STATE OF NORTH DAKOTA

PUBLIC SERVICE COMMISSION

Midcontinent Communications, a South Dakota Partnership,	)	
Complainant,	)	Case No. PU-05-451
vs.	)	
North Dakota Telephone Company,	)	
Respondent.	)	

BRIEF IN SUPPORT OF
PETITION FOR RECONSIDERATION
OF NORTH DAKOTA TELEPHONE COMPANY

This is a case of first impression with respect to the North Dakota Public Service Commission ("Commission") actions and authority to address Section 251(f)(1) of the Communications Act of 1934, as amended (the "Act"). North Dakota Telephone Company ("NDTC"), as well as the Commission, has an interest in ensuring that the Commission's actions in attempting to implement the explicit provisions of Section 251(f)(1) are accomplished in a manner consistent with the Act's specific directives, applicable and specific state law, and fundamental due process rights.

As the record in this proceeding demonstrates, the specific scope and focus of the proceeding was solely the establishment of a rational implementation schedule to address the only request that was made by Midcontinent Communications ("Midcontinent") – to remove NDTC's exemption under Section 251(f)(1) of the Act to provide, pursuant to Section 251(c)(4) of the Act, tariffed telecommunications services at a wholesale discount rate within the NDTC Devils Lake exchange to Midcontinent.

The Commission's action in this proceeding, however, has now attempted to expand the scope of the proceeding beyond the record that was developed. The interest in assuring that the Commission's decisions are correct and in accordance with the law is compelling. Significant due process issues are raised by the Commission's April 26, 2006, decision in this matter (the "*April 26th Action*"), and that decision should, accordingly, be reconsidered and amended.

The *April 26th Action* also misstates the record and positions taken by NDTC and compounds that set of errors by failing to reconcile the decision with the clear and unambiguous requirements of the law. With respect to the law, specifically, the *April 26th Action* is fundamentally at odds with the explicit directives issued by Congress and confirmed by the North Dakota Legislature. In failing to address these unambiguous and explicit statutory directives, the Commission engages in what it admits to be a new (albeit improper) interpretation of the Act (*see April 26th Action* at 5 (¶ 15)) as well as North Dakota law.

The Commission's action, therefore, must be corrected and a rational interpretation of the law must be addressed. At the same time, a rational process for negotiating all the terms of an interconnection agreement must be provided. Absent such action, the Commission's *April 26th Action* stands counter to what the United States Congress and the North Dakota Legislature expected the Commission to do – undertake rational decision-making pursuant to the specific directives contained in the sections of the law governing this proceeding.

ERROR 1: THE FINDINGS OF FACT INCORRECTLY STATES, AT PARAGRAPH 10, THAT "NDTC'S POST-HEARING BRIEF STATES THAT IT NO LONGER CHALLENGES THAT ITS RURAL EXEMPTION SHOULD BE TERMINATED."

NDTC requests that this finding of fact be amended to state accurately its position taken in this proceeding. NDTC's position could not have been clearer.

> NDTC now agrees that it will no longer challenge whether the Midcontinent request is unduly burdensome, technically feasible, or whether the "wholesale resale" request made by Midcontinent with respect to NDTC's Devils Lake exchange would adversely impact universal service.

See NDTC Post-Hearing Brief, February 17, 2006, at page 6. Accordingly, the Commission's stated finding of fact – that NDTC "no longer challenges that its rural exemption should be terminated" (*April 26th Action* at ¶ 10) – has no basis in the record and is, in fact, contrary to NDTC's stated position.

The Findings of Fact do not quote the position of NDTC but rather mischaracterizes NDTC's position by failing to acknowledge the specificity of that position. NDTC requests that the *April 26th Action* be amended so that it reflects accurately NDTC's *actual* position in this proceeding. This is not merely a reasonable request but necessary because the *April 26th Action's* improper statement of NDTC's position likewise leads to other errors in the *April 26th Action*, as shown below.[1]

ERROR 2: THE COMMISSION'S PARAGRAPH 23 OF THE FINDINGS OF FACT ERRONEOUSLY STATES THAT ONLY ONE PARTY TESTIFIED ABOUT ACTUAL EXPERIENCE WITH RESALE, A PROPOSITION SIMPLY NOT SUPPORTED BY THE RECORD.

