

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Midcontinent Communications,
a South Dakota Partnership,

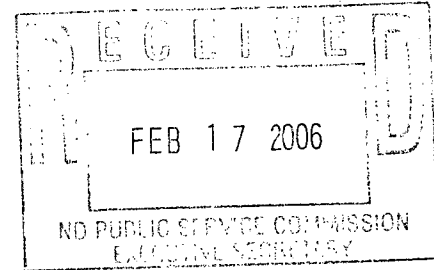
Complainant,

vs.

North Dakota Telephone Company,

Respondent.

Case No. PU-05-451



INITIAL BRIEF OF MIDCONTINENT COMMUNICATIONS

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February 17, 2006

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Midcontinent Communications, by its attorneys, hereby submits its initial brief in the above-referenced proceeding. As shown below, the Commission should grant Midcontinent's petition, remove the rural exemption as applied to the operations of North Dakota Telephone Company ("NDTC") in Devils Lake, and set a strict implementation schedule. These steps are necessary to ensure that consumers in Devils Lake receive the benefits of telephone competition as soon as possible.

I. Introduction.

In this proceeding, Midcontinent is asking the Commission to exercise one of its most important powers under the federal Communications Act of 1934.¹ Section 251(f)(1) of the Communications Act grants an exemption for rural carriers from the standard obligations of incumbent local telephone companies that facilitate local telephone competition. This same provision, however, also entrusts state commissions

¹ 47 U.S.C. § 151 *et seq.*

with the power to determine whether specific statutory tests have been met that require the exemption to be lifted.

The state commission's task begins when a competitor decides to enter a market and ask the commission to end the exemption. In this case, Midcontinent sought to enter the Devils Lake market via wholesale resale, but the rural exemption allows NDTC to deny such a request.

As the testimony established, Midcontinent is both the largest cable operator and the leading provider of competitive local telephone service in the Dakotas.² Although its goal is to provide full facilities-based services, Midcontinent often enters markets via resale to gauge consumer interest and to facilitate prompt entry.³ That is its intent in Devils Lake.

NDTC is the incumbent local telephone company in Devils Lake. It is owned by three other incumbent local telephone companies – Polar Telephone, Dakota Central Telephone and United Telephone. Although NDTC's current plant in Devils Lake is perfectly functional, about a year ago it decided to replace that plant entirely with an \$11 million fiber-optic upgrade.⁴ NDTC will use the new facilities to provide not just the telephone and high speed Internet services it offers today, but also to provide a new video service to compete with Midcontinent.⁵ In this proceeding, NDTC did not acknowledge that it intended to provide video service until it filed its testimony, but in fact it planned to offer video from the time the company decided to upgrade its plant.⁶ While the video

² Exhibit P1, Prefiled Direct Testimony of Mary Lohnes ("Lohnes Direct") at 2.

³ *Id.* at 4-5.

⁴ Tr. at 132, 133 (Dircks).

⁵ Exhibit R1, Prefiled Reply Testimony of David Dircks ("Dircks Reply") at 9.

⁶ *Id.*, Tr. at 142 (Dircks).

component has been part of the upgrade from the start, NDTC has not decided how to allocate the costs of the fiber, nearly a year after the decision to upgrade was made.⁷

NDTC's approach to its video upgrade is consistent with its approach to competition. NDTC is willing to compete, but only on its own schedule, at a time that is convenient for NDTC. That is not what the law requires or permits, and it is the path that is least beneficial to consumers. The Commission, therefore, should reject NDTC's claims and adopt an order that brings local telephone competition to Devils Lake as soon as possible.

II. The Record Establishes that the Commission Must Lift NDTC's Rural Exemption.

Under Section 251(f)(1) of the Communications Act, the Commission must consider three issues to determine whether NDTC's rural exemption shall be lifted. As described in the Commission's initial hearing order, those criteria are as follows:

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).⁸

As shown below, each of these standards has been met in this proceeding; in fact, NDTC acknowledges that each of them has been met. Moreover, although it is not necessary for Midcontinent to make any other showing, the evidence also shows that competition will be beneficial to consumers in Devils Lake, which is one of the most important reasons to encourage local telephone competition. Thus, the Commission is

⁷ Tr. at 144 (Dircks).

⁸ Notice of Hearing, Case No. PU-05-541, dated July 28, 2005 at 1; *see also* Notice of Rescheduled Hearing, Case No. PU-05-541, dated Dec. 14, 2005, at 1.

required by the terms of Section 251(f)(1) to lift the rural exemption as to NDTC's service in Devils Lake.

