do
12 the upgrade with fiber. Is that correct?

13 A. I guess the study was done to determine
14 which way we were going to go as far as rebuilding
15 our facilities in Devils Lake.

16 Q. And you concluded that you were going to
17 do fiber?

18 A. We talked about it, yes.

19 Q. You're doing it now; right?

20 A. No.

21 Q. You're building fiber now?

22 A. Oh, we're building fiber now, yes.

23 Q. Okay. So in conjunction with the

24 conclusion you were going to go to fiber, you had
25 the study that was done on the question of video

□

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1 competition in Devils Lake? Yes?

2 MR. NEGAARD: Your Honor, if I could, the
3 language in the deposition is my language. I think
4 part of the confusion here is I'm not intimately
5 familiar with this study, Your Honor. It was at a
6 deposition. I made an objection about that study.
7 I'm not sure that there were two studies. I
8 believe that the study is the same study and that
9 was referenced in the deposition, and I think that
10 the witness is referring to two studies, one on the
11 effect of a facilities-based competitor, the other
12 one being the study whether or not they should
13 replace their copper lines with fiber. And I think
14 that's where some of the confusion is. I think at
15 the deposition I referenced and objected twice. I
16 think it's the same study that was referenced.

17 MR. HARRINGTON: Mr. Negaard, that's
18 interesting. Not entirely clear to me how that
19 confusion is possible in light of what the
20 deposition says, but I'm going to move on.

21 JUDGE WAHL: Well, it's not at all clear
22 to me, either, and I'm sure to nobody else, Mr.
23 Harrington, so let's --

24 MR. HARRINGTON: I'm going to move on,
25 Your Honor.

1 JUDGE WAHL: Well, either that or let's
2 get to the issue that you're -- the question that
3 you're seeking, the witness either knows the answer
4 or he doesn't and let's forget about which study it
5 is.

6 MR. HARRINGTON: I'm not going to ask
7 about the study anymore.

8 JUDGE WAHL: All right. Fair enough.

9 Q. (MR. HARRINGTON CONTINUING) I'm going to
10 move on and just ask a question as it relates to
11 the timing of all of that, which is, was the
12 ability to offer video over the fiber upgrade part
13 of the decision process in February or March of
14 last year?

15 A. It carried some weight, yes.

16 Q. So the board concluded that it was
17 desirable to be able to offer video in March or
18 February of 2005?

19 A. We were building our infrastructure so
20 that we could offer video sometime in the future.
21 We made that decision, yes.

22 Q. Let's talk about the upgrade, itself,
23 now. What's the capacity of your upgraded plant
24 going to be compared to current capacity besides
25 much more?

1 A. I'm not a technical expert. I don't know
2 if I could answer that. I think everyone knows the
3 band width has much more -- or copper has much more
4 band width and capacity than copper does.

5 Q. You meant fiber has more capacity?

6 A. Or fiber, yes. Excuse me.

7 Q. How many video channels do you think you
8 will be able to offer over that, ballpark?

9 A. I don't know.

10 Q. More than 50?

11 A. I have no idea.

12 Q. Do you have a sense of what percentage of
13 your capacity will be required for telephone
14 service?

15 A. No, I don't.

16 Q. How about for high-speed Internet?

17 A. Again, I'm relying on technical experts
18 that work for our company --

19 Q. Okay.

20 A. -- to say that -- make recommendations as
21 that's the right decision.

22 Q. What technical steps do you know of that
23 you'll have to take to offer video once you've
24 built the fiber upgrade?

25 A. Basically I just know that we have to

□

1 first obtain a franchise from the city and then

2 enter into some agreements with the content
3 providers.
4 Q. Mm-hmm.
5 A. And there's probably numerous other things
6 that I'm not aware of.
7 Q. The fiber, itself, won't have to be
8 changed in any way once you decide to offer video,
9 will it?
10 A. The fiber won't, no.
11 Q. When you were making your purchase
12 decisions to decide what to buy to upgrade the
13 plant to fiber, you included the -- did you include
14 the possibility of providing video as one of your
15 factors in those decisions?
16 A. I think you just asked me that. Would you
17 say that again?
18 Q. When you were deciding what to buy,
19 specifically when you went out to make contracts
20 with suppliers, was the ability to offer video part
21 of what you asked about when you were talking to
22 those suppliers?
23 A. For just the fiber?
24 Q. For the upgrade.
25 A. To actually put in fiber and cut it over,

□

1 there wouldn't need to be any other equipment
2 involved other than what the customer currently has
3 on the side of their house, and, yes, we did go out
4 and talk to providers about some of the equipment

5 necessary to provide video.

6 Q. So, for instance, when you talked to

7 Allied Telesyn who, I believe, is your supplier,

8 you talked to them about whether they would be able

9 to -- whether the facilities you bought from them

10 to put in your network would be able to provide

11 video?

12 A. Yes.

13 Q. I would like to talk a little bit about

14 the cost of the fiber upgrade. You estimated

15 during your deposition the cost would be about 11.5

16 million dollars. Is that still correct?

17 A. Actually, it came in a little lower than

18 that.

19 Q. That's good.

20 A. It's close, yes.

21 Q. And that's to upgrade all of the Devils

22 Lake area and some outlying areas; is that right?

23 A. Yes.

24 Q. But the Devils Lake exchange essentially?

25 A. Yes.

□

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1 Q. How are you paying for it again?

2 A. Part of it we're financing internally and

3 the rest we're borrowing from CoBank.

4 Q. I'm going to ask some questions about how

5 you're allocating the cost of this fiber upgrade on

6 your books. What percentage of the upgrade are you

7 going to allocate -- have you allocated to
8 telephone service?

9 A. You know, I'm not a real expert on
10 finances, but if it's just for regulated telephone
11 service, it would be a hundred percent allocated.

12 Q. But the question is, what percentage of
13 your fiber upgrade are you allocating to telephone
14 service?

15 A. I don't know.

16 Q. As the general manager, are you involved
17 in decisions about cost allocation and spending
18 money?

19 A. Yes.

20 Q. Are you responsible for making sure the
21 company is appropriately profitable and understands
22 what its costs and services it offers are?

23 A. Should be, yes.

24 Q. And you don't know what percentage of the
25 cost is being allocated to telephone service?

□

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1 A. Not for sure, no.

2 Q. Was that allocation done prior to the time
3 that you started the upgrade?

4 A. No, I don't believe so.

5 Q. Is the same thing true that you do not
6 know what percentage of those costs have been
7 allocated to high-speed Internet?

8 A. I just don't know. I can find out. I'm
9 just not sure.

10 Q. That's all right. I'd like to talk a
11 little bit about the part of your testimony where
12 you discuss public statements on your entry into
13 video. And for this purpose I would like to refer
14 you to -- let me get the exhibit number correctly
15 -- P4. Do you have a copy of Plaintiff's 4 up
16 there -- Petitioner's 4? While we're at it, we
17 should get 3 and 5, as well, because we'll be
18 referring to them a little later.

19 JUDGE WAHL: That's Fischer's direct.

20 MR. HARRINGTON: I'm sorry. Maybe I have
21 the numbers wrong. I'm sorry. It's only P3 and
22 P4.

23 Q. (MR. HARRINGTON CONTINUING) Now, during
24 your testimony you indicated that there had been no
25 public statements from your company indicating you

□

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1 were offering video prior to your testimony. Is
2 that correct? Is that correct?

3 A. Yes.

4 Q. I'd like you to turn to the first page of
5 Exhibit P4.

6 A. Mm-hmm.

7 Q. And there's an article with the headline,
8 "Company keeps equalization plan, cans long-
9 distance offer." I'd like you to read the sentence
10 that starts at the very bottom of that article and
11 it continues on to the next page. Would you read

12 it out loud, please?

13 A. "Dircks said equalizing"? --

14 Q. Yes.

15 A. -- "rates will even enable the company to
16 bundle services and compete with cable providers".

17 Q. What did you mean when you said that?

18 A. I meant that our rates were all different
19 at one time and that's why we went through the rate
20 equalization.

21 Q. Right. What about the part where you say
22 you'll enable the company to bundle services and
23 compete with cable providers? What does that refer
24 to?

25 A. I guess in that statement I was referring

□

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1 to local service and high-speed Internet, bundling
2 those together.

3 Q. I see. Do you think it's effective -- in
4 light of your other testimony, do you think it's
5 effective for you to compete with cable operators
6 just with telephone and high-speed Internet?

7 A. I guess I don't have any experience on
8 that.

9 Q. Okay. I'd like you to turn now to what is
10 the fourth page of Exhibit P4, which is the web
11 page, press release from Allied Telesyn.

12 A. Mm-hmm.

13 Q. And I would like you to read the first
14 sentence up to where it says "Devils Lake

15 exchange," please, out loud.

16 A. First sentence starting with Allied
17 Telesyn?

18 Q. Yes.

19 A. "Allied Telesyn, a global provider of
20 secure Ethernet/IP access solutions and an industry
21 leader in the deployment of IP Triple Play networks
22 over copper and fiber infrastructure, today
23 announced that its IP Triple Play solution has been
24 chosen by North Dakota Telephone Company for a
25 multi" -- is that far enough?

□

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1 Q. I was going to have you read up to Devils
2 Lake.

3 A. Okay. -- "for a multi-million dollar
4 fiber-to-the-premise overbuild of its Devils Lake
5 exchange."

6 Q. In that sentence, the term "Triple Play,"
7 what does that refer to?

8 A. Triple Play in the industry standard, I
9 believe, is voice, video, and data.

10 Q. Is that what you said in your testimony?
11 Is that what you said in your testimony, Mr.
12 Dircks?

13 A. Which page are you looking at?

14 Q. Let's look at page 4, lines 2 to 3.

15 A. I did say Triple Play, yes.

16 Q. And what did you describe the Triple Play

17 as in your testimony?

18 A. I don't see where I did describe it.

19 Q. Why don't you read line 3 through the word
20 "video."

21 A. "Triple play of voice, information, and
22 video."

23 Q. So that was the understanding of Triple
24 Play that you had when you wrote your testimony?
25 Yes?

□

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1 A. Yes.

2 Q. All right. I'd like you to turn now in
3 that exhibit to the second to the last page.

4 A. P4?

5 Q. Of P4, yes. And I'd like you to read the
6 second sentence of -- let me ask first, this is a
7 letter that you sent to customers where you're
8 starting to do your fiber rebuild to tell them that
9 you plan to put fiber on their premises; is that
10 correct?

11 A. Looks like it, yes.

12 Q. And you didn't actually sign it, but your
13 name is at the bottom?

14 A. Yes.

15 Q. I'd like you to read the second sentence
16 of the second first full paragraph, please, begins
17 "By converting."

18 A. The second sentence of the --

19 Q. The paragraph begins, "NDTC's fiber to the
Page 136

20 premise."

21 A. Mm-hmm.

22 Q. I would like you to read the second

23 sentence of that paragraph, please.

24 A. "By converting to this type of network,

25 NDTTC will be able to deliver telephone, Internet

□

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1 and new products in the future all on one fiber

2 optic line."

