PEARCE & DURICK

WILLIAM P. PEARCE
PATRICK W. DURICK
B. TIMOTHY DURICK
GARY R. THUNE
JEROME C. KETTLESON
LARRY L. BOSCHEE ♦♦
LAWRENCE BENDER, PC ♦
JONATHAN P. SANSTEAD
TIFFANY L. JOHNSON

ATTORNEYS AT LAW
314 EAST THAYER AVENUE
P.O. BOX 400
BISMARCK, NORTH DAKOTA 58502

TELEPHONE (701) 223-2890
FAX (701) 223-7865
E-MAIL: law.office@pearce-durick.com

May 24, 2006

Illona Jeffcoat-Sacco
Executive Director
North Dakota Public Service Commission
Capitol
600 East Boulevard, Ninth Floor
Bismarck, North Dakota 58505

VIA HAND DELIVERY

Re: Midcontinent Communications/North Dakota Telephone Company
Rural Exemption Investigation
Case No. PU-05-451

Dear Commissioners:

Enclosed for filing herewith is an original and seven copies of Opposition of Midcontinent Communications to Petition for Reconsideration. We are also electronically filing this document with the Commission.

If you have any questions, please do not hesitate to contact our office.

Sincerely,

Patrick W. Durick
J.G. Harrington*

Counsel to Midcontinent Communications

c: Donald Negaard (via email)
William Binek (via email)
Al Wahl (via email)
Scott Knudsvig (via email)
Tom Moorman (via email)

*Admitted pro hac vice

STATE OF NORTH DAKOTA

PUBLIC SERVICE COMMISSION

MIDCONTINENT COMMUNICATIONS, A SOUTH DAKOTA PARTNERSHIP, COMPLAINANT	)	
VS.	)	Case No. PU-05-451
NORTH DAKOTA TELEPHONE COMPANY, RESPONDENT	)	

OPPOSITION OF MIDCONTINENT COMMUNICATIONS TO PETITION FOR RECONSIDERATION

Patrick W. Durick
Pearce & Durick
314 East Thayer Avenue
P.O. Box 400
Bismarck, North Dakota 58502-0400

J.G. Harrington*
Dow Lohnes P.L.L.C.
1200 New Hampshire Avenue, N.W.
Suite 800
Washington, D.C. 20036

*Admitted pro hac vice

May 24, 2006

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OPPOSITION OF MIDCONTINENT COMMUNICATIONS TO PETITION FOR RECONSIDERATION

Midcontinent Communications, by its attorneys, hereby submits its opposition to the petition for reconsideration filed by North Dakota Telephone Company ("NDTC") in the above-referenced proceeding. As shown below, there is no basis for reconsideration of the Commission's *Order*[1] and, consequently, the Commission should deny the petition.

I. Introduction

The NDTC petition seeks to have the Commission overturn a decision in a proceeding that was extensively briefed and in which NDTC took every opportunity to press its case. That, of course, is NDTC's right under the Commission's rules, but the petition and the supporting brief do not provide any reason to reverse an order that was correct in every material respect.

Many of NDTC's complaints are trivial. When they are not, they are unsupported by even the cases that NDTC cites in its brief. Neither the factual record before the

[1] Midcontinent Communications/North Dakota Telephone Rural Exemption Investigation, Case No. PU-05-451, *Findings of Fact, Conclusions of Law, and Order* (Apr. 26, 2006) (the *"Order"*).

Commission nor the law is consistent with the relief that NDTC seeks. Indeed, the essence of the petition is the same as what NDTC sought in its earlier pleadings: It simply does not want competition to come to Devil's Lake until a time of its own choosing. However, the law and good public policy demand the result the Commission reached in the *Order.*

II. The Commission Correctly Determined that NDTC Did Not Oppose Lifting the Rural Exemption.

NDTC's first request is that the Commission reconsider paragraph 10 of the *Order* to eliminate the statement that "NDTC's post-hearing brief states that it no longer challenges that its rural exemption should be terminated."[2] NDTC now would prefer language indicating that it would not challenge Midcontinent's showing that the criteria for terminating the rural exemption were met.[3]

It is unclear why NDTC believes there is any real difference between these two approaches. More important, however, NDTC did, in fact, agree in its reply brief that it would not challenge the lifting of the rural exemption and even quoted Midcontinent's initial brief on this point:

> NDTC has agreed that the current request by Midco for resale at a wholesale discount in the NDTC Devils Lake exchange is not unduly economically burdensome, technically infeasible, or contrary to the universal standards contained in the Act. (*See* NDTC Brief at 6-7; *see also* HT 158-159, 166:7-18.) As such, the Commission need not consider Midco's purported analysis of the Section 251(f)(1)(A) factors (*see* Midco Brief at 3-8), nor the purported consumer benefits that Midco cites. (*See id.* at 9-11.) As Midco states: "Once the three criteria in Section 251(f)(1) are met, the Commission does not need to go any further to determine whether the rural exemption should be lifted, *and the statute*

[2] NDTC Petition at 2, *citing Order,* ¶ 10.
[3] NDTC Petition at 2.

does not permit any further inquiry." (Midco Brief at 9 (emphasis added).)[4]

This is a clear statement that NDTC would not challenge the lifting of the rural exemption. Otherwise, NDTC would not have claimed that "the Commission need not consider" Midcontinent's analysis, and certainly would not have quoted Midcontinent's statement that "the Commission need not go any further to determine whether the rural exemption should be lifted."