A. Permitting Competition in the Devils Lake Exchange Will Not Be Unduly Economically Burdensome.

The first issue to be considered under Section 251(f)(1) is the extent to which lifting the rural exemption will be unduly economically burdensome on the affected incumbent carrier. The evidence is very clear that NDTC will not suffer undue economic harm.

First, Midcontinent's witnesses demonstrated that the economic impact of wholesale resale will be minimal. Assuming a discount rate as high as 16.15 percent, the total impact on NDTC's total revenue is quite small, and the effect on NDTC's net revenue is negligible. As Mr. Fischer explained in his direct testimony, even assuming a 16.15 percent discount rate and the loss of 30 percent of NDTC's retail customers in Devils Lake, NDTC's total revenues in Devils Lake would be reduced by only 1.74 percent and its company-wide revenues would be reduced by only 0.517 percent.⁹ These percentages drop significantly if the resale discount is lowered to 10 percent.¹⁰ Further, even if Midcontinent achieved 30 percent market share, NDTC's profits in Devils Lake would drop by only \$7,031 a year, or just over one quarter of one percent of NDTC's overall operating income.¹¹ This is a negligible change for a company that has operating revenues in excess of \$16 million a year.¹²

⁹ Exhibit P5, Prefiled Direct Testimony of Warren R. Fischer ("Fischer Direct") at 13.

¹⁰ As a percentage of NDTC's total revenue, for instance, the revenue loss would drop to 0.320 percent. *Id.* at 14.

¹¹ *Id.* at 18.

¹² Tr. at 121 (Dircks). The statement of income in NDTC's 2004 Annual Report reports that NDTC earned \$16,977,056 in total operating revenue in 2004. NDTC 2004 Annual Report to the North Dakota Public Service Commission, Statement of Operating Revenues and Expenses.

In fact, NDTC is a very profitable company. As the testimony and the Commission's records establish, NDTC's annual profits over the last five years have ranged from \$3.4 to \$4.3 million.¹³ NDTC is profitable enough that it is willing to spend \$11 million on a speculative venture to build fiber plant that it does not need to provide its current services.¹⁴

In this context, it is no surprise that NDTC agreed, repeatedly and on the record, that it would not be unduly economically burdensome to have the rural exemption lifted.¹⁵ For instance, in response to a direct question from Mr. Binek, Mr. Dircks said "I can't argue that it's economically burdensome."¹⁶ There simply is no evidence to contradict this conclusion.

Further, the evidence also establishes that the existing, facilities-based competition from wireless providers also is not economically burdensome. Mr. Dircks cited wireless providers as providing competition in his prefiled testimony.¹⁷ However, at the hearing, he acknowledged that the impact of that competition was minimal, and

¹³ Tr. at 103 (Dircks); NDTC 2004 Annual Report to the North Dakota Public Service Commission, Statement of Operating Revenues and Expenses; NDTC 2003 Annual Report to the North Dakota Public Service Commission, Statement of Operating Revenues and Expenses; NDTC 2002 Annual Report to the North Dakota Public Service Commission, Statement of Operating Revenues and Expenses; NDTC 2001 Annual Report to the North Dakota Public Service Commission, Statement of Operating Revenues and Expenses; NDTC 2001 Annual Report to the North Dakota Public Service Commission, Statement of Operating Revenues and Expenses.

¹⁴ Tr. at 132, 142 (Dircks). In fact, it appears that one of the primary reasons for the fiber upgrade was that the current, fully functional plant is fully depreciated and, therefore, no longer provides a basis to support NDTC's regulated telephone rates. Tr. at 131, 132 (Dircks) ("...we started looking at replacing our facilities in Devils Lake because they were old and depreciated out..." and "Q. But today everything works fine? A. Today it does.").

¹⁵ See, e.g., Tr. at 167 (Dircks) (response to question from Commissioner Cramer).

¹⁶ Tr. at 158 (Dircks).

¹⁷ Dircks Reply at 2.

that NDTC had lost only a handful of customers to wireless carriers.¹⁸ Thus, even facilities-based competition does not impose an undue economic burden on NDTC.¹⁹

B. Midcontinent's Request Is Technically Feasible.

The second standard in the statute is technical feasibility. Again, Midcontinent and NDTC agree that there are no technical barriers to lifting the rural exemption in Devils Lake.

Ms. Lohnes, in her direct testimony, established that implementing resale is a simple process that can be accomplished promptly. In particular, through its experience with other carriers, Midcontinent has “developed processes that can help smooth the way and shorten the time to market.”²⁰ Further, “once an agreement is reached there is very little work that needs to be done technically, and the time necessary largely is related to back office processes.”²¹ These conclusions were confirmed by Mr. Gates, and were not challenged on cross-examination.²²

NDTC's witnesses agreed with Midcontinent. Asked directly whether there were any technical feasibility issues, Mr. Dircks said there were not.²³ Mr. Meredith, NDTC's other witness, who acts as a consultant to many rural telephone companies, also did not raise any objections on the basis of technical feasibility, and noted that he had been

¹⁸ Tr. at 104 (Dircks) (“Q. Do you know of any customers that you’ve lost to wireless service? A. Yeah, I know of some, yes . . . They would be just in a few. Ten or less that I personally know of.”)

