

**STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION**

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

Case No. PU-05-451

AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

June 7, 2006

Appearances

Commissioners Tony Clark, Susan E. Wefald and Kevin Cramer.

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Patrick W. Durick, Pearce & Durick, P .O . Box 400, Bismarck, ND 58502-0400 and J. G. Harrington, Dow, Lohnes & Albertson, PLLC, 1200 New Hampshire Avenue NW, Suite 800, Washington, D.C. 20036 appearing on behalf of Midcontinent Communications.

William W. Binek, Chief Counsel, Public Service Commission, State Capitol, 600 East Boulevard, Bismarck, North Dakota 58505, appearing on behalf of the Public Service Commission.

Al Wahl, Office of Administrative Hearings, 1707 North 9th Street, Bismarck, North Dakota 58501-1882, appearing as Hearing Examiner.

Preliminary Statement

On May 12, 2005 Midcontinent Communications (“Midcontinent”) sent a letter to North Dakota Telephone Company (“NDTC”) proposing to enter into a resale agreement for telecommunications services in the Devils Lake, North Dakota exchange. Attached to the letter was the proposed Resale Agreement for resale at wholesale rates any telecommunications services tariffed with the Commission that it provides at retail to subscribers who are not telecommunications carriers.

By letter dated June 10, 2005, NDTC asked whether the request by Midcontinent was for 251(b) resale of NDTC telecommunications services or for 251(c) resale of

NDTC telecommunications services at discounted rates. NDTC also advised Midcontinent of its rural exemption from 251(c) requirements of the Telecommunications Act (Act).

On July 15, 2005, Midcontinent filed a Notice of Bona Fide Request for Services under 47 U.S.C. § 251(f)(1)(A) requesting that the Commission conduct an inquiry for the purpose of determining whether Midcontinent's request for wholesale resold services from NDTC under 47 U.S.C. § 251(c) is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of the Act. Under 47 U.S.C. § 251(f) the Commission must conduct an inquiry within 120 days after the Commission received notice of the bona fide request.

On July 28, 2005, the Commission issued a Notice of Hearing scheduling a hearing for October 13, 2005, and identifying the following issues:

1. Whether the request of Midcontinent is unduly economically burdensome.
2. Whether the request of Midcontinent is technically feasible.
3. Whether the request of Midcontinent is consistent with 47 U.S.C. § 254 (other than subsections (b)(7) and (c)(1)(D) thereof).
4. The implementation schedule for compliance with the request should the exemption be terminated.

On September 20, 2005, the parties filed a stipulation that a hearing and determination by the Commission concerning the rural exemption may be held at a time beyond the 120 days directed by 251(f)(1)(B). The hearing was rescheduled to January 23, 2006. The hearing was held as scheduled.

On April 26, 2006, the Commission issued its Findings of Fact, Conclusions of Law and Order in this case. On May 10, 2006, 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.

On June 7, 2006, the Commission issued its Order on Reconsideration.

The Commission, having issued its Order on Reconsideration which it incorporates herein by reference, and having heard the evidence, and having reviewed the positions of the parties on reconsideration, and having reviewed the briefs and other materials filed by the parties, hereby adopts the following:

Findings of Fact

1. NDTC is a wholly owned subsidiary of TPC, Inc. and is a consortium formed by United Telephone Mutual Aid Corporation, Dakota Central Rural Telephone Cooperative, and Polar Communications. NDTC is the incumbent local exchange carrier authorized by the Commission to provide telecommunications services in the Devils Lake exchange. NDTC is a rural telephone company as defined under Section 3(b)(37).
2. Midcontinent is a South Dakota general partnership registered with the Commission to provide local exchange telecommunications services. Midcontinent is a competitive local exchange carrier.

