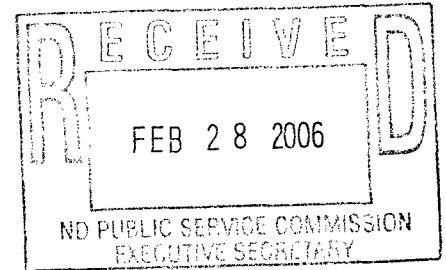


STATE OF NORTH DAKOTA  
PUBLIC SERVICE COMMISSION

MIDCONTINENT COMMUNICATIONS, )  
A SOUTH DAKOTA PARTNERSHIP, )  
COMPLAINANT, )  
vs. )  
NORTH DAKOTA TELEPHONE COMPANY, )  
RESPONDENT. )

**Case No. PU-05-451**



**REPLY BRIEF OF MIDCONTINENT COMMUNICATIONS**

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**Case No. PU-05-451**

## REPLY BRIEF OF MIDCONTINENT COMMUNICATIONS

Midcontinent Communications, by its attorneys, hereby submits its reply brief in the above-captioned proceeding. As shown below, the Commission should lift the rural exemption for North Dakota Telephone Company (“NDTC”) in Devils Lake and adopt an implementation schedule in accordance with the proposal in Midcontinent’s initial brief to ensure that consumers can benefit from fair competition in telephone and video services.

## I. Introduction

Only one issue remains in this proceeding. Because NDTC has agreed that the criteria for lifting the rural exemption have been met for Devils Lake, the only question that remains is what schedule the Commission should adopt for NDTC to implement its obligations under Section 251(c) of the Communications Act.<sup>1</sup>

For all the reasons described in Midcontinent’s initial brief and below, the evidence in this proceeding supports Midcontinent’s proposed two-part implementation schedule. First, NDTC should be required to make wholesale resale available within 90 days of the

<sup>1</sup> 47 U.S.C. § 251(c).

Commission's order, with an interim wholesale discount subject to a true-up once a permanent rate is determined. Second, and equally important, the Commission should require the parties to begin the Section 252 negotiation process for facilities-based interconnection.

It is likely that NDTC will argue that Midcontinent's request for the Commission to set a schedule for facilities-based interconnection is extraordinary and unfounded. While Midcontinent's request is extraordinary, so is the situation. NDTC has been engaged in a long-term plan to enter the video market in Devils Lake for a year and half; would not admit the existence of the plan publicly until its testimony in this proceeding; and has been depending on the rural exemption to shield it from competition in the telephone market. Now, it has proposed a schedule for implementation of resale that would put off resale competition in Devils Lake for close to a year, even though it admits that all of the tests for lifting the rural exemption have been met. These facts compel the conclusion that NDTC will do whatever it can to delay the advent of facilities-based competition, even though it is giving up the right to stop Midcontinent from entering the market by deciding to offer video. Moreover, NDTC could succeed in its efforts – to the detriment of Devils Lake consumers – unless the Commission acts in this proceeding. Such facts demand the extraordinary action of requiring NDTC to negotiate for facilities-based interconnection immediately, rather than a year from now.

**II. There Is No Basis for Adopting NDTC's Proposal to Delay Competition for a Year.**

Any analysis of NDTC's proposed implementation schedule must start with a simple fact: NDTC's proposal would delay the availability of competition to Devils Lake consumers for close to a year and would prevent facilities-based competition from coming until 2008. There is no legal basis to conclude that such a schedule is required or preferred, and there is no reason to wait until then to create a "level playing field."

**A. NDTC's Proposed Schedule Would Deny Consumers the Benefits of Competition in Devils Lake.**

The most important flaw in NDTC's proposed schedule is that it would deprive consumers of local telephone competition for much longer than is necessary or appropriate. As described in Midcontinent's initial brief, consumers benefit greatly from competition through reduced prices, improved customer service and innovation, whether the competition comes from resale or facilities-based service.<sup>2</sup> This is undisputed by NDTC, and even Mr. Dircks admitted that competition is beneficial to consumers.<sup>3</sup> Once the Commission determines that the standards in Section 251(f)(1) are met, any delay in bringing competition to market hurts consumers.