¹⁹ Midcontinent notes that the standard under the statute is not whether competition will be unduly economically burdensome, but whether compliance with Section 251(c) will be unduly economically burdensome. This distinction is significant, in that it does not permit a state commission to maintain the rural exemption merely because a competitor may succeed. Proof that competition will not be unduly burdensome, however, is more than sufficient to meet the Section 251(f)(1) standard.

²⁰ Lohnes Direct at 6.

²¹ Exhibit P2, Prefiled Rebuttal Testimony of Mary Lohnes (“Lohnes Rebuttal”) at 2.

²² Exhibit P11, Prefiled Direct Testimony of Timothy J Gates (“Gates Direct”) at 16-7; Exhibit P12, Prefiled Rebuttal Testimony of Timothy J Gates (“Gates Rebuttal”) at 8.

²³ Tr. at 159 (Dircks) (“Q. Okay. Is the request of Midcontinent technically feasible? A. I believe it is, yes.”); *see also* Tr. at 166 (Dircks) (responding to question from Commissioner Cramer).

involved in “scores” of other cases involving resale of rural carrier services.²⁴ In light of this evidence, the Commission must conclude that there are no technical barriers that would prevent NDTC from meeting Midcontinent’s request.

C. Lifting the Rural Exemption in Devils Lake Will Have No Negative Effect on Universal Service.

The third standard in Section 251(f)(1) requires the Commission to analyze the extent to which lifting the rural exemption will have a negative effect on universal service. The answer to this question also is clear from the record: There will be no harmful effects on service to NDTC’s customers.

On cross-examination, NDTC’s witnesses both agreed that competition will not affect NDTC’s access to universal service funds, which constitute about ten percent of NDTC’s annual revenues.²⁵ Mr. Dircks, in response to questions from the staff, acknowledged that there would be no immediate effect on NDTC’s universal service funding.²⁶ Mr. Meredith agreed, stating that “nothing” would happen to an incumbent LEC’s universal service payments if it lost a customer to a competitive LEC.²⁷

These statements are consistent with the FCC’s rules, which specifically provide that universal service support for high-cost incumbent carriers is based on their costs, not on the number of customers they have.²⁸ Thus, even when Midcontinent enters the Devils Lake market as a facilities-based carrier, NDTC will retain its universal service funding.

²⁴ Tr. at 199 (Meredith).

²⁵ Tr. at 118 (Dircks) (Federal universal service accounts for \$1.7 million of NDTC’s annual revenues).

²⁶ Tr. at 159, 169 (Dircks). Mr. Dircks indicated that NDTC could lose access to universal service funding if Midcontinent provided facilities-based service, but this statement was corrected later by Mr. Meredith. Tr. at 219 (Meredith).

²⁷ Tr. at 198 (Meredith); *see also* Tr. at 218-9 (Meredith).

²⁸ *See, e.g.*, 47 C.F.R. § 54.301. Compensation for eligible competitive carriers is calculated based on the amount of support received by the incumbent carrier divided by the number of lines the incumbent serves. 47 C.F.R. § 54.307.

In addition, resale will not affect the primary source of NDTC's income, which is access charges. As Mr. Dircks acknowledged, NDTC receives about 60 percent of its revenues from access charges and would continue to receive those revenues if Midcontinent obtains service via resale.²⁹ Thus, between access charges and universal service funding, close to three quarters of NDTC's revenues would be entirely unaffected by Midcontinent's entry via resale. This demonstrates that universal service will be unaffected by lifting the rural exemption.

It also is apparent that even facilities-based entry is unlikely to affect universal service. As noted above, NDTC has decided to invest \$11 million to provide video service, and it is aware that the rural exemption will be lifted automatically once it starts offering video to its customers.³⁰ Indeed, the ability to offer video was one of the driving factors in the decision to install fiber.³¹ Moreover, NDTC has been taking a variety of steps, including rebalancing its rates, to prepare for competition once the upgrade is completed.³² NDTC would not be undertaking these steps – and particularly would not be planning to enter a new business that will open up its telephone business to competition – if it believed that doing so would jeopardize its overall business or its ability to serve customers in Devils Lake. Thus, it is apparent that NDTC has concluded that lifting the rural exemption in its entirety will not be detrimental to NDTC or to universal service.

