

STATE OF NORTH DAKOTA  
PUBLIC SERVICE COMMISSION

IN THE MATTER OF: )

Midcontinent Communications, a )  
South Dakota Partnership, )

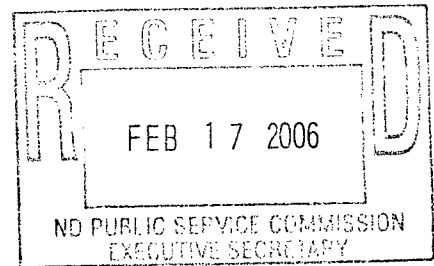
Complainant, )

vs. )

North Dakota Telephone Company, )

Respondent. )

Case No. PU-05-451



**PROPOSED ORDER**

**MARCH , 2005**

On July 12, 2005, Midcontinent Communications, a South Dakota Partnership ("Midcontinent"), filed a bona fide request to lift the rural exemption under Section 251(f)(1) of the Federal Communications Act of 1934 (the "Communications Act") for the operations of North Dakota Telephone Company ("NDTC") in Devils Lake, North Dakota.

Prehearing conferences were held in this proceeding on September 16, November 15 and December 9, 2005. A prehearing order was issued on December 13, 2005. On July 28, 2005, the NDPSC issued a Notice of Hearing in this proceeding, and on December 14, 2005, the NDPSC issued a Notice of Rescheduled Hearing. The Notices identified the following issues to be considered:

1. Whether the request of Midcontinent is unduly economically burdensome;
2. Whether the request of Midcontinent is technically feasible;
3. Whether the request of Midcontinent is consistent with 47 U.S.C. § 254 (other than subsections (b)(7) and (c)(1)(D) thereof);
4. The implementation schedule for compliance with the request should the exemption be terminated.

Midcontinent filed prefiled direct testimony on December 21, 2005; NDTC filed prefiled reply testimony on January 9, 2006; and Midcontinent filed prefiled rebuttal testimony on January 16, 2006. A hearing was held on January 23, 2006. The parties filed post-hearing briefs.

The NDPSC, having heard the evidence and reviewed the briefs, hereby adopts the following Findings of Fact and Conclusions of Law:

### **FINDINGS OF FACT**

1. Midcontinent and NDTC are certificated local exchange carriers in North Dakota. NDTC provides service in Devils Lake and other areas and Midcontinent is certificated to provide service in Devils Lake.
2. Midcontinent requested wholesale resale service from NDTC on May 12, 2005.
3. Midcontinent filed a bona fide request under Section 251(f)(1) of the federal Communications Act of 1934 (the "Communications Act") on July 15, 2005.
4. NDTC is the incumbent local exchange carrier in Devils Lake.
5. Midcontinent is a competitive local exchange carrier in all the areas it serves in North Dakota.
6. NDTC is replacing its current copper telephone plant in Devils Lake with fiber optic cable, at an approximate cost of \$11 million, and anticipates completing the replacement in February, 2007.
7. The replacement of NDTC's plant is not necessary to support NDTC's current services in Devils Lake, but will enable NDTC to offer video service.
8. NDTC has approximately \$16 million in annual revenues, including approximately \$1.6 million in federal universal service support and \$10 million in revenues from access charges.
9. NDTC's profits have ranged from \$3.4 million to \$4.3 million over the last five years.
10. If NDTC were required to offer wholesale resale to Midcontinent at a discount rate of 16.15 percent, and Midcontinent achieved a market share of 30 percent, NDTC's total revenues in Devils Lake would be reduced by 1.74 percent and its net profits in Devils Lake would be reduced by \$7,031 a year.
11. Resale competition would not be economically burdensome for NDTC.
12. Existing facilities-based competition from wireless providers has not been economically burdensome for NDTC.
13. There are no technical barriers to NDTC's provision of service to Midcontinent on a wholesale basis.
14. Competition from Midcontinent will not affect NDTC's access to universal service support under current law.
15. Resale competition from Midcontinent will not affect NDTC's access revenues.