In this context, NDTC's proposal to delay competition from Midcontinent until February 2007 is entirely unwarranted. Moreover, NDTC's schedule provides no opportunity for competition to begin sooner because February, 2007 is the start date regardless of when the parties complete negotiations or an arbitration.<sup>4</sup>

NDTC's schedule also would mean that Midcontinent could not begin the process of obtaining facilities-based interconnection until NDTC turned on video service. As the testimony establishes, this would mean that Midcontinent would be unable to offer facilities-based telephone service in Devils Lake until sometime in 2008.<sup>5</sup> Again, this would mean that consumers in Devils Lake would not be able to enjoy the additional benefits of facilities-based competition until two years from now.

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<sup>2</sup> Midcontinent Initial Brief at 9-10; Tr. at 157 (Dircks) (price reductions result from competition); Tr. at 76 (Gates) (competition creates "good incentives to do even better" for customer service); Exhibit P11, Prefiled Rebuttal Testimony of Timothy J Gates ("Gates Rebuttal") at 15.

<sup>3</sup> See, e.g., Tr. at 157 (Dircks) ("Choice is good.")

<sup>4</sup> Indeed, the NDTC schedule essentially presumes an arbitration, rather than a negotiated agreement between the parties. This suggests that NDTC has little intention of negotiating seriously.

<sup>5</sup> Tr. at 191 (Meredith).

**B. There Is No Legal Basis for NDTC's Proposed Schedule.**

NDTC offers very little justification for its proposed delays. As it did in its testimony and pre-hearing brief, NDTC starts by arguing that its schedule is consistent with the structure of Sections 251 and 252 of the Communications Act.<sup>6</sup> This theory is unsupported by the text of the statute or relevant case law.

First, the statute neither requires nor supports NDTC's schedule. NDTC's analysis focuses on the periphery, not the central language in Section 251(f)(1) concerning implementation schedules. For instance, NDTC notes that Section 251(f)(1)(A), the provision that establishes the exemption, says that Section 251(c) shall not apply "until" a company receives a bona fide request and a state commission determines that the exemption should be lifted.<sup>7</sup> This is true, but irrelevant to the implementation period; Section 251(f)(1)(A) describes the exemption, not the process of lifting it, which is covered by Section 251(f)(1)(B).

Section 251(f)(1)(B) contains the language that matters: "[A] State Commission shall establish an implementation schedule for compliance with the request that is consistent in time and manner with Commission [FCC] regulations."<sup>8</sup> This language is not modified by any provision that refers to Section 252, Section 251(c)(1) or Section 251(f)(1)(A). NDTC's analysis does not account for this simple, straightforward delegation. Indeed, because Section 251(c) does not apply "until" a state commission lifts the exemption, the conclusion that the state commission decides the implementation schedule is entirely consistent with Section 251(f)(1)(A). In other words, the decision on timing is in the hands of the Commission, to be decided based on the evidence before it.

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<sup>6</sup> NDTC Initial Brief at 8-10.

<sup>7</sup> *Id.* at 9.

<sup>8</sup> 47 U.S.C. § 251(f)(1)(B).

Further proof that the Section 252 time frames need not be applied comes from NDTC's own brief. After saying that they are appropriate, NDTC then goes on to ask the Commission to adopt a different schedule, one that could be either longer or shorter than the nine-month period for negotiation and arbitration under Section 252, depending on when NDTC starts providing video service in Devils Lake.<sup>9</sup> If NDTC cannot propose a time frame that is consistent with its legal interpretation, then there plainly is no reason for the Commission to adopt that interpretation.