As noted in the Petition for Reconsideration, the *April 26th Action*, at paragraph 23 of the Findings of Fact, states erroneously that "the only party to testify as to actual experience in implementing resale was Midcontinent, and the only testimony was that

[1] To the extent that the *April 26th Action* uses language that is, in any way, contrary to the stated position of NDTC or does not state accurately the scope of the Midcontinent's request, the *April 26th Action* should be amended to do so.

arrangements for resale can be completed within 90 days." *Id.* (¶ 23). This purported summarization of the evidence in this proceeding misstates the record.

Below are the actual excerpts of testimony, from Witness Meredith, cited in the Petition for Reconsideration.

> I have participated in and have assisted a number of telephone companies in negotiation of interconnection agreements, including situations similar to the one involved in this matter.

(Meredith Testimony, p. 2.)

> Assuming, for sake of completeness, that the NDPSC should determine that the NDTC wholesale resale exemption for its Devils Lake exchange be lifted, then *the Commission should order the parties to begin negotiating the entirety of the terms and conditions for a resale interconnection agreement*, including, but not limited to, the applicable wholesale resale discount percentage for the Devils Lake exchange. Once this agreement is finalized and/or arbitrated in a manner consistent with the time periods stated in Section 252 (with the time periods beginning to run as of the date of the Commission's decision), then the parties would implement the agreement after it is approved by the Commission.

(*Id*., p. 7.) (Emphasis added.)

> Specifically, after terminating the rural exemption as to Midcontinent in Devils Lake, NDTC would not be opposed to having the Commission order the parties to conduct *negotiations on the proper business terms and conditions for a resale agreement* with a wholesale discount specific to the Devils Lake exchange. Based on my familiarity with Section 252, that would allow the parties to negotiate such business terms and conditions for at least 135 days before a party could seek arbitration before the Commission (and, at the outside, up to 160 days from the effective date of the Commission's decision in this proceeding).

(*Id*., p. 8.) (Emphasis added.)

> *Imposing an arbitrary 90-day implementation deadline on the resolution of terms and conditions* and, more importantly, the development and review of an avoided cost study before the rural exemption issue is decided is *unrealistic and unduly burdensome.*

(*Id*., p. 12.) (Emphasis added.)

> Accordingly, I think it is clear by the time frames included within the Act that *interconnection arrangements under the Act are not established out of thin air*. Rather, the practical affect of the Act's structure is *to allow the parties sufficient time to negotiate all of the terms and conditions that each party feels necessary to ensure that its business interests are properly addressed* in both the agreement and the agreement's implementation.

(*Id*., p. 13.) (Emphasis added.)

The integrity of the Commission's decision-making process requires that the *April 26th Action* be amended to address accurately the record before the Commission. The public interest cannot be served when, as here, a party's position that contradicts *directly* a purported finding of fact is not properly acknowledged or addressed. Accordingly, reconsideration is warranted to correct misstatements regarding the record.

In addition, however, the *April 26th Action* compounds its error by failing to provide *any* explanation as to why the evidence that NDTC provided regarding its witness's actual experience with implementing resale arrangements did not lead to an implementation schedule consistent with that experience. Likewise, there is no explanation as to why such experience should not be relied upon, particularly in light of the pronouncements of the North Dakota Legislature as to what the Commission is required to do (which, as explained below, are the time frames found in Section 252(b) of the Act. *See* Error 5, *infra.)*. The *April 26th Action's* error in failing to address the record before the Commission is compounded by the fact that the *April 26th Action* fails to acknowledge that all of the terms of an interconnection agreement must be negotiated, not just a discount rate. The Order in the *April 26th Action* fails to state how these terms and conditions will be negotiated or finalized, which is the very scope of the

implementation process to which NDTC's witnesses testified and which remains unchallenged. *See also* Error 3, *infra*.

