



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

June 2, 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 Motion for Leave to File Supplemental Memorandum in Opposition 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

PWD/jf
Enclosures.

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)	
)	

**MOTION FOR LEAVE TO FILE SUPPLEMENTAL MEMORANDUM
IN OPPOSITION TO PETITION FOR RECONSIDERATION**

COMES NOW Midcontinent Communications, and moves the Commission for leave to file the attached Supplemental Memorandum of Midcontinent Communications in Opposition to Petition for Reconsideration. As a basis for this motion, Midcontinent would suggest that in presenting its claim of insufficient notice, North Dakota Telephone Company has neglected to present any argument or evidence that it was prejudiced in any manner as a result of claimed lack of notice. Proof of such prejudice is a prerequisite to a claim of insufficient notice. In addition, even if prejudice were shown North Dakota Telephone Company has not proposed any reasonable manner of proceeding to cure the alleged lack of notice. Granting the Petition for Reconsideration would result in additional unnecessary delays and such delays are not be in the best interest of the consumers of Devils Lake.

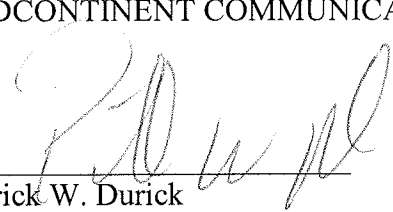
Wherefore, Midcontinent requests that it be granted leave to file the attached Supplemental Memorandum of Midcontinent Communications in Opposition to Petition for Reconsideration.

Dated: June 2, 2006

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

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
)
)
)
)
)

**SUPPLEMENTAL MEMORANDUM OF MIDCONTINENT COMMUNICATIONS
IN OPPOSITION TO PETITION FOR RECONSIDERATION**

Midcontinent Communications, by its attorneys, hereby submits this supplemental memorandum in opposition to the petition for reconsideration filed by North Dakota Telephone Company ("NDTC") in the above-referenced proceeding.¹ This memorandum focuses on issues relating to NDTC's claim that the Commission failed to provide sufficient notice for the hearing in this proceeding. In particular, Midcontinent wishes to emphasize that NDTC has failed to make a showing that it was prejudiced in any way by the Commission's alleged failure to provide notice and to propose a way forward if the Commission, despite the evidence to the contrary, concludes that there is any reason to address NDTC's claims.

Initially, and for the reasons described in Midcontinent's opposition to the petition, NDTC has not established and cannot establish that it was not provided with sufficient notice or a sufficient opportunity to respond to the possibility that it would be required to comply with all

¹ By a separate motion submitted on this date, Midcontinent has requested leave to file this Supplemental Memorandum. NDTC seeks reconsideration of the Commission's *Finding of Facts, Conclusions of Law, and Order* (the "Order"), adopted April 26, 2006.

of the interconnection requirements of Section 251(c) of the federal Communications Act.² In particular, the Commission's *Notice of Hearing* and *Notice of Rescheduled Hearing* both stated plainly that NDTC's rural exemption was at issue in this proceeding, and that was more than sufficient for NDTC to be on notice that the entire exemption was at risk.³ Moreover, NDTC had actual notice that Midcontinent was seeking to have the entire exemption overturned through Midcontinent's initial brief, and NDTC took the opportunity to respond to Midcontinent's arguments in its reply brief.⁴ Thus, NDTC had more than ample notice.

However, even if the Commission were to conclude that NDTC did not have sufficient notice, that is only half of the showing that NDTC must make to demonstrate that reconsideration is warranted. The case law is clear that a party must show not just that it did not receive notice, but also that it was hurt by the lack of notice. As the U.S. Court of Appeals for the Tenth Circuit explained in 2002, there is no due process violation unless a party can show that it "has sustained prejudice as a result of the allegedly insufficient notice."⁵

NDTC has not demonstrated that it sustained any prejudice as a result of the claimed inadequate notice. In fact, NDTC has not even *claimed* that it sustained any prejudice. Rather, its entire argument in the brief supporting its request for reconsideration is that it did not receive sufficient notice.⁶ There is nothing in the brief to indicate that NDTC would have provided any additional evidence, made any different arguments or done anything else different if the notice it says it needed had been provided. In other words, NDTC is arguing that a broader notice should have been provided simply for the sake of providing more notice, not because it would have

² 47 U.S.C. § 251(c); *see* Midcontinent Opposition at 11-14.

³ Opposition at 11-13.

⁴ *Id.* at 13-14.

