

**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA**

---

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.

---

Docket No. TC11-087

**REPLY MEMORANDUM IN SUPPORT  
OF NATIVE AMERICAN TELECOM, LLC'S  
MOTION FOR SUMMARY JUDGMENT**

**INTRODUCTION**

Native American Telecom, LLC ("NAT"), through its counsel and pursuant to SDCL 15-6-56 and ARSD 20:10:01:01.02, submits this reply memorandum in support of its motion for summary judgment.<sup>1</sup>

---

<sup>1</sup> The Commission should note that Midstate Communications, Inc. ("Midstate") and the South Dakota Telecommunications Association ("SDTA") *do not object* to the Commission granting NAT's motion for summary judgment in this certification matter proceeding.

Also, as the Commission is aware, NAT, Midstate and the SDTA recently entered into a stipulation. This stipulation reflects that Midstate and the SDTA do not object to NAT's request for a waiver pursuant to ARSD 20:10:32:15 (Rural service area -- Additional service obligations). This stipulation was filed with the Commission on March 27, 2012.

There is no basis to delay NAT's entry into the proposed service area. NAT has submitted its Revised Application with all required supporting information. NAT's Revised Application has been "deemed complete" by the Commission's Staff. NAT has met all of the legal requirements for receiving a Certificate of Authority from the Commission. Therefore, the Commission should grant NAT's motion for summary judgment.

### **LAW & ANALYSIS**

#### **I. IT IS UNDISPUTED THAT NAT HAS SATISFIED THE COMMISSION'S LEGAL FRAMEWORK FOR RECEIVING A CERTIFICATE OF AUTHORITY**

##### **A. NAT Has Provided The Commission With All Information Required Under South Dakota Law And The Commission's Rules**

SDCL 49-31-3 provides that "[e]ach telecommunications company that plans to offer or provide *interexchange telecommunications service* shall file an application for a certificate of authority with the commission pursuant to this section." (emphasis added). This statutory provision also requires that "[t]elecommunications companies seeking to provide any *local exchange service* shall submit an application for certification by the commission pursuant to §§ 49-31-1 through 49-31-89. . . ." *Id.* (emphasis added). Finally, "[t]he commission shall, by rules promulgated pursuant to chapter 1-26, *prescribe the necessary procedures to*

implement this section.” *Id.* (emphasis added). And indeed, as a result of SDCL 49-31-3’s delegation authority, the Commission has prescribed the “necessary procedures” regarding interexchange service and local exchange service.

First, ARSD 20:10:24:02 provides that “[e]ach telecommunications company required to apply for a certificate of authority with the commission . . . for *interexchange service* shall provide the following information with the company’s application. . . .” (emphasis added). The Commission’s rules then require that a telecommunications company provide information in twenty (20) specific categories. ARSD 20:10:24:02(1-20). NAT has provided this precise information to the Commission and its Revised Application has been “deemed complete” by the Commission’s Staff.

Second, ARSD 20:10:32:03 provides that “[a] telecommunications company required to apply for a certificate of authority for *local exchange services* . . . shall submit a written application and provide . . . [specific] information. . . .” (emphasis added). The Commission’s rules then require that a telecommunications company provide information in twenty-five (25) specific areas. ARSD 20:10:32:03(1-25). NAT has provided this precise information to the Commission and its Revised Application has been “deemed complete” by the Commission’s Staff.

Third, ARSD 20:10:32:06 provides that “[i]n determining if an applicant has sufficient technical, financial, and managerial capabilities and whether to grant a certificate of authority for local exchange services the commission shall consider [eleven specific factors].” ARSD 20:10:32:06(1-11). Once again, NAT has provided this precise information required for the Commission’s review and its Revised Application has been “deemed complete” by the Commission’s Staff.

In sum, NAT has fulfilled each and every one of the Commission’s legal requirements. NAT has followed the *exact legal framework* that has been followed by hundreds of previous applicants. Therefore, the Commission should grant NAT’s motion for summary judgment.

***B. There Is No Basis To Treat NAT Differently From Any Other Applicant And Further Delay Competition***

The Commission has consistently viewed competition in telecommunications services as a benefit to the residents of South Dakota and has approved the applications of numerous Competitive Local Exchange Carriers (“CLEC”). Since competitive telephone services were first introduced in South Dakota, our state’s residents have benefited through lower prices, greater choice, and availability of a broader range of often innovative services. Granting NAT’s Revised Application will help bring these benefits of competition to a significant

number of Tribal members who until now may not have had the opportunity to enjoy such benefits.

The Commission has established a simple regulatory procedure for CLECs because the Commission recognizes the benefits of competition to South Dakota residents. South Dakota law does not envision the kind of elaborate proceeding or investigation of a CLEC's offerings that the intervenors propose. The Commission must review a CLEC's application in a manner consistent with the applicable statutory and administrative laws. And while the Commission affords an opportunity to request a hearing on a CLEC application before a certificate of authority is granted, a hearing has never been requested or held for decades (if ever) in South Dakota. See, e.g., <http://puc.sd.gov/Dockets/Telecom/default.aspx> (providing a complete listing of the Commission's telecommunications dockets - including CLEC applications - from 1997 thru 2012).

By enacting the straightforward CLEC application framework, the Commission has streamlined entry regulation and opted to expedite competition in South Dakota by regulating *conduct rather than entry*. CenturyLink and Sprint propose an unprecedented level of *entry regulation* that is inconsistent with the Commission's framework. These two companies seek an extensive and unwarranted evidentiary investigation into the nature of NAT's services. However, CenturyLink's

and Sprint's imaginative array of "issues" overreaches any entry regulation under South Dakota law.

NAT is only required to abide by the Commission's rules of entry. NAT has complied with each and every one of these rules. Consistent with South Dakota's market-based approach to CLEC regulation, the Commission should not waste time and resources entertaining CenturyLink's and Sprint's "claims" prior to entry.

The wide-ranging "investigation" envisioned by CenturyLink and Sprint can have only one purpose: to erect a massive regulatory barrier that delays competitive entry. Such delay may serve the interests of CenturyLink and Sprint, but it does not serve the public good and is inconsistent with the Commission's framework. These companies' actions also frustrate the Commission's efforts in carrying out its role to open the local exchange and exchange access markets to competition.

CenturyLink's and Sprint's demand for a drawn-out inquiry only serves to delay competitive entry into the market. NAT's CLEC certification process has already been delayed far beyond what has been normal for the Commission. These two companies have shown no reason why NAT's Revised Application should be denied on the basis of any of the grounds identified in the Commission's rules. NAT has met all of the requirements for CLEC certification in South Dakota. Therefore, NAT

asks the Commission to act expeditiously in resolving the narrow issue before it and grant NAT's Motion for Summary Judgment.

**C. CenturyLink's And Sprint's Opposition To NAT's Motion For Summary Judgment Is Based Exclusively Upon "Access Stimulation"**

It is undisputed that the *only reason* CenturyLink and Sprint have intervened in this *routine and limited certification matter* is the issue of "access stimulation." (See generally Intervention Petitions of CenturyLink and Sprint; CenturyLink's Brief in Opposition to NAT's Motion for Summary Judgment; Sprint's Brief in Opposition to NAT's Motion for Summary Judgment).

CenturyLink's and Sprint's responsive briefs attempt to mislead the Commission by depicting "access stimulation" as improper and subject to an extensive "investigation and hearing" in this limited certification matter. However, as the Commission is well-aware, the Federal Communication Commission ("FCC") recently recognized the legality of "access stimulation" and adopted rules governing its practice. Therefore, whether NAT intends to engage in "access stimulation" is irrelevant and beyond the scope of this certification matter.

In November of 2011, the FCC released its long-awaited Final Rule which addresses "access stimulation" and "revenue sharing

agreements.”<sup>2</sup> *Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers*, 76 Fed. Reg. 73830, 2011 WL 5909863 (November 29, 2011) (to be codified at 47 C.F.R. pts. 0, 1, 20, 36, 51, 54, 61, 64, and 69) (“Final Rule”).

In its Final Rule, the FCC specifically recognizes the legality of “access stimulation.” In fact, the FCC’s Final Rule adopts a “bright line definition” to identify when an “access stimulating” Local Exchange Carrier (“LEC”) must re-file its interstate access tariffs at rates that are presumptively consistent with the Federal Communications Act.

The first condition is met where a LEC has entered into an access *revenue sharing agreement*.<sup>3</sup> The second condition is met where a LEC either has had (a) a three-to-one interstate terminating-to-originating

---

<sup>2</sup> The FCC’s nearly-800 page Final Rule can be found at [www.fcc.gov](http://www.fcc.gov).

<sup>3</sup> This “revenue sharing” condition of the definition is met when a rate-of-return LEC or CLEC:

[H]as an access revenue sharing agreement, whether express, implied, written or oral, that, over the course of the agreement, would directly or indirectly result in a net payment to the other party (including affiliates) to the agreement, in which payment by the rate-of-return LEC or competitive LEC is based on the billing or collection of access charges from interexchange carriers or wireless carriers. When determining whether there is a net payment under this rule, all payments, discounts, credits, services, features, functions, and other items of

traffic ratio in a calendar month; or (b) a greater than 100 percent increase in interstate originating and/or terminating switched access Minutes of Use ("MOU") in a month compared to the same month in the preceding year.<sup>4</sup> (Final Rule, ¶¶ 658, 667, 675-678).

