

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Midcontinent Communications/North Dakota
Telephone Company,
Rural Exemption
Investigation

Case No. PU-05-451

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER
ON FURTHER HEARING ON INTERIM DISCOUNT RATE**

JULY _____, 2006

Appearances

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

Don Negaard, Pringle & Herigstad, P.C., P.O. Box 1000, Minot, North Dakota 58702, appearing on behalf of North Dakota Telephone Company, Devils Lake, North Dakota.

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 and its Amended Findings of Fact, Conclusions of Law and Order for Judgment.

A Notice of Further Hearing was noticed by the Commission on April 26, 2006, for a hearing to be held on July 10, 2006, to review two issues, as follows:

1. The interim wholesale discount rate to be applied effective with the effective date of the wholesale resale agreement and effective until the effective date of a final rate established for the service.

2. The need and design of a true-up provision should the final wholesale discount rate be different from the interim wholesale discount rate.

On June 26, 2006, the Commission, through the Office of Administrative Hearings, issued a Prehearing Order for the further hearing to be held on July 10, 2006.

The Commission, having established the above record, the pleadings of the parties, and heard the evidence presented on July 10, 2006, and having reviewed the positions of the parties, and having reviewed the briefs and other materials filed by the parties, hereby adopts the following:

Findings of Fact

True Up Mechanism

1. The Commission requested the parties to provide information on the need for a true-up provision should the final wholesale discount rate be different from the interim wholesale discount rate. The parties appear to agree that the correct true-up mechanism is reflected in Meredith's testimony, page 4, and as reflected in Exhibit P-17. This exhibit is attached to these Findings of Fact and is incorporated by reference.

The Commission agrees this is an appropriate true-up mechanism, once a final discount rate is determined.

Interim Discount Rate

2. The hearing on July 10, 2006, was also held to determine the following:

The interim wholesale discount rate to be applied effective with the effective date of the wholesale resale agreement and effective until the effective date of a final rate established for the service.

3. Each party called one witness to testify on this issue. NDTC called on Douglas Meredith to testify and Midcontinent called on Timothy Gates to testify. Each of these witnesses filed pre-filed testimony on July 5, 2006, and they each adopted their respective testimony at the hearing held on July 10, 2006.

4. NDTC presented an avoided cost study that was based on an MCI model discussed and adopted, with some modification, by the FCC in its Local Competition Order of 1996 (FCC 96-305, see paragraphs 890-894 of the FCC Order). The FCC used this modified MCI model and the results from two other state proceedings to develop its interim rate range.

5. The avoided cost study of NDTC determined that the appropriate discount rate for wholesale/resale of NDTC's tariffed telecommunications service in Devils Lake, North Dakota, is 9.36 percent. The Commission agrees this is an appropriate discount rate.

6. Midcontinent had available to it the annual reports of NDTC filed with the Commission for the year ending December 31, 2005. While Midcontinent used these reports to suggest changes to the NDTC study, it inexplicably did not file this with the Commission prior to the hearing.

7. There are no FCC rules addressing the development of an interim rate study. States are granted discretion to use the FCC interim rate range if an avoided cost study does not comply with the minimal FCC guidelines established in 47 CFR § 51.609. These guidelines only address the composition of the numerator, or the avoided costs. The Commission's requirement to perform an interim cost study is separate and distinct from the requirement to perform a final cost study.

8. Other states have used a methodology for final cost studies different than that used by NDTC. Most states do not conduct interim cost studies and proceed directly to a hearing on long-term rates. Only when the long-term rate study is found deficient does the state Commission use interim rates. The interim rate method proposed by NDTC is appropriate for interim discount rates in Devils Lake, North Dakota.

9. The NDTC cost study complies with the FCC's regulation addressing the avoided costs. It also follows the modeling methodology the FCC used to in part develop interim rates. The FCC has no discussion of retail revenues in the denominator. The FCC does not adopt any method as presumptively correct. It does however, use the modified MCI model as guidance in developing its interim rate range.

10. In establishing an interim rate range, the FCC concluded that the RBOCs would likely be in the higher end of the range (25 percent) and that smaller LECs would likely be near the lower end of the range (17 percent).

11. The facts in North Dakota demonstrate that Qwest and companies created from former Qwest exchanges have a final wholesale discount of 16.15 percent. The only rural LEC in North Dakota that was not formed from a Qwest exchange and has filed rates with the Commission has a discount rate of 10 percent. The

16.15 percent rate filed by Qwest was stipulated to by the parties as was the 10 percent rate.

12. The inferences and conclusions to be gathered from evidence before the Commission is that the common sense default range for interim rates in North Dakota (following the FCC's reasoning that Qwest should be on the higher end of the range) is 10 to 16 percent. NDTC is much more like Dakota Central than Qwest and, consequently, the expected NDTC rate should be near 10 percent.

13. Midcontinent proposed a default rate higher than 25 percent yet Midcontinent agreed to a 10 percent discount rate for wholesale resale in the Carrington, North Dakota, exchange for resale of Dakota Central Telecom I services. Midcontinent offered no explanation of why it agreed to a much lower discount in that exchange.

14. Midcontinent stated that larger companies have a smaller discount rate yet it offered evidence that the Qwest rate in North Dakota is 16.15 percent. This rate is lower than other larger Regional Bell Operating Companies (RBOCs), as documented by the FCC in its Local Competition Order of 1996.

15. The study used by NDTC is the only study before the Commission that follows the FCC-modified MCI model used in the Local Competition Order of 1996 to develop interim rates.

16. While Midcontinent suggested some other services are subject to discount, it has agreed upon services that are subject to resale in the Devils Lake, North Dakota, exchange. (Exhibit R-15, Attachment 1, page 13.)

17. No other information on file with this Commission indicates that an appropriate discount rate or an interim discount rate should be as high as that proposed by Midcontinent.

18. Midcontinent is planning to introduce facilities-based services in Devils Lake within two years.

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 Commission has authority to establish an interim discount rate to be effective on July 26, 2006, under the agreement filed with the Commission by the parties on July 10, 2006. (Exhibit R-15.)

3. The appropriate discount for resale of NDTC's services, to be applied to the agreement filed by the parties, is 9.36 percent. This rate shall stay in effect until such time as the Commission is able to conduct a hearing and determine the appropriate discount rate for wholesale resale of NDTC's services pursuant to § 252(d)(3).

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

Order

The Commission orders:

1. NDTC shall begin providing wholesale resale of NDTC's services, as set forth in the interconnection agreement and attachments filed by the parties with the Commission (Exhibit R-15) on July 26, 2006.
2. The rate at which the services will be offered to Midcontinent by NDTC under the agreement for resale shall be discounted 9.36 percent for the tariffed prices and as set forth in the agreement until a final discount rate is established.
3. The formula agreed to by the parties for a true-up mechanism once a final discount rate is developed shall be used once a final discount rate is established.
4. A hearing on establishment of a final discount rate shall be held on January _____, 2007, absent an agreement of the parties filed with the Commission.

PUBLIC SERVICE COMMISSION

Susan E. Wefald
Commissioner

Tony Clark
President

Kevin Cramer
Commissioner