⁵ *St. Anthony Hospital v. U.S. Dept. of Health and Human Svcs.*, 309 F.3d 680, 708 (10th Cir. 2002) (quoting *Savinia Home Indus., Inc. v. Secretary of Labor*, 594 F.2d 1358, 1365 (10th Cir. 1979), *accord* *Southwest Sunsites, Inc. v. FTC*, 785 F.2d 1431 (9th Cir. 1985).

⁶ *See* NDTC Brief in Support of Petition for Reconsideration at 7-10.

made any difference in any aspect of the proceeding. As *St. Anthony Hospital* demonstrates, that theory is insufficient to support a due process claim.

Moreover, it is doubtful that NDTC could provide any evidence that it was prejudiced by a lack of notice.⁷ The hearing established a series of key facts that show that NDTC cannot expect meaningful harm to arise from the Commission's determination that Section 251(f)(1) requires the entire exemption to be lifted when the statutory criteria are met.

First, and most significantly, NDTC told the Commission, in its own direct testimony, that it will be entering the video market in Devils Lake in early 2007, just months from now, which will eliminate the rural exemption as to Midcontinent, the most significant potential facilities-based competitor in that market.⁸ This alone makes it impossible for NDTC to argue that it will be harmed in any meaningful way by losing the exemption. This conclusion is reinforced by other testimony at the hearing, including NDTC's admission that it has not been hurt by competition from wireless providers⁹ and its admission that losing customers to even a facilities-based competitor will have no effect on the amount of money it receives from the federal universal service fund.¹⁰ In other words, it is impossible to conceive of additional evidence from NDTC that would justify changing the Commission's conclusions in this proceeding. Therefore, NDTC could not have been prejudiced by any lack of notice.

For the reasons described above, Midcontinent submits that there is no basis to reconsider the *Order* on due process grounds. However, if the Commission were to conclude otherwise, it also would be appropriate to recognize that Midcontinent would be prejudiced by any change to

⁷ It is, in any event, too late for NDTC to now claim that it was prejudiced by the lack of notice, since it failed to do so in its petition for reconsideration.

⁸ See Exhibit R1, Reply Testimony of David Dircks, at 9.

⁹ *Id.* at 2 (competition from wireless providers); Tr. at 104 (Dircks) (Impact of competition is minimal).

¹⁰ Tr. at 118 (Dircks) (\$1.8 million in annual revenues from universal service), 219 (Meredith) (no effect on universal service revenues if NDTC loses a customer); see also 47 C.F.R. § 54.307 (FCC rule providing that incumbent carriers maintain funding if they lose customers).

the *Order* and to take specific steps to ameliorate the potential harm to Midcontinent. The greatest risk is that modifying the *Order* would allow NDTC to further delay Midcontinent's entry into the Devil's Lake market as a facilities-based provider, particularly if Midcontinent were required to initiate a separate proceeding under Section 251(f)(1).

To address that concern, the Commission could adopt an expedited schedule to give NDTC the opportunity to provide any further evidence it deemed appropriate to address the impact of facilities-based service. This could be accomplished through an order to show cause why the rural exemption should not be lifted as to facilities-based services. The order could require NDTC to inform the Commission if it objects to such action within a suitable period, such as seven days. If NDTC does not object, then the exemption could be lifted immediately. If NDTC did object, then a hearing could be held, again within a reasonable period, such as a month from the date of the order to show cause, at which both NDTC and Midcontinent could provide testimony. A one day hearing would be feasible because there would be very few issues to be addressed, and the Commission then could use the combined record of the two hearings as the basis for a new order on facilities-based competition.

This approach would balance any perceived concerns about NDTC's notice rights against the significant benefits of introducing facilities-based telephone competition to consumers in Devils Lake as soon as possible. Even under this schedule, it is more likely than not that NDTC will be able to introduce video service in Devils Lake months before Midcontinent can begin to provide facilities-based telephone service. That would not be the best possible outcome of this proceeding, either for Midcontinent or for Devils Lake consumers. Nevertheless, it would be preferable to requiring a brand new proceeding, which easily could delay facilities-based competition in Devils Lake until late 2007.

The process described in the two preceding paragraphs is entirely unnecessary, however, if the Commission affirms the *Order*. For the reasons described above and in Midcontinent's Opposition, that is the course the Commission should adopt.

Dated: June 2, 2006

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

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)	
)	
)	

AFFIDAVIT OF SERVICE

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

Jeanne Feist hereby certifies that on June 2, 2006, she served a copy of the foregoing:

**MOTION FOR LEAVE TO FILE SUPPLEMENTAL MEMORANDUM IN 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 Feist

Subscribed and sworn to before me June 2, 2006.



Notary Public
Burleigh County, North Dakota