ERROR 3: THE APRIL 26TH ACTION FAILS TO ADDRESS THE RECORD BEFORE THE COMMISSION AS TO HOW THE PARTIES SHOULD IMPLEMENT THE REQUIREMENT TO NEGOTIATE AN INTERCONNECTION AGREEMENT FOR THE PROVISION BY NDTC TO MIDCONTINENT OF WHOLESALE RESALE WITHIN THE NDTC DEVILS LAKE EXCHANGE AND FAILS TO ADDRESS HOW THE TERMS OF AN INTERCONNECTION AGREEMENT WILL BE NEGOTIATED.

As the above excerpts from NDTC Witness Meredith demonstrate, the record before the Commission reflects the obvious – interconnection terms and conditions are not created out of thin air, but rather must be negotiated. *See* Meredith Testimony at p. 13. These negotiations must occur within the time frames that Congress (and likewise the North Dakota Legislature) deemed appropriate, and are those found within Section 252(b) of the Act. *See, e.g.,* 47 U.S.C. § 252(b)(1) ("During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.").

The *April 26th Action*, however, fails to address this aspect of the record. In fact, it appears that, contrary to the explicit record in this proceeding, the *April 26th Action* supports the improper proposition that the *only* element of an interconnection agreement that must be negotiated between NDTC and Midcontinent is the wholesale discount rate. *See April 26th Action* at 8 (Ordering Clause Nos. 2 and 3). Likewise, the *April 26th Action* fails to address how the discount rate could be established (or the costs involved to NDTC in doing so would be worthwhile to incur should a negotiated

discount not be reached) when the record reflects the fact that such study would likely take NDTC three months. (*See* Transcript, at pp. 208-209, 219-223.)

Accordingly, NDTC requests that the Commission amend the *April 26th Action* on reconsideration and adopt an implementation schedule that includes the arbitration time periods established by Section 252 of the Act. Likewise, and at a minimum, the Commission should order that *all* terms and conditions of an interconnection agreement be negotiated by the parties. *See* Meredith Testimony in Ex. R6, at pp. 2, 7, 8, 12, and 13 (noting, among other facts, that the discount rate is only one of *many* terms and conditions that must be negotiated for implementation of wholesale/resale). Such action is required by the record in this proceeding and the failure to address that obligation would likewise fail to acknowledge the practical realities confronting parties in negotiating an interconnection agreement.

ERROR 4: THE COMMISSION'S ORDER VIOLATES THE DUE PROCESS RIGHTS OF NDTC BY EXPANDING THE SCOPE OF THE PROCEEDING BEYOND THE SPECIFIC REQUEST MADE BY MIDCONTINENT.

The scope of proceeding was the request made by Midcontinent in July 2005. The Midcontinent request was to the remove the existing exemption that NDTC has with respect to the provision of resale at a wholesale discount *solely* within the NDTC Devils Lake Exchange. The Commission's December 2005 amended notice (which is conspicuously not mentioned in the *April 26th Action*) noted the same, as follows: "On May 12, 2005 Midcontinent Communications (Midcontinent) made a bona fide request under Section 251(c) for wholesale resold services *for the Devils Lake, North Dakota exchange* from North Dakota Telephone Company (NDTC)." *Notice of Rescheduled*

Hearing, Case PU-05-451, dated December 14, 2005 (the "*December 14th Notice*") (emphasis added).

With respect to this "request" from Midcontinent, the Commission then stated the issues that would be addressed in its public hearing:

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.

Id. (emphasis added). Consistent with these directives, all testimony filed in the proceeding was for wholesale/resale within the NDTC Devils Lake exchange, and the Midcontinent witnesses confirmed this scope of the proceeding. *See, e.g., April 26th Action* at 5 (¶ 15), 7 (Conclusions of Law Nos. 1-4), 8 (Ordering Clause No. 2).[2]

In the *April 26th Action*, the Commission expanded the relief it granted beyond that which was identified in the Notice to include the removal of NDTC's existing exemption for all Section 251(c) services and arrangements in Devils Lake. *See id.* at 4 (¶ 14), 6 (¶ 16), 7 (Conclusions of Law No. 5); 8 (Ordering Clause No. 1). In doing so, the *April 26th Action* violated the due process rights of NDTC.