3 Q. Right. What new products?

4 A. Video would be one of them.

5 Q. All right. I'd like you to turn to the

6 last page of that exhibit, which is the ad for the

7 account executive job, and I'd like you to read the

8 second sentence of that ad, please.

9 A. Starting with "a substantial degree"?

10 Q. A substantial degree.

11 A. "A substantial degree of knowledge and

12 experience in all aspects of telephony with

13 emphasis in voice, data, IP" --

14 Q. Continue.

15 A. -- "computer based networking, video,

16 surveillance and security cameras, et cetera, is

17 desired."

18 Q. So video was part of the job description

19 in the ad for that job?

20 A. It's something we had in there as

21 desired.

22 Q. Okay.

23 A. I don't think it's any secret that we're
24 not going to be offering video. Hopefully when you
25 hire someone, it will be for quite a number of

□

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1 years.

2 Q. When was that ad placed?

3 A. July 5th, 2005, it says.

4 Q. That's the closing date; right? That's
5 the date by which you had to have the resumes in?

6 A. Yes.

7 Q. In your testimony you attach to that a job
8 description that is dated -- was approved in May of
9 2005. So would the ad have been run roughly
10 contemporaneously with the approval of the job
11 description?

12 A. I'm going to have to look at the
13 description because --

14 Q. Because if you look at the top of the job
15 description, it has a prepared date and an approved
16 date and they're both May '05.

17 A. Do I have this in here?

18 Q. It's in your testimony, Mr. Dircks. Are
19 those dates accurate?

20 A. Apparently it looks like we revised it and
21 then it was approved that day, yeah, 5-5.

22 Q. Okay. I'd also like to ask you about
23 other ways you might have of getting into video
24 service. Has North Dakota Telephone considered

25 reselling DirecTV?

□

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1 A. We've looked at it, yes.
2 Q. But decided not to?
3 A. Haven't pursued it, no.
4 Q. How about EchoStar DISH Network?
5 A. No.
6 Q. Do you need anybody's permission to do
7 that outside of DirecTV or EchoStar?
8 A. No.
9 Q. You don't need a franchise?
10 A. I don't believe you do with those.
11 Q. So if you wanted to make video available
12 to your customers today via those mechanisms, you
13 could?
14 A. We could, yes.
15 Q. I'd like to move on to Midcontinent's
16 request to you for resale in May of last year, and
17 that is the other exhibit that you were given,
18 which is P3.
19 A. Mm-hmm.
20 Q. You indicate in your testimony that you
21 received that letter. That's correct?
22 A. Yes.
23 Q. The enclosure in that letter was a draft
24 resale agreement, wasn't it?
25 A. Yes.

1 Q. Are you aware that the agreement was an
2 agreement for wholesale resale?
3 A. That's the agreement that's attached
4 here?
5 Q. Yes.
6 A. I think I probably did, yes.
7 Q. Okay. Did you ever read the agreement?
8 A. I looked through it.
9 Q. Not closely?
10 A. No.
11 JUDGE WAHL: The answer is no?
12 THE WITNESS: No.
13 Q. (MR. HARRINGTON CONTINUING) Did anyone
14 else at North Dakota Telephone look at it closely,
15 to your knowledge?
16 A. I don't believe so.
17 Q. Did North Dakota Telephone ever send a
18 substantive response to that agreement to
19 Midcontinent saying we don't like this part, we do
20 like this part, or something like that?
21 A. We sent a letter of clarification.
22 Q. Now, that letter said you weren't sure if
23 Midcontinent wanted wholesale or retail resale;
24 right?
25 A. Based on the fact that we have the rural

1 exemption.
2 Q. And yet the agreement is a wholesale
3 agreement, isn't it?
4 A. Yes.
5 Q. Okay. Has NDTC at any point identified
6 any parts of this agreement that it finds
7 objectionable?
8 A. Never got that far with it.
9 Q. Now, your other witness in his reply
10 testimony, Mr. Meredith, said Midcontinent has
11 never requested retail resale. That's on page 10
12 of his testimony. How is that consistent with your
13 testimony?
14 A. I'm going to have to look at his testimony
15 because I don't know.
16 Q. Do you have a copy?
17 A. I don't think so.
18 Q. I would give you mine except that it has
19 markings that I prefer not to show you.
20 JUDGE WAHL: I have a copy, Mr.
21 Harrington.
22 MR. HARRINGTON: Thank you.
23 MR. DURICK: I've got one here, too,
24 Judge.
25 JUDGE WAHL: whichever.

□

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1 MR. HARRINGTON: This is on page 10, lines
2 3 through 4.

3 MR. NEGAARD: Whose testimony are we
4 reviewing?
5 MR. HARRINGTON: Mr. Meredith's.
6 MR. NEGAARD: Your Honor --
7 MR. HARRINGTON: Are you asking whether
8 it's appropriate for me to cross on testimony
9 that's not been admitted? We'll stipulate we are
10 not going to object to that testimony.
11 MR. NEGAARD: If you want to ask Mr.
12 Meredith about his testimony, I believe, Your
13 Honor, that that would be more appropriate to ask
14 Mr. Meredith.
15 JUDGE WAHL: I don't think that's the
16 question, Mr. Negaard.
17 MR. HARRINGTON: I'm asking --
18 JUDGE WAHL: I understand. Proceed.
19 Q. (MR. HARRINGTON CONTINUING) So, Mr.
20 Dircks, on page 10 of his testimony, Mr. Meredith
21 said Midcontinent has never requested retail
22 resale, on lines 3 and 4. How is that consistent
23 with your testimony where it appears that you
24 thought that Midcontinent was asking for retail
25 resale?

□

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1 A. Well, apparently wholesale. If I
2 understand, retail is the one that's not in the
3 discount.
4 Q. That's correct.
5 A. That's what I mean.

6 Q. I want to turn to the impact of offering
7 resale on NDTC for a moment. During your
8 deposition you indicated that there were no
9 technical issues that would prevent NDTC from
10 offering wholesale resale; is that correct?

11 A. That's correct.

12 Q. So once the rural exemption is lifted, all
13 that's needed prior to implementation is an
14 agreement between NDTC and Midcontinent?

15 A. Yes, to the best of my knowledge.

16 Q. I'd also like to move on -- I'd now like
17 to move on to the benefits of competition. This is
18 the last thing I'll be asking you about unless
19 something surprises me.

20 In your testimony you indicate that NDTC
21 provides excellent customer service and that there
22 have been very few complaints against your
23 company. That's on page 1 -- I'm sorry -- page 4,
24 I believe.

25 A. Okay.

□

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1 Q. Do you know how many complaints were filed
2 against your company at the North Dakota Commission
3 from September 2004 through August 2005?

4 A. I did check, and I think within the last
5 five years we had 15.

6 Q. Would you be surprised to know that the
7 correct number is 94 for that one year?

8 A. I would be surprised. I'm talking about
9 service-related issues.

10 Q. Oh, okay. So what would the other
11 complaints be about? would they have been about
12 your rate increase?

13 A. They could have been.

14 Q. So if you think -- if customers were
15 concerned enough to complain about rate increases,
16 do you think they might find competition
17 beneficial?

18 A. I'm not saying that competition isn't
19 good. I've had nothing against that. I'm not
20 afraid of it. We haven't raised our rates since
21 1984.

22 Q. Mr. Dircks, do you think your customers
23 would find competition beneficial?

24 A. I think they would, yes.

25 Q. Do you think competition helps make you

□

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1 more responsive to customer needs?

2 A. I'll just answer that by saying, again,
3 I'm not against competition. I think we're very
4 responsive to our customers' needs now.

5 Q. I understand, Mr. Dircks. I would like
6 you, though, to answer the question.

7 A. Say it again.

8 Q. Do you think competition makes you more
9 responsive to customer needs?

10 A. I think it could, yes.

11 Q. Do you think choice is better for
12 customers?

13 A. Choice is good.

14 Q. To your knowledge, how did choice affect
15 long distance customers in the prices they pay?

16 A. It's pretty common knowledge that it
17 reduced the cost of long distance once the
18 competition was introduced.

19 MR. HARRINGTON: Thank you. Your Honor, I
20 have nothing further.

21 JUDGE WAHL: Mr. Binek.

22 MR. BINEK: An awful lot has been covered
23 here.

24 COMMISSIONER WEFALD: May we take a
25 five-minute break?

□

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1 JUDGE WAHL: We may. We'll be in recess
2 for --

3 THE WITNESS: why don't you let me finish
4 first.

5 JUDGE WAHL: -- at least five minutes. We
6 won't start without you, Commissioner Wefald.

7 COMMISSIONER WEFALD: All right. Thank
8 you.

9 (Recess taken at 2:37 p.m. to 2:48 p.m.)

10 JUDGE WAHL: You're on, Mr. Binek.

11 MR. BINEK: Thank you. Hopefully I just
12 have a few questions.

13

14 BY MR. BINEK:

15 Q. I'm going to address the issues that were
16 set forth in the Commission's hearing notice.
17 First of all, the first issue is whether the
18 request of Midcontinent is unduly economically
19 burdensome. And I just would like clarification as
20 to what your position is on that issue. Do you
21 believe that it's economically burdensome for the
22 request to be granted?

23 A. I can't argue that it's economically
24 burdensome.

25 Q. So it is not economically burdensome?

□

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1 A. Not now, but --

2 Q. Okay. Is the request of Midcontinent
3 technically feasible?

4 A. I believe it is, yes.

5 Q. And the third one is whether the request
6 of Midcontinent is consistent with 47 USC Section
7 254, which is the universal service part of it. Do
8 you believe that if the request is granted, that
9 there will be any major effect on universal
10 service?

11 A. Should not be any short-term effect, no.

12 Q. Now, getting to -- the fourth issue is the
13 implementation schedule. Are you familiar with
14 what other states have done regarding
15 implementation schedules when a rural exemption has

16 been lifted?

17 A. No, I'm not.

18 Q. Based on my reading of the testimony in
19 this case and the testimony that's been given here,
20 it appeared that -- to me that the concerns or
21 objections are essentially limited to establishing
22 a level playing field for competitors both for
23 telecommunications and for video. Is that your
24 position?

25 A. Yeah. We'd like to have a level playing

□

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1 field, yes.

2 Q. If the Commission were to deny
3 Midcontinent's request for lifting the rural
4 exemption, that would mean basically that resale of
5 telecommunications at a wholesale discount would
6 not be available to Midcontinent until you began
7 offering video; is that correct?

8 A. That's how I understand it, yes.

9 Q. At the point that you begin offering
10 video, of course, your exemption no longer exists.
11 How long would you say it would take for
12 Midcontinent to begin providing telecommunications
13 service -- resale service at a wholesale discount
14 from your company?

15 A. Now, you're saying if the rural
16 exemption --

17 Q. Assume that you have started providing

18 video service so your rural exemption no longer
19 exists.

