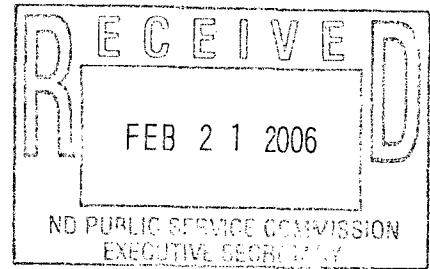


STATE OF NORTH DAKOTA  
PUBLIC SERVICE COMMISSION



Midcontinent Communications, )  
a South Dakota Partnership, )  
                                  )  
                                  )  
Complainant,                )      Case No. PU-05-451  
                                  )  
                                  )  
vs.                            )  
                                  )  
                                  )  
North Dakota Telephone Company, )  
                                  )  
                                  )  
Respondent.                 )

North Dakota Telephone Company ("NDTC"), by counsel, hereby files this Post-Hearing Brief in this matter following the hearing which was held before the North Dakota Public Service Commission (the "Commission") on January 23, 2006. For the reasons stated herein, NDTC respectfully requests that the Commission direct NDTC and Midcontinent Communications ("Midcontinent") to begin negotiations on the complete terms and conditions of an interconnection agreement that will, when implemented, afford Midcontinent the ability to provide wholesale resale within NDTC's Devils Lake exchange (the "Agreement"). In a manner consistent with the record developed in this proceeding, applicable law, and the public interest advanced through the encouragement of both fair competition and a level playing field, NDTC respectfully submits that the Commission direct the parties to implement the Agreement by the earlier of February 1, 2007, or the date by which NDTC first provides video programming within its Devils Lake exchange.

## I. BACKGROUND AND APPLICABLE FACTS

### A. The Parties

#### 1. NDTC

NDTC is a facilities-based incumbent rural telecommunications carrier with its main offices located in Devils Lake, North Dakota. NDTC operates nearly 18,000 access lines across 26 exchanges located in rural areas of North Dakota; approximately 5,500 of those lines are in the Devils Lake exchange. (HT at 94:7-18; Ex. R-1 at 1.)<sup>1</sup> NDTC meets the requirements of a "Rural Telephone Company" under 47 U.S.C. § 153 because, for example, it serves less than 50,000 access lines. See 47 U.S.C. §§ 153(37)(B) and (C). Accordingly, NDTC qualifies for the rural exemption contained at 47 U.S.C. § 251(f)(1)(A), a conclusion that Midcontinent concedes. (Ex. P-11 at 4:88-90.)

The day-to-day operations and personnel at NDTC are managed by David Dircks. (HT 91:13-15.) In addition to telecommunications services, NDTC presently offers DSL internet services over its existing copper plant. (HT 132:6-8.) NDTC resells Verizon Wireless service through an affiliation with United Telephone. (HT 104:14-17.) NDTC currently competes with a wireless provider, CellularOne (now Alltel), for telecommunications service in its markets. (HT 104:1-6.) NDTC has been investigating constructing fiber to the home for the replacement of its present copper plant since 2004. (Ex. R-1 at 9.) NDTC began actual physical construction of the project in August 2005. *Id.* NDTC is investigating offering video at some point in the future, and if all continues on the

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<sup>1</sup> The hearing transcript is cited as HT with corresponding page and line numbers. Exhibits are referenced by Ex. and number.

fiber deployment as planned, NDTC would be in a position to offer video services sometime after February 1, 2007. *Id.* at 8. At the same time, however, the record is clear that the fiber deployment is not the only issue concerning NDTC's capability of offering video programming. Both a cable franchise and programming, among other items, would need to be obtained, which have not yet occurred. *Id.*