If a LEC meets both conditions of this definition, it must file a revised tariff and benchmark its tariffed access rates to the rates of the price cap LEC with the lowest interstate switched access rates in the state. (Final Rule, ¶ 679). Specifically, the Final Rule requires a CLEC to file its revised interstate switched access tariff within 45 days of meeting the definition, or within 45 days of the effective date of the rule if on that date it meets the definition. A CLEC whose rates are already at or below the rate to which they would have to benchmark in the re-filed tariff will not be required to make a tariff filing.<sup>5</sup> (Final Rule, ¶ 691).

---

value, regardless of form, provided by the rate-of-return LEC or competitive LEC to the other party to the agreement shall be taken into account.

(Final Rule, ¶ 669).

<sup>4</sup> In turn, *IXCs will be permitted to file complaints* based on evidence from their traffic records that a LEC has exceeded either of the traffic measurements of the second condition (*i.e.*, that the second condition has been met). (Final Rule, ¶ 659).

<sup>5</sup> The FCC's Final Rule became effective on December 29, 2011. Although beyond the scope of this certification proceeding, the Commission should note that NAT's current tariff with the FCC became effective on August 23, 2011. ***In this tariff, NAT properly benchmarked its interstate switched access rate to that of***

The FCC's Final Rule rejects CenturyLink's and Sprint's long-standing claim that "access stimulation" and "revenue sharing" violates the Federal Communications Act. In fact, the FCC declares just the opposite:

[W]e do not declare revenue sharing to be a *per se* violation of section 201(b) of the Act. A ban on all revenue sharing arrangements could be overly broad, and no party has suggested a way to overcome this shortcoming. *Nor do we find that parties have demonstrated that traffic directed to access stimulators should not be subject to tariffed access charges in all cases.*

(Final Rule, ¶ 672) (emphasis added).<sup>6</sup>

---

***Qwest/CenturyLink's access rate.*** See Affidavit of Jeff Holoubek in Support of NAT's Motion for Summary Judgment, ¶ 3. *In other words, several months before the FCC's Final Rule became effective, NAT's current tariff fully complied with the FCC's Final Rule.*

<sup>6</sup> The FCC also rejected several of CenturyLink's and Sprint's (and its fellow IXCs') suggestions, including (1) adopting a benchmark rate of \$0.0007 ("We will not adopt a benchmarking rate of \$0.0007 in instances when the definition is met, as is suggested by a few parties. The \$0.0007 rate originated as a negotiated rate in reciprocal compensation arrangements for ISP-bound traffic, and there is insufficient evidence to justify abandoning competitive LEC benchmarking entirely"); (2) adopting an immediate bill-and-keep system ("Nor will we immediately apply bill-and-keep, as some parties have urged. We adopt a bill-and-keep methodology for intercarrier compensation below, but decline to mandate a flash cut to bill-and-keep here"); and (3) detariffing certain CLEC access charges ("Additionally, we reject the suggestion that we detariff [CLEC] access charges if they meet the access stimulation definition. Our benchmarking approach addresses access stimulation within the parameters of the existing access charge regulatory structure"). (Final Rule, ¶ 692).

CenturyLink's and Sprint's entire reason for intervening in this certification matter is based on attempting to "police" a practice ("access stimulation") that the FCC has deemed to be appropriate as long as certain guidelines are followed. If CenturyLink and Sprint believe that NAT's "access stimulation" activities do not comply with the FCC's Final Rule, it is entitled to commence a dispute action with the FCC (or the Commission). See Final Rule, ¶ 659 (stating that IXC's will be permitted to file a complaint if it believes that a LEC failed to comply with the Final Rule's guidelines). However, CenturyLink's and Sprint's efforts to engage in "access stimulation gamesmanship" in this routine and limited certification matter is inappropriate and violates the Commission's rules.

## **II. THE COMMISSION MUST GRANT NAT'S MOTION FOR SUMMARY JUDGMENT**

### ***A. Affidavits Submitted In Opposition To Summary Judgment And Comprised Of Ultimate Conclusions Of Fact Or Law, Or Are Otherwise Inadmissible, Must Be Stricken***

It is well-settled that affidavits must be supported by specific facts that are admissible in evidence and based on first-hand knowledge. See SDCL 15-6-56(e) (Affidavits must "be made on personal knowledge, . . . [and] set forth such facts as would be admissible in evidence. . . ."). A party opposing summary judgment "may not rest upon the mere allegations or denials . . . [but] must set forth specific facts showing that there is a genuine issue for trial." *Id.* If a party does not respond in this

way, "summary judgment . . . shall be entered against [them]." *Id.* See also *Firemen's Fund Ins. Co. v. Thien*, 8 F.3d 1307, 1310 (8th Cir.1993) (inadmissible material is not "properly available to defeat . . . [a summary judgment] motion").

Affidavits also become improper when they contain "self-serving" statements or conclusions of either law or fact. See e.g., *BellSouth Telecomms., Inc. v. W.R. Grace & Co. - Conn.*, 77 F.3d 603, 615 (2nd Cir. 1996) (finding that the district court's disregard of affidavits that advocated conclusions of law was proper); *Hampton Inns, Inc. v. Ameritel Inns, Inc.*, 1995 WL 762148, at \*6 (D. Idaho - October 19, 1995) ("An affiant's opinion that . . . consists largely of legal conclusions does not conform to the dictates of Rule 56(e) and is not sufficient to raise a genuine issue of fact"). In other words, it is clear that "*an expert may not state his . . . opinion as to legal standards nor may he . . . state legal conclusions drawn by applying the law to the facts.*" *VIM, Inc. v. Somerset Hotel Assoc.*, 19 F.Supp.2d 422, 427 n. 4 (W.D.Pa. 1998) (emphasis added).

Additionally, when an expert submits an affidavit that simply opines as to his personal views of a legal issue, it must be stricken from consideration. To hold otherwise would permit a party (and its expert) to improperly assume the role of the court. See e.g., *A&M Records, Inc. v.*

*Napster, Inc.*, 2000 WL 1170106, at \*8 (N.D. Ca. Aug. 10, 2000) (striking the declaration of a university professor that “merely offers a combination of legal opinion and editorial comment on Internet policy”); *Hampton Inns, Inc.*, 1995 WL 762148, at \*16 (striking portions of an expert’s declaration and holding that “[experts] may harbor different views of what they perceive to be the status of the law [in a particular area], . . . but it is the function of [the court] – not retained . . . experts – to discern the legal standard to be applied in [a] case”); *Wahad v. FBI*, 179 F.R.D. 429, 435 (S.D.N.Y. 1998) (striking portions of an affidavit which were “fraught with improper legal conclusions, ultimate facts, conclusory statements, and inadmissible hearsay”).

Therefore, the affidavits submitted by CenturyLink and Sprint in opposition to NAT’s motion for summary judgment must be carefully reviewed. If the Commission determines that any portion of these affidavits fail to comply with SDCL 15-6-56(e), these portions cannot be considered in determining whether a “genuine issue of material fact” exists to defeat NAT’s summary judgment motion. Very simply, “[a]n expert who supplies nothing but a bottom line supplies nothing of value to the judicial process.” *Mid-State Fertilizer Co. v. Exchange National Bank of Chicago*, 877 F.2d 1333, 1339 (7th Cir.1989).

**B. Numerous Portions Of William Easton's Testimony Must Be Stricken Because It Is Comprised Solely Of Improper Legal Analyses, Legal Conclusions, And Irrelevant, Speculative, And Conclusory Assertions**

For purposes of NAT's motion for summary judgment, the Commission must exclude significant portions of the "legal brief" styled as the "Direct Testimony of William R. Easton" ("Easton Testimony") because it provides little more than Easton's "legal review and analysis" and bottom line opinions.<sup>7</sup>

The Commission cannot consider **Page 2 (Lines 10-23)** through **Page 4 (Lines 1-6)** of Easton's testimony because he doesn't provide any

---

<sup>7</sup> CenturyLink submitted the Easton Testimony for the Commission's consideration. The Easton Testimony was filed with the Commission on March 26, 2012. CenturyLink's "Statement of Material Facts" ("SUMF") in opposition to NAT's motion for summary judgment relies *exclusively* on "facts" contained in the Easton Testimony. As such, CenturyLink's SUMF ¶¶ 1-38; ¶¶40-42; and ¶¶ 44-65 (filed with the Commission on April 11, 2012) must also be excluded by the Commission.

Finally, portions of CenturyLink's "Response to NAT's Statement of Undisputed Material Facts" ("CenturyLink's Response to NAT's SUMF") ¶¶ 3, 4, 11, 14, 20, 24, 25, 27, 28, 29, 30, 31, 33, 34, 36, 38, 39, 44, 49, 51, 52, 54, and 72 must also be excluded by the Commission (and thus admitted) because these paragraphs are based on Easton's "legal analysis and review," and are irrelevant, speculative, conclusory, and fail to cite to an appropriate part of the record. See SDCL 15-6-56(c) ("The opposing party must respond to each numbered paragraph in the moving party's statement with a separately numbered response and *appropriate citations to the record*") (emphasis added).

admissible “facts.”<sup>8</sup> Instead, Easton improperly presents the Commission with the “purpose” of his testimony and his own personal “legal review and analysis” of the following:

- the “importance of this case”;
- the decisions of the Iowa Utilities Board and FCC;
- the FCC’s *Connect America* Order;
- the “public interest harms” of “access stimulation”;
- the “contextual background on “access stimulation.”
- “regulatory rulings and interpretations of [access stimulation]”
- the *Connect America* order; and
- “mileage pumping.”

This testimony is also inadmissible as irrelevant in this proceeding.