In this context, it is evident that the Commission correctly described NDTC's position. The Commission is not required to use NDTC's exact words. Instead, it is the Commission's job to appropriately analyze the parties' positions, rather than merely parroting the language the parties use. Thus, there is no basis for altering this finding of fact.

III. The Commission's Finding of Fact in Paragraph 23 of the Order Is Correct.

NDTC next argues that the Commission erred by finding that "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."[5] Once again, the Commission was correct and reconsideration should be denied.

First, the Commission correctly concluded that Midcontinent gave testimony on the issue of the implementation period and that it was reasonable to implement resale in 90 days. This testimony was provided by Mary Lohnes.[6] NDTC did not choose to cross-examine Ms. Lohnes on this issue.[7]

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[4] NDTC Reply Brief at 2.
[5] Petition at 2, *citing Order,* ¶ 23.
[6] Exhibit P1, Prefiled Direct Testimony of May Lohnes ("Lohnes Direct") at 6; Exhibit P2, Prefiled Rebuttal Testimony of Mary Lohnes ("Lohnes Rebuttal") at 1.
[7] Tr. at 23-27 (Negaard cross-examination of Mary Lohnes).

Second, the Commission correctly concluded that NDTC did not provide any testimony on whether the parties could implement resale within 90 days, and certainly did not provide any evidence based on the experience of any witness in actually implementing resale. While NDTC's reconsideration brief offers the Commission no less than five "actual excerpts" from the testimony of Mr. Meredith, not one of those excerpts indicates that he has any real-world experience in implementing resale, that resale cannot be implemented within 90 days, or that there even is specific minimum period within which resale can be implemented.[8] The most he says is that he has participated in *negotiations* for resale agreements; that he believes that these negotiations should be allowed to follow the Section 252 time line; and that taking less time for those negotiation is "unrealistic and unduly burdensome."[9] In other words, the sum of Mr. Meredith's testimony, even in the excerpts provided by NDTC, is that he prefers that resale arrangements be negotiated over a long period.[10]

There is nothing in this testimony that indicates that it is infeasible to make the arrangements necessary to implement resale within 90 days. Indeed, there is nothing in this testimony to indicate that Mr. Meredith even knows what steps are necessary to implement resale (let alone has any experience in the operational aspects of resale). In contrast, Midcontinent provided testimony on the specific requirements for implementation from a witness who had actual experience.[11] In this context, there is no doubt that the Commission's finding was correct.

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[8] NDTC Reconsideration Brief at 4-5.
[9] *Id.*
[10] Moreover, on cross examination, Mr. Meredith acknowledged that there were no FCC rules that required use of the Section 252 time frames, and that it was feasible to use a true-up to address the possibility that an interim discount rate would be too high or too low. Tr. at 184 (Meredith) (No FCC rules), 193 (Meredith) (True-up permitted).
[11] *See, e.g.*, Lohnes Rebuttal at 1.

Moreover, while NDTC's effort to string together unrelated elements of Mr. Meredith's testimony to create the impression that he discussed this issue is impressive, it comes too late. NDTC has waived its right to make this argument because it missed the opportunity to do so when it was first raised by Midcontinent. Midcontinent noted in its reply brief that no NDTC witness had challenged the implementation period, and NDTC did not challenge this statement in any of its post-briefing filings.[12] If NDTC believed that Midcontinent was incorrect, it had ample opportunity to inform the Commission on several different occasions. It chose not do so, even as it continued to argue several other issues in this proceeding, and therefore has waived its rights.

IV. There Is No Basis for Changing the Time Frame or the Other Parameters of Negotiation in Paragraphs 2 and 3 of the Ordering Clauses.

In its petition, NDTC argues that ordering clauses 2 and 3 should be amended to adopt a nine month period for negotiation and arbitration and to require that "all terms and conditions of an interconnection agreement be negotiated by the parties."[13] For all of the reasons described at the hearing and in the *Order,* the first part of this request should be denied. The second part of the request, however, is entirely unnecessary because that is what the *Order* already requires.

First, the Commission's adoption of a 90-day implementation period was entirely justified. Midcontinent witnesses provided ample evidence to support that conclusion, starting with the testimony of Ms. Lohnes described above, in which she indicated that Midcontinent's actual experience was that resale could be implemented in 90 days.[14]

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[12] Midcontinent Reply Brief at 8.
[13] NDTC Petition at 2-3 (emphasis omitted).
[14] *See, e.g.*, Lohnes Direct at 6. It is important in this context to remember that resale does not require the physical interconnection of the NDTC and Midcontinent networks, which greatly simplifies the implementation process.

