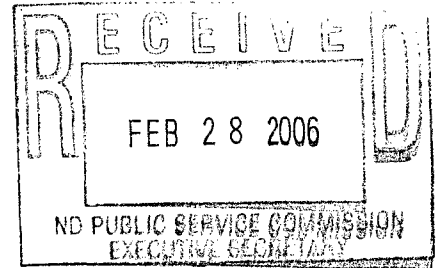


STATE OF NORTH DAKOTA  
PUBLIC SERVICE COMMISSION



Midcontinent Communications, )  
a South Dakota Partnership, )  
 )  
Complainant, )  
 )  
vs. )  
 )  
North Dakota Telephone Company, )  
 )  
Respondent. )

Case No. PU-05-451

**POST-HEARING REPLY BRIEF OF  
NORTH DAKOTA TELEPHONE  
COMPANY**

North Dakota Telephone Company ("NDTC"), by counsel, hereby submits this Reply Brief to the North Dakota Public Service Commission (the "Commission") in response to the February 17, 2006, post-hearing filing of Midcontinent Communications ("Midco") in the above-captioned matter.<sup>1</sup> NDTC respectfully submits that the Commission should resolve this proceeding in the manner proposed by NDTC as it is the *only* proposal that is consistent with the facts, law, common sense, and rational public policy. Accordingly, NDTC respectfully requests that the Commission direct: (1) the parties to enter into good faith negotiations of a Section 251/252 agreement for the provision to Midco of wholesale resale by NDTC within its Devils Lake exchange once NDTC receives a valid request for interconnection from Midco after the Commission issues its decision in this proceeding; and (2) that any such interconnection agreement

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<sup>1</sup> For the Commission's convenience, NDTC will refer to the post-hearing brief of Midco as the "Midco Brief" and NDTC's February 17, 2006, filing in this proceeding as the "NDTC Brief."

be implemented by “the earlier of February 1, 2007, or the date by which NDTC first provides video programming within its Devils Lake exchange.” (NDTC Brief at 1.)<sup>2</sup>

**I. THE SOLE ISSUE REQUIRING COMMISSION ACTION IS THE ADOPTION OF AN IMPLEMENTATION SCHEDULE.**

What the post-hearing filings have now demonstrated is that the Commission need not consider the three factors found in Section 251(f)(1)(A) of the Communications Act of 1934, as amended (the “Act”). (See 47 U.S.C. § 251(f)(1)(A).) NDTC has agreed that the current request by Midco for resale at a wholesale discount in the NDTC Devils Lake exchange is not unduly economically burdensome, technically infeasible, or contrary to the universal standards contained in the Act. (See NDTC Brief at 6-7; see also HT 158-159, 166:7-18.) As such, the Commission need not consider Midco’s purported analysis of the Section 251(f)(1)(A) factors (see Midco Brief at 3-8), nor the purported consumer benefits that Midco cites. (See *id.* at 9-11.) As Midco states: “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.*” (Midco Brief at 9 (emphasis added).)

Thus, the only remaining issue is the establishment by the Commission of an implementation schedule that advances the public interest. See 47 U.S.C. § 251(f)(1)(B). Consistent with the NDTC Brief (which is incorporated herein by reference), it is abundantly clear that, unlike Midco’s proposed 90-day implementation

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<sup>2</sup> The parties each submitted proposed findings of facts and conclusions of law on February 17, 2006, along with their respective briefs and Midco also filed a proposed order. To the extent that the proposed findings of fact and conclusions of law and proposed order provided by Midco differ from NDTC’s submissions, the Commission should reject Midco’s proposals for the reasons stated herein and in the NDTC Brief.

schedule, NDTC's proposal is grounded in fact, the law, and rational public policy.<sup>3</sup> Accordingly, NDTC respectfully requests that its proposed implementation schedule be adopted in total by the Commission.

**II. THE COMMISSION MUST REJECT MIDCO'S IMPLEMENTATION PROPOSAL BECAUSE IT IS BASED ON FUNDAMENTALLY FLAWED STATEMENTS OF FACTS AND LAW AND WOULD RESULT IN THE ESTABLISHMENT OF IRRATIONAL PUBLIC POLICY.**

NDTC respectfully submits that, consistent with the scope of the request made by Midco, the Commission has ample authority under Section 251(f)(1)(B) to establish an implementation schedule in this proceeding that is rational and advances the public interest. Midco states that the Commission needs to rely upon "the record in this proceeding" (see Midco Brief at 11), and that the Commission needs to establish a "level playing field." "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." Midco Brief at 10. Without question, NDTC has amply demonstrated that the encouragement of a "level playing field" and fair competition is a result that should guide the Commission's resolution of this proceeding. (See NDTC Brief at 7; see also Ex. R-1 at 1:23-2:2, 2:20-3:4, 10:15-17.) Thus, the Commission can have confidence that its authority to establish a rational implementation schedule that advances the public interest is fully understood and supported by both parties.