The Commission cannot consider **Page 4 (Lines 7-22) through Page 5 (Lines 1-7)** of Easton’s testimony because he doesn’t provide any admissible “facts.” Instead, Easton improperly presents the Commission with his own personal “legal review and analysis” of the “background of access stimulation.” This testimony is also inadmissible as irrelevant in this proceeding.

---

<sup>8</sup> For the Commission’s convenience, NAT has provided the portions of the Easton Testimony, CenturyLink’s SUMF, and CenturyLink’s Response to NAT’s SUMF that are inadmissible and must be stricken. These inadmissible provisions are specified by an appropriate “~~strike through~~” designation and attached as “Exhibit 1” to this reply brief.

The Commission cannot consider **Page 5 (Lines 8-21) through Page 7 (Lines 1-19)** of Easton's testimony because he doesn't provide any admissible "facts." Once again, Easton improperly presents the Commission with his own personal "legal review and analysis" of the "reason that access stimulation constitutes arbitrage and is contrary to public policy." This testimony is also inadmissible as irrelevant in this proceeding.

The Commission cannot consider **Page 7 (Lines 20-22) through Page 8 (Lines 1-8)** of Easton's testimony because he doesn't provide any admissible "facts." Once again, Easton improperly presents the Commission with his own personal "legal review and analysis" of the "policy significance of revenue sharing agreements." This testimony is also inadmissible as irrelevant in this proceeding.

The Commission cannot consider **Page 8 (Lines 9-31)** of Easton's testimony because he doesn't provide any admissible "facts." Once again, Easton improperly presents the Commission with his own personal "legal review and analysis" of the "FCC's rulings regarding access stimulation." This testimony is also inadmissible as irrelevant in this proceeding.

The Commission cannot consider **Page 9 (Lines 1-18)** of Easton's testimony because he doesn't provide any admissible "facts." Once

again, Easton improperly presents the Commission with his own personal “legal review and analysis” of “state regulators having investigated and curbing ‘access stimulation.’” This testimony is also inadmissible as irrelevant in this proceeding.

The Commission cannot consider **Page 9 (Lines 19-21) through Page 12 (Lines 1-7)** of Easton’s testimony because he doesn’t provide any admissible “facts.” Once again, Easton improperly presents the Commission with his own personal “legal review and analysis” of “how the *Connect America* Order addresses ‘access stimulation.’” This testimony is also inadmissible as irrelevant in this proceeding.

The Commission cannot consider **Page 12 (Lines 8-26) through Page 13 (Lines 1-14)** of Easton’s testimony because he doesn’t provide any admissible “facts.” Once again, Easton improperly presents the Commission with his own personal “legal review and analysis” of the “FCC’s further clarification of the *Connect America* Order.” This testimony is also inadmissible as irrelevant in this proceeding.

The Commission cannot consider **Page 13 (Lines 15-26)** of Easton’s testimony because he doesn’t provide any admissible “facts.” Once again, Easton improperly presents the Commission with his own personal “legal review and analysis” of whether the “*Connect America* Order eliminated concerns about ‘access stimulation.’” This testimony is

also inadmissible as irrelevant in this proceeding.

The Commission cannot consider **Page 14 (Lines 1-6)** of Easton's testimony because he doesn't provide any admissible "facts." Once again, Easton improperly presents the Commission with his own personal "legal review and analysis" of whether "there are pending court cases concerning 'access stimulation.'" This testimony is also inadmissible as irrelevant in this proceeding.

The Commission cannot consider **Page 14 (Lines 7-23) through Page 15 (Lines 1-7)** of Easton's testimony because he doesn't provide any admissible "facts." Once again, Easton improperly presents the Commission with his own personal "legal review and analysis" of "NAT and access stimulation." This testimony is also inadmissible as irrelevant, conclusory, and speculative in this proceeding.

The Commission cannot consider **Page 15 (Lines 8-19)** of Easton's testimony because he doesn't provide any admissible "facts." Once again, Easton improperly presents the Commission with his own personal "legal review and analysis" of "NAT's link with free conference calling services." This testimony is also inadmissible as irrelevant in this proceeding.

The Commission cannot consider **Page 16 (Lines 1-12)** of Easton's testimony because he doesn't provide any admissible "facts." Once

again, Easton improperly presents the Commission with his own personal “legal review and analysis” of the “financial linkage between NAT and other companies.” This testimony is also inadmissible as irrelevant in this proceeding.

The Commission cannot consider **Page 16 (Lines 20-21) through Page 17 (Lines 1-8)** of Easton’s testimony because he doesn’t provide any admissible “facts.” Once again, Easton improperly presents the Commission with his own personal “legal review and analysis” of whether “NAT will continue to have revenue sharing agreements with FCSCs.” This testimony is also inadmissible as irrelevant, conclusory, and speculative in this proceeding.

The Commission cannot consider **Page 17 (Lines 9-19)** of Easton’s testimony because he doesn’t provide any admissible “facts.” Once again, Easton improperly presents the Commission with his own personal “legal review and analysis” of whether “NAT’s business model with have implications on its request for certification.” This testimony is also inadmissible as irrelevant, conclusory, and speculative in this proceeding.

The Commission cannot consider **Page 17 (Lines 20-22) through Page 18 (Lines 1-12)** of Easton’s testimony because he doesn’t provide any admissible “facts.” Once again, Easton improperly presents the

Commission with his own personal “legal review and analysis” of his “concerns about NAT’s technical, financial, and managerial capabilities.” This testimony is also inadmissible as irrelevant, conclusory, and speculative in this proceeding.

The Commission cannot consider **Page 18 (Lines 13-21) through Page 19, (Lines 1-9)** of Easton’s testimony because he doesn’t provide any admissible “facts.” Once again, Easton improperly presents the Commission with his own personal “legal review and analysis” of “other indicators that LECS involved in ‘access stimulation’ do not have sufficient financial capabilities.” This testimony is also inadmissible as irrelevant, conclusory, and speculative in this proceeding.

The Commission cannot consider **Page 19 (Lines 10-23) through Page 20, (Lines 1-16)** of Easton’s testimony because he doesn’t provide any admissible “facts.” Once again, Easton improperly presents the Commission with his own personal “legal review and analysis” of the “public policy considerations of NAT’s application.” This testimony is also inadmissible as irrelevant, conclusory, and speculative in this proceeding.

The Commission cannot consider **Page 20 (Lines 17-27) through Page 21, (Lines 1-3)** of Easton’s testimony because he doesn’t provide any admissible “facts.” Once again, Easton improperly presents the

Commission with his own personal “legal review and analysis” of his “concern about mileage pumping.” This testimony is also inadmissible as irrelevant, conclusory, and speculative in this proceeding.

The Commission cannot consider **Page 21 (Lines 4-22)** of Easton’s testimony because he doesn’t provide any admissible “facts.” Once again, Easton improperly presents the Commission with his own personal “legal review and analysis” of his “recommendation to this Commission regarding ‘mileage pumping.’” This testimony is also inadmissible as irrelevant, conclusory, and speculative in this proceeding.

The Commission cannot consider **Page 22 (Lines 1-14)** of Easton’s testimony because he doesn’t provide any admissible “facts.” Once again, Easton improperly presents the Commission with his own personal “legal review and analysis” of how the “FCC has ruled that CLECs are obligated to offer DTT to IXCs.” This testimony is also inadmissible as irrelevant, conclusory, and speculative in this proceeding.

The Commission cannot consider **Page 22 (Lines 15-20)** of Easton’s testimony because he doesn’t provide any admissible “facts.” Once again, Easton improperly presents the Commission with his own personal “legal review and analysis” of whether “NAT currently offers DTT

through its South Dakota intrastate tariff.” This testimony is also inadmissible as irrelevant in this proceeding.

The Commission cannot consider **Page 22 (Lines 21-25) through Page 23 (Lines 1-5)** of Easton's testimony because he doesn't provide any admissible “facts.” Once again, Easton improperly presents the Commission with his own personal “legal review and analysis” and simply provides “Qwest's proposal for a reasonable DTT rate.” This testimony is also inadmissible as irrelevant, conclusory, and speculative in this proceeding.

The Commission cannot consider **Page 23 (Lines 1-6) through Page 24 (Lines 1-4)** of Easton's testimony because he doesn't provide any admissible “facts.” Once again, Easton improperly presents the Commission with his own personal “legal review and analysis” of “what the Commission should do with regard to NAT's certification request” and “other options available to the Commission.” This testimony is also inadmissible as irrelevant, conclusory, and speculative in this proceeding.

In sum, Easton's “testimony” is nothing more than a twenty-four (24) page legal brief, largely derived from his personal “legal review and analysis.” While his “sworn” statements may have a place in telecommunications journals, law review journals, and policy debates, it

has no place in this certification proceeding and cannot be relied upon by the Commission in reviewing NAT's motion for summary judgment.

**C. Numerous Portions Of Randy G. Farrar's Testimony Must Be Stricken Because It is Comprised Solely Of Improper Legal Analyses, Legal Conclusions, And Irrelevant, Speculative, And Conclusory Assertions**

For purposes of NAT's motion for summary judgment, the Commission must exclude significant portions of the "legal brief" styled as the "Direct Testimony of Randy G. Farrar" ("Farrar Testimony") because it provides little more than Farrar's "legal review and analysis" and bottom line opinions.<sup>9</sup>

The Commission cannot consider **Page 5 (Line 19) through Page 7 (Lines 1-23)** of Farrar's testimony because he doesn't provide any

---

<sup>9</sup> Sprint submitted the Farrar Testimony for the Commission's consideration. The Farrar Testimony was filed with the Commission on March 26, 2012. Numerous portions of the Farrar Testimony must be excluded by the Commission. Sprint's "Response to NAT's Undisputed Statement of Facts" ("Sprint's Response to NAT's SUMF") relies *exclusively* on "facts" contained in the Farrar Testimony. As such, portions of Sprint's Response to NAT's SUMF ¶¶ 3, 4, 11, 14, 20, 24, 26, 27, 28, 29, 30, 31, 33, 34, 44, 45, 46, 47, 48, 50, 51, 52, 70, 71, and 72 must also be excluded by the Commission (and thus admitted) because these paragraphs are based on Farrar's "legal analysis and review," and are irrelevant, speculative, and conclusory.

