

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Midcontinent Communications,)
a South Dakota Partnership,)
)
 Complainant,) Case No. PU-05-451
)
)
 vs.)
) MEMORANDUM OF
) NORTH DAKOTA TELEPHONE
North Dakota Telephone Company,) COMPANY
)
)
 Respondent.)

North Dakota Telephone Company (NDTC) makes this filing in an effort to assist the Commission in taking action that is inconsistent with governing law and the record before it in this proceeding. While NDTC fully appreciates the courtesy of being provided a copy of staff's memorandum dated March 13, 2005, (the "Staff Memorandum") that contains staff's recommendations in the above-captioned matter, NDTC respectfully submits that the Commission should either reject outright or significantly modify the staff's recommendations during its planned working session to be held on March 14, 2005.

NDTC recognizes that this filing is out of the course of typical Commission process. NDTC believes, however, that staff may have failed to appreciate fully the governing law and prior Commission actions that directly impact the Commission's decision in this case. Accordingly, absent acceptance of this filing and consideration of it by the Commission, NDTC believes that the Commission would be acting in a manner inconsistent with governing law and the record in this proceeding.

The shortness of time precludes an exhaustive review and response to Staff Memorandum. While NDTC fully retains all legal rights with respect to Commission action in this proceeding, NDTC initially notes that Staff Memorandum does not present all available options to the Commission with respect to the resolution of the issues in this proceeding. Accordingly, NDTC respectfully suggests that the Commission ensure that the methods by which it may be able to resolve the issue in this proceeding are fully developed and before it for consideration.

At the same time, it appears that at least certain of the staff recommendations would subject the Commission to unnecessary legal exposure. With respect to this aspect of its concerns, NDTC notes as follows:

1. The Staff Memorandum relies, at page 2, on a 1996 FCC order concerning Section 251(f)(2) (suspension or modification of obligations).

Staff's position does not address the applicable law provided by NDTC on this issue in its Prehearing Brief (see Iowa Utilities Board v. Federal Communications Commission, 219 F.3d 744 (8th Cir., 2000) (copy attached), which invalidated FCC rules placing the burden of proof on rural carriers. Moreover, it appears that Staff may not have recognized that the FCC ruling, at least with respect to Section 251(f)(1) relief, upon which the staff relies *was overturned* by the 8th Circuit Federal Court of Appeals in 2000. (See headnote 14 at 762.)

2. The Staff Memorandum suggests NDTC should have applied for Section 251(f)(2) relief. This Commission has previously found that it has no jurisdiction over Section 251(f)(2) requests for suspension or modification of obligations (see attached PSC order regarding Red River Telephone's request for suspension of LNP

obligations). Moreover, Staff's position fails to address the specific and distinct relief afforded certain entities found in Section 251(f)(1) versus that provided for in Section 251(f)(2) .

3. It also appears from the Staff Memorandum that staff believes NDTC should have introduced evidence on all of its exchanges beyond that related to Midcontinent's specific request for wholesale resale within the NDTC Devils Lake exchange. This issue was not noticed in this matter by the Commission, and is independent grounds for reversal. See State ex rel. Public Service Commission v. Northern Pac. Ry. Co. (75 N.W.2d 129 (N.D. 1956) and N.D. Cent. Code § 28-31-21.

In any event, it appears that staff's reasoning is again based on a 1996 FCC order that was later overturned by a Federal Circuit Court in 2000.

CONCLUSION

NDTC respectfully requests that the Commission conduct its own independent review of the legal and factual issues in this proceeding or direct its staff to revise the Staff Memorandum to address the full record before the Commission and applicable law.

Dated this 14th day of March, 2006.

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CERTIFICATE OF SERVICE

A true and correct copy of the foregoing Memorandum of North Dakota Telephone Company was served electronically and by regular mail on the 14th day of March, 2006, on the following:

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