## **2. Midcontinent**

Midcontinent provides cable television, broadband internet, and telephone services to customers in four states. (Ex. P-11 at 3-4.) Midcontinent is a partnership; one of its partners is Comcast, a large cable television provider in the United States. (Ex. P-1 at 3.) Midcontinent's headquarters are located in Minneapolis, Minnesota, and its main operations center is located in Sioux Falls, South Dakota. (Ex. P-1 at 3.) Midcontinent serves over 200 communities in North and South Dakota, as well as northern Nebraska and western Minnesota. *Id.* Midcontinent currently provides service in 23 North Dakota communities. (Ex. P-1 at 3.) Midcontinent described itself in a recent press release as follows:

"Midcontinent Communications, a subsidiary of Midcontinent Media, Inc. and Comcast, is the Upper Midwest's leading provider of cable television, local and long distance telephone service, high-speed Internet access, and cable advertising services to communities in North and South Dakota, Northern Nebraska, and Western Minnesota. Midcontinent's service area includes over 200 communities serving over 200,000 customers."

(Ex. R-6 at 14.)

Midcontinent also possesses the necessary regulatory authority from the Commission to offer local exchange services as a competitive local exchange

carrier. (Ex. P-1 at 3.) To date, however, Midcontinent's offering of telecommunications services along with the establishment of the necessary terms and conditions for interconnection have, with few exceptions, been with respect to Qwest Corporation ("Qwest"). (Ex. P-1 at 3, Ex. P-11 at 17, HT 27:19-28:6, 31:18-20.)

#### **B. The Request for Interconnection**

As the Commission is aware, Midcontinent sent a letter on May 12, 2005, to NDTC which proposed that the parties establish terms and conditions with respect to Midcontinent's ability to resell services within NDTC's Devils Lake exchange. (Ex. R-2.) To ensure that it properly understood the request, NDTC responded to Midcontinent's May 2005 letter on June 10, 2005. (Ex. R-3.) In NDTC's response, it rightfully asked whether the Midcontinent request was, in fact, intended to trigger the "rural exemption" under Section 251(f)(1) of the Act since, as a Rural Telephone Company under federal law, NDTC is exempt from providing wholesale resale services. *Id.*

#### **C. The Instant Controversy**

On July 15, 2005, Midcontinent filed this complaint with the Commission asking to have lifted any exemption that NDTC possesses with regard to Section 251(c)(4) of the Act.<sup>2</sup> Midcontinent's complaint was made solely with respect to

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<sup>2</sup> Section 251(c)(4) states as follows:

(c) Additional Obligations of Incumbent Local Exchange Carriers.--In addition to the duties contained in subsection (b), each incumbent local exchange carrier has the following duties:

(4) Resale.--The duty--

its request for the resale at a discount of NDTC's tariffed telecommunications services within NDTC's Devil Lake exchange, and the subsequent record in this proceeding confirms this fact. (Docket #1, Ex. P-5 at 2, Ex. P-6 at 3, Ex. P-11 at 3, Ex. P-1 at 4.) By interim orders and decisions of the Commission, this matter was set for hearing on January 23, 2006. (Docket #3, 19, 21, 47.) At the same time, the parties agreed the 120-day time frame required by Section 251(f)(1) for resolving this matter would not be applied. See 47 U.S.C. § 251(f)(1)(B). (Docket #19.)

## **II. APPLICABLE LAW AND ANALYTICAL FRAMEWORK**

NDTC has previously provided the analytical framework and applicable law in its Prehearing Brief in this matter. See Prehearing Brief of North Dakota Telephone Company, Case PU-05-451, filed January 20, 2006 (the "Prehearing Brief"). Rather than repeat verbatim the Prehearing Brief here, NDTC incorporates its Prehearing Brief herein by reference.

In general, the 1996 revisions to the Communications Act of 1934, as amended, (the "Act") make clear, Congress has established a general framework

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(A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and

(B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.

