

**STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION**

**Midcontinent Communications/North Dakota
Telephone Company
Rural Exemption
Investigation**

Case No. PU-05-451

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

April 26, 2006

Appearances

Commissioners Tony Clark, Susan E. Wefald and Kevin Cramer.

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William W. Binek, Chief Counsel, Public Service Commission, State Capitol, 600 East Boulevard, Bismarck, North Dakota 58505, appearing on behalf of the Public Service Commission.

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Preliminary Statement

On May 12, 2005 Midcontinent Communications (Midcontinent) sent a letter to North Dakota Telephone Company (NDTC) proposing to enter into a resale agreement for telecommunications services in the Devils Lake, North Dakota exchange. Attached to the letter was the proposed Resale Agreement for resale at wholesale rates any telecommunications services tariffed with the Commission that it provides at retail to subscribers who are not telecommunications carriers.

By letter dated June 10, 2005, NDTC asked whether the request by Midcontinent was for 251(b) resale of NDTC telecommunications services or for 251(c) resale of

NDTC telecommunications services at discounted rates. NDTC also advised Midcontinent of its rural exemption from 251(c) requirements of the Telecommunications Act (Act).

On July 15, 2005, Midcontinent filed a Notice of Bona Fide Request for Services under 47 U.S.C. § 251(f)(1)(A) requesting that the Commission conduct an inquiry for the purpose of determining 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 of the Act. Under 47 U.S.C. § 251(f) the Commission must conduct an inquiry within 120 days after the Commission received notice of the bona fide request.

On July 28, 2005, the Commission issued a Notice of Hearing scheduling a hearing for October 13, 2005, and identifying the following issues:

1. Whether the request of Midcontinent is unduly economically burdensome.
2. Whether the request of Midcontinent is technically feasible.
3. Whether the request of Midcontinent is consistent with 47 U.S.C. § 254 (other than subsections (b)(7) and (c)(1)(D) thereof).
4. The implementation schedule for compliance with the request should the exemption be terminated.

On September 20, 2005, 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). The hearing was rescheduled to January 23, 2006. The hearing was held as scheduled.

The Commission, having heard the evidence and reviewed the briefs, hereby adopts the following:

Findings of Fact

1. NDTC is a wholly owned subsidiary of TPC, Inc. and is a consortium formed by United Telephone Mutual Aid Corporation, Dakota Central Rural Telephone Cooperative, and Polar Communications. NDTC is the incumbent local exchange carrier authorized by the Commission to provide telecommunications services in the Devils Lake exchange. NDTC is a rural telephone company as defined under Section 3(b)(37).
2. Midcontinent is a South Dakota general partnership registered with the Commission to provide local exchange telecommunications services. Midcontinent is a competitive local exchange carrier.

Bona Fide Request

3. 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 under section 251.

4. 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.

5. 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.

6. The proposed Resale Agreement included with Midcontinent's May 12, 2005 letter clearly states that "NDTC shall offer to Midcontinent for resale at wholesale rates any Telecommunications Services tariffed with the Commission that it provides at retail to subscribers who are not telecommunications carriers...."

7. We find Midcontinent has made a bona fide request for a service which a local exchange carrier must provide under Section 251(c)(4) of the Act, specifically, a request for retail services at wholesale rates. The validity of the bona fide request was not disputed at the hearing.

Rural Exemption

8. Under Section 251(f)(1)(A) NDTC is exempt from the requirement to provide the service requested until NDTC has received a bona fide request from Midcontinent and the Commission determines that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254.... To initiate a Commission proceeding to terminate the rural exemption, Midcontinent is required to submit to the Commission a Section 251(f)(1)(B) notice of its bona fide request.

9. On June 15, 2005, Midcontinent filed a Notice of Bona Fide Request for Services requesting that the Commission conduct a 251(f)(1)(A) proceeding to determine whether to terminate NDTC's rural exemption.

10. Initially, NDTC challenged that its rural exemption should be terminated. NDTC's post-hearing brief states that it no longer challenges that its rural exemption should be terminated.