Bona Fide Request

3. Under Section 252(a)(1) of the Act, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier upon receiving a request for interconnection, services, or network elements under section 251.
4. Under Section 251(f)(1)(A), a rural telephone company is exempt from the requirements of 251(c) until (1) the rural company has received a bona fide request for interconnection, services, or network elements, and (2) the state commission determines that such request is not unduly economically burdensome, is technically feasible, and is consistent with the universal service requirements of Section 254.
5. Under Section 251(c) an incumbent local exchange carrier is obligated to provide (1) good faith negotiation, (2) facilities and equipment interconnection, (3) unbundled network elements, (4) retail services at wholesale rates, (5) notice of network changes, and (6) collocation of equipment.
6. The proposed Resale Agreement included with Midcontinent's May 12, 2005 letter clearly states that "NDTC shall offer to Midcontinent for resale at wholesale rates any Telecommunications Services tariffed with the Commission that it provides at retail to subscribers who are not telecommunications carriers...."
7. We find Midcontinent has made a bona fide request for a service which a local exchange carrier must provide under Section 251(c)(4) of the Act, specifically, a request for retail services at wholesale rates. The validity of the bona fide request was not disputed at the hearing.

Rural Exemption

8. Under Section 251(f)(1)(A) NDTC is exempt from the requirement to provide the service requested until NDTC has received a bona fide request from Midcontinent and the Commission determines that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254...." To initiate a Commission proceeding to terminate the rural exemption, Midcontinent is required to submit to the Commission a Section 251(f)(1)(B) notice of its bona fide request.

9. On June 15, 2005, Midcontinent filed a Notice of Bona Fide Request for Services requesting that the Commission conduct a 251(f)(1)(A) proceeding to determine whether to terminate NDTC's rural exemption.

10. The Commission's Notice of Hearing specified the issues to be considered at the hearing. The statement of issues specifically referenced the "request of Midcontinent." Midcontinent's request was for wholesale resold services for the Devils Lake exchange. Because the Commission's Notice of Hearing limited the issues to the "request of Midcontinent", due process requires that the Commission limit its consideration to the request for wholesale resold services for the Devils Lake exchange.

11. Initially, NDTC challenged that its rural exemption should be terminated. NDTC no longer challenges that its rural exemption should be terminated for resale at wholesale rates in the Devils Lake exchange.

Implementation Schedule

12. Section 251(f)(1)(B) provides that, upon termination of the rural exemption, the state commission "shall establish an implementation schedule for compliance with the request that is consistent in time and manner with Commission [FCC] regulations."

13. Midcontinent contends that the Commission has the authority to establish whatever implementation schedule is supported by the record in this proceeding. Midcontinent asks that the Commission require NDTC to provide wholesale resale to Midcontinent within 90 days of the Commission's order, with an interim wholesale discount subject to true-up once a permanent rate is determined.

14. NDTC alleges that the implementation schedule must be established according to the timeline in 252(b)(1). Section 252(b)(1) provides that a negotiated agreement be acted on by the Commission within 90 days after submission. An arbitrated agreement must be acted on by the Commission within 30 days after submission, however, a party may not request arbitration of open issues in a negotiation until the period from the 135th to the 160th day after the incumbent local exchange carrier received the request for interconnection, services, or network elements. A second timeline offered by NDTC is that negotiations for wholesale resale begin after NDTC receives a valid request from Midcontinent after the Commission issues its decision in this proceeding. The

agreement would be implemented by the earlier of February 1, 2007, or the date by which NDTC first provides video programming within its Devils Lake exchange.

15. Midcontinent states there is no basis for a conclusion that the Section 252 negotiation and arbitration period is mandated by Section 251(f)(1), and that Section 251(f)(1) does not mention Section 252 or include any other reference to the negotiation and arbitration provisions of the Act. Section 251(f)(1) only provides that the implementation schedule must be consistent with FCC regulations. Both parties agree there are no FCC regulations on the subject.

16. NDTC states, in a memorandum filed with the Commission on April 12, 2006, that the Commission has only the authority granted to it by the North Dakota Legislature under N.D.C.C. §§ 49-21-01.7(9) and 49-21-01.7(15), and that nowhere did the North Dakota Legislature grant to the Commission the authority to mandate terms and conditions absent an arbitration proceeding. NDTC contends that Section 252 of the Act provides the specific time frames and procedures for such action.