This testimony was buttressed by the testimony of Midcontinent's other witnesses, which showed that discount rate issues could be addressed through the use of interim rates and a true-up, an approach that ensures service can begin promptly while protecting NDTC against the possibility that the discount rate would be set too low.[15]

In response to this testimony, and as shown above, NDTC witnesses provided no evidence that a 90-day period was infeasible. The most they claimed was that a cost study to determine the resale discount was "not an add water and mix proposition."[16] At the same time, though, NDTC's witness agreed that it was permissible for states to adopt interim rates and true-ups, a point that is omitted from NDTC's brief.[17] In fact, and contrary to NDTC's brief, its witness did not say that a cost study "would likely take NDTC three months."[18] Rather, he said that a cost study could "take *up to* two to three months depending on the availability of the data," data that he acknowledged is entirely in the hands of NDTC.[19] In other words, even if the Commission credits NDTC's testimony in its entirety – which it should not – the longest it would take to do an avoided cost study is three months, and the Commission has the ability to address that issue by adopting interim rates and a true-up, just as it did in the *Order*.

Moreover, there is no credible evidence that the entire nine-month Section 252 period is necessary or appropriate to implement simple resale in Devil's Lake. As discussed in more detail below, there is no statutory basis for adopting the nine-month period. At the same time, the experience in other states does not provide any support for

[15] Tr. at 70 (Gates).
[16] Tr. at 224 (Meredith).
[17] Tr. at 193 (Meredith).
[18] NDTC Reconsideration Brief at 7.
[19] Tr. at 220, 222 (emphasis supplied)

such a requirement.[20] For that matter, other than its unsupported claim that the nine-month period was best, NDTC provided no evidence that there was any need for nine months to negotiate a resale agreement, and no NDTC witness offered any objection to the agreement that Midcontinent proposed nearly a year ago.[21]

There also is no basis to adopt NDTC's request that all terms of a resale agreement be negotiated because the Commission already has required negotiation of a complete interconnection agreement. The *Order* is quite direct on this point: It says "NDTC shall begin providing" service to Midcontinent "under an interconnection agreement no later than 90 days from the date of this order."[22] The term "interconnection agreement" covers what NDTC says it wants, that is, "all terms and conditions" of the resale service.[23] The Commission's specific references to rates in Ordering Clauses 3 and 4 do not change the meaning of this language, and NDTC provides no reason to believe that they do.

NDTC's claim that the ordering clauses should be modified to require negotiation of a complete agreement also is curious in light of its later claim that the Commission did not provide adequate notice that negotiation of an interconnection agreement would be required.[24] If the Commission did not require negotiation of a complete agreement, then no notice issue could be raised. This contradiction further demonstrates that NDTC's claim that Order Clause 2 must be amended is without substance.

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[20] *See* Midcontinent Initial Brief at 13-15. As noted in Midcontinent's initial brief, New York adopted a time frame for provision of unbundled loops of approximately three months. *Id.* at 13-14.
[21] *See* Tr. at 153 (Dircks), 192 (Meredith). In fact, nearly four weeks after the *Order* was released, NDTC has not provided any objections to the agreement that Midcontinent proposed.
[22] *Order,* Ordering Clause 2.
[23] NDTC Reconsideration Brief at 7.
[24] *Id.* at 10.

V. The Commission's Decision to Lift the Rural Exemption in Devil's Lake in Its Entirety Was Correct.

NDTC's petition next asserts that the Commission should amend its order to eliminate portions of the decision that purportedly go beyond what was contemplated by the Commission's notice.[25] In fact, the Commission's decision was fully justified by the law and by the record in this proceeding, and there is no basis for limiting it any further than the Commission already has limited it.[26] Specifically, the Commission correctly interpreted the requirements of Section 251(f)(1); properly determined that the exemption should be lifted as to all Section 251(c) requirements; and has met all due process requirements.

A. The Statute Does Not Permit the Commission to Lift the Rural Exemption as to Only a Single Competitor.

In this portion of the petition, the first thing NDTC asks is for the Commission to limit the scope of the order only to Midcontinent.[27] However, the statute does not permit the Commission to limit the order in that way.

NDTC makes no argument concerning the question of whether the Commission could have limited its Section 251(f)(1) relief to cover only Midcontinent. This omission, by itself, makes NDTC's due process claims incorrect, because it cannot credibly claim that it lacked notice of the potential scope of the Commission's actions unless it also can claim that it did not know that the statute required this relief.

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[25] NDTC Petition at 3-4.

[26] Midcontinent notes that the petition asks the Commission to modify the second ordering clause "to eliminate the requirement that a discount rate be agreed upon within 30 days under an 'interconnection agreement.'" *Id.* at 4. It is unclear what NDTC means by this request, as the *Order* does not impose any 30-day period.

[27] *Id.* at 3. NDTC also asks that the *Order* be modified to limit its scope to Devils Lake. *Id.* However, the *Order* already is limited to Devil's Lake, so no modification is necessary. *Order,* Ordering Clause 1. NDTC's brief appears to recognize this limitation in a later discussion. NDTC Reconsideration Brief at 11 (heading describing extent of Commission action as relating to "The Devils Lake Exchange").

Even assuming that NDTC had made such an argument, however, the statute makes it clear that the Commission does not have the discretion to limit the relief to Midcontinent. Section 251(f)(1)(A) provides that Section 251(c) "shall not apply to a rural telephone company" until it has received a bona fide request and the relevant state commission has determined that the specific statutory criteria have been met.[28] There is nothing in Section 251(f)(1) (A) that indicates that the relief is limited to the specific carrier that makes the request. This omission stands in contrast to the language of Section 251(f)(1)(C), which lifts the exemption when a rural ILEC begins to provide video service, but specifically limits that relief to "a cable operator providing cable service" in the area where the ILEC offers video.[29] This distinction makes it evident that Congress intended to limit the reach of Section 251(f)(1)(C), but had no such intent as to Section 251(f)(1)(A).

