

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 in this proceeding that is consistent with governing law and the record before it. NDTC fully appreciates the courtesy of being provided a copy of Staff's e-mail dated April 11, 2006, (the "Staff e-mail" [copy attached]) that contains Staff's request to the parties for suggested hearing dates to establish an interim wholesale discount rate in the above-captioned matter.¹ NDTC respectfully submits, however, that the Commission should either reject outright or significantly modify its Staff's suggestion that "The hearing needs to be held in time for a Commission decision prior to the expiration of the 90 day period at which time NDTC will begin providing retail services at wholesale prices for resale." Specifically, Staff's request for hearing dates is premature under the explicit terms of the Communications Act of 1934, as amended

¹ As it noted in its March 14, 2006, submission in this proceeding, NDTC recognizes that this filing is likewise out of the course of typical Commission process. However, the Staff email appears directly to impact the upcoming Commission decisional meeting scheduled for today, April 12, 2006 where the matters raised in this proceeding will be addressed. NDTC notes that Staff's email was received by counsel yesterday morning. While NDTC has made good faith efforts to address Staff's email request, the shortness of time does not enable a complete and thorough review and response to the Staff e-mail, particularly since it appears premised on actions that Staff believes the Commission will be taking in this proceeding. Nonetheless, NDTC respectfully submits that this Memorandum will assist the Commission as it addresses both the subject matter of the underlying case as well as Staff's request for hearing dates.

(the “Act”), as confirmed by statements of the Federal Communications Commission (“FCC”).

While NDTC fully retains all legal rights with respect to Commission action in this proceeding, NDTC initially notes that the Staff e-mail implies that an Order will be issued ordering interconnection within 90 days without the benefit of arbitration or mediation. As NDTC noted earlier, the Commission has only that authority granted it by the North Dakota legislature.² Those powers are set forth in North Dakota Century Code section 49-21-01.7(9) and section 49-21-01.7(15). Nowhere did the North Dakota Legislature grant to the Commission the authority to mandate terms and conditions absent an arbitration proceeding,³ and the Act provides the specific time frames and procedures for such action. See 47 U.S.C. § 252(b). (A copy of Section 252 is attached.) These directives are not less applicable to the ability of the Commission to order an interim wholesale discount rate.⁴ In fact, the Act and supporting FCC statements make clear that an interim wholesale rate can only be established through the Act’s arbitration process.⁵

The pricing standard applicable to Section 251(c)(4) is contained in Section 252(d)(3). Section 252(d)(3) states, as follows:

² See, e.g., Prehearing Brief of NDTC dated January 20, 2006, (“NDTC Prehearing Brief”) at pp. 1-2; NDTC’s Post-Hearing Reply Brief of February 28, 2006, (“NDTC Post-Hearing Reply Brief”) at p. 3, n.3.

³ NDTC has previously explained why a short time frame such as this is inconsistent with federal law. See NDTC Prehearing Brief at pp. 8-12; NDTC’s Post-Hearing Brief of February 17, 2006, at pp. 8-14; NDTC’s Post-Hearing Reply Brief at pp. 2-4, 6, 8-11.

⁴ NDTC has already demonstrated that any reliance upon an “interim” wholesale discount rate actually confirms the use of the time frames contained in Section 252(b) of the Act for purposes of the implementation schedule required to be established in this proceeding. See NDTC Post-Hearing Reply Brief at 11.

⁵ Section 252(d) sets forth the pricing standards Congress chose to authorize in the Act.

WHOLESALE PRICES FOR TELECOMMUNICATIONS SERVICES.—For the purposes of section **251(c)(4)**, a State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

(Emphasis added.)

Section 252(d)(3), however, cannot be read in isolation. Specifically, as one of the pricing standards, Section 252(d)(3) is subject to Section 252(c)(2).

Section 252(c)(2) states:

(c) **Standards for Arbitration. -- In resolving by arbitration under subsection (b)** any open issues and imposing conditions upon the parties to the agreement, a State commission shall . . . (2) establish any rates for interconnection, services, or network elements according to **subsection (d)**. . . .

47 U.S.C. § 251(c)(2) (emphasis added). The reference to “subsection (b)” within Section 252(c)(2) is to Section 252(b) which is entitled: “**(b) Agreements Arrived at Through Compulsory Arbitration.**” 47 U.S.C. § 252(b) (emphasis added). “Compulsory Arbitration” under the Act occurs *only* after a petition for arbitration is filed, and such filing can occur only during the time period between 135 to 160 days after the date on which an interconnection request is received. See 47 U.S.C. §252(b)(1). The FCC confirmed this conclusion.

A default rate is to be used only in three instances: **(1) in a state arbitration proceeding if an avoided cost study that satisfies the criteria we set forth above does not exist;** (2) where a state has not completed its review of such an avoided cost study; (3) where a rate established by a state before the release date of this Order is based on a study that does not comply with the criteria described in the previous section.

In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange

Carriers and Commercial Mobile Radio Service Providers, First Report and Order, CC Docket Nos. 96-98 and 95-198, 11 FCC Rcd 15499 (1996) (“*First Report and Order*”) at 15960-15961 (para. 925) (emphasis added).⁶

Thus, NDTC respectfully submits that, contrary to the inferences arising from Staff’s email, the Commission has no authority to establish an “interim wholesale rate discount rate” within some “90 day period.” The North Dakota law mandates that this Commission must follow the Act and FCC mandates in its implementation of its duties under North Dakota Century Code section 49-21-01.7(9). (It should be noted the legislature gave the Commission authority to arbitrate or mediate. Nowhere in Chapter 49-21 of the North Dakota Century Code did the North Dakota Legislature grant to the Commission the authority to mandate an interim wholesale discount rate following an arbitrary 90-day negotiation period, as presumably Staff believes will be ordered by the Commission.)

CONCLUSION

This Commission has the authority to mediate or arbitrate pursuant to the directives contained in the Act. It has no power to order, absent an arbitration proceeding conducted in a manner consistent with the provisions of the Act, an “interim wholesale discount rate” to which Staff refers. Congress and the FCC have mandated that an interim wholesale discount rate can only be imposed in this case after an arbitration, and the timing of the process that the North Dakota Legislature directed that the Commission must follow cannot be reconciled with

⁶ As the record before the Commission makes clear, no avoided cost study applicable to NDTC’s Devils Lake exchange has been conducted. See, e.g., Transcript at pp.197-224, and Exhibit R6 at pp. 11-12. The other times that the interim rates could apply are not applicable to the instant case as no cost study is before the Commission and any decision that will be reached by the Commission in this proceeding clearly is after the FCC’s 1996 action in the *First Report and Order*.

Staff's purported reliance on either a hearing being held prior to 90 days or the implementation of an interconnection agreement within 90 days of Commission action in this proceeding. Accordingly, NDTC respectfully requests that the Commission follow the time periods contained in Section 252(b) for any implementation schedule arising from this proceeding. To do otherwise would be contrary to directives of the North Dakota legislature and rational public policy.

Dated this 12th day of April, 2006.

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/s/

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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 12th day of April, 2006, on the following:

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