[2] With respect to the purported conclusions of law, NDTC notes that the Commission's discussion of what Midcontinent requested is "for the provision of retail service at wholesale rates. . .." *April 26th Action* at 7. The Commission's conclusions, however, omit the fact that the request was also limited by Midcontinent to wholesale/resale *solely within the NDTC Devils Lake exchange. See, e.g., December 14th Notice*.

The 5th Amendment to the United States Constitution provides, as follows: "*No person shall be . . . deprived of life, liberty, or property, without due process of law.*" (Emphasis added.) The 14th Amendment to the United States Constitution, section 1 also guarantees this "due process" concept, as follows: "*No state shall . . . abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law*, nor deny to any person within its jurisdiction the equal protection of the laws...." (Emphasis added.)

The North Dakota Constitution has its own due process requirement in Article I, section 9, as follows: *"[E]very man* for any injury done him in his lands, goods, person or reputation *shall have remedy by due process of law*, and right and justice administered without sale, denial or delay." (Emphasis added.) These due process requirements are also reflected in section 28-32-31 of the North Dakota Century Code, which requires governmental agencies to give adequate notice of the issue being heard at a public hearing.

At no time did this Commission give notice that the *entirety* of NDTC's rural exemption in its Devils Lake exchange was under review. The scope of the proceeding and the notice that was provided is that contained in the *December 14th Notice,* which addressed only the request of Midcontinent for wholesale/resale within the NDTC Devils Lake exchange. Likewise, at no time did the Commission issue any notice that it would establish the terms and conditions of an interconnection agreement between NDTC and Midcontinent, assuming that the Section 251(f)(1) exemption with respect to the specific Midcontinent request for wholesale/resale within the NDTC Devils Lake exchange was removed.

Rather, the *December 14th Notice* speaks for itself. Nowhere in that document did the Commission provide notice that the terms and conditions of the agreement for wholesale/resale services would be decided by the Commission. While the Order in one respect improperly goes too far, it does not go far enough in another respect. No other condition or terms of an interconnection agreement are even discussed in the *April 26th Action*, and the Commission neither noticed nor addressed how those terms and conditions will be arrived at between Midcontinent and NDTC. *See also* Error 2 and Error 3, *supra*.

The scope of the *April 26th Action*, therefore, goes beyond what the Commission stated the hearing was to address. This uncontroverted fact violates the due process rights of NDTC to respond in a governmental proceeding and to the issues that are to be addressed. See *State ex rel. Public Service Commission v. Northern Pac. Ry. Co.*, 75 N.W.2d 129 (N.D. 1956) (It is error for the Public Service Commission to try to expand the scope of a proceeding if it was not properly noticed as an issue.). Thus, the *April 26th Action* must be reconsidered and the scope of the action the Commission takes must be limited *solely* to the scope of the issue for which it gave notice – the request made by Midcontinent to remove the NDTC Section 251(f)(1) exemption "for wholesale resold services *for the Devils Lake, North Dakota exchange* from NDTC." *December 14th Notice.*

ERROR 5: THE COMMISSION ENGAGES IN ERRONEOUS INTERPRETATIONS OF LAW CONTAINED IN PARAGRAPHS 12, 13, 14, 15, 16, AND 22 OF THE FINDINGS OF FACT, PARAGRAPH 5 OF THE CONCLUSIONS OF LAW, AND THE RELATED ORDERING CLAUSES.

The *April 26th Action* compounds its other errors by misinterpreting significantly not only the explicit provisions of the Act, but also by relying on an unsupported

interpretation of a Federal Communications Commission ("FCC") decision addressing Sections 251(f)(1) and Section 251(f)(2). At the same time, the *April 26th Action* violates time honored principles of statutory construction by suggesting a general North Dakota statutory provision regarding the Commission's authority over state law interconnection trumps the more specific directives of the North Dakota Legislature with respect to the Act. As a result, the legal errors reflected in the *April 26th Action,* both individually and collectively, render the *April 26th Action* unlawful. Accordingly, on reconsideration, the NDTC requests that the Commission rectify these errors in a manner consistent with the specific, unambiguous directives that the Act requires.

A. By Purportedly Lifting The Entirety Of NDTC's Exemption From All Of The Subsections Of Section 251(c) In The Devils Lake Exchange, The Commission Ignores The Explicit And Specific Directives Of The Act.