47 U.S.C. §251(c)(4). These obligations, however, are not applicable to a Rural Telephone Company until and unless action by a State commission is taken pursuant to the requirements of Section 251(f)(1). See generally 47 U.S.C. §251(f)(1).

that, on the one hand, provides the interconnection obligations required for the establishment of competition within the exchange service areas of telephone companies while, on the other hand, encourages and establishes foundational requirements for universal service policies in the United States.

Against this general framework, in turn, is the distinct treatment as found in Section 251(f)(1) of the Act afforded Rural Telephone Companies (like NDTC) with respect to interconnection obligations. (See Prehearing Brief at 4.) Accordingly, it's the interplay between Section 251(f)(1) and the facts in this proceeding that NDTC respectfully submits that the Commission must address.

### **III. REMAINING CONTROVERSY**

While the Act provides a specific framework for addressing interconnection requests for wholesale resale such as that made of NDTC by Midcontinent (see *id.* at 5, 6-8) and which the Commission fully recognizes and understands (see *id.* at 6), NDTC now agrees that it will no longer challenge whether the Midcontinent request is unduly economically burdensome, technically feasible, or whether the "wholesale resale" request made by Midcontinent with respect to NDTC's Devils Lake exchange would adversely impact universal service. (HT at 158-159, 166:7-18.)

At the same time, however, NDTC's agreement does not end the inquiry nor would it have negated the need for a hearing. The Act requires that the Commission establish an implementation schedule. This was and is a contested issue. The Act provides: "Upon termination of the exemption, a State commission shall establish an implementation schedule for compliance with the

request that is consistent in time and manner with [FCC] regulations." 47 U.S.C. § 251(f)(1)(B).

Thus, the remaining and all-important issue that must be resolved in this proceeding is the appropriate schedule for implementing Midcontinent's request for wholesale resale within NDTC's Devils Lake exchange. For the reasons stated below, NDTC respectfully submits that the time frames included within the Act for the negotiation and arbitration of interconnection agreements as established by Congress are appropriate and rational, and should be adopted by the Commission in this proceeding.

Moreover, since the Commission's determination regarding an implementation schedule is not constrained by the requirements of Section 251(f)(1)(A) regarding the merits of Midcontinent's request, NDTC respectfully submits that the Commission has the authority to ensure that the overall public interest is achieved through the implementation schedule it establishes. Accordingly, NDTC also respectfully requests that the Commission require that any interconnection agreement between the parties (whether it be arbitrated or not) be implemented by the earlier of February 1, 2007, or the date by which NDTC first provides video programming within its Devils Lake exchange. This date will ensure a "level playing field" in the Devils Lake exchange and fair competition between the parties. As part of this requirement, and at the time the Commission issues a decision in this proceeding and Midcontinent issues a bona fide request to NDTC, NDTC will agree to negotiate in good faith pursuant to the time frames established in Section 252 of the Act *all of the necessary terms and*

conditions of an interconnection agreement for the provision within the Devils Lake exchange required for wholesale resale.

**IV. THE ACT, RATIONAL PUBLIC POLICY AND THE FACTS FULLY SUPPORT THE CONCLUSION THAT ANY IMPLEMENTATION SCHEDULE APPLIED TO THE MIDCONTINENT REQUEST BE THOSE TIME PERIODS FOUND IN SECTION 252 OF THE ACT.**

While no specific regulations from the FCC are on point, the Commission's analysis is not subject to a blank canvas to shorten the Act's Section 252 time frames as Midcontinent suggests. (See, e.g., Ex. P-1 at 6.) Rather, consistent with its considerable experience in approving and/or arbitrating interconnection agreements ("ICAs") under the Act, the Commission is fully aware that Congress provided a framework for the negotiation and, where required, arbitration, of outstanding issues with respect to ICAs. See 47 U.S.C. §§ 251 and 252.

