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 **PREHEARING BRIEF OF NORTH DAKOTA TELEPHONE COMPANY**

North Dakota Telephone Company ("NDTC"), by counsel, hereby files this Prehearing Brief in this matter. NDTC respectfully submits this filing in an effort to outline for the North Dakota Public Service (the "Commission") and the Hearing Officer the legal and analytical framework within which the issues in this proceeding are to be resolved. Because this matter is of first impression to the Commission, the proper legal framework applicable to this proceeding is of the utmost importance. Proper application of the framework will ensure that the Commission's action resolving the issues in this proceeding is accomplished in the manner prescribed by the 1996 revisions of the Communications Act of 1934, as amended (the "Act") and controlling precedents regarding proceedings (like this one) undertaken pursuant to Section 251(f)(1)(B). *See* 47 U.S.C. §251(f)(1)(B). Thus, Commission-application of the framework provided herein should avoid the unnecessary expenditure of additional resources that a contrary course may take. At the same time, this will also ensure that future proceedings are conducted in a manner wholly consistent with the Commission's authority

under Section 251(f)(1) of the Act and Section 49-21-01.7(9) and (11) of the North Dakota Century Code.

FACTS

To place this proceeding in context, NDTC provides these specific facts that will be adduced at hearing and concerning which NDTC does not believe there is any significant dispute (if any dispute) between the parties.[1] In 2004, NDTC initiated planning to replace aging copper wire plant used for the provision of telecommunications service and high-speed internet services in Devils Lake, North Dakota. Plans to install fiber optic cable were finalized in early 2005, and installation began in August 2005. Construction has not been completed and no service over the fiber has begun. NDTC plans to finish installation of the fiber in the first quarter of 2007 and will not be in a position to offer video programming using this fiber until after February 1, 2007. NDTC does not have a franchise to provide video programming in Devils Lake, North Dakota. Likewise, it does not yet have licenses or agreements to distribute video content.

On May 12, 2005, before any new fiber cable had been installed, Midcontinent Communications Company ("Midcontinent") sent a letter to NDTC with a proposed interconnection agreement to resell NDTC's tariffed telecommunications service. On June 10, 2005, NDTC wrote a letter to Midcontinent and requested clarification of Midcontinent's request. In that letter,

[1] NDTC has attempted not to characterize any of these facts and has specifically limited this brief background of facts to those historical events that should not be in dispute. At the same time, however, NDTC fully recognizes that the hearing will develop the record and evidence upon which this matter will be resolved and, as such, nothing in this Pre-Hearing Brief is intended to limit NDTC's arguments and/or underlying evidentiary basis for its position in the January 23, 2006 hearing in this matter or the post-hearing submissions that will be made by it in this proceeding.

NDTC properly asked whether the Midcontinent request was, in fact, intended to trigger the "rural exemption" under Section 251(f)(1) of the Act since NDTC is a rural company under federal law and, as such, was exempt from providing wholesale resale services. On July 15, 2005, Midcontinent filed this complaint with the Commission asking to have lifted any exemption that NDTC had with regard to Section 251(c)(4) of the Act as it applied to Midcontinent's request for the resale at a discount of NDTC's telecommunications services within NDTC's Devil Lakes exchange.[2]

By interim orders and decisions of the Commission, this matter was set for hearing for January 23, 2006. At the same time, the 120 day time frame required by Section 251(f)(1) for resolving this matter would not be applied by agreement of the parties. *See* 47 U.S.C. § 251(f)(1)(B).

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[2] Section 251(c)(4) states as follows:

> (c) Additional Obligations of Incumbent Local Exchange Carriers.--In addition to the duties contained in subsection (b), each incumbent local exchange carrier has the following duties:
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> (4) Resale.--The duty--
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> (A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and
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> (B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.
>
> 47 U.S.C. §251(c)(4). These obligations, however, are not applicable to a Rural Telephone Company until and unless action by a State commission is taken pursuant to the requirements of Section 251(f)(1). *See generally* 47 U.S.C. §251(f)(1).