NDTC also strains to argue that the other state cases support its interpretation of Section 251(f)(1)(B), but this is incorrect. For instance, NDTC claims that the New York decision did not involve any Section 251(c) issues, but one of the questions before the New York Commission was the pricing of unbundled loops.<sup>10</sup> As NDTC notes in passing, the Texas case is inapposite because the decision was made "while relying on a Texas regulation," not on the terms of the federal statute.<sup>11</sup> The South Carolina decision provided no analysis beyond a bare statement that it would apply the Section 252 time frames, and certainly does not support the conclusion that the time frames are required.<sup>12</sup>

In the end, the New York decision still provides the most appropriate framework for the schedule in this proceeding. As in that case, the issues that need to be addressed by the parties to implement resale are relatively simple, and the most complicated one – the discount rate – can be addressed through an interim rate and true-up, which is exactly what the New York Commission

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<sup>9</sup> NDTC Initial Brief at 1 (proposing implementation of resale in February, 2007 or when NDTC starts providing video, whichever is sooner).

<sup>10</sup> Exhibit R14 at 12, 13 (setting temporary price for unbundled loops).

<sup>11</sup> NDTC Initial Brief at 13; Exhibit R13 at 2.

<sup>12</sup> Exhibit R12 at 5. In addition, the South Carolina decision is inconsistent with NDTC's proposal in that the South Carolina Commission did not require the competitive LEC to submit a new bona fide request to the rural carrier. *Id.* at 5 (ordering period for negotiation to commence on issuance of order). As Midcontinent noted in its initial brief, the South Carolina decision also was complicated by the rural telephone company's decision to abandon its exemption prior to the hearing. Midcontinent Initial Brief at 14-5.

did.<sup>13</sup> NDTC's protests notwithstanding, the New York decision provides the best model for this case.

**C. It Is Neither Necessary Nor Appropriate to Attempt to Create a Level Playing Field for NDTC.**

NDTC claims to be seeking "fairness" in any Commission decision.<sup>14</sup> NDTC's notion of fairness, however, is a business environment in which it decides when competition will come to Devils Lake, based on its ability to offer the products it thinks are necessary for it to compete as effectively as possible. There is no basis in the record for the Commission to adopt NDTC's approach.

Initially, the record establishes that there never will be a completely level playing field in the Devils Lake market. NDTC will continue to have access to cheap capital, universal service support and the advantages of starting off with essentially all of the telephone customers in the market, not to mention its ability to bundle wireless service with its other offerings.<sup>15</sup> Midcontinent will have its own advantages, including being a larger company and starting off with a majority of the video customers in the market.<sup>16</sup> Nothing the Commission does in this proceeding will affect these advantages, or the companies' disadvantages in the market.

Adoption of NDTC's proposal will not make this playing field more level. Rather, it will give NDTC unmerited advantages in Devils Lake. Midcontinent would be handicapped because it would have to wait a year or more to enter the market, and then would have to wait another year after NDTC begins offering video until being able to offer facilities-based telephone

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<sup>13</sup> Exhibit R14 at 13.

<sup>14</sup> NDTC Initial Brief at 15.

<sup>15</sup> Midcontinent Initial Brief at 15-6; Tr. at 94 (existing NDTC customer base), 104 (wireless), 107-110 (sources of financing), 118 (access to universal service support) (Dircks).

<sup>16</sup> NDTC's initial brief characterizes Midcontinent as "the only true monopoly holder" in Devils Lake, apparently based on the assertion of Mr. Negaard during cross-examination of Ms. Lohnes. NDTC Initial Brief at 11, citing Tr. at 25. In reality, of course, Midcontinent competes with satellite providers like DirecTV. Tr. at 197 (Meredith) (acknowledging that bundling telephone service with video "may" assist a cable company in competing with satellite providers).



service. This lag would give NDTC significant opportunities to lock in customers who might have been interested in Midcontinent's bundle if it were available, and these advantages would accrue from regulatory action, not from the merits of NDTC's offerings or NDTC's business acumen.

The greatest injury from waiting would not, however, be suffered by Midcontinent. Rather, consumers would be hurt most because they would be deprived of the benefits of competition acknowledged by both parties in the proceeding.<sup>17</sup> NDTC does not argue that there is any countervailing benefit to waiting other than "fairness" to NDTC.<sup>18</sup> In truth, there is nothing in the record that suggests that there is any benefit to waiting to introduce telephone competition in Devils Lake. All of the evidence demonstrates that the sooner competition is introduced, the more consumers will benefit, and that is the evidence the Commission should accept.<sup>19</sup>

### **III. The Commission Should Adopt Midcontinent's Proposed Implementation Schedule.**

Midcontinent's initial brief proposed a two-part implementation schedule that will make resale competition available to consumers quickly and make facilities-based competition available at the time that NDTC brings its facilities-based video service to Devils Lake. The evidence continues to support this approach.