16. Competition benefits consumers by lowering prices, creating incentives for innovation, encouraging better customer service and providing choice.
17. While facilities-based competition has the greatest benefits to consumers, resale competition also is beneficial.
18. There are no meaningful benefits to waiting for NDTC to begin providing video service before allowing local telephone competition to begin.
19. In light of Midcontinent's experience in other markets, it is feasible for NDTC to begin providing resale to Midcontinent within 90 days of an order from the Commission.
20. Adopting a true-up provision will insulate both parties from potential harm that could be caused by errors in setting an interim discount rate.
21. Adoption of NDTC's proposed schedule for implementation would delay the consumer benefits of competition for a year or more.
22. Waiting to start the negotiation process for facilities-based competition until NDTC enters the video market could prevent consumers from obtaining the benefits of facilities-based competition until some time in 2008.
23. Because NDTC already is entering the video market, it would not be harmed by requiring it to negotiate full interconnection arrangements with Midcontinent.

#### **CONCLUSIONS OF LAW**

1. Midcontinent has met the requirements for a bona fide request for the rural exemption under Section 251(f)(1) of the Communications Act to be lifted in Devils Lake.
2. The Commission must grant Midcontinent's petition to lift the rural exemption in Devils Lake if the criteria established in Section 251(f)(1) of the Communications Act are met.
3. The criteria under Section 251(f)(1) are (a) whether Midcontinent's request is unduly economically burdensome; (b) whether Midcontinent's request is technically feasible; and (c) whether Midcontinent's request is consistent with 47 U.S.C. § 254 (other than subsections (b)(7) and (c)(1)(D) thereof).
4. The evidence in this proceeding establishes that the criteria in Section 251(f)(1) have been met.
5. Section 251(f)(1) automatically lifts the rural exemption as to a competing video provider if the rural carrier begins providing video service.
6. The rural exemption will be lifted as to Midcontinent in Devils Lake when NDTC completes its fiber upgrade and begins providing video service.
7. Once a state commission determines that the three criteria for lifting the exemption have been met, it is empowered to set a schedule for the rural carrier's implementation of its obligations under Section 251(c) of the Communications Act, so long as the schedule is consistent with any rules adopted by the FCC.

8. The FCC has adopted no rules governing how state commissions may set implementation schedules under Section 251(f)(1).

In light of the findings of fact and conclusions of law, and being fully advised in the premises, the NDPSC hereby enters the following:

### **ORDER**

The NDPSC Orders:

1. NDTC and Midcontinent shall enter into a wholesale resale agreement substantially in the form of the agreement offered by Midcontinent to NDTC in its initial request for service within thirty (30) days of the issuance of this order. The agreement shall provide an interim discount rate of 16.15 percent unless the parties agree to some other permanent rate.

2. NDTC shall conduct any necessary cost study to determine the appropriate level of the wholesale discount in accordance with the rules of the Federal Communications Commission. That study and all supporting information shall be provided to the Commission and Midcontinent within sixty (60) days of the issuance of this order. NDTC shall not be required to comply with this requirement if the parties agree on a permanent discount rate prior to the expiration of the sixty (60) day period.

3. Midcontinent and NDTC shall inform the NDPSC promptly of any agreement on a permanent discount rate. If Midcontinent and NDTC do not provide such notification within ninety (90) days of the issuance of this order, the NDPSC will schedule a hearing to commence not more than one hundred twenty (120) days after the issuance of this order. Each party will be required to submit prefiled direct testimony not less than twenty (20) days before the hearing and shall be permitted to submit prefiled rebuttal testimony not less than seven (7) days before the hearing. The NDPSC will determine the permanent discount rate based on the prefiled testimony, the evidence presented at the hearing, NDTC's cost study and the supporting information provided by NDTC. Any discount rate adopted by the NDPSC will apply retroactively to the date NDTC first provides wholesale services to Midcontinent.

4. NDTC shall make its retail telecommunications services available to Midcontinent at wholesale rates for resale, in accordance with the requirements of Section 251(c)(4) of the Communications Act, no later than ninety (90) days after the issuance of this order.

5. Upon issuance of this order, NDTC and Midcontinent shall commence negotiation of a full interconnection agreement for the Devils Lake market. The negotiation and any necessary arbitration shall be conducted in accordance with the requirements of Sections 251(c)(1) and 252 of the Communications Act, including the time periods described in Section 252.

6. NDTC will provide at least sixty (60) days notice to the NDPSC and Midcontinent prior to marketing or offering any video service in Devils Lake.

**PUBLIC SERVICE COMMISSION**

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SUSAN E. WEFALD	TONY CLARK	KEVIN CRAMER
COMMISSIONER	PRESIDENT	COMMISSIONER