20 A. Mm-hmm.

21 Q. At that point you would not be able to
22 deny Midcontinent the right to obtain resale --

23 A. At a wholesale --

24 Q. -- services at a wholesale level.

25 A. Right.

□

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1 Q. How long would it take to implement that
2 process of having them be able to receive those
3 services from you and begin offering
4 telecommunications service in the Devils Lake
5 exchange?

6 A. I'm assuming that would be dependent on
7 when an agreement was reached on an interconnection
8 agreement.

9 Q. Do you have any idea how long that would
10 take?

11 A. No, not really, I don't.

12 Q. Midcontinent has suggested a 90-day time
13 period. Do you think that's realistic?

14 A. I don't see how it could be. There's a
15 lot of issues to resolve there. I'm not an expert
16 on what those would be, but just getting everybody
17 together for this hearing took quite some time.

18 Q. So if the rural exemption were not lifted
19 and you began offering video service, at that point
20 doesn't North Dakota Telephone Company have the

21 advantage?

22 A. They would have, but I'm saying that to
23 have a level playing field, that we should be able
24 to offer that both at the same time.

25 Q. How is that going to happen? I guess

□

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1 that's what I'm trying to figure out. How can you
2 get both companies providing the same thing at the
3 same time?

4 A. Just off the surface, we'd have to work
5 together to make sure that an interconnection
6 agreement was in place so we could both offer that
7 service at the same time.

8 MR. BINEK: I have no further questions.

9 JUDGE WAHL: Questions by the
10 Commissioners. Commissioner Clark.

11 EXAMINATION

12 BY COMMISSIONER CLARK:

13 Q. Just one. On the universal service side,
14 I think you responded to Mr. Binek regarding
15 universal service support and the impact of losing
16 voice customers to Midcontinent potentially would
17 have. As you understand it, is universal service
18 support calculated for North Dakota Tel as such
19 that if you lost a line to a customer to a
20 Midcontinent or any competitor, that when you
21 recalculate that line next year for purposes of
22 high cost support, that you just reweight the

23 average cost per line, right, so that in effect is
24 North Dakota Tel made whole on the case when you
25 lose a customer and the support goes away? Do you

□

163

1 understand what I'm asking? So that all you do is
2 you recalculate the average cost per line?

3 A. I believe that's the way it works, yeah.
4 The only way we would really be affected is if we
5 lost it to a facility-based, then we would lose the
6 whole thing, of course.

7 Q. A facilities-based ETC?

8 A. Yeah.

9 COMMISSIONER CLARK: Okay. Thank you.

10 JUDGE WAHL: Commissioner Wefald, any
11 questions?

12 COMMISSIONER WEFALD: I have no questions
13 at this time.

14 JUDGE WAHL: Commissioner Cramer.

15 EXAMINATION

16 BY COMMISSIONER CRAMER:

17 Q. I have a couple, and forgive me if they
18 have been answered and I know that some have, so
19 I'm been trying to keep track of that.

20 Getting back to what, I think, Mr. Binek
21 was asking, and I'm not sure I got it real clear,
22 what would prevent North Dakota Telephone Company
23 from offering triple play bundle or triple play
24 services as soon as you're able?

25 A. That's what we plan on doing as soon as
Page 150

1 we're able.

2 Q. But is that in a level playing field then
3 with the competition, because they're going to have
4 to, as I understand it, go through what you and --
5 you have testified would be a long process to be
6 able to offer resale telecommunications service.
7 So if a level playing field is the basis of your
8 position, that doesn't seem level to me.

9 A. Well, however it's worked out. I guess
10 what I mean by a level playing field is that we
11 both would be able to offer that service at the
12 same time.

13 Q. Okay.

14 A. And I'm not sure how all that would work
15 out.

16 Q. So you're saying, as I understand it and
17 if I understand your testimony, if all goes
18 according to plan and the buildout works, basically
19 a year from now or a year from February, you'll be
20 able to offer video service?

21 A. If things go as planned, yes.

22 Q. If everything goes as planned. Well, then
23 would you be -- is there a possibility, I guess, or
24 would you be willing to work with Midcontinent that
25 would guarantee that on February 1st everybody

1 would be able to offer everything? In other words,
2 as soon as you're ready to go, they would be ready
3 to go and that we wouldn't have another situation
4 where suddenly we would be talking about 90 days
5 and then 90 days turns into all the nightmares we
6 have been hearing about today? In other words, we
7 have a year to be prepared for this, depending on,
8 of course, the Commission's decision.

9 A. Yes.

10 Q. Evidently you don't agree, but -- maybe
11 this is a better way to put it. Do you agree with
12 Mr. Gates' presumption that calculating a resale
13 rate agreement should not be complicated? You
14 know, he testified that it shouldn't be that
15 complicated. I hear you saying it could be very
16 complicated. Which is --

17 A. Again, this is all new to me and I've
18 never done it before, but I guess I believe it
19 could be complicated or it could be worked out.

20 Q. Has North Dakota Telephone been preparing
21 for competition? Would it be safe to say you have
22 been preparing for competition?

23 A. Yes.

24 Q. Certainly the recent decision by this
25 Commission on your rebalancing rates was -- largely

□

1 your arguments were you want to be prepared for
Page 152

2 competition?

3 A. Well, we have competition today and we
4 know that Midco is going to be offering telephone
5 service, both facility-based and otherwise, and we
6 have to prepare for the future.

7 Q. Just one other thing then. Mr. Binek went
8 down the issues that we have to consider in this
9 matter and, if I heard you right, it almost sounds
10 like they're settled -- I mean, unless I heard
11 something -- unless there's something that I'm not
12 seeing, but you said that the request by
13 Midcontinent is not unduly burdensome --
14 economically burdensome, that the request is
15 technically feasible and that the request is
16 consistent with 47 USC 254, basically the universal
17 service.

18 A. Yes, sir.

19 Q. Then the only outstanding issue would be
20 the implementation schedule for compliance, which
21 we can start working on it right now, or am I
22 missing something? I mean, technically there's no
23 reason we couldn't do what Midcontinent is asking
24 right now other than, as I understand you to say,
25 other than it just doesn't create a level playing

□

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1 field?

2 A. You know, it's technically feasible to do
3 it, but --

4 Q. And it's not economically burdensome to
5 North Dakota Telephone?

6 A. At this point in time, no, it isn't.

7 COMMISSIONER CRAMER: That's all I have.

8 JUDGE WAHL: Mr. Negaard, followup.

9 MR. NEGAARD: Okay. Just a couple
10 questions.

11 REDIRECT EXAMINATION

12 BY MR. NEGAARD:

13 Q. The discussion about the person you hired,
14 did you hire someone to fill that position?

15 A. Yeah. It was October, I think, they were
16 hired.

17 Q. Okay.

18 A. Or November. I'm not sure.

19 Q. Is that person out selling video today?

20 A. No.

21 Q. The discussion about the USF funds, some
22 of those dollars could go away, as I understand it,
23 if there were a facilities-based competitor?

24 A. That's correct.

25 Q. And the money that's received from that

□

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1 USF funding, is that for money that your company
2 has invested in serving as an essential
3 telecommunications carrier?

4 A. The way I understand it, yes.

5 Q. Is that from the investment that you've
6 made in the system that you have and the business

7 operations that you conduct as an ETC?

8 A. Yes.

9 MR. NEGAARD: That's all I have. Thank
10 you.

11 JUDGE WAHL: Mr. Harrington, anything
12 further?

13 MR. HARRINGTON: Just a couple.

14 CROSS-EXAMINATION

15 BY MR. HARRINGTON:

16 Q. Mr. Dircks, you just testified that some
17 of the universal service support could go away.
18 Can you identify what support you're referring to?

19 A. I was referring to a facility-based.

20 Q. I'm sorry. I may not have been clear.
21 During cross-examination you identified two sources
22 of support from the FCC, one was interstate common
23 line support and the other was local switching
24 support. Is one of those vulnerable particularly,
25 or both of them, or is there some other place you

□

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1 would lose universal service funding?

2 A. Not that I know of. On a facility-based
3 loss of a customer, I think we lose all that, if
4 I'm not mistaken.

5 MR. HARRINGTON: Thank you. No further
6 questions.

7 JUDGE WAHL: Anything further, Mr. Binek?

8 FURTHER EXAMINATION

9 BY MR. BINEK:
 10 Q. Just a clarification following up here.
 11 we're not talking about facility-based competition
 12 here, are we?
 13 A. No.
 14 Q. So you wouldn't lose any universal service
 15 funds --
 16 A. No.
 17 Q. -- from competition from Midcontinent at
 18 this time; is that right?
 19 A. That's correct, I believe, yes.
 20 MR. BINEK: Thank you.
 21 JUDGE WAHL: Anything further, Mr. Binek?
 22 MR. BINEK: No.
 23 JUDGE WAHL: Any further questions from
 24 the Commissioners? If not, Mr. Negaard, anything
 25 further for this witness?

□

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1 MR. NEGAARD: Not at this time, no.
 2 JUDGE WAHL: Thank you, Mr. Dircks.
 3 THE WITNESS: You're welcome.
 4 JUDGE WAHL: Mr. Negaard.
 5 MR. NEGAARD: Your Honor, Mr. Moorman will
 6 take the next witness.
 7 JUDGE WAHL: All right. Mr. Meredith, I
 8 believe.
 9 MR. MEREDITH: Yes, sir.
 10 JUDGE WAHL: As you heard me advise
 11 previous witnesses, your testimony is required to

12 be under oath and I'm required by law to advise you
13 regarding perjury before administering the oath.
14 Perjury is a false statement of material fact which
15 you do not believe to be true; in other words,
16 generally speaking, a lie. In North Dakota perjury
17 is a Class C felony, punishable by a fine up to
18 \$5,000, imprisonment for a period of up to five
19 years, or both. Will you raise your right hand,
20 please.

21 (Witness sworn.)

22 JUDGE WAHL: Mr. Moorman.

23 MR. MOORMAN: Thank you, Your Honor.

24 DOUGLAS DUNCAN MEREDITH,
25 being first duly sworn, was examined and testified

□

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1 as follows:

2 DIRECT EXAMINATION

3 BY MR. MOORMAN:

4 Q. Would you please state your name, title
5 and business address for the record?

6 A. Yes. My full name is Douglas Duncan
7 Meredith. My title is director of economics and
8 policy for a consulting firm named John
9 Staurulakis, Incorporated -- that's
10 S-t-a-u-r-u-l-a-k-i-s -- headquartered in
11 Greenbelt, Maryland.

12 Q. And on whose behalf are you testifying
13 today?

14 A. North Dakota Telephone Company.

15 Q. Are you the same Mr. Meredith that had
16 caused to be filed prefiled testimony on January
17 9th, 2006, in this proceeding consisting of 17
18 pages of testimony and 16 pages of attachments?

19 A. Yes.

20 MR. MOORMAN: Your Honor, I would like to
21 have designated as Exhibit, I believe, R6 his
22 prefiled testimony for identification purposes.

23 JUDGE WAHL: It is, pursuant to
24 stipulation of counsel.

25 Q. (MR. MOORMAN CONTINUING) Do you have any

□

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1 corrections to that prefiled testimony?