The Commission's Order states erroneously: "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)." *April 26th Action* at 5 (¶ 16) (emphasis in original). This statement cannot be reconciled with what Congress directed the Commission to do.

It is a time honored rule of statutory construction that, in interpreting a statute, the plain English meaning of the language used by the legislature must be used. *See, e.g., KCMC, Inc. v. Federal Communications Commission,* 600 F.2d 546, 549 (1979), *citing T.V.A. v. Hill,* 437 U.S. 153, 98 S. Ct. 2279, 57 L. Ed. 2d 117 (1978), *Caminetti v. United States,* 242 U.S. 470, 37 S. Ct. 192, 61 L. Ed. 442 (1917), and *Diamond Roofing Co. v. Occupational Safety & Health Review Commission,* 528 F.2d 645, 649 (5th Cir. 1976) ("[W]here the language selected by the drafters is clear and unequivocal, the courts are

bound to give effect to the plain meaning of the chosen words and no duty of interpretation arises."); see also *United Parcel Service, Inc. v. United States Postal Service,* 455 F. Supp. 857, 865, 866 (1978); (While the "plain meaning" of the statute creates a presumption of the statutory meaning, "if the plain and ordinary meaning of the language is itself reasonable in light of the broad purposes of the statute and in light of the structure and context of the legislation as a whole, we must uphold that meaning." (internal citations omitted)).

In the instant situation, there can be no question based on Congress's language what Congress intended the Commission to do. In fact, Congress could not have been clearer with respect to the scope of the action it expected the Commission to take when addressing the exemption issue raised in this proceeding – the focus is on the "request" that was made and solely that request.

Section 251(f)(1)(A) makes clear that the scope of the inquiry is on the specific request.

> Subsection (c) of this section shall not apply to a rural telephone company until (i) such company has received *a bona fide reques*t for interconnection, services, or network elements, and (ii) the State commission determines (under subparagraph (B)) that *such request* is not unduly economically burdensome, is technically feasible, and is consistent with section 254 (other than subsections (b)(7) and (c)(1)(D) thereof).

47 U.S.C. § 251(f)(1)(A) (emphasis added). Section 251(f)(1)(B) states the same. "Upon 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 [FCC] regulations." 47 U.S.C. § 251(f)(1)(B) (emphasis added).

By failing to rely upon these directives, the Commission writes out of the statute the term "request" and thus commits an error of law. See *Reiter v. Sonotone Corp.*, 442

U.S. 330, 339 (1979), citing *U.S. v. Menasche*, 348 U.S. 528, 538-539 (1955) ("In construing a statute, we are obliged to give effect, if possible, to every word Congress used."). The "request" was made *solely* by Midcontinent and *solely* with respect to the provision by NDTC of wholesale/resale to Midcontinent within the NDTC Devils Lake exchange.

The suggestion arising from the *April 26th Action* that the Commission can disregard the "request," and thereby grant relief beyond what both Midcontinent testified to and the specific request that Midcontinent made, is without basis.[3] Accordingly, the conclusion in the *April 26th Action* that the entirety of NDTC's exemption in Devils Lake should be removed is erroneous as a matter of law and should be reversed. *See April 26th Action* at (Conclusion of Law No. 5); 8 (Ordering Clause No. 1). On reconsideration, the Commission should ensure that any relief complies *solely* to Midcontinent and *solely* to the request it made for wholesale resale within the NDTC Devils Lake Exchange.

B. The Commission Misconstrues Section 251(f)(1) And Section 251(f)(2) Of The Act To Bolster Its Erroneous Interpretation Of The Scope Of Section 251(f)(1).

The *April 26th Action* compounds its erroneous reading of the plain language of Section 251(f)(1) law through its reading of the FCC's *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*, 11 FCC 15499 (1996) ("*First Report and*

[3] In an analogous situation, the Supreme Court of Alaska confirmed that Section 251(f)(1) requires a review of solely the request that has been made. *See ASC of Alaska, Inc. v. Regulatory Commission of Alaska,* 81 P.3d 292, 300-301 (S. Ct. Alaska, 2003).