The broader reading of Section 251(f)(1)(A) also is reasonable in light of the nature of the evidence that the Commission considers in the context of rural exemption proceedings. It is entirely reasonable to conclude that evidence in support of lifting the exemption for one competitor will support lifting the exemption for all competitors. On the other hand, requiring each competitor to come to the Commission separately to make its case, as NDTC suggests, would waste the resources of the Commission, the competitors and even the rural ILEC, for no good purpose.

In addition, Section 251(f)(1)(A), like the rest of the provisions added by the 1996 Act, must be read in light of the Congressional intent to create a "pro-competitive"

[28] 47 U.S.C. § 251(f)(1)(A).
[29] 47 U.S.C. § 251(f)(1)(C).

regulatory regime.[30] Requiring additional individual proceedings to lift the rural exemption carrier-by-carrier would discourage, not encourage competition, and that would be contrary to the expressed desires of Congress. Thus, the statute itself, common sense and Congressional intent all support the conclusion that the Commission was required to lift the exemption as to all competitors, not just Midcontinent.

B. The Commission Was Fully Justified in Lifting the Exemption as to All of Section 251(c).

NDTC's claim that the Commission should not have lifted the exemption as to all of Section 251(c) suffers from many of the same infirmities as its claim that the exemption should have been lifted as to only Midcontinent. Contrary to what NDTC says in its brief, the question of whether the exemption should be lifted in its entirety was properly raised in the proceeding and the parties had the opportunity to brief the issue.

First, and as described in more detail below, the Commission's conclusion that Section 251(f)(1)(A) requires lifting the exemption as to all of Section 251(c) was correct.[31] The Commission had no obligation to provide notice as to its potential interpretation of the governing law and, more significantly, no discretion to adopt an order that was inconsistent with the law. NDTC points to no contrary interpretation by the FCC, any regulatory agency or any court.[32] NDTC cannot claim to have been denied due process because it failed to read the statute properly.

Second, NDTC had ample opportunity to argue that the rural exemption should be lifted only as to wholesale resale. Midcontinent briefed the issue of whether the exemption should be lifted as to all of NDTC's Section 251(c) obligations, and discussed

[30] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 96, preamble.
[31] *See infra* Part VI(A).
[32] As described below, the Alaska case cited by NDTC is inapposite and, in any event, consistent with the Commission's actions.

related issues throughout its initial brief.[33] Midcontinent even requested that the Commission consent to amending Midcontinent's petition to the extent necessary to address facilities-based interconnection issues.[34] NDTC clearly was aware of this issue because it devoted one section of its reply brief to responding to Midcontinent's request.[35] While NDTC did not choose to respond to Midcontinent's showing that full relief was justified by the record, that was NDTC's own choice, and it was not deprived of an opportunity to do so.

Moreover, NDTC itself put the issue of lifting the entire exemption into the proceeding when it admitted that it intended to provide video service in Devils Lake.[36] This admission meant that the only question concerning lifting the entire exemption was the timing. NDTC should not be permitted to claim that its due process was violated because of an issue raised by its own testimony.

C. NDTC's Due Process Rights Were Fully Protected.

As shown above, most of the specific portions of the *Order* that NDTC claims violate its due process rights are interpretations of statutory provisions, and NDTC cannot fairly claim that it did not have notice of what statutes were at issue. In any event, NDTC was provided all of the notice it was entitled to receive from the Commission, had actual notice of the possibility that the full exemption would be lifted and has no basis at all for its further complaint that it did not realize that the Commission would consider all of the terms and conditions for resale in this proceeding.

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[33] *See, e.g.,* Midcontinent Initial Brief at 5-6 (existing facilities-based competition), 7 (no loss of universal service funding from facilities-based competition), 8 (no effect on universal service generally from facilities-based competition), 19-22 (implementation period).
[34] *Id.* at 22, n. 81.
[35] NDTC Reply Brief at 11-3. This discussion included an analysis of NDTC's interpretation of Section 251(f)(1)(A), which demonstrates that NDTC believed that interpretation to be an open issue in the proceeding.
[36] *See* Exhibit R1, Reply Testimony of David Dircks, at 9.

At the outset, the Commission provided NDTC with full notice of all of the issues that mattered in this proceeding. Both the *Notice of Hearing* and the *Notice of Rescheduled Hearing* informed the parties that Midcontinent made a request under Section 251(c), that NDTC claimed an exemption under Section 251(f)(1) and that the proceeding would consider whether the exemption should be terminated.[37] While the notices made reference to the specific services Midcontinent had requested, that information was necessary only to describe the factual issues required to be considered under Section 251(f)(1)(A). The notice does not limit the range of the possible relief to be granted or propose a specific interpretation of Section 251(f)(1)(A) that NDTC can claim to have relied upon in devising its positions in the proceeding. It merely states that NDTC's rural exemption is at issue.

