

MEMORANDUM

TO: Commissioners Clark, Wefald and Cramer

FROM: Bill Binek and Pat Fahn

DATE: May 31, 2006

RE: Memorandum -- Midcontinent Communications v. North Dakota Telephone Company, Rural Exemption, Case No. PU-05-451

On April 26, 2006, the Commission issued its Findings of Fact, Conclusions of Law and Order in this case. On May 10, 2006, North Dakota Telephone Company (NDTC) filed a Petition for Reconsideration. On May 24, 2006, the Commission received Midcontinent Communications Inc.'s Opposition to the Petition for Reconsideration.

NDTC cites numerous challenges to the Commission's order, some of which are relatively minor, but some that require careful consideration. The main thrust of NDTC's petition relates to the lack of adequate notice of the issues that would be considered by the Commission in its decision and the imposition of a 90 day implementation schedule

Midcontinent) argues that there is no basis for reconsideration of the Commission's order, and that the Commission should deny the NDTC's petition

Staff believes that NDTC raises legitimate concerns regarding some of the notice issues, but that the Commission had the authority to and was justified in its determination of the implementation schedule.

Notice Requirements

NDTC requests in paragraph 4 of its petition that the Commission amend its order to the extent that it addresses issues that are beyond the record developed in the proceeding and beyond those matters for which prior notice was given.

Midcontinent argues that the Commission was fully justified in terminating the entire exemption. Midcontinent states that the Commission had no obligation to provide notice as to its potential interpretation of the governing law and has no discretion to adopt an order that is inconsistent with the law. Midcontinent argues that NDTC cannot claim to have been denied due process because it failed to read the statute properly.

The Commission's April 26th order addressed the issues set forth in the Notice of Hearing as the Commission interpreted the applicable law that applied to those issues. Staff believes that the Commission's interpretation of the law is correct, but also believes that NDTC has raised legitimate questions regarding the sufficiency of the

identification of some of the issues in the Commission's Notice of Hearing. NDTC argues that the Commission's notice violates the due process requirements of the 5th and 14th Amendments to the United States Constitution and Article I of the North Dakota Constitution.

Adequate notice is a fundamental due process element.¹ N.D.C.C. § 28-32-21(3)(c) provides:

A hearing under this subsection may not be held unless the parties have been properly served with a copy of the notice of hearing as well as a written specification of issues for hearing or other document indicating the issues to be considered and determined at the hearing. In lieu of, or in addition to, a specification of issues or other document, an explanation about the nature of the hearing and the issues to be considered and determined at the hearing may be contained in the notice.

The North Dakota Supreme Court has ruled that due process requires that a participant in an administrative hearing be given notice of the general nature of the questions to be heard and an opportunity to prepare for and to be heard on those questions. *Saakian v. North Dakota Workers Compensation Bureau*, 1998 ND 227, ¶ 11, 587 N.W.2d 166; *Hentz Truck Line v. Elkin*, 294 N.W.2d 774, 780 (N.D. 1980). In the *Saakian* decision, the Court stated that “[b]asic notions of fundamental fairness dictate a person challenging an agency action must be adequately informed in advance of the questions to be addressed at the hearing so the person can be prepared to present evidence and arguments on those questions. Staff believes that an appellate court would require similar notice in this case.

Staff suggests that this is not the case that the Commission should rely on to get an appellate court's ruling on the Commission's interpretation of Section 251(f)(1)(B) of the Act regarding unlimited termination of the rural exemption. Because the hearing notice did not specify that termination of the rural exemption would not be limited to the Devils Lake exchange and would not be limited to termination for wholesale resale, an appellate court would likely find the Notice of Hearing deficient and determine that NDTC was denied due process. Staff suggests that the Commission needs to step back in this case and only address the issues sufficiently noticed, because the record in this case will likely not support the Commission's position on appeal. In all likelihood, an appellate court will not even get to substantive issues because it will first determine whether the notice of hearing was inadequate. If the appellate court determines that the notice was inadequate, it will likely reverse the Commission's decision without addressing the other issues.

Staff recommends that the Commission reconsider and amend the findings, conclusions and order to provide that termination of the rural exemption in this case is for resale of telecommunications services at wholesale rates, and that it applies only to the Devils Lake exchange.

¹ 2 Charles H. Koch, Jr., *Administrative Law and Practice* § 5.32 (2nd ed. 1997).

NDTC also requests that the Commission limit the relief it grants in its order solely to Midcontinent. NDTC argues that the law does not permit the Commission to terminate the exemption to only a single competitor.

Staff recommends that the Commission deny NDTC's request that any relief applies solely to Midcontinent. When a rural exemption is terminated under Section 251(f)(1), the termination of the exemption applies to all telecommunications carriers. The only exception to that is the limitation under Section 251(f)(1)(C) where a cable operator providing video programming seeks to provide telecommunications service in an area where the telecommunications company provides video service. In that situation, the rural exemption does not apply to the request of the cable operator that seeks to provide telecommunications service, but the limitation under Section 251(f)(1)(C) only applies to the cable operator and not to other competitors. That is not the situation in this case because NDTC is not providing video service, so the termination of the rural exemption relief cannot be limited to Midcontinent but rather applies to all competitors.

Implementation Schedule

NDTC argues that the North Dakota Legislature directs the Commission to follow the federal Act in establishing an implementation schedule upon termination of the rural exemption and in doing so the Commission must provide for implementation in accordance with Section 252. NDTC also stated that the Commission's order should require the parties to negotiate all terms and conditions of an interconnection agreement

Midcontinent argues that the plain language of Section 251(f)(1) gives the Commission the full discretion to establish an implementation schedule and does not require that the timelines in Section 252 be used in the implementation schedule. NDTC further states that there is no basis to adopt NDTC's request that all terms of a resale agreement be negotiated because the Commission order already requires negotiation of a complete interconnection agreement.

