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

RESPONSIVE MEMORANDUM OF NORTH DAKOTA TELEPHONE COMPANY

North Dakota Telephone Company (herein NDTC) submits this Responsive Memorandum to the North Dakota Public Service Commission (herein the Commission), in conjunction with the Commission's consideration of the motion by Midcontinent Communications (herein Midco) requesting Commission permission to file a supplemental, late-filed memorandum. In that regard, NDTC requests the Commission to consider not only the Commission's own rule, N.D. Admin. Code § 69-02-06-02(4), but also the effect of the proposed action by Midco.

Due process is not only a constitutional guarantee but a fundamental concept of fairness afforded litigants or participants that they be fully advised of the actions a government tribunal intends to take. In this context, the nature of "fairness" in each case is dependent on how an outcome was arrived at and not necessarily of the magnitude of the property interest or protected status that is at stake.

NDTC submits that (1) the record in this matter already clearly demonstrates the possible harm to NDTC from the lack of adequate notice in this matter, even if a

showing of prejudice by NDTC were required; (2) the case cited by Midco is not applicable to this matter, either factually or legally; and (3) Midco's requested Commission action fails to address the need for the Commission to comply with the legislative mandates and notice requirements of the North Dakota Administrative Practices Act, specifically, N.D. Cent. Code § 28-32-21.

Simply stated, due process requires a notice, a hearing in accordance with that notice, and undertakings consistent with the notice. Mullane v. Central Hannover Bank & Trust Co., 339 U.S. 306 (1950). Due process is required for any government deprivation of property rights, which may take the form of government program payments. Goss v. Lopez, 419 U.S. 565 (1975), (welfare programs). Even though a drivers license is a privilege, it is a statutory benefit. This type of statutory benefit or status is also protected by due process requirements. Eventes v. Shevin, 407 U.S. 67 (1983).

The magnitude of the right being deprived is not of importance—it is the nature of the interest.

1. **THE RECORD.**

In this particular case, the transcript and testimony, directly and by implication, already demonstrate the potential harm to NDTC resulting from lack of proper notice. The record already also shows the possible nature of evidence NDTC could have presented had it been notified its rural exemption vis-à-vis a facilities-based competition was being studied.

This was elicited by Midco itself at the hearing from the testimony of David Dircks:

Q. (Mr. Harrington continuing) Mr. Dircks, does North Dakota Telephone Company receive universal service funding from the FCC or the FCC programs?

A. Yes, it does.

(Emphasis added.) (Dircks testimony 117:22-118:1.)

Q. So roughly speaking, and I understand this number is not exactly right, you're getting in federal universal service support in any given year somewhere between 95 and $105 per line? Is that a fair number?

A. Just calculating in my mind, yes.

(Dircks testimony 119:7-12.)

Q. So if you're getting somewhere between 95 and $110 per line from the federal universal service program and 160, you're getting close to two-thirds as much per line from universal service as you do from your own customers; is that right?

A. Sounds right.

Q. Okay. Now, if Midcontinent offers resale service in Devils Lake, to your knowledge, will Midcontinent be eligible for any universal service money of its own?

A. They would not be unless they started offering facility-based service.

Q. I'd like to turn to access revenues. Now, your company receives a significant portion of its revenue from access charges; is that correct?

A. Yes.

Q. And those come from long distance carriers who are paying either to originate or terminate calls in North Dakota Telephone's territory?

A. That's the majority of it, yes.

Q. Roughly what percentage of your revenues come from access?

A. Without looking, I would say probably 60 percent.

Q. That's what I had. That would have been about 10 million out of your 16 million dollars in revenues last year?

A. I don't have a financial report with me, but it sounds close.

(Emphasis added.) (Dircks testimony 120:14-121:17.)

Q. And if Midcontinent gets to resell your services, Midcontinent will—will Midcontinent be able to have access to any of those access revenues of yours, or will those still be North Dakota Telephone's revenues?

A. They would still be ours.

(Dircks testimony 122:16-21.)