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<sup>3</sup> NDTC also notes that, from public policy perspective, the North Dakota Legislature has also found the Act's time frames appropriate when it granted this Commission the authority to arbitrate agreements under Section 252 of the Act. See NDCC § 49-21-01.7(9). Thus, both Congress in establishing the Section 252(b) and the North Dakota Legislature in likewise adopting the Section 252(b) time frames provide the legal and associated public policy basis for Commission action adopting the same time frames as proposed by NDTC. See also, NDCC § 49-21-01.7(15) (The Commission should not adopt rules when carrying out the Commission's duties under the Act that impose obligations on carriers that are not imposed by the Act.).

Unlike NDTC, however, Midco's implementation proposal is built upon misstatements of fact and innuendo that lead to irrational public policy. Thus, when the erroneous nature of *any one* of Midco's positions are exposed, it is clear that there is no basis upon which the Commission can or should rationally find that Midco's 90-day implementation schedule is appropriate.

**A. Midco's Claimed Reliance on the Goal of Creating a "Level Playing Field" Rings Hollow.**

Midco's purported efforts to encourage a "level playing field" through its proposal are nothing of the sort. (See Midco Brief at 17.) The effect of the Midco proposal is the creation of an "unlevel" playing field that is clearly tilted in favor of Midco. Accordingly, for this reason alone, Midco's proposal should be rejected.

Midco's proposal is based on the false premise that NDTC will be providing video within the NDTC Devils Lake exchange in less than a year. (See *id.* at 20. (NDTC will "begin providing video over its facilities in Devils Lake in less than a year. . . .)) Midco's assertion has no basis in fact.

While NDTC used the date of February 1, 2007, as a target date, the record is clear that NDTC never stated that it *would* provide cable television service on or before that date as Midco now claims. As David Dircks from NDTC consistently has made clear, "[a]s I stated at my deposition for this proceeding, we feel *at some point* we will offer video, but that time has not come." (Ex. R-1 at 8 (emphasis added).) "Our *goal* is to offer video services sometime *after* February 1, 2007." (*Id.* at 9 (emphasis added).)

Rather than face these facts, Midco also relies on innuendo in an apparent effort to cloud the record. Midco speculates as to a number of ways that NDTC *could* gain some form of competitive advantage over Midco within the NDTC Devils Lake

exchange. (See Midco Brief at 16.) However, speculation is not fact; no citation is provided by Midco that ties its speculation to NDTC.

For example, Midco cites to Midco Witness Lohnes' testimony at the hearing that some unidentified "communities" and some unidentified "competitors" have entered into long-term contracts with customers. (*Compare* Midco Brief at 16 and HT 29:24-30:3.) The record is clear that Midco's speculation was never tied to NDTC.

Likewise, Midco selectively refers to the record regarding why NDTC deployed the new fiber, inferring that the reason for deployment was for video and that the plant was otherwise fully depreciated. (See Midco Brief at 5, n.14.) Midco further states that NDTC's plan for reinvestment was some form of "speculative venture." (*Id.* at 5.) NDTC could not have been clearer with respect to why it deployed the new fiber – the constant review of its offerings to maintain a high quality network in the communities it serves; aging plant; increased customer demand for high-speed data; the potential for increased reliability and lower maintenance costs of fiber; and the ability of fiber to handle high bandwidth services consumers want. (See Ex. R-1 at 6:20-7:10.) Contrary to the inferences left by Midco, NDTC should be encouraged to reinvest in North Dakota and that is what NDTC has done. The record rejects Midco's narrow scope of NDTC's plans. NDTC's plans are justified by common sense, rational public policy, and effective business practices.

The record is also clear that each of the parties has one missing element of the "triple play"; *i.e.*, the provision of telephone service, high-speed access to the internet, and cable television. (See, *e.g.*, HT 147:6-148:1.)<sup>4</sup> Midco lacks telephone service

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<sup>4</sup> Midco's statements regarding the potential for NDTC to offer a "quadruple play" that includes wireless (see Midco Brief at 11 (n. 44), 15) should not deter the Commission's action in encouraging a

and NDTC lacks cable television. NDTC's ability to provide cable television service, however, is contingent upon the completion of its fiber facilities, a head end, a cable television franchise, and securing programming. (See Ex. R-1 at 7:19-8:21.) No such contingencies exist for Midco's offering of telephone service.