This type of notice plainly suffices to meet due process requirements under both state and federal law. The case law establishes that notice need not include every possible issue that could arise in a proceeding. Rather, notice is sufficient if it describes the general bounds of the proceeding so that the parties are aware of the types of issues that could arise, and there is no violation if a party had an opportunity to demonstrate that the relief that was granted was inappropriate.[38] As the Alaska Supreme Court has held:

> [S]ince the basic element to be satisfied is the opportunity to prepare one's case, the actual content of the notice is not dispositive. The question is

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[37] *Notice of Hearing* (Jul. 28, 2005) at 1; *Notice of Rescheduled Hearing* (Dec. 14, 2005).

[38] *See, e.g., St. Anthony Hospital v. U.S. Dept. of Health and Human Svcs.,* 309 F.3d 680, 708 (10th Cir. 2002) (denying relief because "'as long as a party to an administrative proceeding is reasonably apprised of the issues in controversy and is not misled, the notice is sufficient'" and noting that due process violations require a showing that a party "has sustained prejudice as a result of the allegedly insufficient notice.") (quoting *Savinia Home Indus., Inc. v. Secretary of Labor,* 594 F.2d 1358, 1365 (10th Cir. 1979)); *Southwest Sunsites, Inc. v FTC,* 785 F.2d 1431 (9th Cir. 1985) ("The purpose of the notice requirement . . . is satisfied, and there is no due process violation, if the party proceeded against 'understood the issue' and 'was afforded full opportunity' to justify his conduct.") (quoting *Golden Grain Macaroni Co. v. FTC,* 472 F.2d 882, 885 (9th Cir. 1972), *cert. denied* 412 U.S. 918 (1973).

> whether the complaining party had sufficient noticed and information to understand the nature of the proceeding.[39]

Here, the issues were broadly and clearly stated: Whether the rural exemption should be lifted and what the implementation schedule should be if the exemption was lifted. Nothing in the order went beyond those issues, and thus NDTC cannot claim to be prejudiced.

The one case cited by NDTC does not contradict these conclusions and does not support NDTC's thesis. In *Pub. Serv. Comm'n v. Northern Pac. Ry.,* the court did not hold that the Commission attempted to "expand the scope of a proceeding," as NDTC claims.[40] Instead, the issue in that case was the failure of the Commission to provide any notice at all.[41] Here, the Commission did provide notice to NDTC, and ample opportunity to be heard, through both testimony and briefs. NDTC took full advantage of that opportunity by taking discovery; offering witnesses and exhibits; and filing a prehearing brief, post-hearing briefs and multiple post-briefing submissions. Consequently, the *Northern Pacific* case has no bearing on this proceeding.

Further, NDTC did not just have notice of the proceeding, but had actual notice of the possibility that the full exemption would be lifted. As described above, Midcontinent specifically requested that the exemption be lifted in full, and NDTC responded to that argument in its reply brief. Thus, there is no basis for NDTC to claim that it was

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[39] *North State Tel. Co. v. Alaska Pub. Util. Comm'n.*, 522 P.2d 711, 714 (Alaska 1974) (denying appeal where carrier claimed evidence adduced at hearing and nature of decision exceeded scope of notice).
[40] NDTC Reconsideration Brief at 10.
[41] *Pub. Svc. Comm'n v. Northern Pac. Ry. Co.*, 75 N.W.2d 129, 135 (N.D. 1956) (holding that the Commission was not permitted to issue an order requiring railroad service to because the order "was issued without the service of any notice upon the Railway Company and without specifying any complaint").

prejudiced.[42] As the Ninth and Tenth Circuits both explained, in the absence of any prejudice, there is no basis for a due process claim.

Finally, NDTC's claim that it did not have notice that the terms and conditions of resale would be part of this proceeding is absurd.[43] The term "schedule for compliance," which appears in both the statute and the Commission's notices, is quite broad, and easily encompasses all aspects of compliance with Section 251(c). The terms and conditions of resale plainly fall within the scope of Section 251(c).[44] In any event, NDTC cannot credibly claim to be surprised at having to negotiate an interconnection agreement, because one of NDTC's own witnesses, in prefiled testimony that NDTC quoted in its reconsideration brief, supported adoption of an order requiring negotiation:

> 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.[45]

Since NDTC was willing to sponsor this testimony, there can be little doubt that NDTC had sufficient notice that it would be required to negotiate an interconnection agreement.

VI. The Commission's Legal Interpretations Were Correct and Should Not Be Amended.

NDTC's fifth claimed error is that the Commission, in multiple paragraphs of the *Order,* misinterpreted both Section 251(f)(1) and its own authority under North Dakota law. These claims are incorrect.

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[42] In fact, NDTC provides no evidence that it was prejudiced in any way, and does not suggest any evidence that it did not offer because of its misunderstanding of the Commission's notice.
[43] NDTC Reconsideration Brief at 10.
[44] For that matter, a schedule for compliance could have included the Commission specifically dictating the terms on which resale would be provided, rather than merely requiring the parties to enter into negotiations.
[45] NDTC Reconsideration Brief at 4, quoting Meredith Direct at 8 (emphasis added by NDTC in Reconsideration Brief).