Midco's own witnesses, Fischer and Gates, acknowledged that the loss of universal service funds and access revenues on NDTC's operations were not part of the study produced by Midco or the issues before the Commission, as follows:

Q. (Commissioner Clark) In setting a pricing, though, it's not an insignificant-type proceeding, is it? I haven't sat through a lot of them, but I have the most recent Qwest UNE case where you're trying to calculate TELRIC-type rates, and I know before that some of the initial interconnection disputes that this Commission heard, which was prior to my time, they weren't small proceedings, either. How much precedent do you believe he Commission has to build on to be able to do something, the two parties negotiating to get something rather quickly resolved as opposed to a more protracted-type proceeding from your experiences? Because we are dealing with a company we haven't dealt with before and certainly have a totally different cost structure than, say, Qwest.

A. (Fischer) I think because this is limited to resale, a lot of the pricing issues are much more limited. You're not dealing with unbundled element networks and all of the other issues that surround—really determining what correct rates for each one of those elements. When dealing with total service resale, I think you can adopt an existing rate, let's say, for Qwest that's currently in effect subject to true-up or you can pick something lower, and what you'll find is, at least from financial impact that we've calculated, even if you were to pick a rate that's half of that, the financial impact on the company is going to be significantly less obviously because the discount is that much less and, therefore, its revenue stream will not be as impacted as it might be with a higher discount rate.

Q. But you don't anticipate getting into individual network element pricing?

A. From my understanding, this proceeding is strictly limited to resale, and that's what Midcontinent has requested.

(Emphasis added.) (Fischer testimony 39:12-40:24.)

Now, if Midcontinent was asking for unbundled network elements, interconnection, collocation, TELRIC pricing, you know, all of those things, it might take a long time to get through all of that, and you might need another proceeding to get through some of those difficult issues. But in this case when we're talking about simply lifting the exemption for total service resale, I think you issue your order and then you set the implementation schedule based on how long you think it will take to implement total service resale, not start the clock all over again.

(Gates testimony 83:25-84:11.)

(Fischer) [I] looked on the North Dakota Tel website, which is a great website, I enjoyed it. Today there is a picture of a little boy with a big fish, and it's very local, very good, very informative. And there is a history there and it talks about the various acquisitions and mergers, but I don't have a feeling of the relative size in terms of revenues or customers.

Q. Between the two companies?

A. No, I don't.

Q. Do you think there's any relevance for the Commission looking at that?

A. Not really, because, after all, North Dakota Tel is the incumbent, they're established, they have their customer relationships, and this is total service resale. So in essence Midcontinent will be doing the retailing function for North Dakota Tel. So the harm is de minimus, as Mr. Fischer showed —

(Emphasis added.) (Fischer testimony 67:14-68:7.)

Midco and this Commission are well aware that universal service funds and access revenues are payable to the entity which owns the facilities. The financial impact of a facilities-based competitor is different than the impact of a wholesale/resale

competitor. This is the obvious reason why Midco chose to use wholesale/resale for its economic impact analysis. Now, even though Midco never properly asked the Commission for it, Midco now improperly tries to expand the scope of the proceeding.

For Midco to state that this issue was properly noticed because Midco raised the issue, for the first time, in its Post-Hearing Brief, after all the evidence was in, is sheer nonsense. As noted by its own witnesses, this case was about "resale" and nothing else. Midco improperly tries to use the Commission to expand the scope of its own limited request. The Commission acted properly when issuing its notice. It was only when Midco later improperly tried to expand its request that any error occurred.

2. **INAPPLICABILITY OF THE ST. ANTHONY'S CASE.**

The case cited by Midcontinent is St. Anthony Hospital v. United States Department of Health and Human Services, 309 F.3d 680 (10th Cir. 2002), is not applicable to this matter. The St. Anthony case involved a hospital that refused to properly admit a patient who had a life-threatening condition. Two, parallel, federal agency groups were charged with enforcement of a federal law prohibiting such practices. One group was a peer review group and the other was the United States Office of Inspector General. Before a hearing by the United States Office of Inspector General (OIG) was held, St. Anthony's protested to the OIG that they were not invited or given a notice to attend a different hearing conducted by a peer review group. The Tenth Circuit Court found that St. Anthony's was not prejudiced by the action of the OIG because getting no notice of the parallel, peer review hearing did not change the outcome in the OIG hearing.