Several of Sprint's "responses" also fail to cite to an appropriate part of the record. See SDCL 15-6-56(c) ("The opposing party must respond to each numbered paragraph in the moving party's statement with a separately numbered response and *appropriate citations to the record*") (emphasis added).

admissible "facts."<sup>10</sup> Farrar improperly presents the Commission with his own personal "legal review and analysis" of the "purpose of his testimony." This testimony is also inadmissible as irrelevant, conclusory, and speculative in this proceeding.

The Commission cannot consider **Page 8 (Lines 11-21)** of Farrar's testimony because he doesn't provide any admissible "facts." Farrar improperly presents the Commission with his own personal "legal review and analysis" of "non-tribal member service." This testimony is also inadmissible as irrelevant, conclusory, and speculative in this proceeding.

The Commission cannot consider **Page 9 (Lines 2-8)** of Farrar's testimony because he doesn't provide any admissible "facts." Farrar improperly presents the Commission with his own personal "legal review and analysis" of the Commission's "certification requirements." This testimony is also inadmissible as irrelevant, conclusory, and speculative in this proceeding.

The Commission cannot consider **Page 9 (Lines 9-15)** of Farrar's testimony because he doesn't provide any admissible "facts." Farrar

---

<sup>10</sup> For the Commission's convenience, NAT has provided the portions of the Farrar Testimony and Sprint's Response to NAT's SUMF that are inadmissible and must be stricken. These inadmissible provisions are specified by an appropriate "strike-through" designation and attached as "Exhibit 2" to this reply brief.

improperly presents the Commission with his own personal “legal review and analysis” of whether he believes NAT’s application is “in the public interest.” This testimony is also inadmissible as irrelevant, conclusory, and speculative in this proceeding.

The Commission cannot consider **Page 9 (Lines 16-17)** of Farrar’s testimony because he doesn’t provide any admissible “facts.” Farrar improperly presents the Commission with his own personal “legal review and analysis” of whether NAT is a “sham entity.” This testimony is also inadmissible as irrelevant, conclusory, and speculative in this proceeding.

The Commission cannot consider **Page 11 (Lines 5-13)** of Farrar’s testimony because he doesn’t provide any admissible “facts.” Farrar improperly presents the Commission with his own personal “legal review and analysis” of whether NAT “benefits” the Tribe. This testimony is also inadmissible as irrelevant, conclusory, and speculative in this proceeding.

The Commission cannot consider **Page 12 (Lines 4-6)** of Farrar’s testimony because he doesn’t provide any admissible “facts.” Farrar improperly presents the Commission with his own personal “legal review and analysis” of whether NAT “benefits” the Tribe. This testimony is also inadmissible as irrelevant, conclusory, and speculative in this

proceeding.

The Commission cannot consider **Page 12 (Lines 7-23)** of Farrar's testimony because he doesn't provide any admissible "facts." Farrar improperly presents the Commission with his own personal "legal review and analysis" of whether NAT "benefits" the Tribe. This testimony is also inadmissible as irrelevant, conclusory, and speculative in this proceeding.

The Commission cannot consider **Page 12 (Lines 24-27) through Page 13 (Lines 1-29)** of Farrar's testimony because he doesn't provide any admissible "facts." This testimony is also inadmissible as irrelevant, conclusory, and speculative in this proceeding.

The Commission cannot consider **Page 14 (Lines 1-17)** of Farrar's testimony because he doesn't provide any admissible "facts." Farrar improperly presents the Commission with his own personal "legal review and analysis" of the Tribe's "decision making control." This testimony is also inadmissible as irrelevant, conclusory, and speculative in this proceeding.

The Commission cannot consider **Page 15 (Lines 1-32) through Page 16 (Lines 1-21)** of Farrar's testimony because he doesn't provide any admissible "facts." Farrar improperly presents the Commission with his own personal "legal review and analysis" of NAT's Joint Venture

Agreement. This testimony is also inadmissible as irrelevant, conclusory, and speculative in this proceeding.

The Commission cannot consider **Page 16 (Lines 22-28 through Page 17 (Lines 1-5))** of Farrar's testimony because he doesn't provide any admissible "facts." Farrar improperly presents the Commission with his own personal "legal review and analysis" of NAT's Joint Venture Agreement. This testimony is also inadmissible as irrelevant, conclusory, and speculative in this proceeding.

The Commission cannot consider **Page 17 (Lines 6-19 through Page 18 (Lines 1-19))** of Farrar's testimony because he doesn't provide any admissible "facts." Farrar improperly presents the Commission with his own personal "legal review and analysis" of Free Conferencing Corporation's "role" with NAT. This testimony is also inadmissible as irrelevant, conclusory, and speculative in this proceeding.

The Commission cannot consider **Page 19 (Lines 1-18)** of Farrar's testimony because he doesn't provide any admissible "facts." Farrar improperly presents the Commission with his own personal "legal review and analysis" of NAT being a "sham entity." This testimony is also inadmissible as irrelevant, conclusory, and speculative in this proceeding.

The Commission cannot consider **Page 19 (Lines 19-23 through Page 20 (Lines 1-10))** of Farrar's testimony because he doesn't provide any admissible "facts." Farrar improperly presents the Commission with his own personal "review and analysis" of NAT's financial statements. This testimony is also inadmissible as irrelevant, conclusory, and speculative in this proceeding.

The Commission cannot consider **Page 20 (Lines 11-23) through Page 22 (Lines 1-4)** of Farrar's testimony because he doesn't provide any admissible "facts." Farrar improperly presents the Commission with his own personal "review and analysis" of NAT's balance sheets. This testimony is also inadmissible as irrelevant, conclusory, and speculative in this proceeding.

The Commission cannot consider **Page 22 (Lines 5-22) through Page 23 (Lines 1-14)** of Farrar's testimony because he doesn't provide any admissible "facts." Farrar improperly presents the Commission with his own personal "review and analysis" of NAT's income statement. This testimony is also inadmissible as irrelevant, conclusory, and speculative in this proceeding.

The Commission cannot consider **Page 23 (Lines 15-25)** of Farrar's testimony because he doesn't provide any admissible "facts." Farrar improperly presents the Commission with his own personal "review and

analysis” of profits for the Tribe. This testimony is also inadmissible as irrelevant, conclusory, and speculative in this proceeding.

The Commission cannot consider **Page 24 (Lines 1-19) through Page 27 (Lines 1-12)** of Farrar’s testimony because he doesn’t provide any admissible “facts.” Farrar improperly presents the Commission with his own personal “review and analysis” of NAT’s owner’s “profitability.” This testimony is also inadmissible as irrelevant, conclusory, and speculative in this proceeding.

The Commission cannot consider **Page 27 (Lines 13-24) through Page 28 (Lines 1-6)** of Farrar’s testimony because he doesn’t provide any admissible “facts.” Farrar improperly presents the Commission with his own personal “review and analysis” of the “relationship” between NAT’s partners. This testimony is also inadmissible as irrelevant, conclusory, and speculative in this proceeding.

The Commission cannot consider **Page 28 (Lines 7-14)** of Farrar’s testimony because he doesn’t provide any admissible “facts.” Farrar improperly presents the Commission with his own personal “legal review and analysis” of NAT’s “future viability.” This testimony is also inadmissible as irrelevant, conclusory, and speculative in this proceeding.

The Commission cannot consider **Page 28 (Lines 15-26) through Page 29 (Lines 1-14)** of Farrar's testimony because he doesn't provide any admissible "facts." Farrar improperly presents the Commission with his own personal "review and analysis" of how the FCC "targets 'access stimulation.'" This testimony is also inadmissible as irrelevant, conclusory, and speculative in this proceeding.

The Commission cannot consider **Page 29 (Lines 15-34) through Page 30 (Lines 1-3)** of Farrar's testimony because he doesn't provide any admissible "facts." Farrar improperly presents the Commission with his own personal "legal review and analysis" of the "FCC's premise of assisting tribal lands." This testimony is also inadmissible as irrelevant, conclusory, and speculative in this proceeding.

The Commission cannot consider **Page 30 (Lines 4-11)** of Farrar's testimony because he doesn't provide any admissible "facts." Farrar improperly presents the Commission with his own personal "legal review and analysis" of "how the FCC has addressed 'access stimulation.'" This testimony is also inadmissible as irrelevant, conclusory, and speculative in this proceeding.

The Commission cannot consider **Page 30 (Lines 12-15) through Page 32 (Lines 1-6)** of Farrar's testimony because he doesn't provide any admissible "facts." Farrar improperly presents the Commission with his

own personal "legal review and analysis" of the "effect \$0.007 will have on NAT's financials." This testimony is also inadmissible as irrelevant, conclusory, and speculative in this proceeding.

The Commission cannot consider **Page 32 (Lines 7-23) through Page 33 (Lines 1-29)** of Farrar's testimony because he doesn't provide any admissible "facts." Farrar improperly presents the Commission with his own personal "legal review and analysis" of "transport rates under the *Connect America Order*." This testimony is also inadmissible as irrelevant, conclusory, and speculative in this proceeding.