As the Commission is aware, interconnection arrangements between two carriers do not occur automatically. (See Ex. R-6 at 6 (Interconnection arrangements under the Act are "not established out of thin air.")) For purposes of this proceeding, interconnection occurs within the framework of Section 251 of the Act and, but for the need to first address the rural exemption issue (47 U.S.C. § 251(f)(1)), is initiated by a request of one telecommunications carrier to another. As such, the Act includes the time frames for negotiation of an ICA. Section 252(b)(1) of the Act specifically states:

(1) Arbitration

During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

47 U.S.C. § 252(b)(1). Congress's mandate of a minimum of 135 days for parties to negotiate an interconnection agreement before a party could invoke arbitration from a Commission under Section 252(b) of the Act is unequivocal, and the rationale for it is clear.

To be sure, it is only logical under the structure of the Act that if the duty to offer resale at wholesale discounts was imposed on a Rural Telephone Company (like NDTC) (and thus the existing exemption removed), the duty to negotiate terms and conditions for the offering of that resale at wholesale discounts would *only then apply*. Section 251(f) confirms this fact.

(A) Exemption

Subsection (c) of this section shall not apply to a rural telephone company *until*

- (i) such company has received a bona fide request for interconnection, services, or network elements, and
- (ii) the State commission determines (under subparagraph (B)) that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof).

47 U.S.C. § 251(f)(1)(A) (emphasis added.) Absent such conclusion, Congress's use of the term "until" would be superfluous, a conclusion contrary to law.<sup>3</sup>

The facts and the Act's structure also support the conclusion that the parties should be allowed to develop their own detailed agreement and to narrow the scope of any disagreement before invoking the resources of the Commission to try to attempt to write an agreement for them. The record is clear that

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<sup>3</sup> See *Reiter v. Sonotone Corp.*, 442 US 330 (1979), citing *US v. Menasche*, 348 US 528, 538-539 (1955) ("In construing a statute, we are obliged to give effect, if possible, to every word Congress used.").

Midcontinent has not engaged in any substantive discussion with NDTC of the business terms and conditions required within an ICA. (HT 27:3-9.) It would be foolhardy to suggest that the parties could implement some form of arrangement for the offering of wholesale resale without first ensuring the business terms and conditions establishing the parties' respective rights and responsibilities are not first discussed, arbitrated if necessary, and approved by the Commission.

The framework that confirms this result was provided by Congress and it saw fit to ensure that the parties had at least 135 days to have those discussions, and the Commission a full 9 months to resolve any disputed issues. See 47 U.S.C. §§ 252(b)(1) and 252(b)(4)(C). Thus, there is no sustainable basis to conclude that this same Section 252(b) framework should not be applied by the Commission in this proceeding.

At the same time, it is also clear that Midcontinent's suggested 90-day implementation time frame is unrealistic and without a legal basis. (Ex. P-1 at 6, Ex. P-11 at 24, HT 69:10-20, 72:2-25.) Based on the record established at the hearing, it appears that Midcontinent's suggested time frame was based on a variety of mistaken premises or statements.

First, Midcontinent suggested that the establishment of a wholesale resale discount is an easy process based on the experience with Qwest. (HT 61:14-63:14.) As the Commission is well aware, NDTC is not Qwest and no resale discount has ever been established by the Commission for a Rural Telephone Company like NDTC. *Id.*

Second, Midcontinent suggested that the establishment of a wholesale resale discount study would be an easy process. *Id.* While that testimony was provided by a non-economist (HT 56:5-14.), the only economist testifying clearly demonstrated that the matter involved a number calculations and determinations as to the inputs required for such a study. (HT 220:14 to HT 223:12.)

Q. Mr. Meredith, based on recross by Mr. Harrington, is it safe to say that an avoidable cost study is not an add-water-and-mix proposition?

A. Yes it is.

(HT at 224:22-25.)