Midco's ability to provide telephone service could have been accomplished through simple resale pursuant to Section 251(b)(1) of the Act (see Ex. R-6 at 9:21-10:7), and that would have avoided this proceeding. It was Midco that chose to pursue wholesale resale and thus triggered this Section 251(f)(1) proceeding. If time was an issue, Midco could have chosen to pursue simple "retail resale" instead. Midco's decision, however, to pursue Section 251(c) wholesale resale in NDTC's Devils Lake exchange in this proceeding should not foist an unrealistic time frame for the establishment and implementation of a Devils Lake exchange-specific wholesale resale agreement upon NDTC.

Midco's proposal – 30 days for negotiation and 60 days for implementation – would not allow the parties the ability to narrow issues or to reach agreement if possible. This is further exacerbated by the fact that the parties have not even discussed the terms and conditions of the required interconnection agreement. (*Accord* NDTC Brief at 8; see *also* Ex. R-6 at 13:4-13.) The Commission is well aware of the need for proper discussions and negotiations based on its experience with resolving Section 252(b) interconnection disputes. The parties' agreement to reschedule and the Commission's rescheduling of the hearing in this matter are testament to the difficulty of ensuring that the due process rights of interested parties are advanced. NDTC is not aware of any

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level playing field. NDTC offers these services through resale (see HT 104:16-17)), and there is no fact in the record that Midco could not do the same.

reason (and Midco has provided none) as to why due process considerations with respect to negotiating terms and conditions of an interconnection agreement should be any less important than those the Commission considers when engaging in its hearing process.

The net effect of Midco's proposal is that it either wants to *impose terms and conditions upon NDTC*, or have the Commission do it. Both effects are entirely inappropriate from a public policy basis, and would otherwise be counter to other State Commissions that have needed to address an implementation schedule after, like here, a specific aspect of a Section 251(f)(1) exemption has been removed.<sup>5</sup>

Any doubt over NDTC's good faith is resolved because NDTC runs the risk of not having the ability to provide the triple play by February 1, 2007; e.g., if the fiber project is delayed or NDTC is delayed by the local franchising authority, NDTC assumes that risk. Midco, on the other hand, has the firm *outside date* of February 1, 2007, proposed by NDTC absent further Commission action. NDTC only requests that an appropriate amount of time be provided by the Commission so that its decision in this proceeding can encourage both fair competition and a level playing field. (See, e.g., NDTC Brief at 7.) Contrary to this proposal, Midco is not seeking a level playing field at all. Midco claims it wants fair competition, but its actions demonstrate otherwise. Midco's position should be rejected by the Commission.

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<sup>5</sup> Presumably, Midco relies upon the New York Public Service Commission case in support of its position that Midco's proposed implementation time frame is appropriate (see Midco Brief at 19), and vainly attempts to distinguish both the South Carolina Public Service Commission and Texas Public Utilities Commission decisions. (See *id.* at 13-15.) Midco is wrong on both accounts. The New York case dealt with considerably different facts and a different provision of the Act (*i.e.*, 47 U.S.C. §251(f)(2)) (request for suspension or modification of interconnection duties). The South Carolina and Texas cases establish an implementation schedule entirely consistent with that proposed by NDTC. (See NDTC Brief at 13-14.)

**B. Midco's Claim that an Unrealistic 90-Day Full Implementation Time Frame will Create Purported Public Interest Benefits is Erroneous.**

While it acknowledged that the benefits of competition to consumers are not relevant to the consideration of whether to lift the exemption (see Midco Brief at 9), Midco appears to rely upon its purported consumer benefits – “reduced prices, better customer service, innovation and a level playing field for all competitors.” (*id.*) to justify its unrealistic 90-day implementation time line. (See *id.* at 15.) Midco's generalized assertions of competitive benefits have not been demonstrated to be applicable in this proceeding.

First, and with respect to the claimed “level playing field” that Midco suggests, Midco's position has been amply demonstrated to be just the opposite. Midco's statements make clear that it wants an “uneven” playing field. See Section II.A, *supra*.