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<sup>17</sup> Midcontinent Initial Brief at 9-11, 15; Tr. at 156-7 (Dircks).

<sup>18</sup> NDTC Initial Brief at 15.

<sup>19</sup> Tr. at 76 (Gates) ("... the benefits are great and all of those inure to the consumer, because all those things that North Dakota Tel will do, and any other company facing competition, will ultimately benefit consumers by ... more efficient provision of service, better customer service, more offerings, reduced prices.").

**A. The Evidence Fully Supports a Prompt Schedule for Implementing Wholesale Resale.**

NDTC's initial brief claims that Midcontinent's proposed time frame for resale is "unrealistic." However, all of the evidence shows that there is no reason to think that wholesale resale could not be implemented in a 90-day period.

First, the only party that testified as to actual experience in implementing resale was Midcontinent, and the only testimony was that arrangements for resale can be completed in 90 days.<sup>20</sup> Moreover, this experience is not just with Qwest, but with other companies as well.<sup>21</sup> A short time frame is feasible because resale "is a very, very simple application" and "we've been doing it for years."<sup>22</sup> In fact, in practical terms the back office requirements for resale are not meaningfully different from those for providing service to a large customer.

In response to this testimony, NDTC provided no evidence that resale could not be implemented in 90 days. Nearly all of NDTC's testimony is merely assertive.<sup>23</sup> The only substantive issue raised by NDTC is the time it will take to determine the resale discount, and that is not a roadblock to prompt implementation.

Initially, NDTC's own testimony is that a cost study for wholesale resale can be completed in two months.<sup>24</sup> This means that, if the Commission believed, for whatever reason, that it could not adopt a wholesale rate on an interim basis without a cost study, there would be time to put a rate into place within a 90 day window.<sup>25</sup> Such a study actually could have been

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<sup>20</sup> Exhibit P1, Prefiled Direct Testimony of Mary Lohnes ("Lohnes Direct") at 6; Exhibit P2, Prefiled Rebuttal Testimony of Mary Lohnes ("Lohnes Rebuttal") at 1; Tr. at 78-80 (Gates).

<sup>21</sup> See, e.g., Tr. at 78-79 (Gates) (involved in hundreds of proceedings over the last 20 years).

<sup>22</sup> *Id.*

<sup>23</sup> See Exhibit R6, Prefiled Reply Testimony of Douglas Duncan Meredith ("Meredith Reply") at 12 (Midcontinent's proposal "is unrealistic").

<sup>24</sup> Tr. at 220 (Meredith). The Commission should assume that the shorter time frame described in his testimony is feasible because the timing of completion of a cost study is entirely in the hands of NDTC.

<sup>25</sup> NDTC also claims that Midcontinent's analysis of the timing for establishing a resale discount is "based on the experience with Qwest." NDTC Initial Brief at 10, citing Tr. at 61-63 (Gates). That is incorrect. The testimony cited by NDTC discusses the question of what companies have had rates set by this Commission, and Mr. Gates

completed by Midcontinent for the hearing if NDTC had agreed to provide the underlying information.<sup>26</sup>

More important, however, NDTC never has demonstrated or even suggested that it would infeasible or impermissible for the Commission to adopt interim rates and true-ups. To the contrary, Mr. Meredith agreed that states can take such steps.<sup>27</sup> The record also establishes that use of the Qwest rates, even without a true-up, would have only a minimal effect on NDTC's revenues.<sup>28</sup> In other words, adopting the Qwest rate as an interim rate, with a true-up once a permanent rate is determined through negotiation or a Commission decision, will allow the implementation of resale without waiting for permanent rates to be established.