The Commission cannot consider **Page 33 (Line 30) through Page 34 (Lines 1-19)** of Farrar's testimony because he doesn't provide any admissible "facts." Farrar improperly presents the Commission with his own personal "review and analysis" of his "speculation" regarding NAT's sustainability. This testimony is also inadmissible as irrelevant, conclusory, and speculative in this proceeding.

The Commission cannot consider **Page 34 (Lines 20-22) through Page 35 (Lines 1-15)** of Farrar's testimony because he doesn't provide any admissible "facts." Farrar improperly presents the Commission with his own personal "legal review and analysis" of whether NAT should "be granted certification in South Dakota." Not surprisingly, his "recommendation" is "no." Of course, this testimony and

“recommendation” is also inadmissible as irrelevant, conclusory, and speculative in this proceeding.

Therefore, the above-referenced portions of both the Easton Testimony and Farrar Testimony must be disregarded because it (1) “merely offers a combination of legal opinion and editorial comment” and (2) is “fraught with improper legal conclusions, ultimate facts, conclusory statements, and inadmissible hearsay.”

***D. Based On The Undisputed Record In This Case, The Commission Must Grant NAT's Motion for Summary Judgment***

CenturyLink's and Sprint's opposition to NAT's motion for summary judgment recites at extraordinary length facts not material to the issues relevant in this certification matter. Moreover, CenturyLink's and Sprint's submissions contain mischaracterizations of the scope of this certification proceeding.

CenturyLink's filings concede that NAT has complied with the Commission's rules on all *relevant* matters. (*See generally* “CenturyLink's Response to NAT's Statement of Undisputed Material Facts,” pages 9-26). CenturyLink unconditionally admits the truth of NAT's SUMF -- ¶¶ 1, 2, 5, 6, 7, 8, 9, 10, 12, 13, 15, 16, 17, 18, 19, 21, 26, 28, 32, 35, 37, 40, 41, 42, 43, 45, 46, 47, 48, 50, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, and 71.

CenturyLink “denies” the truth of NAT’s SUMF -- ¶¶ 3, 4, 11, 14, 20, 24, 25, 27, 29, 30, 31, 33, 34, 36, 38, 39, 44, 49, 51, 52, and 54. However, each of CenturyLink’s “denials” is based on the Easton Testimony, which NAT has established is *clearly inadmissible* in this summary judgment matter.

Similarly, Sprint’s filings also concede that NAT has complied with the Commission’s rules on all relevant matters. (*See generally* “Sprint’s Response to NAT’s Statement of Undisputed Material Facts,” pages 1-15). Sprint unconditionally admits the truth of NAT’s SUMF NAT -- ¶¶ 1, 2, 5, 6, 7, 8, 9, 10, 12, 13, 15, 16, 17, 18, 19, 21, 25, 27, 32, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 49, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, and 69.

Sprint “denies” the truth of NAT’s SUMF -- ¶¶ 3, 4, 11, 14, 20, 24, 26, 28, 29, 30, 31, 44, 48, 50, 51, 52, 70, 71, and 72. However, each of Sprint’s “denials” is either based on (1) the Farrar Testimony, which NAT has established is *clearly inadmissible* in this summary judgment matter or (2) Sprint’s claims that it should be entitled to responses to its unjustifiable discovery requests so that it can proceed with its desire to act as a “Super Commission” in evaluating NAT’s Revised Application.

In sum, NAT has complied with ARSD 20:10:24:02(1-20) (requiring that a telecommunications company applying for *interexchange service*

shall provide information in twenty (20) specific categories). NAT has complied with ARSD 20:10:32:03(1-25) (requiring that a telecommunications company applying for *local exchange service* shall provide information in twenty-five (25) specific areas. NAT has complied with ARSD 20:10:32:06(1-11) (requiring that the Commission shall consider eleven (11) factors in determining whether an applicant has “sufficient technical, financial, and managerial capabilities”). NAT’s Revised Application has been “deemed complete” by the Commission’s Staff. The Commission must grant NAT’s motion for summary judgment as there remains “no genuine issue of material fact.”

#### **CONCLUSION**

There is no basis to delay NAT’s entry into the proposed service area any longer. NAT has met all of the legal requirements for receiving a Certificate of Authority from the Commission. The Commission’s Staff has deemed NAT’s Revised Application “complete.” Therefore, the Commission should (1) find the above-designated portions of the Easton Testimony and Farrar Testimony to be inadmissible; and (2) grant NAT’s motion for summary judgment.

Dated this 16<sup>th</sup> day of April, 2012.

SWIER LAW FIRM, PROF. LLC

/s/ Scott R. Swier

Scott R. Swier

202 N. Main Street

P.O. Box 256

Avon, South Dakota 57315

Telephone: (605) 286-3218

Facsimile: (605) 286-3219

scott@swierlaw.com

www.SwierLaw.com

*Attorneys for NAT*

**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of *REPLY*  
*MEMORANDUM IN SUPPORT OF NATIVE AMERICAN TELECOM, LLC'S*  
*MOTION FOR SUMMARY JUDGMENT* was delivered *via electronic mail* on  
this 16<sup>th</sup> day of April, 2012, to the following parties:

*Service List (SDPUC TC 11-087)*

/s/ Scott R. Swier  
Scott R. Swier

**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA**

**IN THE MATTER OF THE APPLICATION OF )  
NATIVE AMERICAN TELECOM, LLC FOR A )  
CERTIFICATE OF AUTHORITY TO PROVIDE )  
LOCAL EXCHANGE SERVICE WITHIN THE )  
AREA OF MIDSTATE COMMUNICATIONS, INC. )**

**DOCKET NO. TC11-087**

**DIRECT TESTIMONY OF**

**WILLIAM R. EASTON**

**ON BEHALF OF**

**QWEST COMMUNICATIONS COMPANY, LLC**

**MARCH 26, 2012**

1202



**TABLE OF CONTENTS**

**I. IDENTIFICATION OF WITNESS ..... 1**

**II. INTRODUCTION AND PURPOSE OF DIRECT TESTIMONY ..... 2**

**III. ACCESS STIMULATION BACKGROUND ..... 4**

**IV. NATIVE AMERICAN TELECOM AND ACCESS STIMULATION ..... 14**

**V. MILEAGE PUMPING..... 20**

**VI. QWEST'S RECOMMENDATION ..... 23**

1

**I. IDENTIFICATION OF WITNESS**

2 **Q. PLEASE STATE YOUR NAME, BUSINESS ADDRESS, AND POSITION WITH**  
3 **QWEST.**

4 A. My name is William R. Easton. My business address is 1600 7th Avenue, Seattle  
5 Washington. I am employed as Wholesale Staff Director. I am testifying on behalf of  
6 Qwest Communications Company, LLC ("Qwest"), doing business as CenturyLink.

7

8 **Q. PLEASE DESCRIBE YOUR EDUCATIONAL BACKGROUND AND**  
9 **PROFESSIONAL EXPERIENCE.**

10 A. I graduated from Stanford University in 1975, earning a Bachelor of Arts degree. In  
11 1980 I received a Masters of Business Administration from the University of  
12 Washington. In addition, I am a Certified Management Accountant.

13

14 I began working for Pacific Northwest Bell in 1980, and have held a series of jobs in  
15 financial management with U S WEST, Qwest and now CenturyLink, including staff  
16 positions in the Treasury and Network organizations. From 1996 through 1998, I was  
17 Director – Capital Recovery. In this role I negotiated depreciation rates with the FCC  
18 and state commission staffs and testified in various regulatory proceedings. From 1998  
19 until 2001 I was a Director of Wholesale Finance, responsible for the management of  
20 Wholesale revenue streams from a financial perspective. In this capacity I worked  
21 closely with the Product Management organization on their product offerings and  
22 projections of revenue. In October of 2001 I moved from Wholesale Finance to the

1 Wholesale Advocacy group, where I am currently responsible for advocacy related to  
2 Wholesale products and services.

3

4 **Q. HAVE YOU PREVIOUSLY SUBMITTED TESTIMONY BEFORE THIS**  
5 **COMMISSION?**

6 A. Yes. I previously testified in docket numbers TC96-184, TC01-098 and TC10-014.

7

~~8 **H. INTRODUCTION AND PURPOSE OF DIRECT TESTIMONY**~~

~~9~~

~~10 **Q. WHAT IS THE PURPOSE OF YOUR DIRECT TESTIMONY?**~~

11 ~~A. The Commission has a seminal case of great importance before it, because Native~~  
12 ~~American Telecom ("NAT") has admitted that its certification will be utilized to engage in~~  
13 ~~a practice known as "traffic pumping" or "access stimulation." Decisions issued by the~~  
14 ~~Iowa Utilities Board and the Federal Communications Commission ("FCC") have~~  
15 ~~criticized the practice as an "abuse" and as "arbitrage." The FCC's recent Connect~~  
16 ~~America order intended to remove the economic and financial incentives that encouraged~~  
17 ~~some carriers to engage in access stimulation and the FCC also cautioned against other~~  
18 ~~schemes that may constitute an abuse of the current regulatory scheme. Thus, the South~~  
19 ~~Dakota Commission has before it in this docket the threshold and vital issue of whether this~~  
20 ~~state should authorize the practice of access stimulation through the issuance of a~~  
21 ~~certificate to an applicant who has admitted that the certificate will be used in such a~~  
22 ~~manner. Further, to the extent that a certificate is granted for a carrier to engage in access~~  
23 ~~stimulation, the Commission should consider the extent to which conditions are necessary~~