²⁹ Tr. at 121, 122 (Dircks) (Access revenues "would still be ours").

³⁰ Dircks Reply at 10-1.

³¹ Tr. at 139 (Dircks).

³² Tr. at 165-6 (Dircks).

D. Lifting the Exemption Will Be Beneficial to Consumers.

Once the three criteria in Section 251(f)(1) are met, the Commission does not need to go any further to determine whether the rural exemption should be lifted, and the statute does not permit any further inquiry. However, it also is important to recognize that lifting the rural exemption, and opening the Devils Lake market to competition, will create significant consumer benefits that were acknowledged by all parties to this proceeding. These benefits include reduced prices, better customer service, innovation and a level playing field for all competitors.

First, it is well established that competition helps lower prices. For instance, as Mr. Dircks noted “It’s pretty common knowledge that it reduced the cost of long distance once the competition was introduced.”³³ As Ms. Lohnes explained, this is true “even in a resale environment.”³⁴ The reason for this, as Mr. Gates described, is that, to maintain margins and market share, companies “try to reduce their costs” and “are diligent in managing their operations and expenses so as to provide the most efficient cost structure to maximize profits.”³⁵ Considering that Devils Lake customers recently experienced a price increase, and that the increase led to a significant number of complaints to the Commission, it is likely that they would find price competition to be beneficial.³⁶

Competition also drives companies to improve customer service. As Mr. Gates explained, for this reason “[c]ompetition is beneficial even to customers who are happy

³³ Tr. at 157 (Dircks).

³⁴ Lohnes Direct at 5.

³⁵ Tr. at 75 (Gates); Gates Rebuttal at 4; *see also* Gates Direct at 20. As Mr. Gates notes, even in efficient operations “[t]here is always room to improve on operations and efficiencies.” Gates Rebuttal at 4.

³⁶ Tr. at 156 (Dircks). According to the Commission’s web site, 96 complaints were filed against NDTC from September 2004 to August 2005, and all but five of those complaints related to its proposed rate changes. *See* NDPSC Contact Record Report, 9/1/2004 to 8/31/2005 at <http://pc6.psc.state.nd.us/media/reports/non-pu-contact-report-by-company.pdf>.

with their current providers.”³⁷ Indeed, competition will give NDTC “good incentives to do even better” than it does today “because they want their customers to stay with them[.]”³⁸ In this case, because Midcontinent is committed to “superior customer service,” NDTC will have strong reasons to meet or beat the standard set by Midcontinent.³⁹

Third, competition creates incentives to innovate. While these incentives may be strongest when facilities-based competition is present, they also exist in a resale environment. For instance, the availability of wholesale resale enables a competitor to create bundles or packages that would not be possible without the resold service.⁴⁰ This can lead to the incumbent creating its own packages that combine different services or different types of offerings for the same services.⁴¹ Consumers benefit directly from these additional choices.⁴²

Finally, lifting the exemption will help create a level playing field in Devils Lake so that consumers can benefit from full competition between NDTC and Midcontinent. The testimony establishes that waiting until NDTC turns up its video services to let the rural exemption expire automatically easily could delay competition until February 2008.⁴³ Permitting NDTC to offer the full “triple play” for a year or more before Midcontinent could enter the market would create a significant competitive disadvantage for Midcontinent and would prevent consumers in Devils Lake from having the benefits

³⁷ Gates Rebuttal at 3.

³⁸ Tr. at 76.

³⁹ Lohnes Direct at 5.

⁴⁰ Gates Rebuttal at 15.

⁴¹ For instance, NDTC might respond to a Midcontinent package of telephone, high speed Internet and video with a package of telephone, high speed Internet and wireless service.

⁴² Gates Direct at 19-20; Tr. at 157 (Dircks) (“Q. Do you think choice is better for consumers? A. Choice is good.”).

⁴³ Tr. at 191 (Meredith).

of competition until two years from now.⁴⁴ Lifting the exemption now will minimize or eliminate the time when NDTC has a competitive advantage over Midcontinent in Devils Lake.

III. The Commission Should Adopt an Aggressive Implementation Schedule.

As shown above, the record establishes that all of the requirements of Section 251(f)(1) have been met, and that the rural exemption therefore must be lifted. Once it determines that the exemption should be ended, the Commission's next task under the statute is to set an implementation schedule. Given the benefits of competition, Midcontinent submits that the schedule should be as aggressive as possible and should require the availability of wholesale resale within three months and full interconnection between NDTC and Midcontinent within a year. There are no legal barriers to adoption of such a schedule, and the record fully supports prompt implementation.