Only after this discussion did the Tenth Circuit decide that St. Anthony's, which received a full and fair OIG hearing following proper notice, was not prejudiced because it did not get notice of a different hearing by the peer review group.

A key to the St. Anthony case is that St. Anthony's had prior notice of all the issues before the OIG hearing and failed to present any evidence at the hearing before the OIG on the issue complained of. Not only did St. Anthony's fail to do so, it also relied on the evidence it later complained of. 309 F.2d 680 at 699.

3. **ADMINISTRATIVE PRACTICES ACT AND NORTH DAKOTA LAW.**

The North Dakota Administrative Practices Act, N.D. Cent. Code § 28-32-21(3)(c), provides as follows:

> 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.

(Emphasis added.)

In Flink v. North Dakota Workers Compensation Bureau, 574 N.W.2d 784 (N.D. 1998), the decision by the North Dakota Workers Compensation Bureau was overturned when the agency decided to expand the nature of its review and study issues not detailed in its notice.

The North Dakota Supreme Court, in Flink, summed up due process requirements in North Dakota, as follows:

> The right to a fair hearing comporting with due process includes reasonable notice or opportunity to know of the claims of opposing parties and an opportunity to meet them. (Citations omitted.) In this case, there appears to be no way Flink could have known whether he had been

> released to return to work would be an issue and ultimately the basis for the ALJ's decision. Flink was essentially blindsided by the ALJ relying on Flink having been released to return to work, because by marking choice number four, instead of choice number two, the Bureau indicated being released to work was not at issue. . . . [T]he Bureau's attorney asked no questions regarding Flink being released to return to work.

(Emphasis added.) Flink, supra, at 789.

In the case at hand, like Flink, no one raised or discussed the issue of the financial impact of a facilities-based competition on NDTC, as opposed to a wholesale/resale competition because, as noted by Midco's own witness, "I think because this is limited to resale, a lot of the pricing issues are much more limited." (See Fischer, supra at p. 4.) NDTC was totally blindsided when Midco tried to raise the issue after the hearing.

See also, Morrell v. North Dakota Department of Transportation, 598 N.W.2d 111 (N.D. 1999) wherein the North Dakota Department of Transportation (DOT) action and hearing to suspend a drivers license was limited to 90 days because the DOT failed to give notice that it was going to consider prior convictions to order a longer suspension of the drivers license. In the Morrell case, Morrell was even informed prior to the start of the hearing that a longer suspension was being considered and that the notice was in error. The Court held that was insufficient because he could have made different arguments had he known. Midco's own witnesses show the arguments are different in a setting other than wholesale/resale. There was no need for NDTC to try to fully develop and explain those arguments under North Dakota law as shown by North Dakota Supreme Court precedent which requires adherence to N.D. Cent. Code § 28-32-21.

CONCLUSION

Due process is an issue of fundamental fairness. There is no magical formulation that fits every situation, but, at a minimum, due process requires the notice of a hearing contain and outline the issues to be discussed. In addition, the North Dakota statute requires proper notice before an agency can act.

NDTC is not complaining, like St. Anthony's Hospital complained, that it was not given a parallel hearing. As such, the St. Anthony case is inapplicable to this matter.

North Dakota law, as applied by North Dakota courts, requires that administrative agencies give notice of issues to be presented and considered so that participants have proper time to prepare arguments to address the issues presented. This is a fundamental requirement of agency action.

Midco did not properly present other issues prior to or at the hearing and its own witnesses testified that the only issue was resale. It is now asking the Commission to cure its own lack of foresight and this Commission should not allow Midco to use the Commission as a lightning rod to accomplish what Midco failed to ask the Commission for.

Dated at Minot, North Dakota, this 6th day of June, 2006.

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CERTIFICATE OF SERVICE

A true and correct copy of the foregoing Responsive Memorandum of North Dakota Telephone Company was served electronically and by regular mail on the 6th day of June, 2006, on the following:

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