2 A. Yes, I have one correction on page 8, line
3 23. The sentence that begins in that line says,
4 "These procedures are followed by state
5 commissions and the FCC," and I need to strike the
6 words "and the FCC." So it reads, "These
7 procedures are followed by state commissions in
8 resolving."

9 Q. With that correction, if I ask you the
10 same questions today, would your answers be the
11 same?

12 A. Yes.

13 Q. Do you accept this testimony as your
14 testimony in this proceeding?

15 COMMISSIONER WEFALD: I'm sorry. I can't
16 find the place. Is this the January 9th reply

17 testimony?

18 MR. MOORMAN: Yes.

19 COMMISSIONER WEFALD: Was it on page 23?

20 COMMISSIONER CLARK: Page 8.

21 THE WITNESS: Page 8.

22 COMMISSIONER WEFALD: Page 8, line 23.

23 Thank you.

24 MR. MOORMAN: The last three words on that

25 line.

□

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1 COMMISSIONER WEFALD: Okay. Thank you.

2 MR. BINEK: What should those words be

3 that were deleted?

4 MR. MOORMAN: Strike it.

5 MR. NEGAARD: Strike the words "and the

6 FCC."

7 Q. (MR. MOORMAN CONTINUING) Mr. Meredith,
8 again, with that correction, if I asked you the
9 same questions today, would your answers be the
10 same?

11 A. Yes.

12 Q. And do you accept this testimony as your
13 testimony in this proceeding?

14 A. Yes.

15 MR. MOORMAN: Your Honor, pursuant to
16 stipulation, I would like to move the prefiled
17 testimony, R6, which was previously, I believe,
18 docket entry 55, into evidence.

19 JUDGE WAHL: It is received pursuant to
20 the stipulation of counsel.

21 Q. (MR. MOORMAN CONTINUING) Mr. Meredith,
22 you also had several attachments which have been
23 preliminarily marked as exhibits to your
24 testimony. I believe R7 consists of six pages from
25 Cornell Law School, U.S. Code collection; is that

□

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1 correct?

2 A. Yes.

3 Q. R8, I believe, is a five-page -- five
4 pages, U.S. Code collection, Section 252
5 procedures?

6 A. Yes.

7 Q. R9, I believe, consists of two pages
8 dealing with the North Dakota Century Code, Title
9 49, public utilities?

10 A. Yes.

11 Q. I believe R10 is two pages consisting of
12 excerpts from the Code of Federal Regulations,
13 Federal Communications Commission, in the bottom
14 right-hand corner a notation Section 51.611 and
15 continuing for two pages?

16 A. Yes.

17 Q. And, finally, if I haven't mistaken the
18 number of exhibits, we have also an exhibit
19 consisting of one page, 12/12/2005 Midcontinent
20 Communications to Develop Family Friendly Choice?

21 A. Yes, I had filed that, but I do not have
Page 160

22 that marked as a marked exhibit in front of me.

23 Q. Mr. Meredith, I just handed to you
24 something preliminarily marked as R11. Is that the
25 document that I previously referred to?

□

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1 A. Yes.

2 Q. And that is entitled?

3 A. Midcontinent Communications to Develop
4 Family Friendly Choice.

5 Q. And that was one of the exhibit
6 attachments that were originally included in your
7 prefiled testimony?

8 A. Yes.

9 MR. MOORMAN: Your Honor, I would like to
10 move Exhibits, I believe, R7 through R11 into
11 evidence.

12 JUDGE WAHL: Mr. Durick or Mr.
13 Harrington.

14 MR. HARRINGTON: With the understanding
15 that these are identical to the ones filed with the
16 testimony, we have no objection.

17 JUDGE WAHL: Exhibits R7 through R12,
18 inclusive, are each received.

19 MR. HARRINGTON: 12 or 11, Your Honor?

20 JUDGE WAHL: 12. I'm sorry.

21 COMMISSIONER CRAMER: 11.

22 JUDGE WAHL: 11.

23 MR. MOORMAN: Let's just make sure because

24 I may have misstated.

25 JUDGE WAHL: I thought R12 was the Midco

□

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1 announcement.

2 MR. MOORMAN: I believe that's R11.

3 THE WITNESS: No, that's marked as R11.

4 JUDGE WAHL: Then I'm mistaken. All
5 right.

6 MR. MOORMAN: Just with confirmation of
7 counsel, that should consist of the 16 pages of
8 attachments that were included with Mr. Meredith's
9 original testimony prefiled on January 9th, and
10 that's the intent here. If there is some
11 variation, we can clean that up, counsel.

12 MR. HARRINGTON: Okay.

13 JUDGE WAHL: Well, but, counsel, for the
14 record, what we have is Exhibits R7 through R11,
15 inclusive.

16 MR. MOORMAN: Right. And we already
17 admitted R6, I believe.

18 JUDGE WAHL: Yes. Well, it comes in
19 pursuant to stipulation. So Exhibits R7 through
20 R11, inclusive, are each received.

21 MR. MOORMAN: Just one moment. Just
22 double-checking.

23 JUDGE WAHL: Indeed.

24 MR. MOORMAN: Your Honor, the witness is
25 available for cross-examination.

□

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1 JUDGE WAHL: All right. Mr. Harrington.
2 MR. HARRINGTON: Thank you, Your Honor.
3 CROSS-EXAMINATION
4 BY MR. HARRINGTON:
5 Q. Good afternoon, Mr. Meredith.
6 A. Good afternoon.
7 Q. I'm J.G. Harrington. I'll be doing the
8 cross-examination for Midcontinent.
9 A. Nice to meet you.
10 Q. I want to start with what I think is
11 turning out to be the central issue in this
12 proceeding, which are timing issues, and although I
13 understand that this is probably an assumption you
14 prefer not to make, I'd like you to assume for the
15 moment that the Commission rules against your
16 client and concludes that the rural exemption
17 should be lifted.
18 A. Okay.
19 Q. In your testimony you argue that the
20 Commission should adopt an order that starts the
21 clock for interconnection negotiations only after
22 the order is issued; is that correct?
23 A. Yes.
24 Q. Is it your view that once that order is
25 issued, that Midcontinent will need to send a new

□

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1 bona fide request for interconnection negotiations?

2 A. Yes.

3 Q. So the clock will only start once
4 Midcontinent sends a request to your client, in
5 your view?

6 A. Yes. A valid request needs to be received
7 before the clock starts.

8 Q. Now, therefore, your view that a bona fide
9 request under Section 252 of the Communications Act
10 is different from a bona fide request under Section
11 251(f); is that right?

12 A. A bona fide request for Section 251(f)
13 deals with the rural exemption and the lifting of
14 the rural exemption. They are different.

15 Q. I'd like you to turn then to what has been
16 marked as Exhibit R7 for the moment, and page 4 of
17 6 in that exhibit.

18 A. Yes.

19 Q. Could you read the first sentence of what
20 is (f)(1)(B) on that page?

21 A. Yes. "(f)(1)(B) states, "State
22 termination of exemption and implementation
23 schedule. The party making a bona fide request of
24 a rural telephone company for interconnection,
25 services, or network elements shall submit a notice

□

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1 of its request to the State commission."

2 Q. All right. Now, would you turn to Exhibit
Page 164

3 R8, which is Section 252 of the Communications
4 Act.

5 A. Yes.

6 Q. And I would like you to read the first
7 sentence of Section (a)(1).

8 A. 252(a)(1) entitled "Agreements arrived
9 through negotiation, (1) voluntary negotiations.
10 Upon receiving a request for interconnection,
11 services, or network elements pursuant to 251 of
12 this title, an incumbent local exchange carrier may
13 negotiate and enter into a binding agreement with
14 the requesting telecommunications carrier or
15 carriers without regard to the standards set forth
16 in subsections (b) and (c) of section 251 of this
17 title."

18 Q. Is it your view that the request described
19 here would also be a request that triggers the
20 period for arbitration under Section 252?

21 A. The difference is --

22 Q. This request, the request in 251 --
23 252(a)(1), would that also trigger the 270-day
24 period for interconnection arbitrations?

25 A. A 252 request under 252(a)(1), yes,

□

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1 triggers this -- the process.

2 Q. All right. Does 252(a)(1) say Section
3 251(c) or 251(f) or 251(b), or does it just say
4 Section 251?

012307PS.txt
5 A. I'm sorry. 251(a)(1)?
6 Q. The first sentence of 252(a)(1). When it
7 refers to Section 251, does it say 251(a) or (b) or
8 (c) or (f) or any subsection, or does it just refer
9 to that section?
10 A. The first clause refers to 251 of this
11 title.
12 Q. Okay. That's the question I asked you.
13 Thank you.
14 A. There is a difference between those two.
15 Q. Between 252?
16 A. Yeah, an (f)(1) needs to be filed with the
17 state commission --
18 Q. Right.
19 A. -- to invoke the rural exemption.
20 Q. Let's talk about that. The request has to
21 be filed with the Commission after it's made;
22 right? That's what 251(f)(1) says, isn't it?
23 A. Yes. They shall submit a notice of its
24 request to the state commission, and that
25 particular process doesn't get started until that

□

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1 submission occurs.
2 Q. So there's nothing in the text of 251(f)
3 or 252(a)(1) that says that those two requests
4 can't be the same, is there?
5 A. No. They can be the same --
6 Q. Ah, okay.
7 A. -- to the extent that --

8 Q. Thank you. Thank you.
9 A. -- to the extent that the state
10 commission --
11 MR. MOORMAN: Excuse me, Your Honor.
12 Counsel is asking a question. Your Honor said this
13 morning you were trying to get the most developed
14 record possible.
15 JUDGE WAHL: The objection is sustained.
16 The witness may be allowed to --
17 THE WITNESS: To the extent that the
18 interconnection agreement is filed with the state
19 commission, then that triggers a 251(f)(1) issue,
20 and if it is not filed with the state commission,
21 it stays over there in 252. So to my way of
22 thinking in this regard, trying to answer your
23 question fully, they have some different
24 characteristics.
25 Q. (MR. HARRINGTON CONTINUING) Do you know

□

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1 of any cases at the FCC that say that?
2 A. That say what?
3 Q. That there's a difference between the
4 request under 251(f)(1) and the request under
5 252(a).
6 A. Are you speaking of the document, itself,
7 that is sent? The document, itself, can be
8 identical.
9 Q. Is there anything in the FCC's rules that

10 says a 251(f)(1) request cannot also at the same
11 time trigger 252?

12 A. No, it can't, as long as it's filed with
13 the state commission. That's the only difference
14 between those two.

15 Q. But you've now testified that, in your
16 view, Midcontinent will need to send a new
17 bona fide request after this Commission acts --

18 A. Yes.

19 Q. -- to start the nine-month clock. How is
20 it consistent for you to say that they can be the
21 same request, but that Midcontinent will need to
22 send another one?

23 A. The request sent to North Dakota Tel by
24 Midcontinent, my understanding is that apparently
25 it was trying to be a 252(a)(1) request and North

□

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1 Dakota Telephone Company sought clarification as to
2 whether it really meant it to be a 251(a) request
3 or something else because of the issue of whether
4 it was a retail service or a wholesale service.
5 And my understanding is the response to that letter
6 that North Dakota Tel sent was a request by this
7 Commission to review an (f)(1) exemption.