Order"). The Commission indicates that, at paragraph 1262 of the *First Report and Order*,

> 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.

April 26th Action at 4 (¶ 12).

From these quotes, the *April 26th Action* concludes erroneously that: (1) the "FCC has interpreted Sections 251(f)(1) and 251(f)(2) together" (*id.* at 4 (¶ 13); and (2) "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)." *Id.* (¶ 14). This analysis is wrong.

With respect to paragraph 1263 of the FCC's *First Report and Order*, the *April 26th Action* fails to quote the operative language. ". . . we find that rural LECs must prove to the state commission that they should continue to be exempt pursuant to section 251(f)(1) from requirements of section 251(c), once a bona-fide request and been made, *and that smaller companies must prove to the state commission, pursuant to section 251(f)(2), that a suspension or modification of requirements of sections 251(b) or (c) should be granted."* Thus, the FCC was not interpreting the two provisions

of the Act – Section 251(f)(1) and Section 251(f)(2) – together. As the emphasized language makes clear, the FCC was merely stating who bears the burden of proof, not that the Section 251(f)(2) is triggered by a removal of an element of the exemption under Section 251(f)(1).[4]

Also without basis is the Commission's statement that, "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)." *April 26th Action* at 4 (¶ 14). In fact, for several reasons, the Commission's statement cannot be reconciled with the very provisions themselves.

First, the eligibility requirements to trigger a Section 251(f)(1) proceeding versus a Section 251(f)(2) proceeding are not the same. Section 251(f)(1) applies to "rural telephone companies" ("RTCs"). *Compare* 47 U.S.C. § 251(f)(1)(a) and 47 U.S.C. § 153(37). Section 251(f)(2) applies to "local exchange carrier with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide." 47 U.S.C. § 251(f)(2). Not all "2%" telephone companies are "RTCs."[5] Thus, the very structure of

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[4] It is unclear from the entirety of the discussion contained within the *April 26th Action* whether the Commission's ruling relied upon the statements contained in paragraph 1262 of the *First Report and Order* regarding the burden of proof. The FCC's statements regarding the Section 251(f)(1) burden of proof (and the *April 26th Action's* repetition thereof) have been rejected. The 8th Circuit made clear that the FCC's interpretation of whom bears the burden of proof was erroneous. *Iowa Utilities Board v. Federal Communications Commission*, 219 F.3d 744 (8th Cir., 2000); *ASC of Alaska*, *supra*. (See also prior Briefs and Memorandums of NDTC in this matter.) In any event, the fact that the FCC's discussion regarding burden of proof with respect to Section 251(f)(1) was isolated by the 8th Circuit significantly undermines the Commission's suggestion that the Section 251(f)(1) and Section 251(f)(2) are to be read together. *See April 26th Action* at 4 (¶12).

[5] The FCC has recognized this fact, as follows:

> We use the term "rural LEC" to refer to a LEC that qualifies as a "rural telephone

the Act confirms that non-rural companies can apply for suspension or modification of duties, but only RTCs receive the automatic exemption, and that the type of company to which relief under Section 251(f)(2) applies is different as recognized by the FCC. *See* n. 5, *supra*.

Second, the type of relief is different. Section 251(f)(1) is the removal of a specific subsection 251(c) requirement, based on a request. Section 251(f)(2) allows a modification of that requirement or a suspension of *both Section 251(b) and Section 251(c) requirements. Compare* 47 U.S.C. § 251(f)(1) and 47 U.S.C. § 251(f)(2). Moreover, only Section 251(f)(1) requires the existence of Section 251(c) request. No such requirement exists in Section 251(f)(2). *See, e.g., id.*

Third, Section 251(f)(1) is a mandatory proceeding. *See* 47 U.S.C. § 251(f)(1)(B) ("The party making a bona fide request of a rural telephone company for interconnection, services, or network elements *shall* submit a notice of its request to the State commission.") (emphasis added). Section 251(f)(2) is permissive. *See* 47 U.S.C. § 251(f)(2) (An eligible telephone company *"may* petition a State commission for a suspension or modification of the application of a requirement or requirements of

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> company" under the 1996 Act. Under the 1996 Act, a LEC can qualify as a "rural telephone company" based on its small size *or* its location in a rural geographic area. In addition, we use the term "mid-sized LEC" to refer to an independent LEC with fewer than 2 percent of the nation's subscriber lines *that does not fall within the Act's definition of "rural telephone company."* Section 3(37) of the Act defines the term "rural telephone company." 47 U.S.C. § 153(37). Section 251(f)(2) allows independent LECs with fewer than 2 percent of the nation's subscriber lines to petition a state commission for suspension or modification of the requirements of section 251(b) and (c). See 47 U.S.C. § 251(b), (c), (f)(2).