Second, Midco has not demonstrated that *its* provision of wholesale resale will increase innovation. The record is clear that it will be reselling the tariffed service offerings of NDTC in the NDTC Devils Lake exchange and nothing more. (See, e.g. Ex. R-1 at 3:1-4; R-6 at 10:22-11:1.) Since no additional functional value to NDTC's tariffed offerings will be added by Midco, no innovation has been demonstrated. While bundling of products could be viewed by some as some form of innovation (see Midco Brief at 10), the benefit of both parties being able to innovate is significantly undermined when the playing field would not be level as is the result of Midco's 90-day implementation schedule.

Third, Midco has no evidence of how customer service will improve when NDTC has had few customer complaints about its tariffed services (See Ex. R-1 at 4:6-9; HT



155:20-156:21) and Midco is reselling NDTC's services. Midco's efforts to contradict these facts simply confuse the record.

Midco suggests that "[c]onsidering that Devils Lake customers recently experienced a price increase, and that the increase led to a significant number of complaints to the Commission . . ." (Midco Brief at 9.) This statement cannot be reconciled with the actual records contained in the Commission's files in PU-05-325. NDTC respectfully requests the Commission to take judicial notice of its own records in that case. The Commission, based on its independent review, will be able to confirm that not all 96 "contacts" were "complaints." Some portion of the consumers wanted the Extended Area Service ("EAS") plan that NDTC filed. All but two of the contacts in that case came from consumers outside Devils Lake. Of the two contacts from Devils Lake, one contact was resolved before the EAS plan was withdrawn by NDTC in September of 2005 and the other contact was in favor of the EAS plan.

As demonstrated herein, none of the purported consumer benefits that Midco cites supports its position that an unrealistic implementation time frame is in the public interest. Accordingly, NDTC respectfully requests that the Commission disregard Midco's claims in this regard.

**C. Midco's Claim that Its Unrealistic 90-Day Full Implementation Schedule is Reasonable Because a Wholesale Resale Discount is Easily Developed is Entirely Without Basis.**

Midco's position that its 90-day implementation time frame is reasonable is based on two additional claims that actually demonstrate why Midco's proposal is unrealistic. First, Midco continues to claim that the wholesale resale discount can be done quickly. (See Midco Brief at 17 (" . . . Midcontinent believes that calculating a wholesale discount

should be a fairly straightforward process. . . .”).) Midco Witness Gates also stated it would be a “simple matter” for the Commission to establish the wholesale resale discount rate for the NDTC Devils Lake exchange (see HT 62:7). Repetition by Midco of the same statement does not make it true or a fact. The only economist testified that these assertions were without merit.

Q. Mr. Meredith, based on your 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 224:22-25; see also NDTC Brief at 11.)

Second, Midco claims that the Commission can take a “fix it later approach” by adopting an interim wholesale rate. (See Midco Brief at 18.) That idea can and should be rejected by the Commission.

Midco’s suggestion that the Commission can “fix” an improper wholesale resale rate later (see *id.* at 18) contradicts Midco’s suggestion to the Commission that it must rely upon the “record” in fashioning the implementation schedule in this proceeding. (See *id.* at 11.) The record confirms, however, that: (1) this proceeding is not about the establishment of a wholesale resale discount for NDTC’s Devils Lake exchange as confirmed by the Commission’s December 14, 2005, “Notice of Rescheduled Hearing” (the “December 14th Notice”) and (2) no Devils Lake exchange-specific wholesale discount study or an NDTC-wide study has been undertaken by Midco (see HT 37:16-24, 46:3-8), the Commission (see *id.* 61:17-62:7), or the NDTC’s witness, Mr. Meredith. (*Id.* 194:9-19.)

Consequently, there is absolutely *no record* upon which an interim rate for NDTC can rationally be established. Moreover, the Federal Communications Commission

(“FCC”) rule upon which Midco presumably relies only applies *after* the Commission finds a study that is produced is lacking. To that end, and taken to its logical conclusion, Midco’s position actually supports the need for Section 252(b) time frames suggested by NDTC to be applied.

Midco’s suggestion regarding an interim wholesale discount rate presumably relies upon Section 51.611 of the FCC’s rules. (See Midco Brief at 18; *see also* 47 C.F.R. § 51.611.) That rule states a state commission can establish an interim wholesale rate only “[i]f a state commission cannot, *based on the information available to it*, establish a wholesale rate using the methodology prescribed in §51.609. . . .” 47 C.F.R. § 51.611(a) (emphasis added). A study could take up to two to three months to conduct (see HT 219:23-222:11), but would *only* be necessary if the parties cannot reach an agreement. Any agreement or disagreement, however, would not be known until the “gives and takes” of a negotiation between the parties have begun and are taking place. Even if the study was required, the only time “a state commission” would have “information available to it” (47 C.F.R. § 51.611(a)) would be during arbitration, an event that comes *before* the application of an interim rate. Carried to its logical conclusion, therefore, Midco’s reliance on an interim rate confirms the need for the arbitration process of Section 252(b) of the Act.