8 Q. That, however, was not the question. The
9 question was, how is it consistent -- how are the
10 two positions you have taken here about what the
11 meaning of the law is consistent? That is, you
12 have said at one point that they are the same

13 request and that a 251(f)(1) request triggers a
14 270-day period and at another point in your
15 cross-examination you have said that there needs to
16 be a second request following the lifting of the
17 exemption, and my question is, how are those
18 positions consistent as a matter of law?

19 A. The first request was not technically a
20 valid request because there was a rural exemption
21 that was already in place, and this is consistent
22 with what other state commissions have done. For
23 example, in South Carolina the same issue came up
24 with Horry Telephone Company, and the state
25 commission there said the responsibility -- the

□

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1 duty to negotiate, the duty to have an
2 interconnection agreement for 251(c) duties is not
3 valid until the rural exemption is removed. They
4 removed the rural exemption and the clock started
5 at the time of that order.

6 Q. Is there an FCC rule that addresses this
7 topic?

8 A. No, I do not believe so.

9 Q. In fact, are there any FCC rules, to your
10 knowledge, that address how the rural exemption
11 must be applied that have not been overturned by a
12 court?

13 A. No. I believe that's the purview of the
14 state commissions, themselves.

15 Q. Let's go back to your time frame. I'm
16 going to work on the assumption that, although I
17 believe you are wrong, that you are correct. If
18 you're correct and Midcontinent needs to make a
19 request, that starts the clock for negotiation
20 arbitration; correct?
21 A. If the rural exemption is removed --
22 Q. After the rural exemption is lifted in
23 your scenario.
24 A. Yes.
25 Q. How long does that give this Commission to

□

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1 issue an arbitration order?
2 A. Under 252 --
3 Q. Yes.
4 A. -- rules?
5 Q. Yes.
6 A. It's a total of up to nine months through
7 the various processes that are established in 252.
8 Q. Do states always make the 270-day,
9 nine-month limit, or do they miss it sometimes?
10 A. They -- no, I believe they -- they make
11 it. Sometimes they miss it and the FCC takes the
12 responsibility, so, I'm sorry, sometimes they do
13 miss the 270-day time period.
14 Q. All right. Once the arbitration order is
15 issued, what's the next step?
16 A. Once an arbitration order is issued?
17 Q. Mm-hmm.

18 A. The state commission reviews that and it
19 gets processed and becomes effective.

20 Q. Do the parties have to turn the
21 arbitration order into an agreement?

22 A. Yes, they do.

23 Q. Do they have to submit the agreement to
24 the Commission?

25 A. Yes, they do.

□

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1 Q. How long does the Commission have after
2 the order is submitted to approve -- the agreement
3 is submitted -- I'm sorry -- to approve the order
4 -- approve the agreement? I will get it right.

5 A. I'm looking for it. It's in (e)(4) of
6 252, state commission -- I believe it's 90 days, if
7 I'm looking at that particular paragraph correctly.

8 Q. So 90 days.

9 A. If the state commission does not act to
10 approve or reject the agreement within 90 days
11 after submission by the parties --

12 Q. It goes into effect?

13 A. -- then it goes into effect.

14 Q. All right.

15 A. I think that's the right -- it's
16 252(e)(4).

17 Q. Okay. Now, once the agreement is
18 approved, the next step is for the parties to
19 implement the terms; is that right?

20 A. Yes.

21 Q. Okay. Do you think that parties typically
22 implement the terms of an agreement within a month
23 after it's been approved?

24 A. It depends on the circumstances. I can't
25 say typically in that scenario. It's all

□

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1 fact-based.

2 Q. Is it common for it to be less than a
3 month, in your view?

4 A. In my experience, it can be done rather
5 quickly. In other instances, it is not done
6 quickly. So it depends really on the facts and the
7 circumstances of the carriers.

8 Q. So is it common?

9 A. I don't know.

10 Q. All right. I'd like to put this time line
11 together to see if you agree with me. Based on
12 your testimony, what you've said is if a commission
13 issues an order February 1st -- I realize that's
14 unlikely, but we'll just use a time line. I
15 realize we'll probably still be briefing on
16 February 1st. If the Commission issues an order on
17 February 1st, Midcontinent needs to make a request,
18 let's just say for argument's sake that it takes
19 until February 4th.

20 A. Oh, I would expect it to be February 1st,
21 the effective date.

22 Q. Let's say February 1st. Midcontinent
Page 172

23 makes the request February 1st. The Commission
24 then -- the process could then take, if the
25 proceeding goes to arbitration, nine months or a

□

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1 bit more; is that right?
2 A. That's possible.
3 Q. On top of that nine months there's a
4 period of time for the parties to put the agreement
5 into written terms?
6 A. That's what I understood your "plus more"
7 was.
8 Q. Right. And then after that, as you said,
9 the Commission has up to 90 days to act on the
10 agreement?
11 A. Yes.
12 Q. And as you said, after that there's an
13 implementation period where you're unsure of how
14 long it would take, but it would take some period
15 of time?
16 A. That's all what I described -- what I
17 understood you to say what "plus more" was.
18 Q. Right. All right. So in your analysis if
19 all the time periods go to the end of the time
20 periods -- and I understand you probably think they
21 don't have to, but if all the time periods go to
22 the end of the time periods, the soonest
23 Midcontinent could be providing resale in your
24 analysis would be about -- a time period which

25 Midcontinent could be providing resale under your

□

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1 analysis is a year from the date the Commission
2 issues an order; is that correct?

3 A. Given the numbers that you've just
4 provided, yes.

5 Q. You provided the nine months; right?

6 A. The nine months is the maximum time
7 limit --

8 Q. Right.

9 A. -- for this Commission to make a
10 determination and arbitration.

11 Q. You provided the 90-day period under the
12 statute; correct?

13 A. That is the maximum time provided under
14 the Act for the Commission to act on an approved
15 agreement.

16 Q. That's correct. But it could be a year or
17 more; is that right?

18 A. If you maximize the time lines as we've
19 just described, it can be a year.

20 Q. So that's yes?

21 A. Yes.

22 Q. When did your client say that it expects
23 to be in the video business?

24 A. My understanding is the date in this
25 hearing is February 1st, 2007.

1 Q. Okay. Now let's say the Commission rules
2 in favor of your client and denies the exemption --
3 or continues the exemption -- I'm sorry -- denies
4 the request of Midcontinent. As you just stated,
5 your understanding is your client is going to be
6 providing video in February of 2007.

7 A. Yes.

8 Q. Using the same time lines, does that mean
9 that Midcontinent might be unable to offer resale
10 in Devils Lake until sometime after February 1st,
11 2008?

12 A. No.

13 Q. Now, you've just testified that the
14 Commission has nine months from the time the
15 request is made and that the Commission has at
16 least -- has up to another 90 days after that --

17 A. Mm-hmm.

18 Q. -- which by my calculation is 12 months.

19 A. Yes.

20 Q. And that's the maximum period. And you
21 just agreed that would apply if the exemption were
22 lifted, and you're saying it would not apply if the
23 exemption were lifted by the action of NDTC in
24 February of next year?

25 A. Yes, because you specified the question as

1 resale, and Midcontinent has the ability to offer
2 retail resale right now out of North Dakota
3 Telephone Company's tariff.

4 Q. All right. Then let's ask about wholesale
5 resale. The same question. Wouldn't Midcontinent
6 potentially not be able to offer wholesale resale
7 in Devils Lake until February 2008 if your client
8 prevails in this proceeding?

9 A. Yes.

10 Q. Are you aware that Midcontinent provided a
11 draft agreement for wholesale resale to NDTC in
12 May?

13 A. I reviewed it, yes, last fall.

14 Q. Has your client objected to that agreement
15 in any way?

16 A. North Dakota Telephone Company at the time
17 that it was given to North Dakota Telephone Company
18 was unclear given its cover letter whether it
19 applied to resale -- retail resale or wholesale
20 resale.

21 Q. You've read the agreement, though?

22 A. Yes.

23 Q. Does the agreement call for wholesale
24 resale?

25 A. The agreement has a wholesale discount. I

□

1 also understand that a lot of times in this
2 industry cover letters don't correspond exactly to
3 what the attachments are, and so that's --

4 therefore, it was very prudent for the company --
5 for North Dakota Telephone Company to ask for
6 clarification.

7 Q. You had no question what the agreement
8 said when you read it?

9 A. When I read the cover letter, I had lots
10 of questions as to what Midcontinent wanted to do.

11 Q. When you read the agreement, did you have
12 any doubt what the agreement said?

13 A. No, because I read it in the context of
14 reading it after a bona fide request for rural
15 exemption was filed by Midcontinent.

16 Q. Is there anything ambiguous in the
17 agreement, itself?

18 A. I didn't find anything terribly ambiguous,
19 no.

20 Q. Let's talk about the discount analysis.

21 A. Mm-hmm.

22 Q. In your testimony you criticize the
23 discussion of the FCC's interim rate -- discount
24 rate range that's in Mr. Fischer's testimony.

25 A. Yes.

□

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1 Q. Is the range reported in the testimony the
2 same as the range in the FCC's rules?

3 A. Yes, I believe it is, 17 percent -- at
4 least 17 percent and no more than 25 percent.

5 Q. Was the rate used in the Midcontinent

6 analysis higher or lower than the bottom end of
7 that range?

8 A. My understanding is that Midcontinent used
9 Qwest's rate, which was 16 percent and something,
10 so it was lower.

11 Q. It was lower. Now, when a state adopts
12 interim rates, for instance, under the FCC's rules
13 and those rates turn out to be incorrect, can the
14 state require a true-up?

15 A. Yes.

16 Q. States in fact do require true-ups, don't
17 they?

18 A. I don't know of a case where the interim
19 rates have been used for many, many years, so I'm
20 not sure what states are using them right now.

21 Q. Let's talk for a moment about the specific
22 rate. As you noted, Mr. Fischer used the Qwest
23 rate as part of his analysis. Do you disagree with
24 that choice?

25 A. For Qwest, no. It was a voluntarily

□

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1 negotiated rate that Qwest struck with its
2 competitor.

3 Q. Do you disagree with that rate for North
4 Dakota Telephone?

5 A. Oh, yes.

6 Q. Is it too high?

7 A. I'm not sure.

8 Q. Is it too low?

9 A. I would presume it to be too high based
10 upon my experience in calculating wholesale
11 discounts for scores of rural telephone companies
12 around the country.

13 Q. Have you performed an analysis for North
14 Dakota Telephone?

15 A. No, I have not. They don't have a duty to
16 offer wholesale discount.

17 Q. That was not my question. You have not
18 performed an analysis?

19 A. I answered no.

20 Q. So you don't actually know if that number
21 is too high or too low then?

22 A. That's exactly what I said.

23 Q. Let's talk a little bit about how the
24 resale pricing standard works. You're familiar
25 with the avoided cost standard under the FCC's

□

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1 rules?

