

STATE OF SOUTH DAKOTA )  
COUNTY OF BUFFALO )

IN CIRCUIT COURT  
FIRST JUDICIAL CIRCUIT

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CIV. 12-06

In the Matter of the Application of Native American Telecom, LLC for a Certificate of Authority to Provide Local Exchange Service Within the Study Area of Midstate Communications, Inc.

**PUBLIC UTILITIES COMMISSION'S  
REPLY MEMORANDUM IN  
SUPPORT OF MOTION TO DISMISS**

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The South Dakota Public Utilities Commission, by and through its counsel, submits the following Reply Memorandum in Support of Motion to Dismiss Appeal and Supplement to Motion to Dismiss.

**PRELIMINARY STATEMENT**

Throughout this brief, the South Dakota Public Utilities Commission will be referred to as "Commission." Appellant Native American Telecom, LLC will be referred to as "NAT." Intervenor Sprint Communications Company L.P. will be referred to as "Sprint." Intervenor AT&T Communications of the Midwest, Inc. will be referred to as "AT&T." Intervenor Qwest Communications LLC, dba CenturyLink, will be referred to as "CenturyLink." All references to the Chronological Index will be designated as "CI" followed by the appropriate page number.<sup>1</sup>

The only issue before the Court at this time is CenturyLink's Motion to Dismiss and Supplement to Motion to Dismiss and the Commission's joinder in the Motion and Supplement to Motion. It is CenturyLink and the Commission's position that this Court

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<sup>1</sup> The Commission will not repeat the procedural history of this case as that is contained in its initial memorandum. The Commission does not set forth a statement of facts since a contested case hearing has not yet been held before the Commission and therefore it has not made findings of facts.

lacks subject matter jurisdiction to hear this intermediate appeal.<sup>2</sup>

### ARGUMENT

In its initial brief, the Commission pointed out that, as an appeal of intermediate agency orders, NAT must demonstrate, pursuant to SDCL 1-26-30, that review of the final Commission decision would not provide an adequate remedy. SDCL 1-26-30 states as follows:

1-26-30. Right to judicial review of contested cases--Preliminary agency actions. A person who has exhausted all administrative remedies available within any agency or a party who is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter. If a rehearing is authorized by law or administrative rule, failure to request a rehearing will not be considered a failure to exhaust all administrative remedies and will not prevent an otherwise final decision from becoming final for purposes of such judicial review. This section does not limit utilization of or the scope of judicial review available under other means of review, redress, or relief, when provided by law. A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy.

(emphasis added).

In its initial brief, the Commission cited to case law that clearly supported the Commission's position that this requirement is jurisdictional and must be met in order for a court to proceed with a review of an intermediate agency ruling. The Commission cited to the South Dakota Supreme Court's *Clagget* decision in which the Supreme Court found that "[w]hen the legislature provides for appeal to circuit court from an administrative agency, the circuit court's *appellate* jurisdiction depends on compliance with conditions precedent set by the legislature." *Clagget v. Dept of Revenue*, 464 N.W.2d 212, 214 (S.D. 1990) (emphasis added).

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<sup>2</sup> NAT sets forth what it believes is the standard of review relating to NAT's appeal issues. However, the issue before the Court is the motion to dismiss which concerns whether the Court has the necessary subject matter jurisdiction to even hear NAT's appeal. Thus, the Commission will not address, at this time, the standard of review that would be applicable to NAT's appeal of its issues regarding intermediate agency decisions.

NAT did not dispute that the clear condition precedent under SDCL 1-26-30 is that NAT must show that review of the Commission's final agency decision would not provide an adequate remedy. The Commission cited to the *Richards* decision, a case that is directly on point on this issue, in which the Iowa Supreme Court found that failure of the appellant to show that review of the final agency action would not provide an adequate remedy was a jurisdictional defect. *Richards v. Iowa State Commerce Commission*, 270 N.W. 2d 616, 619 (Iowa 1978).

The question then becomes whether NAT has shown that review of the Commission's final decision will not provide an adequate remedy. NAT has made no such showing. NAT alleges that errors were made by the Commission in ruling on discovery issues and a petition to intervene but fails to demonstrate why review of the final agency decision would not provide an adequate remedy.<sup>3</sup> NAT argues that "*waiting* to review the Commission's final decision would not provide NAT with an adequate remedy in this contested case proceeding." NAT's Memorandum in Opposition at 44 (*emphasis added*). However, this is not the standard to be applied when determining whether an agency's intermediate decision is reviewable by a circuit court.

The *Richards* court could not have been clearer when addressing this issue. The court stated: "That *each issue* raised in the intermediate proceeding could be heard in the final review is *telling proof* that final review is an adequate remedy." *Richards*, 270 N.W.2d at 621 (*emphasis added*). If NAT is aggrieved by the final decision, there is no dispute that all of the issues raised by NAT are reviewable by an appellate court. As quoted in the *Richards* decision, "the adequacy of a remedy at law is measured by 'whether the statutory remedy provides an avenue for review of the administrative determination by which the party was aggrieved.'" *Richards*, 270 N.W.2d at 621

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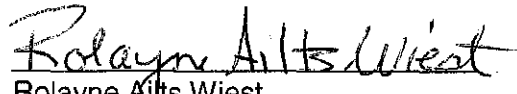
<sup>3</sup> The Commission does not address NAT's allegations of errors as the issue before the Court is the motion to dismiss, not the merits of NAT's appeal.

(quoting *Ragano v. Rigot*, 25 Pa.Cmwlth. 428, 360 A.2d 779, 781). NAT has failed to show that review of the final agency decision would not provide an adequate remedy. This failure means that NAT's appeal must be dismissed.

### **CONCLUSION**

For all of the reasons set forth above, the Commission respectfully requests that the Court dismiss this appeal.

Dated at Pierre, South Dakota, this 10<sup>th</sup> day of August, 2012.

  
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