A. Section 251(f)(1) Requires Lifting the Entire Rural Exemption When Appropriate Findings Are Made.

NDTC relies on a series of statutory construction principles to conclude that the Commission misinterpreted Section 251(f)(1)(A) as requiring the entire rural exemption to be lifted whenever the specified criteria are met by a requesting carrier.[46] NDTC's real argument, however, is that the Commission failed to consider all of the language of this section. In reality, NDTC commits the same error it has committed before in this proceeding by attempting to import language from one part of Section 251(f)(1)(A) to another.

Section 251(f)(1)(A) says that "Subsection (c) of this section shall not apply to a rural carrier until" a request for interconnection is received and the Commission concludes that the statutory criteria for lifting the exemption have been met.[47] There are no qualifiers or other language in this portion of the statute. There is nothing in this simple language to indicate that the Commission has the power to lift only part of the exemption or to indicate that the only parts of the exemption to be lifted are those that are the subject of the competitive carrier's request. The plain meaning of the text is obvious: The exemption – the whole exemption – is lifted when the criteria are met. This is exactly what the Commission concluded.

NDTC argues that the Commission's interpretation is wrong because it does not consider the language in clauses (i) and (ii) of Section 251(f)(1)(A) that refers to the "bona fide request" of the competitive carrier.[48] NDTC's theory is that the Commission, by not limiting the relief to the specific interconnection request, did not give meaning to

[46] NDTC Reconsideration Brief at 11-13.
[47] 47 U.S.C. § 251(f)(1)(A).
[48] NDTC Reconsideration Brief at 12-3.

that language. The problem with NDTC's theory is that the word "request" does not appear in the first part of Section 251(f)(1)(A), but only in clauses (i) and (ii). This omission limits the impact of "request" to the clauses where it appears. Thus, the Commission is permitted to consider the specific request only in determining whether a bona fide request has been made (and therefore whether clause (i) is satisfied) and whether the three criteria have been met as to that request (and therefore whether clause (ii) is satisfied). That is how those terms are given meaning, and that is what the Commission did when it specified consideration of the three criteria in the hearing notice. This approach is entirely consistent with the statute.

NDTC's approach, on the other hand, would require the Commission to import the term "request" into the first part of Section 251(f)(1)(A), where it does not appear. Much like NDTC's attempt to import Section 252 into Section 251(f)(1), there is no support for this approach in the statute itself or in the principles of statutory construction. In fact, NDTC's approach does not just require the Commission to import the competitive carrier's request into the first part of Section 251(f)(1)(A), but also requires importing the request into Section 251(f)(1)(B). This provision refers repeatedly to termination of the exemption without once indicating that the termination is limited to the specific request of the competing carrier.[49] In other words, throughout both Section 251(f)(1)(A) and Section 251(f)(1)(B), Congress was careful to distinguish between the specific request of

[49] 47 U.S.C. § 251(f)(2)(B) (The "State commission shall conduct an inquiry for the purpose of determining whether to terminate the exemption under subparagraph A . . . . shall terminate the exemption" if the criteria are met and "[u]pon termination of the exemption . . . shall establish an implementation schedule[.]") The language in Section 251(f)(1)(B) that directs the Commission to adopt an implementation schedule for the specific request after terminating the exemption also is consistent with this analysis because, once the exemption is lifted, the requesting carrier will need specific relief that other carriers, which will be able to invoke the Section 252 process, will not require.

an individual carrier and the general termination of the exemption. This demonstrates that NDTC's analysis is incorrect.

In this regard, NDTC's citation to *ASC of Alaska* is inapposite. That case considered only the geographic scope of a request to terminate a rural exemption, not the services covered.[50] The *Order,* which limits the geographic scope of the relief to Devils Lake, is entirely consistent with that decision.

NDTC's next theory is that the Commission misapprehended the relationship between Sections 251(f)(1) and 251(f)(2). These claims are both incorrect and irrelevant.

Initially, NDTC repeatedly misstates the Commission's analysis. For instance, the Commission did not rely on the FCC's 1996 analysis of the burden of proof.[51] Rather, the *Order* states explicitly that the rural exemption should be lifted "if Midcontinent is able to prove that NDTC should not be exempt."[52] Similarly, there is nothing in the *Order* that suggests that "Congress sought to make Section 251(f)(2) automatic."[53] In fact, the Commission explicitly stated that companies seeking relief under Section 251(f)(2) "must prove . . . that a suspension or modification" is warranted.[54] Further, contrary to NDTC's claim, the Commission explicitly recognized that Section 251(f)(2) applies to a broader group of carriers than Section 251(f)(1).[55] Because of these errors, these claims are entitled to no consideration.

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[50] *ASC of Alaska v. Regulatory Comm'n of Alaska,* 81 P.3d 292, 300-1 (S. Ct. Alaska 2003).
[51] NDTC Reconsideration Brief at 15, n.4.
[52] *Order,* ¶ 14.
[53] NDTC Reconsideration Brief at 17.
[54] *Order,* ¶ 12.
[55] *Id.,* ¶ 11. NDTC's claim that the FCC did not interpret Sections 251(f)(1) and 251(f)(2) together is wrong as a matter of fact. Even a cursory review of the 1996 *Local Competition Order* shows that the FCC intentionally considered them together and in the context of each other. Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, *First Report and Order,* 11 FCC Rcd 15499, 16111-9 (1996).