11. Section 251(f)(2) provides that a local exchange carrier with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide may petition the Commission for a suspension or modification of the application of a requirement or requirements of Section 251(c) to telephone exchange service facilities specified in such petition.

12. The FCC's *Local Competition Order*¹ discusses the intent of Sections 251(f)(1) and 251(f)(2) of the Act. At Paragraph 1249 the FCC pointed out that Section 251(f)(1) grants a rural company an exemption from Section 251(c) until the rural company has received a bona fide request for "interconnection, services, or network elements, and the state commission determines that the exemption should be terminated." At Paragraph 1262 the FCC stated that "Congress generally intended the requirements of section 251 to apply to carriers across the country, but Congress recognized that in some cases, it might be unfair or inappropriate to apply all of the requirements to smaller or rural telephone companies." The FCC went on to state that to justify suspension or modification of the Section 251 requirements, "an 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." Paragraph 1263 provides that once a bona fide request is made, smaller companies must prove to the Commission, under Section 251(f)(2) that a suspension or modification of Sections 251(b) or (c) should be granted.

13. The FCC has interpreted Sections 251(f)(1) and 251(f)(2) together and it appears to say 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) for the rural carrier in its entire service area. However, a small company may file a Section 251(f)(2) petition for a suspension or modification of the application of a requirement or requirements of Section 251(c) to specific telephone exchange service facilities.

14. It appears to the Commission that if Midcontinent is able to prove that NDTC should not be exempt from a requirement of Section 251(c), then NDTC's rural exemption must be lifted. A determination that the Commission could terminate a portion of the rural exemption under Section 251(f)(1), for example to terminate the rural exemption for only retail services at wholesale prices for only the Devils Lake exchange, would render meaningless the provisions of Section 251(f)(2) for suspension or modification of the requirement or requirements of Section 251(c). We note however that a petition under Section 251(f)(2) must be made to the FCC because N.D.C.C. §49-23-01.7(11) limits the Commission's authority to the determination of the rural telephone company's exemption under Section 251(f) of the Act and not to a determination of suspensions and modifications of rural carriers under Section 251(f)(2).

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

15 It appears that neither party to this proceeding considered such an interpretation since the evidence presented is specific to the provision of retail services at wholesale rates. While NDTC no longer challenges terminating the rural exemption to provide retail services at wholesale rates in the Devils Lake exchange, it may challenge a Commission requirement to provide any other Section 251(c) obligations in Devils Lake and a requirement to provide any Section 251(c) obligations in its other local exchanges.

16. While it is appropriate under the law to terminate NDTC's rural exemption, we limit our decision in this case only to termination of the rural exemption to NDTC's Devils Lake exchange which is the specific area identified in Midcontinent's request. We recognize that the Commission's Notice of Hearing specifically referenced the "request of Midcontinent" in identifying the issues to be considered at the hearing. While we believe it is appropriate in this case to limit the termination of the exemption to the specific area identified in the request, we also believe as we discussed previously that the law requires that the rural exemption for the Devils Lake exchange be terminated in its entirety. Midcontinent made a bona fide request for resale services at wholesale rates. A bona fide request for **any** interconnection, service, or network element triggers a determination concerning termination of the rural exemption with regard to the entire list of obligations under Section 251(c). We believe that, at a minimum, NDTC must enter into an interconnection agreement to provide Midcontinent with retail services, at wholesale prices, for resale in the Devils lake exchange. Although this order terminates NDTC's rural exemption in its entirety for the Devils Lake exchange, NDTC may petition the FCC under Section 251(f)(2) for suspension or modification of the application of requirements of Section 251(c) to telephone exchange service facilities specified in such petition.

Implementation Schedule

17. Section 251(f)(1)(B) provides that, upon termination of the rural exemption, the state commission "shall establish an implementation schedule for compliance with the request that is consistent in time and manner with Commission [FCC] regulations."

18. 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.