A. There Is No Legal Barrier to Adopting an Aggressive Implementation Schedule.

NDTC devoted much of its testimony and its prehearing brief to an argument that the Communications Act mandates adoption of the standard arbitration schedule in Section 252 of the Act.⁴⁵ This simply is incorrect. Rather, the Commission has the authority to set whatever implementation schedule is supported by the record in this proceeding.

First, the specific language of Section 251(f)(1) does not provide for any limitation on the implementation schedule. It says, in full: "[A] State Commission shall establish an implementation schedule for compliance with the request that is consistent in

⁴⁴ Considering its resale of wireless service, NDTC actually could offer a "quadruple play" during that time. Tr. at 104 (Dircks).

⁴⁵ See, e.g., Exhibit R6, Prefiled Reply Testimony of Douglas Duncan Meredith at 7, 8-9; NDTC Prehearing Brief at 9-11.

time and manner with Commission [FCC] regulations.”⁴⁶ As Mr. Meredith conceded, the FCC has not adopted any rules that implement this provision.⁴⁷ In fact, the only valid FCC rule concerning the rural exemption merely indicates that state commissions should decide rural exemption proceedings on a case-by-case basis.⁴⁸

There also is no basis for the conclusion that the Section 252 negotiation and arbitration period is mandated by Section 251(f)(1). Section 251(f)(1) does not mention Section 252 at all, or include any other reference to the negotiation and arbitration provisions of the Communications Act.

Even though not a single word of the FCC’s rules or the statute supports its position, NDTC submits that some notion of consistency between Section 251(f)(1) and Section 252 requires that any implementation schedule must follow the Section 252 timetable.⁴⁹ The text of the statute belies this claim, however: There would be no reason to give state commission the discretion to set the implementation timetable if Section 252 applied automatically. The actual language, in fact, is much more consistent with the conclusion that the state commission has the power to weigh the evidence to determine how quickly implementation should proceed.

The acrobatics necessary to adopt NDTC’s proposed interpretation were evident during the hearing. Mr. Meredith claimed, for instance, that the statute requires separate requests to trigger a Section 251(f)(1) proceeding and the Section 252 process, even as he conceded that there was no substantive difference between those requests and that there is

⁴⁶ 47 U.S.C. § 251(f)(1).

⁴⁷ Tr. at 184 (Meredith).

⁴⁸ 47 C.F.R. § 51.401.

⁴⁹ See, e.g., NDTC Prehearing Brief at 9.

nothing in the FCC's rules that prevents a Section 251(f)(1) request from triggering the Section 252 process:

Q. Do you know of any cases at the FCC that say that [there are differences]?

A. That say what?

Q. That there's a difference between the request under 251(f)(1) and the request under 252(a).

A. Are you speaking of the document, itself, that is sent? The document, itself, can be identical.

Q. Is there anything in the FCC's rules that says a 251(f)(1) request cannot also at the same time trigger 252?

A. No, it can't, as long as it's filed with the state commission. That's the only difference between those two.⁵⁰

Moreover, even if Mr. Meredith were right, and a Section 251(f)(1) request could not trigger the Section 252 process, that is not sufficient to prove that the Communications Act requires use of the Section 252 process following elimination of a rural exemption because Section 251(f)(1) does not mention a second request. Once again, nothing in the statute supports NDTC's view.⁵¹

The state rural exemption cases cited by NDTC also do not support its claims. In particular, although Mr. Meredith claimed during the hearing that he was "not aware of any states or any case that involves a different implementation schedule," the New York case that he is "intimately familiar with" adopted a schedule that is essentially the same as requested by Midcontinent in this proceeding.⁵² In that case, the competitive carrier was seeking interconnection, reciprocal compensation and unbundled loops. The New

⁵⁰ Tr. at 181-2 (Meredith).

⁵¹ Further, the time frames in Section 251(f)(1) and Section 252 suggest that Congress did contemplate that one request could trigger both provisions. Under normal circumstances, a Section 251(f)(1) proceeding is to be completed within 120 days after a request is submitted, while Section 252 does not require an arbitration petition to be filed until 160 days after the request and does not require a decision until nine months after a request. 47 U.S.C. §§ 251(f)(1), 252(b)(1), (4). Thus, it is possible under the statute to complete a rural exemption proceeding and still have time to meet the arbitration timetable.

⁵² Tr. at 206, 208 (Meredith); Exhibit R14 at 11-2.

York Commission adopted interim rates for reciprocal compensation and unbundled loops (subject to later adjustment), required the incumbent carrier to use its best efforts to provide the loops by a date approximately three months after the order was issued and required the parties to sign an interconnection agreement less than four weeks after the issuance of the order.⁵³ From this result, it is apparent that the New York Commission did not believe that the Communications Act required it to follow the Section 252 process when a rural exemption was lifted.