NDTC's nitpicking appears intended to obscure the most important point in the Commission's analysis, which is that Section 251(f)(2) allows rural carriers to ameliorate any potential harms that might arise from lifting the rural exemption. As the Commission properly recognizes, Section 251(f)(2) gives rural carriers a second bite at the apple if they can show that application of a specific requirement of Section 251(c) is overly burdensome. This provides an important safety valve for rural carriers that lose their exemptions.[56]

Even if NDTC were correct, however, and the Commission had misunderstood the relationship between Sections 251(f)(1) and 251(f)(2), that would be irrelevant. As shown above, the Commission's interpretation of the plain meaning of Section 251(f)(1)(A) is correct. The interplay of Sections 251(f)(1) and 251(f)(2) merely provides additional support for the plain language interpretation of Section 251(f)(1)(A). If that interplay did not exist, the plain meaning of the relevant language still would remain, and that plain meaning would require the Commission to lift the exemption as to all of the Section 251(c) requirements.

B. The Commission Has Full Authority to Implement Section 251(f)(1).

NDTC repeats a series of arguments it made in earlier filings concerning the Commission's authority to implement Section 251(f)(1). The short answer to these arguments is that there is nothing more in federal or North Dakota law that supports NDTC's theories than there was the first time they were raised.[57]

First, the plain language of Section 251(f)(1) gives the Commission the full discretion to set an implementation schedule based on the evidence before it in this

[56] While Section 251(f)(2) applies to certain non-rural carriers, that does not affect this analysis.
[57] For this reason, Midcontinent respectfully requests that the Commission incorporate by reference the arguments concerning this issue made in Midcontinent's initial and reply briefs.

proceeding. While NDTC insists again that Section 252 provides "the only time frames applicable," there is still no reference to Section 252, or its time frames, anywhere in Section 251(f)(1).[58] NDTC provides no basis under principles of statutory interpretation for importing the requirements of Section 252 into a section that does not mention it.[59] Indeed, the opposite is true – there is no justification for concatenating unrelated statutory language.

NDTC's remaining arguments concerning Section 251(f)(1) merely reiterate its own preference for more time than the Commission has determined is appropriate to implement the resale obligation.[60] Such a preference is understandable, but is not supported by the statute, for all the reasons described in Midcontinent's briefs.[61] NDTC has provided no new reasons for the Commission to adopt its analysis and, as the Commission previously concluded, the old reasons do not suffice.

NDTC next claims that the Commission should have interpreted Section 251(f)(1) in light of North Dakota state law, particularly Section 41-21-01.7(9) of the North Dakota Century Code. There is no support for this novel theory, either as a matter of statutory interpretation or under the North Dakota statutes that NDTC claims apply.

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[58] NDTC Reconsideration Brief at 20.

[59] NDTC's best explanation is that "[t]he Commission cannot refuse to follow [Section 252(b)] . . . by suggesting that Section 251(f)(1) provides it unfettered discretion." This argument, however, is a non sequitor. *Id.* The Commission did not refuse to follow Section 252(b); it held, correctly, that Section 252(b) did not apply because there was no language in Section 251(f)(1) or elsewhere in the statute to suggest that the Section 252(b) time frames applied to determining the compliance schedule under Section 251(f)(1). *Order,* ¶ 22. Indeed, since Section 252(b) by its terms applies only to negotiations and arbitrations initiated via Section 251(c), there is no basis at all for importing those time frames into another provision.

[60] *See* NDTC Reconsideration Brief at 20.

[61] Midcontinent Initial Brief at 11-15; Midcontinent Reply Brief at 4-6.

NDTC's fundamental error is to assume that North Dakota law can bind the Commission to interpret federal law in a particular way.[62] This turns the Supremacy Clause of the U.S. Constitution on its head.[63] Where, as here, there is a national law that governs all actions in a particular area, that law must be interpreted on its own terms, and it is state law that, if necessary, must give way.[64] Thus, the Commission's obligation is to determine the meaning of the federal law, as it did in this case, and then assess the impact on state law considerations.[65]

In any event, the reference to Section 41-21-01.7(9), which addresses interconnection negotiations and arbitrations, is inapposite because there is a separate provision addressing rural exemption proceedings. This provision, Section 41-21-01.7(11), specifically empowers the Commission to "[d]etermine whether to terminate a rural telephone company's exemption under section 251(f) of the federal act."[66] The Commission has interpreted this provision, correctly, to allow it to fully implement Section 251(f)(1).[67] Significantly, there is nothing in either Section 41-21-01.7(9) or Section 41-21-01.7(11) that requires or suggests that the two provisions must be, should be or even can be read together. Rather, they are separate provisions that, like other portions of Section 41-21-01.7, give the Commission independent powers.

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[62] NDTC Reconsideration Brief at 20.

[63] U.S. Const., Art VI, cl. 2.

[64] *See, e.g.*, *Boomer v. AT&T*, 309 F.3d 404, 420 (7th Cir. 2002) ("[A]llowing state law to determine the validity of the various terms and conditions agreed upon by long-distance providers and their customers will create a labyrinth of rates, terms and conditions and this violates Congress's intent in passing the Communications Act."). As shown below, in this case the state and federal law are in accord and therefore the Commission need not consider the Supremacy Clause issues.