Third, Midcontinent's position apparently was based on its effort to portray NDTC as a monopolist trying to keep out competition. As was confirmed by Midcontinent Witness Lohnes, however, the fact is that Midcontinent is the only true monopoly holder in cable television provisioning in Devils Lake, North Dakota. (HT 25:19-21.) Likewise, Mr. Dircks testified that NDTC is not afraid of competition provided it is fair. (See Ex. R-1 at 1-2.) Moreover, confusion may exist in the record because Midcontinent suggested that NDTC could delay the discussion of interconnection agreement terms and conditions for the Devils Lake exchange by over a year after NDTC began providing video programming within Devils Lake since the exemption regarding wholesale resale with respect to Midcontinent would, at that time, no longer exist. (HT 15:9-16:14, 189:24-191:9.) While NDTC agrees that § 251(f)(1)(C) speaks for itself, NDTC's position on the timing and implementation of an ICA is clear. See Section III, *supra*. Thus,

NDTC's efforts to assert its legal rights are appropriate and Midcontinent's attempts to discredit NDTC should be rejected outright.

Fourth, Midcontinent Witness Gates' effort to confuse the record that a normal implementation schedule with normal negotiation processes would require the parties to "engage in another round of negotiations" (Ex. P-11) was shown to be inaccurate by the only Midcontinent employee involved in the process prior to the hearing (see Ex. P-1 at 1), as Mary Lohnes was copied on the May 2005 letter sent to NDTC. (See Ex. R-2.) In fact, Midcontinent Witness Lohnes confirmed that the parties have not negotiated at all. (HT 27:3-9.)

Fifth, Midcontinent Witness Gates further tried to paint NDTC as having withheld necessary information. (Ex. R-11:34-36.) He was refuted by his own colleague, Midcontinent Witness Fischer, who testified that Midcontinent had received all the information that it had agreed it needed. (HT 37:25-38:14.)

Finally, Midcontinent apparently based its claim on the need for some type of expedited implementation schedule based on the suggestion that NDTC might try to "lock in" its customers to long-term contracts. (See Ex. R-1 at 4.) Yet, when confronted with that assertion, Midcontinent Witness Lohnes admitted she knew of no such instance of NDTC doing so (HT 32:19-23) and was not aware that NDTC operated under filed tariffs (HT 25:11-14).

In addition to the law and record, rational public policy also supports the conclusion that the Commission should utilize the Section 252 time frames as the starting basis for the implementation schedule of the Midcontinent request. The record is clear that the Commission is being asked to do what is fair, and to

ensure that there is a level playing field for the provision of voice, high speed Internet, and video programming within the Devils Lake exchange. (Ex. P-1 at 6.) Midcontinent apparently does not disagree with the need for fair competition. Even though its concerns regarding early entry are without foundation, Midcontinent apparently also wants to compete by adding the service that NDTC currently provides. (See *generally* Ex. P-1 at 4-5.)

Consequently, utilization of the nine-month framework would permit both Midcontinent and NDTC to stand on even footing with the implementation of any ICA for wholesale resale at the time NDTC is first able to provide video programming and by no later than February 1, 2007. Should Midcontinent be truly interested in engaging in fair competition, and thus creating a level playing field, rather than casting aspersions as to the creation of an unlevel playing field by NDTC, there should be no disagreement with respect to the implementation schedule proposed by NDTC.

Independent of the need to ensure a level playing field, however, the Commission can take comfort in knowing that the very same type of implementation schedule was used by sister jurisdictions in situations similar to that here. For example, in a case in South Carolina, the Rural Telephone Company involved in that case agreed its rural exemption was lost to a competitor. The South Carolina Public Service Commission adopted the Section 252 time frames. (See Ex. R-12 at 5.) Likewise, in Texas, the Texas Public Utilities Commission, while relying on a Texas regulation, also ruled that Section 252 time frames under the Act were appropriate when terminating a rural

exemption. (See Ex. R-13 at 4, applying Texas time frames which are identical to Section 252 of the Act.)

