

MEMORANDUM

TO: Commissioners Clark, Wefald and Cramer

FROM: Bill Binek and Pat Fahn

DATE: March 13, 2006

RE: Midcontinent Communications v. North Dakota Telephone Company, Rural Exemption, Case No. PU-05-451

Background

The Commission held a hearing in this case on January 23, 2006. Midcontinent Communications (Midcontinent) and North Dakota Telephone Company (NDTC) have filed their respective post-hearing briefs, reply briefs and proposed findings.

The parties filed a stipulation that a hearing and determination by the Commission concerning the rural exemption may be held at a time beyond the 120 days directed by 251(f)(1)(B).

Bona Fide Request

On May 12, 2005 Midcontinent filed a 252(a)(1) bona fide request for 251(c) wholesale resale services in the Devils Lake exchange.

On June 15, 2005 Midcontinent provided 251(f)(1)(A) notification to the Commission of its bona fide request.

Under Section 252(a)(1) of the Act, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier upon receiving a request for interconnection, services, or network elements pursuant to section 251.

Under Section 251(f)(1)(A), a rural telephone company is exempt from the requirements of 251(c) until (1) the rural company has received a bona fide request for interconnection, services, or network elements, and (2) the state commission determines that such request is not unduly economically burdensome, is technically feasible, and is consistent with the universal service requirements of Section 254.

Under Section 251(c) an incumbent local exchange carrier is obligated to provide (1) good faith negotiation, (2) facilities and equipment interconnection, (3) unbundled network elements, (4) retail services at wholesale rates, (5) notice of network changes, and (6) collocation of equipment.

The validity of the bona fide request was not disputed at the hearing but NDTC, in its brief, suggests that Midcontinent be required to file a “valid” request for wholesale retail services after the Commission makes its final decision in this proceeding. To require Midcontinent to submit another bona fide request for the same purpose is an unnecessary duplication of effort and such requirement would make meaningless the language in Section 251(f)(1)(B) that provides that “[u]pon 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 Commission [FCC] regulations.”

OPTIONS:

- 1) Find that Midcontinent’s request is a valid, bona fide request for an interconnection agreement for wholesale resale services.
- 2) Find that Midcontinent has not filed a bona fide request and agree with NDTC that Midcontinent must file such a request.

Rural Exemption

In the June 15 notice Midcontinent requested that the Commission conduct a 251(f)(1)(A) proceeding to determine “whether Midcontinent’s request for wholesale resold services from NDTC under 47 U.S.C. § 251(c) is not unduly economically burdensome, is technically feasible, and is consistent with section 254....” In other words, terminate NDTC’s rural exemption.

NDTC no longer challenges that its rural exemption for wholesale resale should be terminated.

The FCC’s *Local Competition Order*¹ discusses the intent of Sections 251(f)(1) and 251(f)(2) of the Act. Under Section 251(f)(1), staff interprets that a bona fide request for **ANY** interconnection, service, **OR** network element filed with the Commission triggers a Commission determination concerning termination of the rural exemption with regard to the **ENTIRE** list of obligations under Section 251(c). Section 251(f)(2) provides that a small company may petition the Commission for a suspension or modification of the application of a requirement or requirements of Section 251(c). If NDTC wishes to maintain its rural exemption for 251(c) obligations other than wholesale resale services, it must petition the Commission pursuant to Section 251(f)(2) and prove that a suspension or modification of the requirements of Section 251(c) should be granted. The FCC in paragraph 1263 of the *Local Competition Order* found that “it is appropriate to place the burden of proof on the party seeking relief from otherwise applicable requirements.” In paragraph 1262 the FCC states that “in order to justify continued exemption once a bona fide request has been made, or to justify suspension, or modification of the Section 251 requirements, a LEC must offer evidence that application of those requirements would be likely to cause undue economic burdens beyond the economic burdens typically associated with efficient competitive entry.”

¹ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996) (*Local Competition Order*).

Section 251(f)(2)(B) further provides that the Commission must act upon a petition for suspension or modification within 180 days and that, pending such action, the Commission may suspend enforcement of the requirement or requirements to which the petition applies with respect to the petitioning carrier.

NDTC argues that the Alaska Supreme Court has ruled that the scope of relief that can be granted is to the request that has been made. See *ACS of Alaska, Inc. v. Regulatory Commission of Alaska*, 81 P.3d 292, 301 (S.Ct. Alaska, 2003). In that case, the CLEC's request was for interconnection at one location and resale throughout the remainder of the ILEC's study area. The Alaska Commission terminated the rural exemption for the entire study area. The Alaska Supreme Court said that the Alaska Commission cited no authority to support its reading of Section 251(f), and that nothing in Section 251(f)'s language precludes localized termination or requires area-wide termination when the request was limited to one exchange within the study area.

ACS of Alaska provides no real precedent for the Commission in this proceeding because there is no indication that the court considered the suspension and modification provisions of Section 251(f)(2).

Midcontinent raised the matter of NDTC's provisioning of video programming. Section 251(f)(1)(C) which provides that the rural exemption does not apply to a cable operator providing video programming seeking to provide any telecommunications service in the area in which the rural telephone company provides video programming. NDTC is not providing video programming at this time but has plans to do so by February 2007.

OPTIONS:

- 1) Find that NDTC did not file a 251(f)(2) **petition** for suspension or modification of the requirements of 251(c) and that the full rural exemption will be terminated. Under the petition, the rural company must prove that the exemption should not be terminated for the entire company (but only Devils Lake) or for all services required (but only wholesale resale).
- 2) Acknowledge that NDTC could have filed 251(f)(2) **proof**, but did not, and therefore the Commission has no evidence to support suspension or modification of part of the request to terminate company-wide, full 251(c)-services rural exemption.
- 3) Find that NDTC may file a 251(f)(2) **petition** for suspension or modification of the request to terminate the rural exemption, and the Commission could suspend enforcement of requirements to which the petition applies. The Commission would have 180 days to make a final decision on the petition.