1 ~~to eliminate or at least limit potential abuses that could result from a carrier continuing to~~  
2 ~~engage in access stimulation after the issuance of the Connect America order.~~

3  
4 ~~The purpose of my testimony is to express Qwest's opposition to NAT's request for a~~  
5 ~~certificate of authority to provide local exchange service in the area of Midstate~~  
6 ~~Communications. NAT's ongoing participation in a scheme to stimulate access billing to~~  
7 ~~interexchange carriers ("IXC") such as Qwest is not consistent with the public interest, a~~  
8 ~~necessary condition to the granting of a certificate. My testimony will first provide some~~  
9 ~~contextual background on access stimulation and review some of the regulatory rulings and~~  
10 ~~interpretations of this practice, including the reasons that access stimulation is an abuse of~~  
11 ~~the regulatory switched access structure. I will then discuss the FCC's recent Connect~~  
12 ~~America order and the guidance it provides on access stimulation schemes. Next I will~~  
13 ~~discuss NAT's past involvement in access stimulation and the reasons that access~~  
14 ~~stimulation is not in the public interest. For these reasons, Qwest proposes that the~~  
15 ~~Commission not grant NAT's request for certification. However, if the Commission is~~  
16 ~~inclined to grant a certificate to NAT, then Qwest requests that it be subject to certain~~  
17 ~~conditions to limit or prevent future arbitrage abuses in South Dakota. Thus, I will also~~  
18 ~~address the concerns, as expressed by the FCC, over forms of abuse in which LECs may~~  
19 ~~engage known as "mileage pumping." In short, mileage pumping is designation by the~~  
20 ~~LEC of distant points of interconnection with interexchange carrier and then the charging~~  
21 ~~of transport on an expensive per minute or per mile basis. Qwest believes that mileage~~  
22 ~~pumping abuses will be exacerbated if the LEC is engaging in traffic pumping at high~~  
23 ~~volumes and applying distant points of interconnection. Based upon these concerns, Qwest~~

1 ~~proposes conditions to help prevent mileage pumping abuses specifically that Qwest and~~  
2 ~~any other requesting interexchange carrier have the ability to connect directly to NAT's~~  
3 ~~and office where the free service calling companies have placed their equipment through~~  
4 ~~Direct End Office Transport, or sometimes know as Direct Trunked Transport, at just and~~  
5 ~~reasonable rates.~~

6  
7 **III. ACCESS STIMULATION BACKGROUND**

8  
9 **Q. WHAT IS ACCESS STIMULATION?**

10 A. ~~Access stimulation, or traffic pumping, is the term used to describe situations where rural~~  
11 ~~local exchange carriers enter into an arrangement with high call volume operations such as~~  
12 ~~free conference calling, chat lines, adult entertainment calls and other free calls with the~~  
13 ~~ultimate objective of deriving revenues solely from interexchange carriers. The conference~~  
14 ~~call or chat line operators, also known as free calling companies, place their equipment in~~  
15 ~~the central office of the local exchange carrier, and the local exchange carrier assigns local~~  
16 ~~numbers to the free service calling companies. Because the free service calling companies~~  
17 ~~offer their conference or chat services to customers across the nation for free, this~~  
18 ~~arrangement greatly stimulates the amount of traffic to the equipment of the free service~~  
19 ~~calling companies, and thus inflates the access minutes terminating to the local exchange~~  
20 ~~carrier. The local exchange carrier bills switched access to the interexchange carrier of the~~  
21 ~~person who places the call to the free service calling company at its tariffed rate, which in~~  
22 ~~rural areas in some states is often several times higher than in non-rural areas and~~

1 ~~exchanges<sup>1</sup>. The local exchange carrier then provides a kickback to the free service calling~~  
2 ~~company, typically about half, of the access revenues that the local exchange carrier~~  
3 ~~collects from the interexchange carriers. The local exchange carrier and the free calling~~  
4 ~~companies more than covers their costs and profits from the shared revenues. The end~~  
5 ~~result is that the IXC's pay higher access charges that provide enormous profits to the free~~  
6 ~~service calling companies and the traffic pumping LECs.~~

7  
8 ~~Q. WHAT ARE THE REASONS THAT ACCESS STIMULATION CONSTITUTES~~  
9 ~~ARBITRAGE AND IS CONTRARY TO PUBLIC POLICY?~~

10 ~~A. There are many. First, there is the threshold principle that IXCs must deliver traffic to the~~  
11 ~~numbers and exchanges called by their end user customers. The FCC has directed~~  
12 ~~interexchange carriers to deliver all such traffic in order to promote and safeguard the~~  
13 ~~ability of callers to reach their intended destinations. Qwest and other interexchange~~  
14 ~~carriers are not permitted to block calls destined to traffic pumping LECs, and Qwest never~~  
15 ~~has. Thus, Qwest and other IXCs are forced to deliver the traffic to the traffic pumping~~  
16 ~~LEC exchanges, and traffic pumping LECs manipulate this forced arrangement to attempt~~  
17 ~~to impose inflated switched access charges upon the IXCs.~~

18  
19 ~~Second, traffic pumping LECs abuse the regulatory structure underlying switched access~~  
20 ~~rates in rural exchanges. Historically, switched access rates in rural areas have been set at~~  
21 ~~rates significantly higher than in non-rural areas in order to provide support to a rural~~

<sup>1</sup> ~~In South Dakota, per RM 05-003 CLECs are not permitted to charge higher switched access rates than the RBOC~~  
~~in the state.~~

1 ~~carrier providing essential basic services in high cost areas. That is, the rates are higher to~~  
2 ~~subsidize the high cost of providing basic services to rural residents and businesses. And,~~  
3 ~~LECs have been generally amenable to paying the higher rates in consideration of those~~  
4 ~~policies and because traffic volumes to rural areas are relatively low. The traffic pumping~~  
5 ~~LECs abuse this laudable structure by placing the conference calling equipment in rural~~  
6 ~~exchanges, generating exponentially higher traffic volumes to the exchange, which~~  
7 ~~combined with their high rural switched access rates lead to increasingly large invoices to~~  
8 ~~EXCs. For example, in rural exchanges where Qwest typically would receive invoices of~~  
9 ~~about a thousand dollars per month before traffic pumping, after certain LECs commenced~~  
10 ~~traffic pumping schemes, Qwest would receive invoices for several hundred thousands of~~  
11 ~~dollars, for just one month. When one multiplies the months by the number of LECs~~  
12 ~~engaging in traffic pumping, the result is tens and hundreds of millions of dollars in~~  
13 ~~increased access charges as a result of this scheme. Thus, the public interest component of~~  
14 ~~higher switched access rates in rural areas to support basic services to rural residences~~  
15 ~~and businesses is abused by traffic pumping LECs that bill millions of dollars out of~~  
16 ~~EXCs for their own profit and that of their free service calling company partners.~~

17

18 ~~As I discuss below, the FCC has attempted to remove the incentive of high terminating~~  
19 ~~switched access rates for LECs engaging in access stimulation in the Connect America~~  
20 ~~order, however, as I also address below, it appears that traffic pumping LECs such as NAT~~  
21 ~~intend to continue this practice, likely supporting their schemes through high transport rates~~  
22 ~~in the place of terminating switched access rates~~

1 ~~Next, it is against public policy that entities that do not use or subscribe to a service be~~  
2 ~~forced to support the costs and enormous profits of the providers of the service. That is,~~  
3 ~~IXCs do not use the services provided by the free service calling companies, such as~~  
4 ~~conference calling or chat line services; rather, it is the end user callers that consume these~~  
5 ~~services. But, the IXCs are forced to deliver and thus incur the switched access charges~~  
6 ~~that are shared with the free service calling companies, and thus the IXCs support the costs~~  
7 ~~and bestow huge profits upon the free service calling companies.~~

8  
9 ~~Finally, IXCs are not permitted to pass on the specific costs of traffic pumping to the~~  
10 ~~individual end user customers that are placing calls to the free service calling companies.<sup>2</sup>~~  
11 ~~IXCs' current charges to their end user customers are not calculated based on traffic~~  
12 ~~pumping patterns, although, as IXCs incur the enormous cost of traffic pumping~~  
13 ~~LECs' switched access bills, all their customers ultimately must absorb these costs through~~  
14 ~~higher rates. Thus, despite the marketing of the underlying calling services as "free," there~~  
15 ~~is little that is free about them. In sum, the Commission and IXCs should be wary of any~~  
16 ~~scheme in which a rural LEC is attempting to generate large volumes of minutes for calls to~~  
17 ~~free service calling companies and in which the LEC intends to invoice IXCs on a usage or~~  
18 ~~per-minute basis.~~

19  
20 Q. ~~WHAT IS THE POLICY SIGNIFICANCE OF AN AGREEMENT TO SHARE~~  
21 ~~REVENUES BETWEEN THE LEC AND THE FREE SERVICE CALLING~~  
22 ~~COMPANIES?~~

<sup>2</sup> See 47 U.S.C § 254 (g).