In the Matter of Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area, Policy and Rules Concerning the Interstate, Interexchange Marketplace; LEACO Rural Telephone Cooperative, Inc., Petition for Waiver: Second Order on Reconsideration and Memorandum Opinion and Order, CC Docket Nos. 96-149, 96-61, 96-149, FCC 99-103 (rel. Jun. 30, 1999) at ¶12, n. 40 (emphasis added).

subsection (b) or (c) to telephone exchange service facilities specified in such petition." (emphasis added)). Thus, if Congress had intended that Section 251(f)(2) was to be triggered by a removal of the exemption of one of the subsections of 251(c) of the Act, then it would have made the relief available by Section 251(f)(2) mandatory, rather than elective.

Fourth, the standards under Section 251(f)(2) are different than those in Section 251(f)(1). Section 251(f)(1)(B) requires the following examination:

> Subsection (c) of this section shall not apply to a rural telephone company until (i) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines (under subparagraph (B)) that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 (other than subsections (b)(7) and (c)(1)(D) thereof).

47 U.S.C. § 251(f)(1)(B). Section 251(f)(2) requires a far different showing.

> The State commission shall grant such petition to the extent that, and for such duration as, the State commission determines that such suspension or modification--
>
> (A) is necessary--
>
> (i) to avoid a significant adverse economic impact on users of telecommunications services generally;
>
> (ii) to avoid imposing a requirement that is unduly economically burdensome; or
>
> (iii) to avoid imposing a requirement that is technically infeasible; and
>
> (B) is consistent with the public interest, convenience, and necessity.

47 U.S.C. § 251(f)(2). Thus, if Congress sought to make Section 251(f)(2) automatic as the *April 26th Action* implies, one issue that is left unexplained by the *April 26th Action* is why the standards are different.

Finally, the *April 26th Action's* own statements make clear that its conclusion that a removal of the exemption under Section 251(f)(1) automatically triggers the need for a Section 251(f)(2) proceeding has no basis. If the *April 26th Action* was correct in its analysis that Section 251(f)(1) and Section 251(f)(2) are conjoined, then it follows that the Commission would then have the authority to address a Section 251(f)(2) request. However, the *April 26th Action* states that the Commission does not have that authority, as follows:

> 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).

April 26th Action at 4 (¶14).

None of the distinguishing factors between Section 251(f)(1) and Section 251(f)(2) or the FCC's later pronouncements acknowledging the distinction (*see* n. 4, *supra*) have been addressed in the *April 26th Action*. Nor, for that matter, could they be addressed without demonstrating that the position taken in the *April 26th Action is* without basis. While it is true that the FCC addressed (and not interpreted) aspects of Section 251(f)(1) and Section 251(f)(2) together within its *First Report and Order*, the *April 26th Action's* reliance the FCC's discussion does not change the fact that the two provisions are, as demonstrated herein, entirely different. Thus, the *April 26th Action* in suggesting that the "FCC has interpreted Sections 251(f)(1) and Section 251(f)2) together" (*id.* (¶ 13) is in error, as is the *April 26th Action's* suggestion that a partial exemption removal "would render meaningless the provisions of Section 251(f)(2) for suspension or modification of the requirement or requirements of Section 251(c)." *Id.*

(¶ 14). If Congress intended the *April 26th Action's* result, then it would not have created the different sections.

C. The Commission Engages In An Unlawful Expansion Of Its Authority Under Governing Law By Interpreting A General Interconnection Statute In A Manner That Nullifies The More Specific Authority Granted To Implement The Act, And Otherwise Fails To Address The Record Before It.