[65] Ironically, NDTC states that "The Commission has been directed to implement the requirements of the Act by the North Dakota Legislature[,]" and then insists that the Commission should adopt the Section 252 time frames on the basis of North Dakota law rather than federal law. NDTC Reconsideration Brief at 20. NDTC does not explain this contradiction.

[66] ND Cent. Code § 41-21-01.07(11).

[67] Any other interpretation would require the Commission to terminate rural carriers' exemptions without the possibility of any transition or compliance period, which would have meant that NDTC would have been required to provide resale as of the date of the *Order*.

At the same time, the Commission's reliance on Section 41-21-09 as an additional source of authority also is reasonable. NDTC's argument, in essence, is that the Commission cannot rely on this provision because it was implicitly repealed by Section 41-21-01.7(9).[68] As a matter of statutory construction, such an implicit repeal is disfavored, and is available, in the words of the case cited by NDTC, only when there is "an irreconcilable conflict."[69] The problem with NDTC's argument is that there is no such conflict. As NDTC itself has argued, Section 41-21-01.7(9) was enacted to give the Commission additional powers to implement the provisions of the Telecommunications Act of 1996.[70] In other words, this section adds to the Commission's powers, and does not remove any power the Commission already had. Consequently, there is no reason to believe that the Legislature intended for the new provision to have any effect at all on the old provisions.

It is telling that NDTC provides no evidence that the two provisions are in conflict with each other, but merely cites a statutory provision requiring harmonization of conflicting statutes.[71] However, harmonization, and the requirement that an earlier statute must give way to a later statute, another principle cited by NDTC, are relevant only when statutory provisions appear to be incompatible.[72] In this case, the opposite is true. Section 41-21-09 gives the Commission general powers and Section 41-21-01.7(9), along with other elements of Section 41-21-01.7, ensures that the Commission has certain specific powers that it may not have needed before the 1996 Act. Indeed, a broad reading

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[68] NDTC Reconsideration Brief at 20-21.
[69] *Kershaw v. Burleigh County,* 77 N.D. 932, 936 (1951).
[70] NDTC Reconsideration Brief at 21 (Section 41-21-01.7(9) was passed "in response to a need to give the Commission authority to implement Section 251 and 252 agreements under the Act.").
[71] *Id.*
[72] *Id.* at 21-2.

of Section 41-21-09, rather than conflicting with Section 41-21-01.7(9), complements the specific powers granted by the newer provision. In the absence of any actual conflict, it is evident that the Commission's analysis is correct.

In any event, the Commission's citation of Section 41-21-09 simply provides further support for the conclusion that it has the authority to implement Section 251(f)(1) under multiple provisions of North Dakota law.[73] This power is amply established by other provisions as well, particularly Section 41-21-01.7(11). Even if Section 41-21-09 were insufficient in and of itself, the Commission still would be empowered to adopt the relief granted in this proceeding.

IV. Conclusion.

NDTC has raised no issues that require reconsideration. Its claims are inconsistent with the facts in evidence and with the governing law. Consequently, NDTC's petition for reconsideration should be denied forthwith and the *Order* should remain in full effect.

[73] For this reason, NDTC's claim that the Commission did not provide appropriate notice that it was proceeding under Section 41-21-09 is irrelevant. *Id.* at 21. Moreover, and as discussed above, the Commission is not obligated to provide notice of the specific statutes under which it is proceeding, merely notice of the general issues before it in a proceeding. *See supra* Part V.

Respectfully submitted,

MIDCONTINENT COMMUNICATIONS

By: _____
Patrick W. Durick
J.G. Harrington*

Its Attorneys

*Admitted pro hac vice

Pearce & Durick
314 East Thayer Avenue
P.O. Box 400
Bismarck, North Dakota 58502-0400

Dow Lohnes P.L.L.C.
1200 New Hampshire Avenue, N.W.
Suite 800
Washington, D.C. 20036

May 24, 2006

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Midcontinent Communications, a South Dakota Partnership, Complainant, vs. North Dakota Telephone Company, Respondent.	)	**Case No. PU-05-451** **AFFIDAVIT OF SERVICE BY MAIL**

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

Jeanne Feist, hereby certifies that on May 24, 2006, she served a copy of the foregoing:

OPPOSITION OF MIDCONTINENT COMMUNICATIONS TO PETITION FOR RECONSIDERATION,

by e-mail in PDF format as follows:

William W. Binek
Public Service Commission
wbinek@state.nd.us

Scott Knudsvig
Counsel for NDTC
sknudsvig@srt.com

Tom Moorman
Counsel for NDTC
tmoorman@woodsaitken.com

Donald Negaard
Counsel for NDTC
donn@srt.com

Hon. Al Wahl
awahl@state.nd.us

Jeanne A Feist
Jeanne Feist

Subscribed and sworn to before me May 24, 2006.

Suzanne M Cahill
Notary Public
Burleigh County, North Dakota

SUZANNE M CAHILL
Notary Public
State of North Dakota
My Commission Expires Jan 29, 2011