The Texas and South Carolina cases do not support NDTC's theory either. The Texas decision was based entirely on the Texas Commission's rules, which required certain information in a competitive carrier's bona fide request, and not on the requirements of federal law.⁵⁴ In fact, the Texas Commission reached no conclusion at all concerning the requirements of the Communications Act.⁵⁵ Since this Commission has no corresponding state rule concerning the specific elements of a bona fide request, the Texas case is inapplicable.

Like the Texas Commission, the South Carolina Commission did not base its conclusions about the timing of implementation on an analysis of federal law. It merely adopted the time frame in Section 252.⁵⁶ Even then, the South Carolina Commission did not require the competitive carrier to submit a new request to the incumbent, as NDTC proposes, but merely started the clock on the release date of the order.⁵⁷ In fact, because

⁵³ Exhibit R14 at 11-3. The period for implementation of unbundled loops could have been extended to six months, but only with New York Commission approval. *Id.* at 12.

⁵⁴ Exhibit R13 at 2 ("This letter was sufficient to commence this docket for termination of South Plains' rural exemption, but it does not meet all of the requirements of P.U.C. SUBST. R. 26.272(f)(3)(A)-(D). Therefore, no deadlines have been triggered in this docket[.]").

⁵⁵ *Id.* at 4 (conclusions of law).

⁵⁶ Exhibit R12 at 5. The entire discussion of the implementation time frame is two sentences long, one of which is a description of Section 251(f)(1). *Id.*

⁵⁷ Tr. at 177-8 (Meredith) (second request is required after exemption is lifted); Exhibit R12 at 5.

the incumbent telephone company in the South Carolina case gave up its rural exemption before the proceeding went to hearing, it is unclear whether the South Carolina Commission had the authority to set a timeline for implementation, or if the parties were required to default back to the standard schedule under Section 252.⁵⁸

In sum, the very cases cited by NDTC do not support its position. In fact, they provide better support for the conclusion that the Commission should set the implementation schedule based on the evidence it has received in this proceeding.

B. The Commission Should Require NDTC to Provide Wholesale Resale to Midcontinent Within Three Months of the Issuance of the Order in this Proceeding.

The evidence in this proceeding establishes that it is both desirable and feasible to adopt the implementation schedule recommended by Midcontinent's witnesses. Prompt implementation not only is possible, but beneficial to consumers in Devils Lake.

1. Prompt Implementation Maximizes Consumer Benefits.

The Commission should recognize that making competition available as soon as possible maximizes benefits to Devils Lake consumers. As described above, competition lowers prices, spurs innovation and improves customer service. Every additional day in the implementation schedule reduces these benefits.

NDTC says it does not oppose competition, but believes the Commission should wait until there is a level playing field.⁵⁹ The perfect level playing field, however, is an illusory goal. Rather, each competitor will have advantages and disadvantages whenever it enters the market. NDTC, for instance, offers wireless service, is the incumbent telephone company with a large base of customers and has access to universal service

⁵⁸ *Id.* at 3.

⁵⁹ Dircks Reply at 3-4.

funding and low-cost financing.⁶⁰ Midcontinent, on the other hand, is the incumbent cable operator, with its own base of customers, and has somewhat larger corporate resources available to it. Neither company is in a position to address all of the advantages the other company has, and likely never will be, so there is no benefit in trying to balance the scales before competition begins.

Moreover, waiting creates potential advantages for NDTC in the marketplace that are not warranted by the evidence. For instance, NDTC could accelerate its deployment of fiber, or choose to start providing video in some parts of Devils Lake before the entire project is complete. NDTC also could follow the lead of some other rural carriers, and start signing up customers for video service before it becomes available, locking them into long-term contracts.⁶¹ Unless the Commission adopts a swift implementation schedule, these tactics could greatly disadvantage Midcontinent in the Devils Lake market.

In addition, there is no reason to believe that a “level playing field,” however defined, benefits consumers. NDTC provided no evidence that this is the case, and the broader marketplace suggests otherwise. All companies have advantages and disadvantages. The differences between companies and their products allow consumers to have more choices, which is a benefit of competition, rather than a danger to be avoided.

⁶⁰ Tr. at 94 (customer base), 104 (wireless service), 107-110 (sources of low-cost financing), 118 (access to universal service support) (Dircks).

⁶¹ Lohnes Direct at 5; Tr. at 29-30 (Lohnes)

2. The Record Establishes that Prompt Implementation of Resale Is Feasible.

Midcontinent's testimony provided an appropriate roadmap for the implementation of resale in Devil's Lake.⁶² Under this schedule, the parties would be required to enter into a resale agreement within 30 days, using the agreement that Midcontinent already has provided to NDTC as the template. NDTC would be required to make resale available within 60 days after the agreement is signed, or no more than 90 days after the Commission adopts its order. If the parties cannot agree on a resale discount, they should be required to use an interim rate, such as the current Qwest rate, subject to a true-up following a Commission proceeding to determine the correct rate. To facilitate this process, NDTC should be required to undertake a cost study during the negotiation period.