**D. Midco’s Statements that Nothing in the Law Precludes the Commission from Expanding Relief to Midco Beyond the Request for Wholesale Resale in the Devils Lake Exchange is Clearly Erroneous.**

Midco suggests that “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.” (Midco Brief at 21). This leap is clearly erroneous and should be rejected outright.

First, Midco wants the Commission to ignore the language in Section 251(f)(1)(b) that precludes the Commission from expanding the scope of this proceeding through its implementation authority. The very language of Section 251(f)(1)(B) states: “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) (emphasis added). “The request” at issue in this proceeding is that made by Midco, nothing more. Midco’s request, in turn, is *solely* for the removal of NDTC’s existing exemption from the offering of resale at a wholesale discount within the NDTC Devils Lake exchange. (See, e.g., Docket Entries 1, 3, and 47; Ex. P-5 at 2:41-3:57; Ex. P-11 at 3:51-59.)<sup>6</sup>

Second, Midco knows full well that the Commission did not provide any notice that the scope of the proceeding was beyond Midco’s request for wholesale resale within the NDTC Devils Lake exchange. See *generally* December 14th Notice. Thus, consideration of Midco’s request at this stage raises significant due process issues which again Midco apparently wants the Commission to ignore.

Finally, and should it be necessary, the Commission can note, as stated in NDTC’s Prehearing Brief, that a court has already spoken on this issue, and those directives are absolutely clear – the scope of relief is to the request that is made; i.e.

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<sup>6</sup> Although the expanded negotiation suggested by Midco is wholly improper, the fact that Midco apparently relies upon Section 252 in arguing for it can be viewed as recognizing that the Section 252 time frames are appropriate for Section 251(b) and (c) duties that have not been negotiated. Logically, therefore, that same construct would apply to the instant request for wholesale resale within the NDTC Devils Lake exchange since the record is clear that there have been no negotiations on that request between the parties. Accord NDTC Brief at 8-10.

wholesale resale within the NDTC Devils Lake exchange. See *ASC of Alaska, Inc. v. Regulatory Commission of Alaska*, 81 P.3d 292, 301 (S.Ct. Alaska, 2003); see also Prehearing Brief at 7-8.

Accordingly, the law is clear and specifically prescribes what the Commission can do in establishing an implementation schedule under Section 251(f)(1)(B). Midco's contentions to the contrary should be rejected outright.

### **III. CONCLUSION.**

When NDTC's proposal is viewed properly and in its entirety, the NDTC proposal is appropriate and should be adopted. Midco's proposal is without factual, legal, common sense, or rational public policy bases. Consequently, the Commission should reject outright Midco's "you can fix it later" approach to establishing the terms and conditions for the provision by NDTC of wholesale resale within its Devils Lake exchange to Midco. In doing so, NDTC respectfully submits that the Commission should resolve the sole remaining issue in this proceeding – the appropriate implementation schedule for the provision of wholesale resale by NDTC within its Devils Lake exchange to Midco – in a manner fully consistent with that which has been proposed by NDTC. Simply put, NDTC would ask that the Commission direct: (1) the parties to enter into good faith negotiations of a Section 251/252 agreement for the provision to Midco of wholesale resale by NDTC within its Devils Lake exchange once NDTC receives a valid request for interconnection from Midco after the Commission issues its decision in this proceeding; and (2) that any such interconnection agreement be implemented by "the earlier of February 1, 2007, or the date by which NDTC first provides video programming within its Devils Lake exchange." (NDTC Brief at 1.)

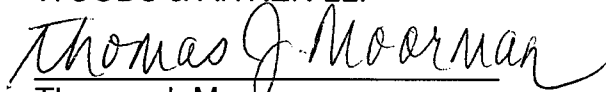
As amply demonstrated herein and in the NDTC Brief, NDTC's implementation schedule is grounded in the facts in this proceeding, common sense, the law, and rational public policy. Accordingly, NDTC respectfully submits that the Commission should adopt it in its entirety.

Dated this 28th day of February, 2006.

  
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### CERTIFICATE OF SERVICE

A true and correct copy of the foregoing Post-Hearing Reply Brief of North Dakota Telephone Company was served electronically and by regular mail on the 28th day of February, 2006, on the following:

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