NDTC's position concerning the implementation schedule makes no sense in light of the fact that the North Dakota Legislature gave the Commission authority under N.D.C.C. §49-21-01.7(11) to terminate a rural telephone company's rural exemption under Section 251(f). The authority to terminate the rural exemption and the directive to establish an implementation schedule are both contained in Section 251(f)(1)(B). Nowhere in that subsection is there a requirement that implementation must be in accordance with Section 252. In fact, the only limitation imposed on the Commission is that an implementation schedule that is established must be consistent in time and manner with FCC regulations. All parties agree that the FCC has no regulations regarding implementation schedules. If Congress intended that implementation had to be in accordance with Section 252, there would have been no reason to give state

commissions the authority to establish an implementation schedule because it would be established under law.

NDTC argues that The Commission's reliance on N.D.C.C. §49-21-09 for authority to impose terms and conditions of interconnection is in error. NDTC states that the only authority that the Commission has to implement provisions of the federal Act must be found in N.D.C.C. §49-21-01.7(9) which provides authority to approve or reject agreements for interconnection, services, or network elements under sections 251 and 252 of the Act.

Section 49-21-01.7 sets forth the Commission's powers in general regarding telecommunications companies, but is not the only authority given to the Commission to establish terms and conditions for interconnection within Chapter 49-21. While Section 49-21-01.7(9) does give the Commission authority to approve or reject agreements for the interconnection between telecommunications companies, Section 49-21-09 also provides the Commission with authority to prescribe reasonable compensation, terms and conditions for interconnection. Nowhere in either the federal Act or in state law is the Commission limited in its discretion to establish an implementation schedule nor is there anything that compels the Commission to use the Section 252 timeline.

N.D.C.C. §1-02-07 requires that whenever a general provision in a statute is in conflict with a special provision in another statute, the two must be construed, if possible to give effect to both provisions. If the Legislature wanted only the provisions of Section 49-21-01.7(9) to apply to interconnections, it would likely have repealed Section 49-21-09.

NDTC argues that a different standard is imposed by Section 49-21-09 than the standard under Section 49-21-01.7(9) in that Section 49-21-09 requires the Commission make a finding of public convenience and necessity, that no irreparable harm will result to the owner of the facilities, that no substantial detriment will result, and that the parties have failed to agree on terms and conditions. NDTC argues that no evidence was introduced to support the needed findings under Section 49-21-09 and that the Commission provided no notice that it was proceeding under Section 49-21-09.

The standards imposed by Section 49-21-09 may not be the same as the standards under Section 49-21-01.7(9), but both provide authority to the Commission to require interconnection and give the Commission authority to establish terms and conditions. The only requirements the Commission has under Section 251(f)(1)(B) are to determine whether to terminate the rural exemption and to establish an implementation schedule. Section 49-21-01.7(11) authorizes the Commission to terminate the rural exemption which includes establishing an implementation schedule. The standards for termination of the rural exemption are not similar to either the standards under Sections 49-21-01.7 or 49-21-09. The law does not state that the Commission, after termination of the rural exemption, must establish the implementation schedule in accordance with Section 252.

NDTC argues that it was denied due process by the Commission because the Commission did not give notice that it would rely on N.D.C.C. §49-21-09 for authority to establish the implementation schedule. The Commission's Notice of Hearing identified that one of the issues to be considered was the implementation schedule for compliance with the request should the exemption be terminated. In fulfilling its responsibilities under the law, the Commission is authorized to use its authority under the law to implement the schedule for compliance. The Commission is not required to identify in its Notice of Hearing any specific section of law that it could rely on for its authority.

Other objections

Language in Paragraph 10

NDTC objects to the language in paragraph 10 of the Commission's Findings of fact which essentially provides that NDTC no longer challenges that its rural exemption should be terminated. Staff understands NDTC's objection to be that its statement was limited to Midcontinent's wholesale resale request in the Devils Lake exchange. Staff suggests that the language in the last sentence of paragraph 10 be revised to state that "NDTC no longer challenges that its rural exemption should be terminated for resale at wholesale rates in the Devils Lake exchange.

Language in Paragraph 23

NDTC also objects to the language at paragraph 23 concerning testimony regarding actual experience in implementing resale. NDTC points to prefilled written testimony of its witness Duncan Meredith in support of its argument.

Midcontinent argues that paragraph 23 is correct. Midcontinent states that its witness, Mary Lohnes gave testimony on the issue of the implementation period and that it was reasonable to implement resale in 90 days. Midcontinent states that NDTC did not provide any testimony on whether the parties could implement resale within 90 days and did not provide any evidence based on the experience of any witness actually implementing resale. Midcontinent argues that none of the excerpts of Duncan Meredith's testimony relied upon by NDTC indicates any real-world experience in implementing resale, or that resale cannot be implemented within 90 days, or that there is any specific minimum period within which resale can be implemented. Midcontinent states that the most Mr. Meredith says is that he participated in negotiations for resale agreements and that he believes the negotiations should follow the Section 252 timeline.

Staff recommends that the following language be substituted for the first sentence in paragraph 23, but that the remaining language in paragraph 23 remain unchanged:

Midcontinent and NDTc both presented testimony concerning the time necessary for implementation of a resale agreement. Midcontinent's witness provided testimony as to actual experience in implementing resale and stated that resale can be completed within 90 days. NDTc's witness stated that he had participated in negotiation of interconnection agreements and that imposing a 90 day implementation deadline is unrealistic and unduly burdensome and that Section 252 timelines should be followed.