STATE OF SOUTH DAKOTA) :SS COUNTY OF BUFFALO)

IN CIRCUIT COURT

FIRST JUDICIAL CIRCUIT

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.

CENTURYLINK'S REPLY BRIEF SUPPORTING MOTION TO DISMISS

Qwest Communications Company, LLC, doing business as "CenturyLink QCC" (hereinafter referred to as "CenturyLink"), moved to dismiss this appeal for lack of appellate jurisdiction because the Public Utilities Commission has not entered a final order. Under the auspices of a response to CenturyLink's motion to dismiss, Native American Telecom, Inc. ("NAT") served a 47-page brief arguing the merits of its appeal but essentially ignores the jurisdictional issue.[1] Because this Court lacks subject matter jurisdiction over NAT's appeal, it should be dismissed.

In this interim appeal, NAT argues that the South Dakota Public Utilities Commission ("the Commission") erred in (1) ruling on pretrial-discovery issues; and (2) granting CenturyLink's motion to intervene. NAT admits that these are not final decisions in a contested case but rather interlocutory matters. (Appellant Native American Telecom, LLC's Memorandum In Opposition to Motion to Dismiss ("NAT's Brief") at p.3).

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[1] CenturyLink strongly disputes NAT's description of the "facts" in this case and its merits argument. These issues are for another day, however. Rather, the issue before this Court is very narrow—does it have subject matter jurisdiction to hear this interim appeal.

I. SDCL 1-26-30 Does Not Grant This Court Appellate Jurisdiction Over NAT's Interlocutory Appeal.

Without any analysis, NAT argues SDCL 1-26-30 grants this Court jurisdiction over NAT's appeal. (NAT's Brief at p.3). SDCL 1-26-30 states:

> 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.**

SDCL 1-26-30 (emphasis added). NAT argues, without citing any authority, that the last sentence of SDCL 1-26-30 grants this Court jurisdiction. It is wrong.

Under the plain language of SDCL 1-26-30, intermediate decisions are only appealable if "review of the final agency decision would not provide an adequate remedy." As stated in CenturyLink's motion to dismiss, the South Dakota Supreme Court has not specifically interpreted this language. Iowa, however, has interpreted identical language in its statute.

The Iowa statute states: "[a] preliminary, procedural or intermediate agency action is immediately reviewable if all adequate administrative remedies have been exhausted and review of the final agency action would not provide an adequate remedy." I.C.A. § 17A.19. The party seeking appellate review bears the burden of proving that "the final agency action would not provide an adequate remedy." *Salsbury Labs. v. Iowa Dep't of Environmental Quality*, 276 N.W.2d 830, 833 (Iowa 1979) (internal quotation omitted). The party must show why delaying appellate review until after a final agency decision is inadequate. *Salsbury Labs*, 276 N.W.2d at

836; *see also Richards v. Iowa State Commerce Comm'n*, 270 N.W.2d 616, 620 (Iowa 1978) ("In order to satisfy the second requirement for intermediate review, a party must show the existence of other reasons, peculiar to the party's own case, which make final review an inadequate remedy."). The Appellant must show how delay would cause irreparable injury. *See Doe v. Iowa Bd. of Medicine*, 2012 WL 836731, at *3-4 (Iowa Ct. App. 2012) (unpublished); *see also Salsbury Labs*, 276 N.W.2d at 837.

Invoking 1-26-30, NAT argues that this Court has appellate jurisdiction over because the "Commission's actions and rulings have left NAT with no remedy other than an appeal to this Court." (NAT's Brief at p.3). NAT misconstrues the issue. The issue is **not** whether NAT has no other remedy than appealing the Commission's decisions. The issue is **when** can NAT proceed with that appeal, and that this Court only has jurisdiction over the interim orders if delaying the appeal until the Commission's final decision would cause irreparable harm. *See Salsbury Labs.*, 275 N.W.2d at 837. NAT fails to bear this burden.

A. <u>Delaying Review of the Commission's Discovery Decisions Will Not Cause Irreparable Harm.</u>

Relying on the broad scope of discovery stated in South Dakota's Rules of Civil Procedure governing the scope of discovery, NAT argues the Commission erred in ruling on his discovery requests. (NAT's Brief at pp. 21-30). Although CenturyLink denies the Commission erred, this is not the issue. Instead, NAT must show how delaying review of the discovery rulings would cause irreparable harm.

As an initial matter, NAT has an adequate remedy for the alleged erroneous discovery decision—NAT can simply appeal the decision after the Commission's final adjudication of this

contested case proceeding.[2] If successful on appeal, the Circuit Court could then reverse the decisions denying discovery and remand for further proceedings. Indeed, this is how most discovery disputes are often resolved on appeal. *See e.g., Corn Exchange Bank v. Tri-City Livestock Auction, Co.*, 368 N.W.2d 596, 600 (S.D. 1985) (stating trial court improperly denied motion to compel disclosure of financial information and thus remanding to trial court to determine whether a new trial was required).