19. 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 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.

20. 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 the implementation schedule must be consistent with FCC regulations. Both parties agree there are no FCC regulations on the subject.

21. NDTC states, in a memorandum filed with the Commission on April 12, 2006, that the Commission has only the authority granted to it by the North Dakota Legislature under N.D.C.C. §§ 49-21-01.7(9) and 49-21-01.7(15), and that nowhere did the North Dakota Legislature grant to the Commission the authority to mandate terms and conditions absent an arbitration proceeding. NDTC contends that Section 252 of the Act provides the specific time frames and procedures for such action.

22. The language in this Section 251(f)(1)(B) concerning implementation must 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. We believe 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 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 said so rather than requiring the state commission to establish an implementation schedule. Furthermore, the Commission's authority regarding interconnection is not limited to the provisions of N.D.C.C. §§ 49-21-01.7(8), 49-21-01.7(9) and 49-21-01.7(15). The Legislature has given the Commission authority under N.D.C.C. § 49-21-09 to require interconnections between telecommunications companies and provides that the Commission "may prescribe reasonable compensation, terms and conditions" for such use. In addition to the broad authority granted the Commission as noted above, the Legislature also provided in N.D.C.C. §49-21-01.7(11) authority to terminate the exemption of a rural company, which arises from Section 251(f)(1) of the Act. We find that the authority to order an implementation and compliance schedule is inseparable from the termination procedure and is, in fact, wholly contained within Section 251(f)(1) which the Legislature has granted the Commission authority to implement.

23. The only party to testify as to actual experience in implementing resale was Midcontinent, and the only testimony was that arrangements for resale can be completed in 90 days. We find that a reasonable implementation schedule requires that NDTC provide wholesale resale within 90 days from the date of this order. The

Commission recommends that, during those 90 days, NDTC prepare any necessary cost study that will aid the parties in negotiating a wholesale rate to be implemented in the wholesale resale agreement. We will schedule a Further Hearing to determine an interim wholesale discount rate in the event the parties are unable to negotiate a rate and to determine the need for an associated true-up provision. We will also schedule a Second Further Hearing to consider a final discount rate for wholesale resale services.

Facilities-based Interconnection

24. In its post-hearing reply brief, Midcontinent requests that the Commission require the parties to begin the Section 252 negotiation process for facilities-based interconnection. We find that 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.

From the foregoing Findings of Fact, the Commission makes the following:

Conclusions of Law

1. The Commission has jurisdiction over the parties and the subject matter of this proceeding.
2. The request of Midcontinent to NDTC for provision of retail services at wholesale rates is not unduly economically burdensome.
3. The request of Midcontinent to NDTC for provision of retail services at wholesale rates is technically feasible.
4. The request of Midcontinent to NDTC for provision of retail services at wholesale rates is consistent with 47 U.S.C. § 254 (other than subsections (b)(7) and (c)(1)(D) thereof).
5. The rural exemption under Section 251(f)(1) for NDTC's Devils Lake exchange should be terminated.
6. The Commission has the authority to establish an implementation schedule for compliance with Midcontinent's request for retail services at wholesale rates. There are no FCC regulations on the subject of an appropriate implementation schedule.

From the foregoing Findings of Fact and Conclusions of Law, the Commission makes the following:

Order

The Commission orders:

1. The rural exemption under Section 251(f)(1) for NDTC's Devils Lake exchange is terminated.
2. NDTC shall begin providing to Midcontinent retail services at wholesale prices for resale in the Devils Lake exchange under an interconnection agreement no later than 90 days from the date of this order.
3. A Further Hearing shall be held to determine an interim wholesale discount rate in the event the parties are unable to negotiate a rate and to determine the need for an associated true-up provision.
4. A Second Further Hearing shall be held at an undetermined date in the future to consider a final discount rate for wholesale resale services.

PUBLIC SERVICE COMMISSION

Susan E. Wefald
Commissioner

Tony Clark
President

Kevin Cramer
Commissioner