As Midcontinent's witnesses testified, this schedule is entirely feasible and consistent with Midcontinent's experience in other markets.⁶³ Resale is simple to implement, and requires no physical connections between the parties. The only significant issues are establishment of a wholesale discount and coordination of back office activities between the carriers.⁶⁴ NDTC's witnesses did not identify any other issues; in fact, their chief claim was that it would take several months to calculate the appropriate discount.⁶⁵

While Midcontinent believes that calculating a wholesale discount should be a fairly straightforward process, the time it takes to make a discount determination should

⁶² Gates Direct at 23; Gates Rebuttal at 10-11; Tr. at 70 (Gates) (discussing use of interim rates).

⁶³ Lohnes Direct at 6; Lohnes Rebuttal at 1; Tr. at 78-80 (Gates).

⁶⁴ Lohnes Rebuttal at 1; Tr. at 71, 72-3 (Gates).

⁶⁵ Tr. at 220 (Meredith).

not affect the implementation schedule. As described in detail during the hearing, the Commission has at least two options to address that concern.

First, the Commission could order an interim rate, based on the testimony in the hearing, subject to a true-up. The record shows that, for instance, the Qwest discount would be an appropriate interim rate because adopting it would not have a significant effect on NDTC's revenues.⁶⁶ NDTC did not produce any substantial objection to this rate and, in fact, when asked at the hearing, Mr. Meredith indicated that he had not conducted any analysis of the appropriate discount rate for NDTC.⁶⁷ Even if the Qwest discount rate proved to be too high or too low, the parties would be protected from any error by adoption of a true-up, which would require a party that benefited from the inaccuracy to make the other party whole.⁶⁸

Alternatively, the Commission could set up a process to determine the appropriate wholesale rate quickly if the parties cannot agree. As Mr. Gates described, the Commission could schedule a one-day hearing towards the end of the implementation period, at which NDTC could present its cost study and Midcontinent could present a response.⁶⁹ The Commission could then issue a prompt decision that would set the discount rate. Because this hearing would be limited to a single issue, it would not require the elaborate discovery, testimony and briefing necessary for a full-blown arbitration, and thus could be completed quickly and efficiently.⁷⁰

⁶⁶ Fischer Direct at 14. In the alternative, the Commission could adopt a ten percent discount rate, which also was analyzed by Mr. Fischer in his testimony.

⁶⁷ Tr. at 194 (Meredith).

⁶⁸ Tr. at 70 (Gates). NDTC did not object to a true-up. Tr. at 193 (Meredith).

⁶⁹ The Commission also would have to require NDTC to make its underlying records and analysis available to Midcontinent during the negotiation process.

⁷⁰ Tr. at 80-1 (Gates).

As noted above, the New York decision provides a perfect framework for the kind of implementation schedule that should be adopted in this proceeding. Like this proceeding, the New York proceeding involved a limited set of issues (in fact, more issues than are present in this case.) The New York Commission required prompt action by both parties, with appropriate follow-up to ensure that its order was followed, and thus implemented interconnection within about a three month period.

NDTC provides no reason for adopting any longer period than proposed by Midcontinent. As described above, there is no legal authority mandating use of the Section 252 calendar. NDTC's only real explanation for its proposed schedule is that it would delay Midcontinent's entry into the Devils Lake market. As Mr. Meredith conceded during cross-examination, NDTC's proposal could prevent Midcontinent from providing service in Devils Lake until a year or more after the Commission's decision.⁷¹ That not only would mean that consumers would not have access to competitive local telephone service for a year, but that NDTC would gain a competitive advantage that is not warranted by the evidence in this proceeding. Indeed, there is no affirmative reason to permit a delay – NDTC's level playing field claims are incorrect, there is no need to wait for a cost study, and implementing resale is not technically or administratively difficult. The only correct result is to implement wholesale resale in Devils Lake as soon as possible, on the schedule that Midcontinent has proposed.

C. The Commission Should Order NDTC to Begin Negotiation of a Full Interconnection Agreement for Facilities-Based Competition on the Section 252 Schedule.

The evidence at the hearing and NDTC's behavior to date demonstrate that the Commission should take one additional step in this proceeding: The Commission should

⁷¹ Tr. at 189 (Meredith).

order NDTC to begin negotiation of a full interconnection agreement with Midcontinent. This step is necessary to ensure that full and fair competition will be in place in Devils Lake as soon as possible.