Lastly, in New York (Ex. R-14), *unlike this proceeding*, the parties had made substantial progress in negotiating an interconnection agreement. (Ex. R-14 at 2.) They were in a deadlock over compensation rates for traffic they exchanged. (*Id.*) After a failed attempt at mediation before the New York Public Service Commission (“NYPSC”) (*id.* at 3) and extensive analysis by the NYPSC staff, the NYPSC concluded the mediation with an order finalizing the missing elements of the interconnection agreement that had already been negotiated. Unlike the New York case, the parties here have spent no time negotiating an interconnection agreement (HT 27:3-9) nor has this Commission mediated the terms of an interconnection agreement. Moreover, the NYPSC made clear that it was acting under Section 251(f)(2) of the Act regarding a request to suspend or modify a reciprocal compensation obligation under Section 251(b)(5) of the Act (see *id.* at 9-10 and n.1) and *not Section 251(f)(1) that is at issue in this proceeding.*

As was so succinctly stated in the South Carolina case:

“Finally, 47 USC § 251(f)(1)(B) requires the State Commission upon termination of the exemption to establish an implementation schedule for compliance with the request. In accordance with this requirement, the Commission finds that the appropriate schedules as set forth in Section 252 of the Telecommunications Act of 1996 shall apply.”

(Ex. R-12 at 5, emphasis added.)

## **CONCLUSION**

In light of the record developed in this hearing and this submission, the sole remaining issue is what the appropriate implementation schedule should be for an interconnection agreement between NDTc and Midcontinent. To that end, the record is clear that the parties have not begun negotiation. The law is also clear since Congress set the minimum standards for an implementation schedule of an interconnection agreement under the Act in Section 252. Likewise, when Congress established that a State Commission had authority to create an implementation schedule in Section 251(f)(1)(B), it provided the State Commissions the necessary flexibility at the local level to establish rational implementation procedures.

The law not only mandates certain minimum periods but also allows this Commission to establish schedules for implementation. Under this framework, the Commission is provided the right to ensure that such schedule guarantees fairness. After all, fairness is apparently Midcontinent's stated desire. Thus, the starting point for any implementation schedule is that found in Section 252(b)(1) and the nine-month period found in Section 252(b)(4)(C).<sup>4</sup>

Using these guidelines, NDTc respectfully submits that the Commission direct the parties to implement any interconnection agreement by the earlier of

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<sup>4</sup> Section 252(b)(4)(C) of the Act states that:

(C) The State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) upon the parties to the agreement, and shall conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section.

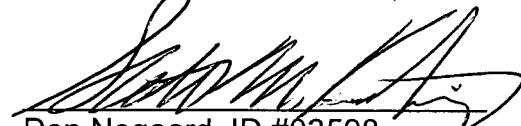
47 U.S.C. §252(b)(4)(C).

February 1, 2007, or the date by which NDTC first provides video programming within its Devils Lake exchange. In doing so, this Commission need not expand its decision beyond the agreement made in this proceeding by NDTC regarding undue economic burden, technical infeasibility, or impacts upon universal service associated with the specific request made by Midcontinent for wholesale resale in NDTC's Devils Lake exchange. See 47 U.S.C. § 251(f)(1)(A).

NDTC respectfully submits that the result it seeks in this proceeding is fully consistent with the law, record, and rational public policy and should be adopted herein. Accordingly, NDTC respectfully requests that the Commission resolve the matters raised in this proceeding in the manner recommended herein.

Dated this 17th day of February, 2006.

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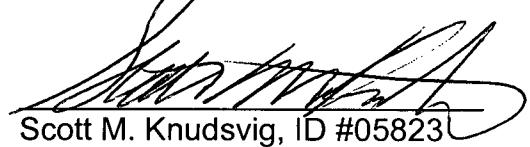
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**CERTIFICATE OF SERVICE**

A true and correct copy of the foregoing Post-Hearing Brief of North Dakota Telephone Company was served electronically and by regular mail on the 17th day of February, 2006, on the following:

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