APPLICABLE LAW AND ANALYTICAL FRAMEWORK

A. General

Through the Act, Congress has established a general framework that, on the one hand, provides the interconnection obligations required for the establishment of competition within the exchange service areas of telephone companies, while on the other hand, encourages and establishes foundational requirements for universal service policies in the United States. Against this general framework, in turn, is the distinct treatment afforded Rural Telephone Companies (like NDTC) with respect to interconnection obligations such as that found in Section 251(f)(1) of the Act.

In Section 251(f)(1) of the Act, Congress recognized the appropriateness of vesting in the Commission the right to continue the exemption of the more onerous interconnection obligations found in Section 251(c) of the Act. Through Section 251(f)(1)(B), Congress evidenced that it fully understood that the implementation of the interconnection requirements found in Section 251 (c) are unduly economically burdensome, are technically infeasible, and/or are otherwise inconsistent with universal service in areas of the nation such as those served by NDTC and other Rural Telephone Companies. Congress' incorporation of the Section 251(f)(1) exemption mechanism also reflects the general understanding that the State commissions (like the Commission here) are the appropriate authority to make the determination in their own respective state as to whether the current exemption should be removed as to a specific request.

The Act establishes a very specific framework for the consideration of a request for the removal of the exemption applicable to a Rural Telephone Company with respect Section 251(c) interconnection obligations. As a result of this framework, the Commission is vested with the authority to determine, based on the scope of a specific request, whether, as here, the exemption applicable to Rural Telephone Company with respect to Section 251(c)(4) should be removed.

> (1) Exemption for certain rural telephone companies.--
>
> > (A) Exemption.--Subsection (c) of this section shall not apply to a rural telephone company until (i) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines (under subparagraph (B)) that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 (other than subsections (b)(7) and (c)(1)(D) thereof).
> >
> > (B) State termination of exemption and implementation schedule.--The party making a bona fide request of a rural telephone company for interconnection, services, or network elements shall submit a notice of its request to the State commission. The State commission shall conduct an inquiry for the purpose of determining whether to terminate the exemption under subparagraph (A). Within 120 days after the State commission receives notice of the request, the State commission shall terminate the exemption if the request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 (other than subsections (b)(7) and (c)(1)(D) thereof). Upon termination of the exemption, a State commission shall establish an implementation schedule for compliance with the request that is consistent in time and manner with Commission regulations.

47 U.S.C. §§ 251(f)(1)(A) and (B).[3]

[3] As discussed *infra*, the Act does provide for a limitation on the exemption applicable to a Rural Telephone Company. Specifically, Section 251(f)(1)(C) states as follows:

> (C) Limitation on exemption

The Commission's statement of issues in this matter effectively mirrors these Congressional directives.

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.

Notice of Rescheduled Hearing, Case No. PU-05-451, dated December 14, 2005.

Accordingly, Congress fully understood that the implementation of Section 251(c) interconnection requirements, in general, and "resale at a wholesale discount" in particular, create undue economic burdens, are technically infeasible, and/or are contrary to universal service, and it is up to the party seeking to remove the exemption to demonstrate that they are not. *See* Section C, Burden of Proof, *infra*. If the exemption applicable to the specific request is removed, however, the Commission's analysis continues with respect to establishing a rational implementation timeline consistent "in time and manner

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> The exemption provided by this paragraph shall not apply with respect to a request under subsection (c) of this section from a cable operator providing video programming, and seeking to provide any telecommunications service, in the area in which the rural telephone company provides video programming. The limitation contained in this subparagraph shall not apply to a rural telephone company that is providing video programming on February 8, 1996.

47 U.S.C. § 251(f)(1)(C).

with" any applicable Federal Communications Commission ("FCC") regulations. *See* 47 U.S.C. §251(f)(1)(B). Thus, the Section 251(f)(1) mechanism ensures that State Commissions have the opportunity to determine whether, such as here, Section 251(c)(4) resale at a wholesale discount is appropriate in the Devils Lake exchange operated by NDTC and, consistent with Congressional and FCC direction, to determine the schedule for how that will occur.

