

**STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION**

**Midcontinent Communications/North Dakota
Telephone Company
Rural Exemption
Investigation**

Case No. PU-05-451

ORDER ON RECONSIDERATION

June 7, 2006

Preliminary Statement

On April 26, 2006, the Public Service Commission ("Commission") issued its Findings of Fact, Conclusions of Law and Order in this case ("Order"). 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. On June 1, 2006, NDTC filed an e-mail clarification regarding its position regarding termination of the exemption solely to Midcontinent. On June 2, 2006, Midcontinent filed a Motion for Leave to File Supplemental Memorandum in Opposition for Petition for Reconsideration together with the Supplemental Memorandum. On June 6, 2006, NDTC filed its Reply to Midcontinent's Motion for Leave to File Supplemental Memorandum.

Positions of the Parties

NDTC's Petition requests the Commission to reconsider its Order issued on April 26, 2006 and to issue an Amended Findings of Fact, Conclusions of Law and Order.

NDTC cites numerous challenges to the Commission's Order. The main thrust of NDTC's petition relates to the lack of adequate notice of some of the issues that were considered by the Commission in its decision and the imposition of a 90 day implementation schedule.

NDTC requests the Commission amend its Order to the extent that it addresses matters that are beyond the record developed in the proceeding and beyond those matters for which prior notice was given. Specifically, NDTC requests:

1. That the Findings of Fact, Conclusions of Law and Order be amended to limit the scope solely to Midcontinent Communications ("Midcontinent") and solely to the relief requested and sought by Midcontinent; i.e., lifting the Act's existing and ongoing exemption of NDTC solely with respect to

- the provision of NDTC of wholesale/resale of tariffed telecommunications within the NDTC Devils Lake exchange to Midcontinent;
2. Eliminate the 30 (sic) day implementation requirement in paragraph 2 of the ordering clauses;
 3. Remove allegedly erroneous interpretations of law in paragraphs 12, 13, 14, 15, 16 and 22 of the Findings of Fact, paragraph 5 in the Conclusions of Law, and the Order;
 4. Amend the language in paragraph 10 of the Findings of Fact concerning NDTC's challenge of the rural exemption; and
 5. Amend paragraph 23 of the Findings of Fact regarding parties' testimony regarding experience with resale obligations and negotiations.

Midcontinent argued in its initial and supplemental responses that there is no basis for reconsideration of the Commission's Order, and that NDTC's petition should be denied. Midcontinent states that the Commission was fully justified in terminating the entire exemption. Midcontinent states:

1. 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;
2. That NDTC cannot claim to have been denied due process because it failed to read the statute properly;
3. That NDTC had actual notice that the entire exemption was at issue and that Midcontinent was seeking to have the entire exemption terminated;
4. That NDTC was not prejudiced by any alleged failure by the Commission to provide adequate notice;
5. That the adoption of a 90 day implementation period was justified;
6. That the language in paragraph 10 of the Findings of Fact correctly determined that NDTC did not oppose termination of the rural exemption;
7. That the Commission's Finding of Fact in paragraph 23 is correct;
8. That termination of the exemption applies to all competitors.

Discussion

Notice Requirements

The Commission's Order addressed the issues set forth in the Notice of Hearing as the Commission interpreted the applicable law that applied to those issues. The Commission believes its 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.

Midcontinent argues in its Supplemental Memorandum that NDTC had actual notice that Midcontinent was seeking to have the entire exemption terminated through Midcontinent’s initial brief. Midcontinent’s brief cannot be relied upon to provide notice of the issues to be considered by the Commission at a hearing. Furthermore, Midcontinent’s initial brief was filed after the hearing in this proceeding and therefore provided no notice of any kind concerning Midcontinent’s position. The issues in the Notice of Hearing were prepared based upon Midcontinent’s specific request in its Bona Fide Request for Services filed July 15, 2005. Midcontinent’s request was limited to resale at wholesale rates in NDTC’s Devils Lake exchange. Due process requires that a party be adequately informed of the issues to be considered at the hearing in order to prepare for the hearing.

Midcontinent also argues in its Supplemental Memorandum that NDTC has failed to make a showing that it was prejudiced in any way by the Commission’s alleged failure to provide notice. The Commission believes that a NDTC was prejudiced in this case by not being adequately informed of the issues prior to hearing in order to sufficiently prepare to address the issues at the hearing.

The Commission agrees with NDTC that 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 services.

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

Limit Termination of the Exemption to Midcontinent

The Commission disagrees with NDTC's argument that termination of the exemption be limited 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. Therefore, 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 little 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. The Commission believes that 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.

The Commission disagrees with NDTC's position regarding implementation. 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. The Commission believes that 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.

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. The Commission understands NDTC's objection to be that its statement was limited to Midcontinent's wholesale resale request in the Devils Lake exchange. The language in the last sentence of paragraph 10 will 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 prefiled 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.

The Commission agrees that both NDTC and Midcontinent provided testimony concerning the time for implementation. The following language will be substituted for the first sentence in paragraph 23, but that the remaining language in paragraph 23 will 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.

In its Supplemental Memorandum, Midcontinent suggests that if the Commission concludes that there is reason to reconsider the order, that the Commission adopt an expedited schedule through an order to show cause to give NDTC the opportunity to provide any further evidence it deemed appropriate to address the impact of facilities-based service. We reject Midcontinent's suggestion to proceed in this manner because Midcontinent is receiving through this Order on Reconsideration and the Amended Findings of Fact, Conclusions of Law and Order that will be issued by the Commission, the specific relief it requested in its Bona Fide Request.

The Commission, having considered NDTC's Petition and Midcontinent's response and supplemental response, issues the following:

Order

1. The Commission grants that part of NDTC's Petition for Reconsideration to limit termination of NDTC's rural exemption to wholesale resale services in the Devils Lake exchange.
2. The Commission grants that part of NDTC's Petition for Reconsideration relating to language in paragraphs 10 and 23.
3. The Commission denies that part of NDTC's Petition for Reconsideration that termination of the rural exemption be limited solely to Midcontinent.
4. The Commission denies that part of NDTC's Petition for Reconsideration to eliminate the 90 day implementation requirement set by the Commission.

5. The Commission will issue Amended Findings of Fact, Conclusions of Law and Order incorporating the changes addressed herein.

PUBLIC SERVICE COMMISSION

**Susan E. Wefald
Commissioner**

**Tony Clark
President**

**Kevin Cramer
Commissioner**