1 A. ~~The sharing of access revenues between the LEC and the free service calling companies~~  
2 ~~means that such revenues are being used for more than simply covering the costs of the~~  
3 ~~LEC to provide service. And, such revenues are not being used to support basic services to~~  
4 ~~legitimate residential and business customers in rural areas. When access revenues are~~  
5 ~~shared to support and provide large profits to free service calling companies, the LEC is~~  
6 ~~charging in excess of the rates appropriate to further valid public interests and is misusing~~  
7 ~~the regulatory system that tightly controls access rates.~~

8  
9 ~~Q. HAS THE FCC ISSUED RULINGS ANALYZING THE POLICY HARMS THAT~~  
10 ~~RESULT FROM ACCESS STIMULATION?~~

11 A. ~~Yes. In its February 8, 2011, Connect America Fund Notice of Proposed Rule Making and~~  
12 ~~Further Notice of Proposed Rulemaking, the FCC described such traffic pumping~~  
13 ~~arrangements as an "arbitrage scheme" (par. 626) and found that~~

14 ~~"Access stimulation imposes undue costs on consumers, inefficiently~~  
15 ~~diverting the flow of capital away from more productive uses such as~~  
16 ~~broadband deployment, and harms competition. Although long distance~~  
17 ~~carriers are billed for and pay for minutes associated with access~~  
18 ~~stimulation schemes, all customers of these long distance providers bear~~  
19 ~~these costs and, in essence, ultimately support businesses designed to take~~  
20 ~~advantage of today's above-cost intercarrier compensation system.~~  
21 ~~Projections indicate that the annual impact to the industry from access~~  
22 ~~stimulators is significant?" (par. 637); and~~

23  
24 ~~"Moreover, access stimulation harms competition by giving companies~~  
25 ~~that offer a "free" service a competitive advantage over companies that~~  
26 ~~charge their customers for the service. As a result, "free" conferencing~~  
27 ~~providers that leverage arbitrage opportunities can put other companies~~  
28 ~~that charge consumers for services at a distinct competitive disadvantage."~~  
29 ~~(par. 638).~~

30  
31

1 ~~Q. HAVE STATE REGULATORS INVESTIGATED ACCESS STIMULATION AND~~  
2 ~~TAKEN STEPS TO CURB THIS PRACTICE?~~

3 ~~A. Yes. In Iowa, Qwest filed a complaint against eight local exchange carriers engaging in~~  
4 ~~traffic pumping. The primary issue before the Iowa Board was, in short, whether the traffic~~  
5 ~~pumping LECs were allowed to charge under their switched access tariffs for calls~~  
6 ~~delivered to free service calling companies. Following extensive discovery and hearings,~~  
7 ~~the Board found in Qwest's favor and stated:~~

8 ~~Based on the record in these proceedings, the Board finds that the intrastate~~  
9 ~~interexchange calls to the conference calling companies were not subject to access~~  
10 ~~charges. Refunds and credits to the LECs are ordered. The Board also announces~~  
11 ~~that it is initiating a proceeding to consider proposed rules intended to prevent this~~  
12 ~~abuse in the future.<sup>3</sup>~~

13 ~~The Iowa Board also initiated show cause hearings to determine if two of the Iowa local~~  
14 ~~exchange carriers should have their certificates revoked, in part because they had few, if~~  
15 ~~any, traditional local exchange customers.<sup>4</sup>~~

16 ~~As this Commission is also aware, there is currently a complaint, brought by Sprint against~~  
17 ~~NAT, pending before the Commission regarding access stimulation traffic (TC10-026).~~

18  
19 ~~Q. HOW DOES THE CONNECT AMERICA ORDER ADDRESS ACCESS~~  
20 ~~STIMULATION?~~

21

<sup>3</sup> Docket ECU-07-2 Final Order Summary, September 21, 2000.

<sup>4</sup> In ~~Re: Great Lakes Communications Corp., SDL 2011-0004 (TC10-06), In Re: Assurant Communications Technology, L.L.C., Docket No. ECU-2011-0002. In the docket involving the traffic pumping LEC known as "Great Lakes", a carrier that engaged in only traffic pumping, the Board indicated during its oral deliberations that continued validity of Great Lakes's certificate would be predicated upon the offering of services to legitimate and user customers. The Board issued a final written order.~~

1 A. ~~The FCC's recent Connect America order was intended to rid the industry of access~~  
2 ~~stimulation by removing the financial incentives for engaging in this form of arbitrage.<sup>5</sup>~~  
3 ~~The order addressed traffic pumpers' exploitation of the switched access rate structure by~~  
4 ~~requiring the filing of new, revised tariffs with a new rate if a LEC satisfies two criteria of~~  
5 ~~"access stimulation." The two criteria are: 1) the existence of a revenue sharing~~  
6 ~~arrangement between the LEC and a calling company; and 2) a volume component, met if~~  
7 ~~the LEC (a) has a three to one ratio of terminating to originating traffic in any month or (b)~~  
8 ~~experiences more than a 100 percent increase in traffic volume in any month measured~~  
9 ~~against the same month during the previous year.<sup>6</sup> If a LEC meets these criteria, then it~~  
10 ~~must file a revised tariff with the FCC setting all of its switched access rates to the rates of~~  
11 ~~the price cap LEC with the lowest interstate switched access rates in the state.~~

12  
13 ~~The overriding intent of the FCC is to reduce traffic pumping by the elimination of traffic~~  
14 ~~pumping and arbitrage incentives. The Order's opening section is entitled "Dues to~~  
15 ~~Reduce Access Stimulation."<sup>7</sup> The FCC consistently recognizes that access stimulation~~  
16 ~~results in unjust and unreasonable rates to IXCs and presents several other policies~~  
17 ~~supporting the issuance of access stimulation rates (one reason for the need to overhaul~~  
18 ~~the entire intercarrier compensation regime is the wasteful and costly arbitrage schemes~~  
19 ~~that have proliferated);<sup>8</sup> ("outtail wasteful arbitrage practices," including access~~

~~5 In the Matter of Connect America Fund, "Regulatory Order and Further Notice of Proposed Rulemaking," FCC~~  
~~12-101 (released November 18, 2011), at ¶¶ 656-701.~~

~~6 Connect America, at ¶¶ 33, 667.~~

~~7 Connect America, at ¶ 656.~~

~~8 Id. at ¶ 9.~~

1 ~~stimulation),<sup>9</sup> ("inflated profits that almost uniformly make the LEC's interstate switched~~  
2 ~~access rates unjust and unreasonable"),<sup>10</sup> ("The record confirms the need for prompt~~  
3 ~~Commission action to address the adverse effects of access stimulation"),<sup>11</sup> ("Access~~  
4 ~~stimulation imposes undue costs on consumers"),<sup>12</sup> ("Access stimulation also harms~~  
5 ~~competition"),<sup>13</sup> ("excess revenues that are shared in access stimulation schemes provide~~  
6 ~~additional proof that the LEC's rates are above cost"),<sup>14</sup> (FCC refers to these rule changes~~  
7 ~~as a "prohibition on access stimulation"),<sup>15</sup> ("similar arbitrage schemes")<sup>16</sup>~~

8  
9 ~~In other parts of the access stimulation section, the FCC expressed the intention of~~  
10 ~~monitoring future access stimulation activities~~

11 ~~should the traffic volumes of a competitive LEC that meets the access~~  
12 ~~stimulation definition substantially exceed the traffic volumes of the price~~  
13 ~~cap LEC to which it benchmarks, we may reevaluate the appropriateness~~  
14 ~~of the competitive LEC's rates and may evaluate whether any further~~  
15 ~~reductions in rates is warranted. In addition, we believe the reforms we~~  
16 ~~adopt elsewhere in this Order will, over time, further reduce intercarrier~~  
17 ~~payments and the incentives for this type of arbitrage.<sup>17</sup>~~

18  
19 ~~And, the concluding paragraphs of the access stimulation section outline the intended result~~  
20 ~~of the FCC's new rules and required rates:~~

21 ~~Taking this basic step will immediately reduce some of the inefficient~~  
22 ~~incentives enabled by the current intercarrier compensation system, and~~  
23 ~~permit the industry to devote resources to innovation and investment~~  
24 ~~rather than access stimulation and disputes. We have balanced the need~~

<sup>9</sup> ~~Id.~~, at ¶ 55.  
<sup>10</sup> ~~Id.~~, at ¶¶ 657, 660.  
<sup>11</sup> ~~Id.~~, at ¶ 662.  
<sup>12</sup> ~~Id.~~, at ¶ 662.  
<sup>13</sup> ~~Id.~~, at ¶ 662.  
<sup>14</sup> ~~Id.~~, at ¶ 666.  
<sup>15</sup> ~~Id.~~, at ¶ 674.  
<sup>16</sup> ~~Id.~~, at ¶ 676.  
<sup>17</sup> ~~Id.~~, at ¶ 690.