Implementation Schedule

Section 251(f)(1)(B) provides that within 120 days after the state commission receives notice of the request, it shall terminate the exemption if the request is not

unduly economically burdensome, is technically feasible, and is consistent with the Section 254. Upon termination of the exemption, Section 251(f)(1)(B) provides that the state commission "shall establish an implementation schedule for compliance with the request that is consistent in time and manner with Commission [FCC] regulations.

Midcontinent contends that the Commission has the authority to establish whatever implementation schedule is supported by the record in this proceeding. Midcontinent asks that the Commission require NDTC to provide wholesale resale to Midcontinent within 90 days of the Commission's order, with an interim wholesale discount subject to true-up once a permanent rate is determined.

NDTC alleges that the implementation schedule must be established according to the timeline in 252(b)(1). Section 252(b)(1) provides that a negotiated agreement be acted on by the Commission within 90 days after submission. An arbitrated agreement must be acted on by the Commission within 30 days after submission, however, a party must may not request arbitration of open issues in a negotiation until the period from the 135th to the 160th day after the incumbent local exchange carrier received the request for interconnection, services, or network elements. A second timeline offered by NDTC is that negotiations for wholesale resale begin after NDTC receives a valid request from Midcontinent after the Commission issues its decision in this proceeding. The agreement would be implemented by the earlier of February 1, 2007, or the date by which NDTC first provides video programming within its Devils Lake exchange.

Midcontinent states there is no basis for a conclusion that the Section 252 negotiation and arbitration period is mandated by Section 251(f)(1), and that Section 251(f)(1) does not mention Section 252 or include any other reference to the negotiation and arbitration provisions of the Act. Section 251(f)(1) only provides that that the implementation schedule must be consistent with FCC regulations. Both parties agree there are no FCC regulations on the subject.

The language in this Section 251(f)(1)(B) concerning implementation has to have some purpose. That same section provides that a state commission is required to determine if an exemption is to be terminated within 120 days after it receives notice of the request for interconnection. Staff believes that the purpose for requiring the state commission to establish an implementation schedule is to allow the state commission to establish a reasonable time period for the parties to complete their negotiations for interconnection. If Congress wanted to require the parties to go through the entire Section 252 process as suggested by NDTC, Congress would have stated that rather than requiring the state commission to establish an implementation schedule.

At the hearing, NDTC referenced Commission orders from South Carolina, Texas and New York in support of their position. The South Carolina Commission, without any discussion, simply found that the schedules set forth in Section 252 should apply. The Texas decision is likewise of little assistance. In that case the bona fide request to interconnect met the requirements to commence the docket for termination of the rural exemption, but did not meet the requirements of the Texas Commission's

rules for negotiation and arbitration of interconnection agreements. Therefore the Texas Commission ordered the company requesting interconnection to file a request for interconnection that met the requirements of the Texas Commission's rules and stated that the timelines set forth in the federal Act and Texas Commission rules. The New York case offers some assistance. The New York case involved the termination of the rural exemption and facilities-based interconnection. In that case there had been substantial progress in negotiating an interconnection agreement but the companies could not agree on compensation matters, and the party seeking interconnection asked the New York Commission to help mediate the compensation issues. At that point the ILEC claimed the rural exemption. In its order issued December 23, 1998, the New York Commission found that the ILEC was not entitled to the rural exemption and ordered the parties to execute an interconnection agreement within less than 4 weeks from the date of the order. The New York Commission also ordered the ILEC to use its best efforts to provide loops within approximately 3 months from the date of the order and adopted interim rates for reciprocal compensation and unbundled loops.

Both parties argue the need for a level playing field. Staff believes that the issue of a level playing field is not a factor to be considered by the Commission in determining the rural exemption termination or the implementation schedule.

NDTC states that the Commission did not provide any notice that the scope of the proceeding was beyond Midcontinent's request for wholesale resale. In reviewing the Notice of Hearing, staff notes that the Commission's notice to determine whether Midcontinent's request is unduly economically burdensome, technically feasible, and consistent with Section 254 does not limit the scope of the rural exemption termination.

OPTIONS:

- 1) Go with Midcontinent's proposal (90 days for NDTC to provide wholesale resale services).
- 2) Go with a Section 252 timeline (up to 270 days to resolve an arbitrated agreement, plus a undetermined time period for filing the arbitrated agreement, plus 30 days for final Commission action).
- 3) Go with NDTC's compromise proposal (NDTC provides wholesale resale services by the earlier of February 1, 2007, or the date by which NDTC first provides video programming within its Devils Lake exchange.)
- 4) One compromise between the positions of the parties would be to require NDTC to provide wholesale resale within 90 to 330 days. Halfway between is 210 days, however, staff believes thinks this is too long. Midcontinent's reply brief makes a compelling argument that "all of the evidence shows that there is no reason to think that wholesale resale could not be implemented in a 90-day period." "[T]he 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."

Facilities-based Interconnection

Midcontinent asks that the Commission require the parties to begin the Section 252 negotiation process for facilities-based interconnection.

Midcontinent has not made a bona fide request for facilities-based interconnection. To order the parties to immediately begin the Section 252 negotiation process for facilities-based interconnection would violate federal law and would deprive NDTC of its due process rights under the law.

OPTIONS:

- 1) Find that Midcontinent has not made a bona fide request for facilities-based interconnection.

Staff Recommendations

Bona Fide Request: option 1

Rural Exemption: option 3

Implementation Schedule: option 4

Facilities-based Interconnection: option 1