

STATE OF NORTH DAKOTA  
PUBLIC SERVICE COMMISSION

Midcontinent Communications, )  
a South Dakota Partnership, )  
                                  )  
                                  Complainant, )  
                                  )  
                                  )  
                                  vs. )                                  Case No. PU-05-451  
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                                  )  
North Dakota Telephone Company, )  
                                  )  
                                  )  
                                  Respondent. )

**POST-HEARING BRIEF OF NORTH DAKOTA TELEPHONE COMPANY  
ON INTERIM DISCOUNT RATES FOR WHOLESALE/RESALE  
IN DEVILS LAKE, NORTH DAKOTA**

**INTRODUCTION**

A hearing was held before the North Dakota Public Service Commission (“the Commission”) on July 10, 2006, for the purpose of determining an interim discount rate for wholesale/resale services in the Devils Lake, North Dakota, exchange pursuant to 47 U.S.C. § 252 (d)(3), to be effective July 26, 2006.

This Brief is submitted to the Commission by North Dakota Telephone Company (“NDTC”) in support of its proposed interim rate.

**FACTS**

Each party offered one witness at the July 10, 2006, hearing. Douglas Meredith testified for NDTC and Timothy Gates testified for Midcontinent Communications (“Midco”).

Witness Douglas Meredith submitted pre-filed testimony and also submitted the only study performed in accordance with FCC criteria. Witness Gates did not pre-file any study but submitted proposed revisions to the Meredith study at the hearing. Meredith's study determined that a discount rate of 9.36 percent is an appropriate interim discount rate for wholesale/resale of NDTC's services in Devils Lake.

Meredith's study used the FCC-recommended rebuttable presumptions of 90 percent and provided reasons why his study deviated from 90 percent in the following areas: Local Order Processing, PIC Charge Charges, White Page Directory, Local Bill Inquiry and Message Processing and CABS. (See Meredith Testimony, Exhibit 21, Schedule 4).

While Witness Gates testified to the actual services which he believes might be subject to resale (see Gates pre-filed testimony, lines 48-5 and 222-233), the parties have agreed upon the scope of resale (Exhibit 15; specifically, see Attachment #1 Resale, page 13) for Devils Lake, North Dakota. As such, this discussion by Gates is irrelevant.

Witness Gates also stated that DSL is subject to wholesale/resale (lines 412-415), but, again, DSL is not subject to the terms of the agreement between NDTC and Midco because it is not included in the terms and conditions agreed to by the parties (Exhibit 15, page 13 of Resale Attachment).

Gates' pre-filed testimony argues that the avoided costs, and therefore the discount, of smaller companies are a larger percentage than appropriate rates for larger companies (lines 143-150). Gates could not explain why Qwest has a

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16.15 percent discount rate on file in North Dakota when the FCC found the default ranges for larger Regional Bell Operating Companies ("RBOCs") to approach 25 percent.

One statement of the Gates testimony that NDTC can agree on, and Witness Meredith did so state, was that:

"In the end, the Commission has to apply a common-sense fact to determine which will be avoided and which ones will not."

(Lines 212-213).

Common sense would cause one to examine Midco's actions compared to its words. Actions speak louder than words. NDTC introduced the pricing schedule from an interconnection agreement, between Dakota Central Telecom I and Midco, that is on file with the Commission. In the case of Dakota Central Telecom I, Midco determined that a reasonable discount rate, considering these avoided costs, was 10 percent. (See Exhibit R-18.)

In addition, the record in this matter shows Gates substituted retail revenues for expenses as a denominator in an FCC-approved formula. The FCC has never used such a formula (Meredith Rebuttal Testimony) and it introduces apples (revenues) into a formula the FCC intended to resolve cost avoidance (oranges). (See Local Competition Order, 96-305, at paragraphs 890-894, and Meredith on Rebuttal).

Gates testified that he felt a discount rate higher than those demonstrated or testified to for any company in the FCC Local Competition Order was reasonable for NDTC. (See paragraph 930 of Local Competition Order, *supra*).

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The parties are in agreement on a formula for true-up mechanism. (See Meredith Pre-filed Testimony and Exhibit P-17.)