Moreover, there is no reason to believe that the terms of a resale agreement cannot be negotiated promptly. Again, while NDTC argues for the full Section 252 period, it does not provide any specific reason to believe that negotiation of a simple resale agreement should take very long. The only witnesses who testified as to their experience – the Midcontinent witnesses – stated that negotiations should not be a barrier to prompt implementation.<sup>29</sup> In this regard, the Commission should remember that NDTC has had Midcontinent's proposed agreement in hand

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actually said he has been involved in "dozens and dozens" of cases "all over the country," not just in Qwest proceedings. Tr. at 61 ("Q. To the best of your knowledge, has the North Dakota Commission ever established a wholesale discount percentage for NDTC? A. No, not for NDTC, but certainly for Qwest. We went through those proceedings and we've certainly done it dozens and dozens of times all of the country, so it's not a new process."); *see also* Tr. at 78-9 (Gates) (involvement in "hundreds" of resale proceedings).

<sup>26</sup> Gates Rebuttal at 2. NDTC responds to this statement by claiming that Mr. Gates "tried to paint NDTC as having withheld necessary information" and that Mr. Fischer "refuted" that claim. NDTC Initial Brief at 12. In fact, Mr. Fischer merely testified that NDTC provided all the information it agreed to provide, not all the information necessary to compute the appropriate resale discount. Tr. at 38 (Fischer) ("Yes, we did receive the information that we had mutually agreed upon would be acceptable to the parties.").

<sup>27</sup> Tr. at 194 (Meredith) ("Q. Now, when a state adopts interim rates, for instance, under the FCC's rules and those rates turn out to be incorrect, can the state require a true-up? A. Yes.").

<sup>28</sup> Exhibit P5, Prefiled Direct Testimony of Warren R. Fischer at 13. Mr. Meredith's pre-filed testimony objected to the use of the Qwest discount rates in Mr. Fischer's study on the impact of resale, but during cross-examination he acknowledged that he did not know if those rates were appropriate or not because he had not prepared an analysis, and that the rates used by Mr. Fischer were lower than the bottom end of the FCC's permissible range for interim discounts, and therefore more favorable to NDTC. Tr. at 194 (Meredith).

<sup>29</sup> Lohnes Direct at 6; Lohnes Rebuttal at 1; Tr. at 73 (Gates) ("You know, a very simple agreement. It's not the 500-, 600-page interconnection agreements that we normally consider.").

since May, 2005, and chose not to raise any objections to the agreement in its testimony or at the hearing, even as it was conceding that the rural exemption should be lifted.<sup>30</sup> Given the limited number of issues in a resale agreement, and the lack of objections to date from NDTC, the parties should be able to complete their negotiations within a month if the parties commit themselves to doing so.

Finally, in considering the time frame for wholesale resale, the Commission should recognize that NDTC has the ability to accelerate its video deployment. In particular, much of NDTC's fiber is in place already, and it could choose to start service in some parts of Devils Lake before construction is complete in the rest of the market.<sup>31</sup> While NDTC's brief argues that it still needs to obtain programming and a franchise from Devils Lake, these are not significant barriers. Because NDTC's parent companies all offer video service already, NDTC has easy access to programming.<sup>32</sup> There also is no evidence that the franchising process will cause meaningful delays. Indeed, NDTC has provided no evidence of how long it will take it to complete these tasks.<sup>33</sup> In addition, NDTC could pre-sell video service to its customers, following a practice adopted by other rural telephone companies that are entering the video market, and lock in customers to long-term agreements.<sup>34</sup> In this context, an accelerated

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<sup>30</sup> See, e.g., Tr. at 153 (Dircks); Tr. at 192 (Meredith). NDTC's initial brief argues that Midcontinent has mischaracterized the situation because one of Midcontinent's witnesses used the phrase "another round of negotiations" in his prefiled rebuttal testimony. NDTC Initial Brief at 12. As the testimony makes clear, the issue being discussed is the appropriateness of requiring Midcontinent to make a second bona fide request and to wait until another set of hearings is completed before being able to provide resale. Gates Rebuttal at 9-10. In addition, there is no evidence that Midcontinent has not been willing to negotiate an agreement.

<sup>31</sup> See Vince Vittore, "NDETEL gets active on FTTP," TELEPHONY ONLINE, Oct. 1, 2005 (NDTC had completed construction of fiber to 1,000 of 3,200 customer premises by October, 2005), included in Exhibit P4.