B. Scope of Analysis

In undertaking its analysis of the case before it, the Commission must review the specific request made by Midcontinent. *See, e.g.,* 47 U.S.C. §251(f)(1)(B)(". . . the State Commission shall terminate the exemption if *the request* is not unduly economically burdensome, is technically feasible, and is consistent with section 254 (other than subsections (b)(7) and (c(1)(D)")(emphasis added).

The record that will be developed in this proceeding will make it abundantly clear that the focus of any analysis is solely with respect to NDTC's Devils Lake exchange. This is the scope of the request made by Midcontinent in the first instance, and the analysis provided by all witnesses in this proceeding. Absent this focused analysis, the Commission could be engaged in improper analysis. *See ASC of Alaska, Inc. v. Regulatory Commission of Alaska*, 81 P.3d 292, 301 (S.Ct. Alaska, 2003) ("[e]ven if the burden of proof had been properly allocated, the RCA [the Regulatory Commission of Alaska] would have erred in terminating the Glacier State Study Area exemption, except as applied to the

North Pole exchange" (which was the exchange for which the request for interconnection was made)).

C. Burden of Proof

It is clear the first issue the Commission needs to resolve in this case is whether the rural exemption of NDTC in Devils Lake is to be lifted. The proponent of removal of a rural exemption bears the burden of proof in such a proceeding. *Iowa Utilities Board v. Federal Communications Commission*, 219 F.3d 744 (8th Cir., 2000); see also *ASC of Alaska,* 81 P.3d at 299. Thus, Midcontinent bears the burden of proving that the NDTC exemption in its Devils Lake exchange should be removed regarding the provision of resale at a wholesale discount. Because, as the evidence at the hearing will demonstrate, Midcontinent has failed to present satisfactory evidence on the effect of removal of the rural exemption of NDTC on NDTC's Devils Lake operations, the request to have the rural exemption lifted should be denied. As such, the complaint should be dismissed and the Commission's analysis should end.

D. Implementation

As the Act reflects, and assuming for sake of argument that NDTC's exemption with respect to the offering of resale at a wholesale discount within the NDTC Devils Lake exchange was removed, the Commission would be required to establish an implementation schedule. The Act, in turn, makes clear that any such implementation schedule must be consistent with applicable FCC regulations. *See* 47 U.S.C. §251(f)(1)B). While no specific regulations from the FCC are on point, the Commission's analysis is not subject to a blank canvas as

it would appear the prefiled testimonies of Midcontinent suggests. Rather, consistent with its considerable experience in approving and/or arbitrating interconnection agreements ("ICAs") under the framework of the Act, the Commission is fully aware that Congress provided a framework for the negotiation of and, where required, arbitration of outstanding issues with respect to ICAs. *See* 47 U.S.C. §§251 and 252.

To be sure, it is only logical under the structure of the Act that if the duty to offer resale at wholesale discounts were imposed on a Rural Telephone Company (like NDTC)(and thus the existing exemption removed), the duty to negotiate terms and conditions for the offering of that resale at wholesale discounts would *only then* apply. Section § 251(f) confirms this fact.

> (A) Exemption
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> Subsection (c) of this section shall not apply to a rural telephone company ***until***
>
> (i) such company has received a bona fide request for interconnection, services, or network elements, and
>
> (ii) the State commission determines (under subparagraph (B)) that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof).