### **LAW AND ARGUMENT**

The Telecommunications Act of 1996 provides for the pricing of wholesale resale of telecommunications services, as follows:

For the purposes of section 251(c)(4), a State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

47 U.S.C. § 252(d)(3).

The statute does not specify or differentiate between interim discount rates and long-term discount rates. The FCC did adopt 47 C.F.R. 51.611, which states, as follows:

(a) If a state commission cannot, based on the information available to it, establish a wholesale rate using the methodology prescribed in Sec. 51.609, then the state commission may elect to establish an interim wholesale rate as described in paragraph (b) of this section.

(b) The state commission may establish interim wholesale rates that are at least 17 percent, and no more than 25 percent, below the incumbent LEC's existing retail rates, and shall articulate the basis for selecting a particular discount rate. The same discount percentage rate shall be used to establish interim wholesale rates for each telecommunications service.

(c) A state commission that establishes interim wholesale rates shall, within a reasonable period of time thereafter, establish wholesale rates on the basis of an avoided retail cost study that complies with Sec. 51.609.

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From the reading of the FCC's regulation, it is clear that a state commission "may" adopt FCC default rates. Obviously, the FCC felt, at the time it adopted its final regulations, that state commissions should have some options.

It is also clear that Witness Meredith is the only witness to provide an interim study consistent with 47 C.F.R. 51.609 and the FCC's interim rate methodology used in the Local Competition Order. Meredith computed and calculated the avoided costs under 47 C.F.R. 51.609 and then provided evidence on the presumptions that were rebutted by NDTC, consistent with 51.609(c).

There are policy reasons why Meredith's method should be used for interim rates. As Meredith indicated, it is logical to use the FCC methodology for an interim study (based on the MCI model) because the model uses publicly available information so that it is also available to competitors. Midco had copies of NDTC's annual reports (Exhibit P-18) to use for cross examination and Gates' testimony utilized these public reports. Additionally, it is appropriate to use the Meredith study since it is the only FCC-compliant study now available to the Commission. Should the Commission determine that in future cases it will forego interim rate studies or request an interim study using different methodology or methodology necessary for a long-term study, that decision need not exclude the Meredith study today.

While Gates was critical of Meredith's methodology, Gates' biggest criticism was Meredith's use of expenses as a denominator even though that is what was used by the FCC (and the MCI model) in the Local Competition Order. Gates' stated reason for this is the language in § 252(d)(3); yet that statute talks

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about reducing retail prices to wholesale and discounts for cost saved. It does not speak to the denominator; only the FCC has discussed that issue. Gates' strained interpretation of the statute is hardly a mandate for using revenue as a denominator in a cost savings formula or rejection of Meredith's calculations. When questioned as to any FCC position on this issue, Gates evaded the question and again referenced § 252(d)(3). That statute was written by Congress, not the FCC, and does not mandate a denominator.

### **CONCLUSION**

To echo Mr. Gates, this Commission must use common sense in this matter. In doing so, it must reject Mr. Gates' attempts to corrupt an FCC-approved formula used as a model to develop a cost savings study for developing an interim wholesale resale discount for Devils Lake, North Dakota.

Witness Meredith testified the appropriate discount is less than 10 percent. While Midco might raise arguments about the accuracy of certain cost savings that could raise Meredith's results to 10 percent, Midco offered no explanation of why it agreed to 10 percent with Dakota Central Telecom I. It merely suggested the 16.15 percent Qwest rate in North Dakota is a more appropriate floor. The fact that Qwest's discount is less than the other RBOCs, as calculated in the FCC's Local Competition Order, supports the conclusions of Meredith's study and actually establishes 16.15 as a ceiling. Smaller companies have less marketing costs to avoid and therefore a smaller discount because there are less costs saved. Common sense can only lead one to lean toward Midco's agreed upon rate with Dakota Central Telecom I.

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Dated this 17th day of July, 2006.

PRINGLE & HERIGSTAD, P.C.



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## CERTIFICATE OF SERVICE

A true and correct copy of the foregoing Post-Hearing Brief of North Dakota Telephone Company on Interim Discount Rates for Wholesale/resale in Devils Lake, North Dakota, was served electronically and by regular mail on the 17th day of July, 2006, on the following:

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