<sup>32</sup> Tr. at 96-7 (Dircks).

<sup>33</sup> NDTC Initial Brief at 3 (stating only that programming and a franchise are required).

<sup>34</sup> Lohnes Direct at 4 ("Early entry into a market is crucial before the incumbent is able to lock in its monopoly customer base with long term agreements."). NDTC's initial brief inflates this statement into a claim that NDTC has been signing customers to long-term agreements, and says that Ms. Lohnes "admitted" that NDTC has not done so to date and that she did not know that NDTC operates under tariff. NDTC Initial Brief at 12. Of course, Ms. Lohnes never said that NDTC was using long term agreements already, and NDTC's tariffing of local telephone

schedule for the availability of wholesale resale is the best way to prevent NDTC from obtaining an unreasonable competitive advantage in Devils Lake.

**B. The Commission Should Order NDTC and Midcontinent to Start the Section 252 Process for Facilities-Based Interconnection.**

At the hearing, both parties agreed that facilities-based competition was better for consumers than resale competition, and the record shows that facilities-based competition is an appropriate goal for regulators and the marketplace.<sup>35</sup> For the reasons described in Midcontinent's brief and below, the Commission should take all necessary steps to ensure that facilities-based competition is in place in Devils Lake by February, 2007.<sup>36</sup>

There are at least three reasons to adopt a schedule for implementation of facilities-based competition. The first, which is well documented, is the benefit to consumers that will result. Second, the record establishes that adopting a schedule for facilities-based competition is the best way to ensure competitive balance because Midcontinent's facilities-based entry could be delayed until a year or more after NDTC's entry into the video business.<sup>37</sup> This delay would hurt both consumers and Midcontinent in its efforts to compete with NDTC.

The third reason for the Commission to adopt a schedule for the implementation of facilities-based competition is that the facts in this case justify this unusual action. The record shows that NDTC is doing whatever it can to delay the advent of competition of any sort, from misconstruing Midcontinent's initial request for resale to proposing to implement resale more than a year after NDTC admitted on the record that the rural exemption should be lifted.<sup>38</sup> This

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service is irrelevant to its ability to offer long term contracts for video, high speed Internet or bundles of these non-regulated services.

<sup>35</sup> Gates Direct at 12-3; Midcontinent Initial Brief at 20-21.

<sup>36</sup> See Midcontinent Initial Brief at 19-22.

<sup>37</sup> Tr. at 191 (Meredith).

<sup>38</sup> Tr. at 152-3 (Dircks) (sought clarification even though the agreement was a wholesale agreement); NDTC Initial Brief at 13. As noted above, the implementation period requested in NDTC's brief potentially is longer than the negotiation and arbitration period under Section 252 of the Communications Act. See *supra* Section II(B).

suggests strongly that NDTC will do whatever it can to delay facilities-based competition as well.

What that means is that, without Commission action, NDTC will be able to hold off facilities-based competition not just until it enters the video business, but for a year after that, as it forces Midcontinent to complete the negotiation and arbitration process and only then permits interconnection and the exchange of traffic.<sup>39</sup> NDTC and its owners would be the only beneficiaries of this delay; Devils Lake consumers, on the other hand, would be hurt.

For these reasons, allowing NDTC to put off competition from Midcontinent until 2008 would be bad public policy, but the Commission also has the evidence in hand to conclude that the criteria for lifting the rural exemption have been met as to facilities-based service. This analysis is described in more detail in Midcontinent's brief, but the crucial point is that NDTC has acknowledged that it will give up the rural exemption as to Midcontinent as soon as it offers video service in Devil's Lake.<sup>40</sup> This means that NDTC itself has concluded it does not need the protection of the rural exemption. Therefore any potential cognizable harm to NDTC from ordering it to comply now with Section 252 is irrelevant.

It is important to remember that adopting Midcontinent's proposed schedule for facilities-based interconnection will have the effect of putting Midcontinent fully into the telephone market at the same time NDTC enters the video market. While, as discussed above, there never really can be a level playing field when there are multiple competitors in a market, facilities-based competition in telephone, high speed Internet and video is as close as any market is likely to come. Thus, it is appropriate for the Commission to ensure that the two main competitors can provide all of their services through their own facilities.