Similarly, the Iowa Supreme Court has recognized that administrative decisions in discovery disputes should be appealed after the final decision. In *Christensen v. Iowa Civil Rights Comm'n*, 292 N.W.2d 429, 429 (Iowa 1980), a party sought judicial review of an administrative order denying the party's motion to compel answers to interrogatories. The Iowa Supreme Court ruled that the trial court lacked jurisdiction to review the interim discovery order. *Id.* at 431. In reaching this conclusion, the court stated the party "failed to allege or prove the 'irreparable injury of substantial dimension' which is necessary in order to show that review of final agency action would not provide an adequate remedy." *Id.* at 431 (quoting *Salsbury Labs.*, 276 N.W.2d at 837).

In reaching its decision in *Christensen*, the Iowa Supreme Court recognized the inherent problems created by piece-meal interim appeals of discovery disputes:

> If parties were able to interrupt agency proceedings by bringing original district court actions to obtain assistance with every discovery problem which conceivably might arise, the agency process could be effectively disrupted and courts would have a difficult additional burden.

Id. To avoid this problem, judicial review of the discovery dispute should "await final agency action." *Id.* *See also U.S. Health, Inc. v. State*, 589 A.2d 485, 488-91 (Md. Ct. App. 1991)

[2] Of course, the outcome of the contested case before the South Dakota Commission will frame whatever appeal may be filed by any party.

(holding that denial of motion to compel was not immediately appealable because order did not cause irreparable harm).

Like in *Christensen*, NAT here fails to prove delaying review of the Commission's discovery decisions would cause irreparable harm. NAT also makes the conclusory statement that the Commission's decisions violate its due process rights. Conclusory allegations do not, however, establish irreparable harm sufficient to establish jurisdiction for this appeal. *Salsbury Labs*, 275 N.W.2d at 837.

Ultimately, this case presents a typical discovery dispute. NAT has an adequate remedy through judicial review following the Commission's final adjudication of this contested case. Because NAT has an adequate remedy, this Court lacks jurisdiction and should grant CenturyLink's motion to dismiss.

B. <u>NAT Fails Its Burden of Proving How Delayed Review of The Commission's Ruling on CenturyLink's Motion to Intervene When Any Alleged Defect Relating to the Motion to Intervene Was Quickly Remedied.</u>

NAT argues that the Commission erred in permitting CenturyLink to intervene because the motion to intervene was filed by out-of-state counsel who had not yet been admitted *pro hac vice*. Once again, NAT fails to explain why this decision cannot be adequately reviewed at the conclusion of this contested case hearing or how it has been irreparably harmed by this decision. Thus, SDCL 1-26-30 does not authorize this interlocutory appeal.

Moreover, NAT is incorrect on the merits of its argument. According to NAT, CenturyLink's petition to intervene should be deemed a nullity because he claims that attorneys Todd Lundy and Jason Topp engaged in the unauthorized practice of law when they filed the petition to intervene. (NAT's Brief at pp. 35-44). Setting aside the validity of NAT's

contention, any defect in the petition was properly cured.[3] Out of an abundance of caution, CenturyLink, through local counsel, refiled its petition to intervene on November 1, 2011.

NAT argues that the second petition to intervene could not "relate back" to the improperly filed first petition. (NAT's Brief at p.43-44). This misunderstands the issue. The Commission had discretion to permit CenturyLink's intervention based upon the second petition standing alone. There is no "statute of limitations" or jurisdictional impediment on intervention, and thus, the motion to second motion to intervene does not need to "relate back" to the first motion. Instead, even if untimely, the Commission could properly permit CenturyLink to intervene based upon the November 1, 2011, petition. *See* ARSD 20:10:01:15:02 (stating that the Commission may grant an untimely petition to intervene "if granting the intervention will not unduly prejudice the rights of other parties to the proceeding or if denial of the petition is shown to be detrimental to the public interest"). Certainly, permitting CenturyLink to cure its allegedly defective petition to intervene three days later does not unduly prejudice any party. In fact, NAT makes not attempt to explain how CenturyLink's intervention prejudiced NAT.

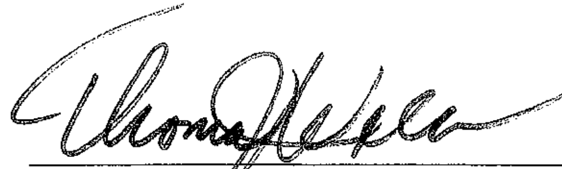
In short, even if NAT is correct and the Commission improperly granted CenturyLink's October 28, 2011 petition to intervene, the Commission could properly permit intervention based upon the November 1, 2011 petition standing alone. Because the Commission could have granted CenturyLink's intervention based upon this second petition, NAT cannot show any harm—let alone irreparable harm—in granting the intervention. As a result, this Court lacks jurisdiction over this interim order. *See Salsbury Labs.*, 276 N.W.2d at 837.

[3] CenturyLink vehemently disputes attorneys Todd Lundy and Jason Topp engaged in the unauthorized practice of law.

CONCLUSION

Because the Court lacks jurisdiction over NAT's appeal of this interim order, CenturyLink respectfully requests that the Court dismiss this appeal and allow the PUC to conduct further proceedings.

Dated this 10th of August, 2012.



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