Commission action plainly is necessary to ensure competitive balance in the Devils Lake market. The record shows that NDTC has had longstanding plans – begun as long ago as fall 2004 – to enter the video market, and it has made a substantial financial commitment to doing so.⁷² The result of that commitment is that NDTC will begin providing video over its own facilities in Devils Lake in less than a year.⁷³

At the same time, the record establishes that negotiation, arbitration and implementation of a full interconnection agreement could take a year or more.⁷⁴ If Midcontinent is required to wait to start that process until NDTC relinquishes its rural exemption by beginning to provide video service, it might not be able to provide full facilities-based competition until February, 2008 or later, two years from now.⁷⁵ In the meantime, NDTC will have a significant competitive advantage in the Devils Lake market.

Even if NDTC were not likely to gain a significant competitive advantage, public policy considerations fully support the conclusion that requiring NDTC to negotiate an interconnection agreement is appropriate because it will benefit consumers. While resale creates some benefits, the greatest consumer benefits arise from facilities-based competition. The FCC reached this conclusion several years ago after evaluating the

⁷² Tr. at 134, 142 (Dircks).

⁷³ Dircks Reply at 9.

⁷⁴ Tr. at 191 (Meredith).

⁷⁵ *Id.*

initial implementation of the Telecommunications Act of 1996, and the witnesses in this proceeding have agreed.⁷⁶

Moreover, NDTC would not be unfairly harmed by requiring it to negotiate a full interconnection agreement. As a matter of law, NDTC will not be entitled to claim the rural exemption in response to any request from Midcontinent once it begins offering video service, so by the time any interconnection agreement is implemented, NDTC will not be exempt any more.⁷⁷ Moreover, as described above, NDTC will retain its universal service funding even if Midcontinent's facilities-based service takes substantial market share from NDTC, because incumbent carrier universal service funding is not dependent on the number of customers served.⁷⁸

Even though Midcontinent's initial request related only to resale, the Commission has the authority to take this step. Section 251(f)(1) does not specify that the implementation schedule must relate only to the services covered by the initial bona fide request, so the Commission has broad discretion to make the remedy fit the evidence it has heard. In this case, the evidence is more than sufficient for the Commission to conclude that the Section 251(f)(1) criteria will be met for facilities-based service as of the date that NDTC starts providing video service and to set a deadline for implementation that is consistent with that conclusion.

⁷⁶ See, e.g., Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability, *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 16978, 16984 (2003); see also Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, *Order on Remand*, 20 FCC Rcd 2533, 2534 (2005) (affirming previous FCC conclusion that it should encourage facilities-based competition); Gates Direct at 12-13.

⁷⁷ If the Commission were concerned about the possibility that Midcontinent could begin providing facilities-based service before NDTC begins providing video service, it could set the date for implementation of any interconnection agreement to be no sooner than the date when NDTC starts offering video to its customers.

⁷⁸ See *supra* Section II(C)

In particular, the evidence showing that NDTC decided to go forward with its video project, at a cost of \$11 million for an upgrade that otherwise was unnecessary, and despite the loss of the rural exemption that would result as a matter of law, demonstrates that lifting the exemption as to facilities-based services would not impose undue economic harm and that NDTC believes that interconnection is technically feasible.⁷⁹ The additional evidence on universal service support received by NDTC also demonstrates that universal service will not be harmed by facilities-based entry, meeting the final standard of Section 251(f)(1).⁸⁰ Consequently, the Commission has more than sufficient grounds for setting a schedule for the implementation of facilities-based competition in Devils Lake.⁸¹

Finally, the Commission should make sure that NDTC does not take actions that will damage the development of facilities-based competition. As Ms. Lohnes has indicated, rural carriers in other areas have engaged in tactics designed to shut Midcontinent out of the market, including signing customers to long-term video contracts well before service begins.⁸² To prevent such occurrences, the Commission should require NDTC to notify it and Midcontinent at least sixty days before NDTC begins marketing its video service to consumers in Devils Lake. Such notice will permit the Commission to adjust its schedules or adopt whatever additional relief is necessary to prevent NDTC from gaining an undue competitive advantage.

⁷⁹ Tr. at 142 (Dircks).

⁸⁰ Tr. at 198-9 (Meredith).

⁸¹ To the extent necessary under the Commission's rules, Midcontinent requests that the Commission grant it leave to amend its petition to conform to this requested relief.


⁸² Tr. at 29-30 (Lohnes).

IV. Conclusion.

For all these reasons, Midcontinent Communications respectfully requests that the Commission grant its petition and adopt the relief requested herein.

Respectfully submitted,

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February 17, 2006