17. The language in this Section 251(f)(1)(B) concerning implementation must have some purpose. That same section provides that a state commission is required to determine if an exemption is to be terminated within 120 days after it receives notice of the request for interconnection. We believe that the purpose for requiring the state commission to establish an implementation schedule is to allow the state commission to establish a reasonable time period for parties to complete their negotiations for interconnection. If Congress wanted to require the parties to go through the entire Section 252 process as suggested by NDTC, Congress would have said so rather than requiring the state commission to establish an implementation schedule. Furthermore, the Commission's authority regarding interconnection is not limited to the provisions of N.D.C.C. §§ 49-21-01.7(8), 49-21-01.7(9) and 49-21-01.7(15). The Legislature has given the Commission authority under N.D.C.C. § 49-21-09 to require interconnections between telecommunications companies and provides that the Commission "may prescribe reasonable compensation, terms and conditions" for such use. In addition to the broad authority granted the Commission as noted above, the Legislature also provided in N.D.C.C. §49-21-01.7(11) authority to terminate the exemption of a rural company, which arises from Section 251(f)(1) of the Act. We find that the authority to order an implementation and compliance schedule is inseparable from the termination procedure and is, in fact, wholly contained within Section 251(f)(1) which the Legislature has granted the Commission authority to implement.

18. 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. We find that a reasonable implementation schedule requires that NDTC provide wholesale resale within 90 days from the date of this order. The Commission recommends that, during those 90 days, NDTC prepare any necessary cost study that will aid the parties in negotiating a wholesale rate to be implemented in the wholesale resale agreement. We will schedule a Further Hearing to determine an interim wholesale discount rate in the event the parties are unable to negotiate a rate and to determine the need for an associated true-up provision. We will also schedule a Second Further Hearing to consider a final discount rate for wholesale resale services.

Facilities-based Interconnection

19. In its post-hearing reply brief, Midcontinent requests that the Commission require the parties to begin the Section 252 negotiation process for facilities-based interconnection. We find that Midcontinent has not made a bona fide request for facilities-based interconnection. To order the parties to immediately begin the Section 252 negotiation process for facilities-based interconnection would violate federal law and would deprive NDTC of its due process rights under the law.

From the foregoing Findings of Fact, the Commission makes the following:

Conclusions of Law

1. The Commission has jurisdiction over the parties and the subject matter of this proceeding.
2. The request of Midcontinent to NDTC for provision of retail services at wholesale rates in the Devils Lake exchange is not unduly economically burdensome.
3. The request of Midcontinent to NDTC for provision of retail services at wholesale rates in the Devils Lake exchange is technically feasible.
4. The request of Midcontinent to NDTC for provision of retail services at wholesale rates in the Devils Lake exchange is consistent with 47 U.S.C. § 254 (other than subsections (b)(7) and (c)(1)(D) thereof).
5. The rural exemption under Section 251(f)(1) for the provision of retail services at wholesale rates in NDTC's Devils Lake exchange should be terminated.
6. The Commission has the authority to establish an implementation schedule for compliance with Midcontinent's request for retail services at wholesale rates. There are no FCC regulations on the subject of an appropriate implementation schedule.

From the foregoing Findings of Fact and Conclusions of Law, the Commission makes the following:

Order

The Commission orders:

1. The rural exemption under Section 251(f)(1) for retail services at wholesale rates in NDTC's Devils Lake exchange is terminated.
2. NDTC shall begin providing to Midcontinent retail services at wholesale prices for resale in the Devils Lake exchange under an interconnection agreement no later than July 26, 2006.
3. A Further Hearing shall be held to determine an interim wholesale discount rate in the event the parties are unable to negotiate a rate and to determine the need for an associated true-up provision.
4. A Second Further Hearing shall be held at an undetermined date in the future to consider a final discount rate for wholesale resale services.

PUBLIC SERVICE COMMISSION

Susan E. Wefald
Commissioner

Tony Clark
President

Kevin Cramer
Commissioner