The North Dakota Legislature directed the Commission to follow the Act. Through the Act, Congress specifically identified the time frames for negotiating the Act's interconnection requirements. *See* 47 U.S.C. § 252(b)(1) ("During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.")

Notwithstanding the North Dakota Legislature's directives and Congress's pronouncements, however, the *April 26th Action* states that, under Section 251(f)(1)(B), the Commission has "the authority to order an implementation and compliance schedule [that] 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." *April 26th Action* at 6 (¶ 22). The *April 26th Action* also notes (*id.* (¶ 22)) 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.

The Commission's statements miss the mark.

The fact that Congress did not cross reference the time frames established in 47 U.S.C. § 252(b)(1) is not the issue. The Commission has been directed to implement the requirements of the Act by the North Dakota Legislature. The Commission, therefore, is not working from a "blank slate" as the *April 26th Action* purports. Rather, Commission actions must follow the Act. The only time frames applicable to the instant situation (and which are confirmed by reliable record evidence) are those found in Section 252. If the Legislature desired to allow the Commission the convenience of end-running its directives, then the Commission would have been provided the discretion to do so by the North Dakota Legislature.

The lack of citation within the *April 26th Action* to this new found authority speaks volumes and, on reconsideration, should be rejected. The Commission cannot refuse to follow one section of the Act (Section 252(b)) where Congress outlined what it thought was a reasonable period of time for parties to sit down and discuss interconnection by suggesting that Section 251(f)(1)(B) provides it unfettered discretion. If so, then the directive from the North Dakota Legislature to follow the Act in this instance would be a nullity.

Equally in error is the fact that the *April 26th Action* relies upon section 49-21-09 of the North Dakota Century Code as broad authority for its powers to impose terms and conditions of interconnection on NDTC. This interpretation is also without basis in light of three insurmountable hurdles and barriers.

First, the *April 26th Action's* reliance on a general interconnection statute cannot trump the more specific requirements of the statute. *See, e.g., Mail Order Association*

of America v. United States Postal Service, 986 F.2d 509, 515 (D.C. Cir. 1993) (Courts "are to attempt to reconcile two statutes on the same subject, so that one does not repeal the other by implication.")

Second, a different standard is imposed by section 49-21-09 than the standard under section 49-21-01.7(9). Under the former, the Commission must make a finding (1) of public convenience and necessity, (2) that no irreparable harm will result to the owner of the facilities, (3) that no substantial detriment will result and, lastly, (4) that the parties have failed to agree on terms and conditions. Just as the Commission made no findings required by section 49-21-09 of the North Dakota Century Code, it also provided no notice that it was proceeding under that section and no evidence was introduced to support the needed findings under section 49-21-09.

Finally, the Commission's interpretation ignores the clear mandate of the Legislature in section 1-02-07 of the North Dakota Century Code.

> Whenever a general provision in a statute is in conflict with a special provision in the same or in another statute, the two must be construed, if possible, so that effect may be given to both provisions, but if the conflict between the two provisions is irreconcilable the special provision must prevail and must be construed as an exception to the general provision, unless the general provision is enacted later and it is the manifest legislative intent that such general provision shall prevail.

Section 49-21-01.7(9) of the North Dakota Century Code was a special provision passed by the North Dakota Legislature after passage of the 1996 Federal Telecommunications Act. It was in response to a need to give the Commission authority to implement 251 and 252 agreements under the Act. Section 49-21-09 was a general provision first passed in 1919 and which was last amended in 1993 to give the Commission general powers over telecommunications providers. See *Kershaw v.*

Burleigh County, 47 N.W.2d 132 (N.D. 1951). (A statute passed earlier must give way to a statute passed later.)

CONCLUSION

The Commission's Order of April 26, 2006, must be amended to reflect properly the proceedings that did occur and to limit it to the matters properly before the Commission. The errors of fact and of law require reconsideration of the *April 26th Action* with dispatch. Accordingly, for the reasons stated in the accompanying Petition for Reconsideration and those stated herein, NDTC requests that the *April 26th Action* be reconsidered and amended to correct each error noted herein.

Respectfully submitted this 10th day of May, 2006.

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