2 A. Yes, I am.

3 Q. I'm going to describe that, and I'm going
4 to ask you if the description is fair, and if it's
5 not fair, I would like you to explain why it's
6 incorrect.

7 A. Okay.

8 Q. The standard under the FCC's rules sets
9 the discount by subtracting costs that the
10 incumbent carrier will not incur on resold services

11 from the incumbent carrier's retail rates.

12 A. Fair.

13 Q. Now, under those rules, is the incumbent's
14 profit an avoided cost?

15 A. I'm sorry.

16 Q. The profit that's included in the
17 incumbent's rates, is that an avoided cost?

18 A. No.

19 Q. So the incumbent continues to make the
20 same profit on wholesale resale that it would make
21 on retail services?

22 A. Yes. I understand how you're using the
23 word "profit" and, yes, I agree with that layman
24 term.

25 Q. I don't think economists think that's a

□

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1 layman's term, but we'll go from there.

2 Let me ask you a little bit about level
3 playing field, which is discussed in your testimony
4 on page 14. Now, we've heard testimony that North
5 Dakota Telephone offers local service, long
6 distance, Internet, and wireless; isn't that right?

7 A. Yes.

8 Q. Can those services be bundled?

9 A. I believe they can, yes.

10 Q. Are you aware of any barrier that would
11 prevent NDTN from reselling DIRECTV or DISH
12 Network?

13 A. I don't know of any. I'm not -- I don't

14 know of any.

15 Q. Are you aware of other rural incumbent
16 local telephone companies that do just that?

17 A. Yes.

18 Q. Could those services be added to a bundle,
19 as well?

20 A. I presume, yes.

21 Q. Would offering telephone help Midcontinent
22 compete against DirectTV and EchoStar?

23 A. Repeat the question. I'm sorry.

24 Q. Would offering telephone service allow --
25 help Midcontinent to compete against EchoStar and

□

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1 DirectTV?

2 A. I'm not exactly sure. I'm not familiar
3 with Midcontinent's operations, what they think are
4 strategic plays against their competitors. I don't
5 know that.

6 Q. You agree that bundling generally is a
7 strategy that's useful in competing against other
8 providers?

9 A. Yes, bundling can provide an advantage.

10 Q. So would it be reasonable, in your view,
11 to believe that adding telephone would help a cable
12 operator compete against a satellite provider?

13 A. Well, it depends on what the satellite
14 provider is offering. I don't know what the
15 satellite provider is offering. Is he just

16 offering in your hypothetical only satellite and
17 isn't bundling himself?

18 Q. Well, let's make it a hypothetical.
19 Presume in fact that it is DirectTV and DirectTV is
20 not offering telephone. Would it assist
21 Midcontinent -- or a cable provider -- I'm sorry --
22 in competing against DirectTV to be able to offer a
23 bundle that included telephone service when DirectTV
24 could not offer the same bundle?

25 A. It may.

□

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1 Q. On page 14 of your testimony you also
2 discuss the notion that the universal service
3 burden on NDTC might increase. Did you provide any
4 data on this issue in your testimony?

5 A. No.

6 Q. Did you perform any study or analysis on
7 this issue in your testimony?

8 A. No.

9 Q. Or in preparation for your testimony. I'm
10 sorry. Did you perform any study or analysis in
11 preparation for your testimony?

12 A. Not for North Dakota Telephone Company
13 specifically.

14 Q. Are you familiar with the FCC's rules on
15 universal service for high-cost areas?

16 A. Yes.

17 Q. If an incumbent LEC loses a customer to a
18 reseller, what happens to the incumbent LEC's

19 universal service payments?

20 A. Nothing.

21 Q. Who is entitled to those payments if a
22 carrier provides service via resale, the reseller
23 or the underlying facilities-based incumbent?

24 A. The incumbent, like I said, receives the
25 payments under current rules, under today's

□

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1 regulatory regime.

2 Q. I'd like to turn back for a moment to
3 something you said earlier. You said you've done
4 scores of avoided cost studies for rural incumbent
5 carriers.

6 A. Yeah. I believe it's over -- it's over
7 40.

8 Q. That's scores.

9 A. Yes.

10 Q. Were those in the context of rural
11 exemptions that had been lifted or in other
12 contexts?

13 A. Both.

14 Q. So in some cases for lifted exemptions and
15 some cases for not?

16 A. Yes.

17 Q. Were those studies done in the context of
18 voluntary negotiations for rural carriers that had
19 not had their exemptions lifted?

20 A. Yes. In some cases, yes.

21 Q. And you have not, as you said earlier,
22 performed such a study for NDTTC?

23 A. Not yet.

24 Q. I'd like to turn to some of your
25 discussion of facilities-based services in your

□

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1 testimony and I just have a couple questions about
2 that.

3 A. Okay.

4 Q. In your testimony you describe concerns
5 about the development of facilities-based
6 competition. As a practical matter, is
7 facilities-based competition possible for
8 Midcontinent without what we think of as the full
9 interconnection agreement that includes physical
10 interconnection between the parties and reciprocal
11 compensation and the like?

12 A. I'm sorry. Is it possible or impossible?
13 I'm sorry.

14 Q. Possible.

15 A. Is it possible to have full
16 facilities-based competition --

17 Q. Without an interconnection agreement.

18 A. Not generally, no.

19 Q. Now, would the rural exemption prevent
20 facilities-based competition for Midcontinent after
21 NDTTC starts offering video service?

22 A. No. In fact, this is an important point,
23 that Midcontinent can provide facilities-based

24 competition today without touching any of the rural
25 exemption parts of 251(c).

□

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1 Q. Under 251(a), which I presume is what
2 you're referring to for interconnection --

3 A. Yes.

4 Q. -- do you have a right to direct physical
5 interconnection?

6 A. You have a right to interconnect directly
7 or indirectly with another carrier.

8 Q. But not a right to direct physical
9 interconnection?

10 A. No. You have a right to interconnection.
11 So if you want special flavors or special
12 arrangements, then we're talking a different thing,
13 but competition can't exist without 251(c) being
14 touched.

15 Q. Is it your view that 251(a) is subject to
16 the arbitration provisions of Section 252?

17 A. The provisions in 251(b) are subject to
18 Section 252 regulations or rules, which include
19 retail resale, number portability, reciprocal
20 compensation, the duty to -- reciprocal
21 compensation is the duty to provide compensation
22 for traffic that is exchanged between two parties.

23 Q. But I did ask about 251(a). What is your
24 view on 251(a)? Is it subject to Section 252
25 arbitration, in your opinion?

1 A. In 252 -- I'm not sure I have an opinion
2 on that. I haven't looked at that particular
3 question. But in 252, the voluntary negotiations
4 deals with all of 251, pursuant to Section 251 of
5 the title, so it's possible. I haven't thought
6 about that particular scenario.

7 Q. I'd like to cover one other topic which
8 relates to arbitration. You've done arbitrations?

9 A. Yes.

10 Q. They're long, difficult, expensive
11 processes, aren't they?

12 A. Generally. Although I have experience
13 with a very successful arbitration where everything
14 settled before the arbitration actually started.

15 Q. That doesn't really count, though, does
16 it?

17 A. Well, it was a wonderful time because I
18 didn't have to -- that was in Puerto Rico and I did
19 not have to hear the parties talk about those
20 issues.

21 Q. But you didn't get to go to Puerto Rico.

22 A. Oh, I was in -- no, it settled literally
23 five minutes before the hearing started. But
24 generally they are -- they can be. They don't have
25 to be, but they can be.

1 Q. Right. So if a party that's a CLEC is
2 going to arbitration, if Midcontinent is going to
3 have to go to an arbitration, doesn't it have an
4 incentive, since it's already going to have all the
5 cost and difficulty and time and expense of doing
6 it, to ask for everything it could possibly want,
7 to ask for physical interconnection and collocation
8 and UNES and wholesale resale and all the terms on
9 reciprocal compensation all at once rather than
10 simply asking for one thing?

11 A. It's possible, but it's not likely given
12 the testimony of Midcontinent. I understand the
13 testimony to reflect that it wants to establish
14 wholesale resale as a starting point and then move
15 quickly to facility-based competition, which
16 wouldn't need collocation generally, can be without
17 it, doesn't need UNES, or unbundled network
18 elements, because it will provide them themselves.

19 Q. Are you aware that Midcontinent uses UNES
20 in some cases?

21 A. No.

22 Q. Are you aware of Midcontinent's practices
23 for physical interconnection whether or not it uses
24 collocation?

25 A. No.

□

1 Q. So you don't actually have a basis for

2 concluding they wouldn't want to do those things?

3 A. My understanding for cable play is a pure
4 facilities-based bypass, which is -- which avoids
5 those things as best as possible. And certainly
6 some carriers need to use them, but generally
7 that's the case where a cable -- my understanding
8 of the cable play is that they try not to use
9 those.

10 Q. Do you think Midcontinent's incentives
11 might be affected if it had to wait a full year
12 before it could actually seek interconnection?

13 A. Incentives, I'm not sure --

14 Q. Incentives about what to include in an
15 interconnection request and arbitration might be
16 affected if it had to wait a whole year.

17 A. It may, yes.

18 MR. HARRINGTON: I have nothing further.

19 JUDGE WAHL: Mr. Binek.

20 EXAMINATION

21 BY MR. BINEK:

22 Q. There's been a lot of testimony here about
23 level playing field, and I guess listening to this
24 hypothetical situation involving the possibility of
25 the Commission denying the request to lift the

□

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1 exemption, it's possible then that Midcontinent
2 would not be in a position to offer
3 telecommunications service until a year after North
4 Dakota Tel has been offering video services; is

5 that a fair summary of your testimony?

6 A. That's the absolute maximum worst-case
7 scenario.

8 Q. But it's possible?

9 A. Possible.

10 Q. What is your knowledge of other states --
11 what other states have done in implementing a
12 schedule for -- I forget the exact terminology --
13 implementation schedule if the exemption is
14 terminated?

15 A. I'm familiar with three cases that are on
16 this point. The first one happened in New York
17 State with Warwick and Citizens Telecommunications,
18 and an implementation schedule for negotiation was
19 started after a rural exemption was removed. I
20 also know that in 1999 South Carolina, the case
21 that I referred to before, when the state
22 commission had to deal with a rural exemption, it
23 removed a rural exemption -- or I should say Horry
24 Telephone Company voluntarily removed itself from
25 the rural exemption, and then the South Carolina

□

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1 Commission ordered that negotiations begin the date
2 of the order of that removal, and its theory was
3 that there was no valid request for a 251(c)
4 interconnection until after the rural exemption was
5 removed, which was the date of the order. And then
6 also in Texas, just last -- just in 2004, there was

7 a case in South Plains, I believe, is the name of
8 the company, dealt with an issue of removal of a
9 rural exemption and the Commission in its first
10 order said, okay, we're going to remove the rural
11 exemption and, therefore, go implement, and then,
12 of course, the parties did not come to an
13 understanding of how to implement the matter. The
14 CLEC wanted 30 to 60 days for interconnection and
15 for implementation and the ILEC said, no, we start
16 with the 252 clock. The state commission in Texas
17 agreed with the ILEC and started a 252 clock after
18 the rural exemption was removed. Those are the
19 three cases that I'm personally familiar with. I'm
20 intimately familiar with New York and South
21 Carolina because I worked on that matter and then I
22 followed closely the Texas matter.