47 U.S.C. § 251(f)(1)(A) (emphasis added.) Absent such conclusion Congress' use of the term "until" would be superfluous, a conclusion contrary to law.[4]

Notwithstanding applicable law, the conclusion that a Rural Telephone Company has no "wholesale resale" interconnection duties *until* a state

[4] See *Reiter v. Sonotone Corp.*, 442 US 330 (1979), citing *US v. Menasche*, 348 US 528, 538-539 (1955) ("In construing a statute, we are obliged to give effect, if possible, to every word Congress used.").

commission determines that a rural exemption should be lifted is also grounded in common sense. It would be counter productive (let alone burdensome and expensive) to suggest that companies should negotiate an interconnection agreement *before* it is ever determined whether the company has a duty to offer § 251(c)(4) resale at a wholesale discount. Any other conclusions would result in the absurd result that parties would be negotiating terms and conditions regarding interconnection only to find out later that the negotiations (and the time, energy and effort involved in them) were not necessary.[5]

As the Commission is aware, interconnection arrangements between two carriers do not occur automatically. Interconnection occurs within the framework of Section 251 of the Act and, but for the need to first address the rural exemption issue (§ 251(f)(1)), is initiated by a request of one carrier to another. As such, the Act includes the time frames for negotiation of an interconnection agreement. Section 252(b)(1) of the Act specifically states:

> (1) Arbitration
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> During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

[5] This same conclusion can be demonstrated based on the FCC's regulations. For example, the FCC regulations require a cost study to be completed if the parties are unable to agree on a discount rate to be applied to the wholesale resale services. *See* 47 C.F.R. 51.611 (copy attached). A cost study is an expensive and time-consuming process, and it would be counter-intuitive for a Rural Telephone Company to be required to complete such a study before that Rural Telephone Company even knows if its rural exemption will be lifted. From a practical perspective, the costs of conducting such study do not go away if the underlying Section 251(c)(4) interconnection requirement is ultimately not imposed. Such costs would, like other operating costs, be recovered from the rates (and any increases thereto) assessed by the Rural Telephone Company to its end users and other customers.

47 U.S.C. §252(b)(1). Congress' mandate of a minimum of 135 days for parties to negotiate an interconnection agreement before a party could invoke arbitration from a Commission under § 252(b) is unequivocal, and the rationale for it is clear.

The parties should be allowed to develop their own detailed agreement and to narrow the scope of any disagreement before invoking the resources of a Commission to try to attempt to write an agreement for them. Thus, there is no sustainable basis to conclude that this same framework should not be applied by the Commission even if one were to assume, that the requirement to negotiate the Section 251(c)(4) request at issue in this proceeding for the NDTC Devils Lake is established. Any suggestion to the contrary is both contrary to the framework established under the Act of the negotiation of an ICA and conflicts with common sense.

Congress set the minimum standards for an implementation schedule in the Act. When Congress established that a State commission had authority to establish an implementation schedule in § 251(f), it clearly recognized that the State commissions needed to have the flexibility at the local level to establish rational implementation procedures. The law mandates certain minimum periods but also allows this Commission to establish schedules for implementation and the Commission is provided the right to ensure that such schedule guarantee fairness. After all, fairness is what Midcontinent's witnesses state that Midcontinent desires. Thus, the starting point for any implementation schedule, assuming that the existing Section 251(c)(4) exemption for NDTC's Devils Lake

exchange is removed, is that found in Section 252(b)(1) and the nine month period found in Section 252(b)(4)(C).[6]

CONCLUSION

The claim for the removal of NDTC's rural exemption for "wholesale resale" should be denied. The record only addresses the Devils Lake exchange. Assuming, *arguendo*, that NDTC's rural exemption with respect to "wholesale resale" is removed for the Devils Lake exchange, NDTC believes the Commission should adopt a negotiation period and, if necessary, an arbitration proceeding, as contained in Section 252(b) of the Act.

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[6] Section 252(b)(4)(C) of the Act states that:

> (C) The State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) upon the parties to the agreement, and shall conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section.

47 U.S.C. §252(b)(4)(C).

Dated this 20th day of January, 2006.

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CERTIFICATE OF SERVICE

A true and correct copy of the foregoing Prehearing Brief of North Dakota Telephone Company was served electronically and by regular mail on the 20th day of January, 2006, on the following:

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