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<sup>39</sup> Tr. at 191 (Meredith).

<sup>40</sup> Exhibit R1, Prefiled Direct Testimony of David Dircks ("Dircks Reply") at 9; Meredith Reply at 9.

**C. The Commission Should Establish Firm, Enforceable Deadlines for Whatever Implementation Schedule It Adopts.**

While the schedule adopted by the Commission is the crucial, the schedule itself does not dictate when resale and facilities-based competition will be established. That is dependent on the actions of the parties. For that reason, the Commission should establish firm deadlines and specific mechanisms for enforcing them, regardless of the schedule it adopts.

The evidence shows that firm deadlines are likely to be necessary. The record is replete with evidence that NDTC wants to slow down competition whenever possible. As described above, this evidence includes NDTC's failure to review Midcontinent's proposed resale agreement; its insistence that a permanent discount rate should be set before resale begins; its suggestion that Midcontinent should have to submit a new bona fide request to start the clock; and the proposal for an implementation period for resale that is longer than the Section 252 arbitration schedule.<sup>41</sup> Of course, NDTC has every incentive to delay: Delay helps it avoid losing market share to Midcontinent, makes its service bundles more attractive when it enters the video business and even makes its marketing simpler.

At the same time, NDTC has significant incentives to accelerate its deployment of video service. As described above, NDTC need not wait until 2007 to offer video because programming and a franchise should be readily available. Adding video sooner than planned would create a competitive advantage, particularly if Midcontinent were unable to offer telephone service when the video was rolled out to customers. Once the video service is available, every day that Midcontinent is unable to offer telephone service is a significant competitive advantage for NDTC.

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<sup>41</sup> See *supra* Section II(B), Section III(A).

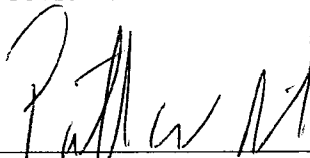
These factors make it critical that the Commission ensure that its schedule includes strict guidelines and mechanisms for enforcing them. For instance, and as proposed in Midcontinent's initial brief, any negotiations on the discount rate should be backstopped by an interim rate, and NDTC should have a deadline for preparing and sharing its cost study. The Commission also should consider penalties for NDTC for failure to comply with its requirements, such as eliminating any true-up that would benefit NDTC if it fails to produce a cost study on time. In the absence of both deadlines and penalties, NDTC will have little incentive to meet the requirements adopted in the Commission's order.

#### IV. Conclusion

For all these reasons, the Commission should adopt an order consistent with Midcontinent's proposed order in this proceeding.

Respectfully submitted,

MIDCONTINENT COMMUNICATIONS

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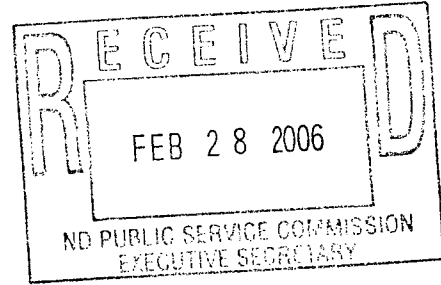
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February 28, 2006



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

**AFFIDAVIT OF SERVICE  
BY E-MAIL**

STATE OF NORTH DAKOTA

COUNTY OF BURLEIGH

) ss.  
)

Sharon Cavender hereby certifies that on February 28, 2006, she served a copy of the foregoing:

- 1) Reply Brief of Midcontinent Communications

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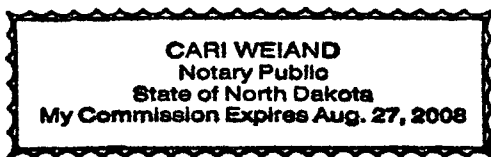
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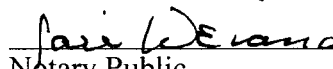
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Subscribed and sworn to before me February 28, 2006.



  
Notary Public  
Burleigh County, North Dakota