23 Q. Can you provide copies of those decisions?

24 A. Yes, I have copies of the South Carolina
25 and the Texas. I'll have to find a copy of the New

□

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1 York, but I would be happy to provide you copies of
2 those.

3 MR. BINEK: I'd request that those be
4 provided as late-filed exhibits in the case.

5 JUDGE WAHL: The motion is granted. Mr.
6 Negaard, you will note that, of course, or Mr.
7 Moorman, as the case may be.

8 MR. MOORMAN: Just as a clarification,
9 late-filed Exhibit R12?

10 JUDGE WAHL: Well, why don't we do -- Mr.
11 Binek, what's the Commission's custom? Do you
12 number those as exhibits?

13 MR. BINEK: Sure. I don't think it would
14 be a problem labeling it as R12.

15 JUDGE WAHL: All right. Do you want to
16 identify them as a group as R12?

17 MR. BINEK: Sure.

18 MR. HARRINGTON: It would probably be
19 easier to identify them separately for reference
20 purposes.

21 JUDGE WAHL: Yeah, that's a good point,
22 Mr. Harrington. I agree. So let's identify them
23 as -- Mr. Meredith, R12 is going to be what?

24 THE WITNESS: I would suggest that we use
25 R12 as the South Carolina decision and R13 as the

□

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1 Texas decision and R14 as the New York decision, if
2 it is available. I do not have a copy of that and
3 I cannot promise that I can get that to you.

4 JUDGE WAHL: That's understood. Mr.
5 Binek, anything further?

6 MR. BINEK: Yes.

7 Q. (MR. BINEK CONTINUING) Are you aware of
8 any states that have determined a different
9 implementation schedule?

10 A. I am not aware of any states or any case
11 that involves a different implementation schedule.

12 I have heard discussion where a rural exemption
13 suspends the 252 clock during the time of a rural
14 exemption review, and if it's found that the rural
15 exemption should be lifted, then the 252 clock
16 resumes. Do you understand? There's a difference
17 between that scenario and the scenario where the
18 clock starts after the rural exemption issue
19 matter. But I do not know of any cases -- state
20 cases where that has happened. I've heard that be
21 argued, but I have not seen an order on that
22 matter.

23 Q. How long would it take to do a cost study
24 of North Dakota Telephone Company?

25 A. To determine -- an avoidable cost study?

□

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1 Q. Right.

2 A. I do not know, but I can imagine, based
3 upon my experience, that it's probably in the
4 two-month -- two- to three-month time.

5 MR. BINEK: I have no further questions.

6 JUDGE WAHL: Questions from the
7 Commission. Commissioner Clark.

8 EXAMINATION

9 BY COMMISSIONER CLARK:

10 Q. I do have one. Granting that the Telecom
11 Act is not exactly a model of clarity, how have
12 other commissions that you've been aware of dealt
13 with this issue of -- maybe you can provide sort of
14 a little bit more meat to the bones along the lines

15 of some of Mr. Binek's questions. The Act does say
16 to implement a schedule once we make an order
17 coming out of 250 exemption proceeding. It would
18 seem to indicate that a schedule is more than just
19 saying, okay, the decision has been made, the clock
20 starts. How did they -- using your interpretation
21 of how the commission should deal with this if we
22 do lift the exemption, how do you both do something
23 more than just start the clock, but also fulfill
24 your mandate to establish an implementation
25 schedule?

□

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1 A. The implementation schedule in 250 -- in
2 that provision of the Act says that it needs to be
3 consistent with the time and manner of FCC
4 regulation, and so my experience with these other
5 commissions -- these other state commissions is
6 that they've looked at that and said we're going to
7 follow the Act's time line in 252 as consistent
8 with the FCC's -- FCC's regulation or with the time
9 and manner to allow the opportunity for carriers to
10 negotiate and then allow for eventual arbitration,
11 if it's necessary, to resolve any matters.

12 Q. And you've testified that the FCC hasn't
13 specifically put a lot on the record as far as what
14 that should be, so is the idea that, lacking any
15 clear direction from the FCC then, states have
16 fallen back on the timetable established in the

17 Act, itself?

18 A. That's what I generally perceive them to
19 be doing. The FCC has regulation on what happens
20 if a state commission doesn't act. That's clear.

21 Q. Right.

22 A. That's a different matter. They kind of
23 leave it to the states. They don't --

24 Q. Has the FCC dealt with any of these issues
25 in those states where the states have deferred

□

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1 action? I think probably the most notable would be
2 Virginia where they've said that they simply are
3 not going to -- I think by virtue of a
4 constitutional provision in Virginia they're not
5 going to subject themselves to being in federal
6 court. Have they handled the Virginia-type case
7 like they have with some of the ETC cases?

8 A. The Virginia case is a good example. The
9 FCC took the Virginia case after the Virginia body
10 -- regulatory body said we're not touching it and
11 essentially said -- the FCC essentially said we'll
12 deal with this -- and I just reviewed this this
13 morning -- we'll deal with this under the (e)(5)
14 provision, which is if the state defaults, then the
15 Commission picks up the ball and follows its
16 rules. That particular procedure was very lengthy,
17 it's a very big case. If you've looked at it at
18 all, it's many, many pages, thanks to -- I think
19 you were part of that, weren't you, or you were

20 counsel for someone.

21 MR. HARRINGTON: I was counsel for the
22 party that didn't make it longer.

23 THE WITNESS: Okay. And it took like a
24 year and a half -- I think a year and a half to do
25 all those issues.

□

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1 Q. (COMMISSIONER CLARK CONTINUING) was that
2 a rural exemption termination?

3 A. No. No. This was with a -- this was the
4 arbitration.

5 Q. That was the arbitration -- big
6 arbitration. To your knowledge, the FCC has not
7 dealt with any rural exemption cases?

8 A. No, not in that -- not in this context of
9 removing a rural exemption.

10 Q. would they have been the body to hear the
11 case first?

12 A. I don't recall of any case where the FCC
13 has done that.

14 COMMISSIONER CLARK: Thank you. That's
15 all I have.

16 JUDGE WAHL: Commissioner Wefald.

17 EXAMINATION

18 BY COMMISSIONER WEFALD:

19 Q. Okay. My question relates to the scope of
20 the rural exemption that's being requested here.
21 Is it your understanding that the scope for this

22 hearing is that the company wants to provide
23 wholesale resale only, and that if the Commission
24 grants the rural exemption, it's only for the
25 purpose of wholesale resale, or -- I'm going to go

□

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1 on a little -- or do we grant a rural exemption and
2 then it allows the company to not only -- once we
3 determine if there's a rural exemption, could
4 Midcontinent then decide they want to go for an
5 interconnection request for unbundled elements, or
6 is the scope narrowed by what they have requested
7 in their letter to you that started this
8 proceeding? Do you understand the question?

9 A. Yes, I do understand the question.

10 Q. Okay.

11 A. First of all, I would like to just note,
12 and I'm sure it was just maybe how I heard it, but
13 the rural exemption was granted by Congress and
14 then the state commission has the opportunity to
15 review whether that rural exemption should be
16 removed.

17 Q. Okay. Removed. Should it be removed only
18 for the purpose for the scope of wholesale resale,
19 or --

20 A. Yes.

21 Q. What is the answer to that, in your
22 opinion?

23 A. My view is -- and this is consistent with
24 what other states have done -- is that they have

25 limited it to the removal of the rural exemption to

□

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1 the matter that's been requested. So it would be
2 specifically removal of a rural exemption for
3 251(c)(4), which is the wholesale discount
4 provision. The other provisions remain. Although
5 it's ambiguous because a state could -- you could
6 go either way, but my experience is when you're
7 dealing with that, you follow the guidance of the
8 request, and the request is in this case for
9 wholesale discount, and, furthermore, the request
10 is only for the Devils Lake exchange.

11 Q. Yes, I understand that.

12 A. So I think it's limited in two respects.

13 Q. Okay. Then in that scenario, we talk
14 about -- people say if they only use it for
15 wholesale resale, there's not a lot of impact.

16 A. Mm-hmm.

17 Q. But wouldn't it be limited if the
18 Commission chose to do that -- it would be limited
19 to only --

20 A. Yes, it would be limited to wholesale
21 discount.

22 Q. Yes.

23 A. And think of it this way, if you would,
24 please. The facts for undue economic burden,
25 technical infeasibility, universal service are very

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1 specific, and in this case before you you have
2 facts dealing with wholesale discount.

3 Q. Mm-hmm.

4 A. The fact set can be very different if
5 you're dealing with UNEs.

6 Q. Oh, I understand. I know. That's why I
7 was wondering.

8 A. So each decision would be unique to the
9 request and unique to the case that's before you.

10 Q. Then I'm going to do another what-if. So
11 then what if North Dakota Telephone Company
12 determined that they wanted to start and did start
13 providing cable services next February, February
14 2007. At that point -- and let's say what if
15 nothing had been done by this Commission before
16 then.

17 A. Okay.

18 Q. Then they don't need to worry about 251(a)
19 -- (1)(a), they don't have to worry about the
20 exemption any longer; is that correct?

21 A. 251 --

22 Q. 251 and then I'm asking --

23 A. (c) or -- there's an (f).

24 Q. Right here.

25 COMMISSIONER CLARK: 251(f)(1).

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1 Q. (COMMISSIONER WEFALD CONTINUING) (f)(1).
2 Okay.
3 A. That's right. When an incumbent local
4 exchange carrier who has been granted a rural
5 exemption by Congress provides -- starts to provide
6 video programming after the date of the Act, then
7 their exemption is limited and it does not apply to
8 the incumbent cable provider in that same exchange
9 -- in that same area where they're offering
10 video.
11 Q. So at that point the company could come in
12 and do an interconnection agreement with you --
13 with North Dakota Telephone Company?
14 A. For UNES or --
15 Q. For UNES or resale or they could provide
16 facilities-based. I'm just trying to distinguish
17 the difference in my own mind here. And they could
18 have come in at this time and they could have asked
19 for unbundled elements in this application, but
20 they didn't, they asked for wholesale resale?
21 A. Correct.
22 COMMISSIONER WEFALD: Okay. I've got it.
23 Thank you.
24 JUDGE WAHL: Commissioner Cramer?
25 COMMISSIONER CRAMER: I have nothing.

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1 JUDGE WAHL: Mr. Moorman, followup?
2 MR. MOORMAN: Yes. Thank you, Your

3 Honor.

4

REDIRECT EXAMINATION

5 BY MR. MOORMAN:

6 Q. Very quickly. And I thought I was accused
7 of talking fast.

8 A. I'm sorry.

9 Q. No. So I just want to make sure I heard.
10 First, in your discussion with Midcontinent's
11 counsel you reference February 1st, 2007. Was that
12 the date that -- NDTC is not in the position to
13 provide video programming in Devils Lake on its
14 fiber installation until after February 1st, 2007?

15 A. Yes, that is the date. That's the date
16 that is the earliest possible starting point. For
17 purposes of this hearing, as I understand it,
18 that's the date that we have as a threshold date.

19 Q. Until after February 1st. And, quite
20 frankly, I am an attorney and I was trying to
21 follow all of the cites that were going back and
22 forth and, by golly, it was tough. I don't know if
23 anyone else had that problem. But I turn your
24 attention to page 4 of 5 of R8 dealing with Section
25 252(e)(4), I believe. And you had a discussion

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1 about that with Midcontinent's counsel.

2 A. Yes, subject -- yes, I did.

3 Q. The 90 days that is referred to in that
4 section, is that 90 days by the parties of an
5 agreement adopted by negotiation?

6 A. When I had this discussion, that was
7 subject to check, but I believe that this is a 90
8 days.

9 Q. If there is a negotiated agreement and 30
10 days if it is subject to arbitration?

11 A. Yes. If we continue on with that --
12 that's the cite, and thank you very much for
13 clarifying -- or helping me clarify. 90 days of a
14 negotiated agreement, and then the next clause in
15 that same section, "or within 30 days after
16 submission by the parties of an agreement adopted
17 by arbitration." So to be full, we should have
18 probably read the whole section.

19 Q. The final point. There was some
20 discussion on universal service, and is it your
21 understanding that under current USF rules a
22 reseller would not get any of the incumbent LEC's
23 universal service disbursements?

24 A. A competitor who is a reseller, who is
25 also -- is not eligible to become an ETC if they

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1 only provide resale, so they would not be getting
2 any disbursements from the universal service
3 program.

4 Q. And if it was a facility-based competitor,
5 and that facility-based competitor was designated
6 presumably by this Commission as an ETC and it
7 served one of the customers of an incumbent LEC,

8 would the incumbent LEC, if its rate of return, a
9 small rural telephone company, under current rules
10 would that incumbent LEC lose any USF?

11 A. No, but in the words of Bob Dillon, times
12 are a-changing, and there is universal service
13 change afoot at the FCC, so I don't know what --
14 under current rules that's the case, but in the
15 future it might change.

16 COMMISSIONER CRAMER: Thank you for
17 clarifying that.

18 MR. MOORMAN: Nothing further.

19 JUDGE WAHL: Mr. Harrington.

20 MR. HARRINGTON: Just a few questions.

21 RECROSS-EXAMINATION

22 BY MR. HARRINGTON:

23 Q. Mr. Meredith, when you were asking --
24 answering -- I'm sorry -- Mr. Binck's questions,
25 you told him it would take two to three months to

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1 do an avoided cost study; is that right?

2 A. Yeah. My experience dealing with these
3 other companies, it can take up to two to three
4 months depending upon the availability of the data,
5 depending upon the requirements -- you know, there
6 are requirements for a study and there's some proof
7 standards in the CFR in 51.609. That's part of my
8 R10 exhibit.

9 Q. Yes.

10 A. And those proof standards take a little

11 bit of time to get together so that everything is
12 square and all the T's are crossed and all the I's
13 are dotted.

14 Q. What information do you need to do one of
15 those studies?

16 A. You need current information -- accounting
17 information, and then you also need to make an
18 analysis of some of those accounts and what costs
19 would be avoidable, because the incumbent LEC, when
20 they produce one of these studies, they have the --
21 they have the responsibility -- I claim it's the
22 responsibility -- they have the right or
23 responsibility to determine in those accounts
24 whether some of those costs are not avoidable, and
25 in order to do that, some study has to be taken

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1 besides just plopping numbers on a page.

2 Q. Section 6 of 51.609 provides significant
3 guidance as to which accounts you're supposed to
4 look at; correct?

5 A. Yes. And I'm speaking of subpart (d) of
6 that same rule. It's 50 CFR -- that's 47 CFR
7 51.609(d), which describes the accounts and then it
8 says, these costs are avoidable and may be included
9 in wholesale rates only to the extent that the
10 incumbent LEC proves to a state commission that
11 specific costs in these accounts will be incurred
12 and are not avoidable. So what happens is there's

13 a presumption of avoidability, saying these
14 accounts are all avoidable or 90 percent of them
15 are avoidable. But the incumbent LEC can show to a
16 state commission that, oh, no, that presumption
17 doesn't quite work for a rural telephone company
18 and that this particular study shows that these
19 costs are not going to be avoidable.

20 An example is this, customer service
21 operator. In some companies there's only one or
22 two, and the presumption here is that you lose all
23 of them or you lose a good number of them, and it
24 may be for that particular rural LEC that you're
25 not going to lose anybody for that particular

□

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1 service, and so, therefore, there's a proof --
2 there's an opportunity to prove to a state
3 commission that those costs are not avoidable and
4 should remain.

5 Q. Now, those accounts are all accounts the
6 company keeps already, so you have a starting point
7 from the existing accounts; correct?

8 A. You have the total amount, but for like
9 customer service operations, how much customer
10 service operations is affected can take a little
11 bit of time, and that's why I say 90 days.

12 Q. I understand what you're saying. I guess
13 the other question I would have about that is, all
14 that information is in the hands of the incumbent
15 carrier; right? You don't have to do discovery for

16 the CLEC or any of those things, do you?

17 A. No, you don't have to do any discovery for
18 anyone else, but you don't have all that -- all
19 that information at the aggregated level is there
20 for the account, but there are special tasks that
21 need to be analyzed for a full understanding of
22 that account, and that information is not available
23 at the rural company level until the study is done,
24 until you actually do the study.

25 Q. And you've done all those allocations,

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1 isn't it really pretty much a matter of arithmetic
2 to figure out what the discount rate is? You don't
3 have to do any elaborate cost modeling or any of
4 those things, do you?

5 A. No. It's arithmetic and algebra.

6 Q. Can't forget the algebra. And just to
7 confirm what you said now in response to my
8 question, is it could take up to two to three
9 months; that's right?

10 A. My experience with a cost -- with cost
11 companies is it takes -- it takes, you know, two to
12 three months to get that done.

13 Q. Now, on redirect you had a couple of
14 questions concerning the timing of when NDTC is
15 going to first provide video, and I just want to
16 confirm what I understand from your testimony,
17 which is that all the information you have on that

18 question in fact comes from what you've been told
19 by people at the company? You, personally, are not
20 involved in any of that; you're not laying any
21 fiber or the like?

22 A. That is correct.

23 Q. So this is entirely based on what the
24 company has told you?

25 A. Let me just refresh my memory in my

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1 testimony.

2 Q. I think it's around page 4, but I could be
3 wrong.

4 A. It's on page, I think, 8.

5 Q. 8. Well --

6 A. Lines 1 and 2, and I say, "I note that
7 North Dakota Telephone Company is not in a position
8 to provide video programming in Devils Lake on its
9 fiber installation until after February 1, 2007."

10 Q. And that information is from the company?

11 A. Yes, that is a -- that particular
12 understanding is cited as a footnote -- a footnote
13 2 and it refers to Mr. Dircks' testimony.

14 MR. HARRINGTON: Thank you very much. No
15 further questions, Your Honor.

16 JUDGE WAHL: Mr. Binek, anything further?

17 MR. BINEK: No.

18 JUDGE WAHL: Any further questions from
19 the Commissioners? Mr. Moorman.

20 REDIRECT EXAMINATION
Page 206

21 BY MR. MOORMAN:

22 Q. Mr. Meredith, based on your recross by Mr.
23 Harrington, is it safe to say that an avoidable
24 cost study is not an add-water-and-mix proposition?

25 A. Yes, it is.

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1 MR. MOORMAN: Thank you.

2 JUDGE WAHL: All right. Quickly, anything
3 further, Mr. Harrington.

4 MR. HARRINGTON: Nothing further, Your
5 Honor.

6 JUDGE WAHL: Commissioners?

7 COMMISSIONER WEFALD: No.

8 COMMISSIONER CLARK: No.

9 JUDGE WAHL: Thank you very much, Mr.
10 Meredith. Anything further, Mr. Negaard?

11 MR. NEGAARD: No, Your Honor.

12 JUDGE WAHL: All right. Mr. Durick,
13 anything further?

14 MR. DURICK: Nothing further, Your Honor.

15 JUDGE WAHL: All right. Counsel, quickly,
16 beginning with you, Mr. Durick, briefing, what's
17 your proposal?

18 MR. DURICK: Our proposal would be, I
19 think you indicated -- or someone indicated it
20 would be simultaneous briefs. We would like to do
21 that on the Commission -- what would you like? --
22 two weeks from today.

23 JUDGE WAHL: Are you agreeing -- are you
24 -- do you --
25 MR. DURICK: We would like responsive

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1 briefs, Your Honor.
2 JUDGE WAHL: So --
3 MR. DURICK: We would submit ours within
4 two weeks.
5 MR. HARRINGTON: Your Honor, could we have
6 one moment? Could we go off the record for a
7 moment, Your Honor?
8 JUDGE WAHL: Sure.
9 (Discussion had off the record.)
10 JUDGE WAHL: Anything else, Mr. Durick?
11 MR. DURICK: Nothing here, Your Honor.
12 JUDGE WAHL: Anything further for the
13 record, Mr. Negaard?
14 MR. NEGAARD: Not at this time.
15 JUDGE WAHL: Mr. Binek?
16 MR. BINEK: In addition to briefs, we
17 would also request --
18 JUDGE WAHL: Oh, I'm sorry.
19 MR. BINEK: -- the parties file proposed
20 findings of fact.
21 JUDGE WAHL: The Commission also requests
22 proposed findings of fact, conclusions of law. In
23 fact, I assume you want a proposed order, too.
24 MR. BINEK: Right.
25 JUDGE WAHL: You want to -- write it up

1 the way you would like to see them sign it. Good
2 luck.

3 Commissioner Clark, anything further for
4 the record?

5 COMMISSIONER CLARK: Just thank you for a
6 very interesting hearing.

7 JUDGE WAHL: Anything else,
8 Commissioners? Any other directions from the
9 Commission?

10 COMMISSIONER WEFALD: No. I would just
11 like to say thank you, also. The witnesses who
12 participated today really did a very good job on
13 both sides and a lot of helpful information was
14 provided by the questions of the counsel, et
15 cetera. Thank you.

16 COMMISSIONER CRAMER: I would say the same
17 thanks to everyone, although there were moments
18 where I was more confused than when we began. In
19 the end I think we had a lot of very good, helpful
20 information.

21 JUDGE WAHL: All right. The record will
22 be closed. Thank you, counsel.

23 (Concluded at 4:17 p.m., the same day.)

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1 CERTIFICATE OF COURT REPORTER

2

3 I, Denise M. Andahl, 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 Bismarck, North Dakota, this 30th day of
14 January, 2006.

15

16

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Denise M. Andahl
18 Registered Professional Reporter

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