1 ~~for our new rules to address traffic stimulation with the costs that may be~~  
2 ~~imposed on LECs and have concluded that the benefits justify any~~  
3 ~~burdens. Our new rules will work in tandem with the comprehensive~~  
4 ~~intercarrier compensation reforms we adopt below, which will, when fully~~  
5 ~~implemented, eliminate the incentives in the present system that give rise~~  
6 ~~to access stimulation.<sup>18</sup>~~  
7

8 Q. ~~HAS THE FCC ISSUED FURTHER CLARIFICATION SINCE THE CONNECT~~  
9 ~~AMERICA ORDER WAS ISSUED?~~

10 A. ~~Yes. One issue arising out of the Connect America order was whether previous FCC~~  
11 ~~precedent adjudicating access stimulation and traffic pumping issues carry over after the~~  
12 ~~effective date of the FCC's new rules. Those FCC cases, in particular the cases known as~~  
13 ~~Farmers & Merchants and Northern Valley, reiterated existing federal law that a LEC's~~  
14 ~~switched access tariffs must include an end-user component in which that customer is~~  
15 ~~receiving telecommunications services purchased from the LEC for a fee.<sup>19</sup> Despite this~~  
16 ~~clear precedent, the traffic pumping industry has contended that mere compliance with the~~  
17 ~~FCC's new tariff rules from the Connect America order exonerates them from complying~~  
18 ~~with the rulings from the Farmers and Northern Valley cases. Thus, Sprint filed a petition~~  
19 ~~for clarification in the Connect America docket requesting clarification that:~~

- 20 ■ ~~The [Connect America] Order does not overturn previous Commission~~  
21 ~~rulings or standards for determining whether a LEC's free service provider~~  
22 ~~partner is a legitimate end user/customer under its access tariff, and,~~
- 23 ■ ~~The Order does not overturn the statutory requirement that~~  
24 ~~telecommunications services be offered "for a fee."<sup>20</sup>~~  
25  
26

<sup>18</sup> ~~18 FCC Rcd 4701~~

<sup>19</sup> ~~Qwest Comm. Corp. v. Farmers & Merchants Mutual Tel. Co. ("Farmers II"), 24 FCC Rcd 14801 (2009),~~  
2009 WL 4073044 (F.C.C.); ~~In the Matter of Qwest Communications Company, LLC, v. Northern Valley~~  
~~Communications, LLC, File No. EB-11 MD-001, Memorandum Opinion and Order, Released June 7, 2011.~~

<sup>20</sup> ~~Petition for Reconsideration and Clarification of Sprint Nextel Corporation, WC Dkt. 10-09, filed December 29,~~  
~~2011.~~

1 ~~On February 3, 2012, the Wireline Competition Bureau and the Wireless~~  
2 ~~Telecommunications Bureau issued a clarifying order<sup>21</sup> affirming the points presented by~~  
3 ~~Sprint's petition. The Bureau's Order says:~~

4 ~~25 Access Stimulation and Previous Rulings on End Users. In the~~  
5 ~~USE/ICC Transformation Order, the Commission adopted revisions to its~~  
6 ~~interstate switched access charge rules to address access stimulation. Prior~~  
7 ~~to the USE/ICC Transformation Order, the Commission adopted several~~  
8 ~~orders resolving complaints concerning access stimulation under~~  
9 ~~preexisting rules and compliance with the Communications Act. We~~  
10 ~~clarify that the USE/ICC Transformation Order complements these~~  
11 ~~previous decisions and nothing in the USE/ICC Transformation Order~~  
12 ~~should be construed as overturning or superseding these previous~~  
13 ~~Commission decisions.<sup>22</sup>~~  
14

15 Q. ~~HAS THE CONNECT AMERICA ORDER ELIMINATED CONCERNS ABOUT~~  
16 ~~ACCESS STIMULATION?~~

17 A. ~~No. In fact, the Connect America order acknowledged evidence in its record of another~~  
18 ~~form of arbitrage, "mileage pumping," in which "service providers designate distant~~  
19 ~~points of interconnection to inflate the mileage used to compute the transport charges."<sup>23</sup>~~  
20 ~~The FCC sought comment in its Further Notice of Proposed Rulemaking to investigate this~~  
21 ~~form of arbitrage.<sup>24</sup> And, despite the FCC's admonitions against traffic pumping practices,~~  
22 ~~it has come to the attention of Qwest that certain traffic pumping LECs are indeed planning~~  
23 ~~on charging access rates with high transport rates. Thus, abuse of terminating access rates~~  
24 ~~may be replaced by new schemes in which high transport rates are charged for calls~~  
25 ~~delivered to free service calling companies.~~  
26

<sup>21</sup> ~~In the Matter of Connect America Fund, WC Dkt. No. 10-99, et al., DA 12-147, released February 3, 2012.~~

<sup>22</sup> ~~Id. at ¶ 66.~~

<sup>23</sup> ~~Connect America Fund, WC Dkt. No. 10-99, et al., DA 12-147, released February 3, 2012, at ¶ 898.~~

<sup>24</sup> ~~Id. at ¶ 900.~~

1 ~~Q. ARE THERE ALSO PENDING COURT CASES CONCERNING ACCESS~~  
2 ~~STIMULATION?~~

3 A. ~~Yes. There are a number of pending court cases, including a suit brought by Sprint against~~  
4 ~~NAT which is before the United States District Court for the District of South Dakota (CV~~  
5 ~~10-4110).~~

6  
7 ~~IV. NATIVE AMERICAN TELECOM AND ACCESS STIMULATION~~

8  
9 ~~Q. WHAT IS THE BASIS FOR YOUR UNDERSTANDING THAT NAT IS~~  
10 ~~INVOLVED IN ACCESS STIMULATION?~~

11 A. ~~My understanding is based on several pieces of information, including statements made by~~  
12 ~~NAT and individuals directly associated with NAT. As was discussed previously, there are~~  
13 ~~ongoing complaints against NAT both here before this Commission and before the United~~  
14 ~~States District Court in South Dakota. This ongoing litigation has yielded information that~~  
15 ~~confirms not only that NAT is engaged in access stimulation, but also that it represents the~~  
16 ~~vast majority of its business. Indeed, without its access stimulation scheme, NAT would~~  
17 ~~likely not exist.~~

18  
19 ~~Q. HOW SIGNIFICANT A PORTION OF NAT'S BUSINESS IS FREE CONFERENCE~~  
20 ~~CALLING SERVICES?~~

21 A. ~~It appears to be nearly the entirety of NAT's business. In the Sprint complaint docket~~  
22 ~~which is before this Commission (TC10-26), a Sprint Access Verification Analyst filed an~~  
23 ~~affidavit on September 27, 2010 stating that study data for July 2010 indicates that~~

1     ~~99.98% of the traffic NAT wants to be paid for terminating actually goes to conference~~  
2     ~~bridge equipment and not to an end user on the Reservation.”<sup>25</sup> In addition, the Treasurer~~  
3     ~~of Crow Creek Sioux tribe acknowledged the significance of free conference calling~~  
4     ~~services to the NAT business model stating, “Well, if it wasn't for FreeConferenceCall,~~  
5     ~~there really wouldn't be a NAT.”<sup>26</sup> Attached as Exhibit WPE 1 is the relevant excerpt~~  
6     ~~from the District Court transcript.~~

7  
8     ~~Q     ARE THERE CLOSE LINKS BETWEEN NAT AND THE FREE CONFERENCE~~  
9     ~~CALLING SERVICES?~~

10    A. ~~Yes. Testimony in the Sprint complaint case before the United States District Court of~~  
11    ~~South Dakota demonstrates that the entities that manage both NAT and Free Conferencing~~  
12    ~~Corporation are one and the same. The controller for Free Conferencing Corporation of~~  
13    ~~Long Beach, California, whose flagship product is FreeConferenceCall.com, is also the~~  
14    ~~controller for NAT.<sup>27</sup> Attached as Exhibit WPE 2 is the relevant excerpt from the District~~  
15    ~~Court transcript. In addition, the acting president of NAT, Jeff Holoubek, is the Director of~~  
16    ~~Legal and Finance at Free Conferencing Corporation.<sup>28</sup> Attached as Exhibit WPE 3 is the~~  
17    ~~relevant excerpt from the District Court transcript.~~

25 Docket No. TC11-087, Affidavit of James S. Cleaver, September 27, 2010, pp. 6-7.

26 Case No. 10-4110, United States District Court, District of South Dakota, Southern Division, Sprint Communications Company, L.P. Plaintiff vs. Native American Telecommunications, LLC, et al., Jones, in his official capacity as Special Agent in Charge, et al. Defendants, Transcript of Motion Hearing, March 3, 2011, p. 147.

27 Id., p. 147.  
28 Id., p. 68.

1 ~~Q. WHAT IS THE FINANCIAL LINKAGE BETWEEN THE TWO COMPANIES?~~

2 ~~A. The controller for both NAT and Free Conferencing Corporation testified in the same~~  
3 ~~hearing that there is a marketing fee agreement between the two parties whereby Free~~  
4 ~~Conferencing Corporation gets 75% of the access revenues generated and NAT retains the~~  
5 ~~remaining 25%.<sup>29</sup> Attached as Exhibit WRE 4 is the relevant excerpt from the District~~  
6 ~~Court transcript. This percentage split, which grants a higher percentage to the free service~~  
7 ~~calling company than I have seen in other cases, demonstrates that a significant portion of~~  
8 ~~access revenues will be directed toward an entity that is not providing the access service~~  
9 ~~itself and thus suggests that the rates charged by NAT for either termination or transport of~~  
10 ~~calls to its free service calling companies is unjust, unreasonable, and constitutes an~~  
11 ~~arbitrage scheme, for the reasons I state above.~~

12  
13 Q. HAS NAT ACKNOWLEDGED THAT IT PLANS TO ENGAGE IN ACCESS  
14 STIMULATION IN THE AREA THAT IS THE SUBJECT OF ITS APPLICATION  
15 FOR CERTIFICATE OF AUTHORITY?

16 A. Yes. Attached as Exhibit WRE-5 is a copy of NAT's response to CenturyLink's discovery  
17 request 1.8. In its response, NAT states that it will be engaging in access stimulation in the  
18 area for which is requesting certification.

19  
20 ~~Q. WILL NAT CONTINUE TO HAVE REVENUE SHARING AGREEMENTS WITH~~  
21 ~~FREE SERVICE CALLING COMPANIES?~~

<sup>29</sup> Id., p. 52.

1 ~~An~~ ~~Yes. As I discuss above, the Connect America order has a two part test for whether a LEC~~  
2 ~~is engaging in access stimulation. One of the criteria is that the LEC has a revenue sharing~~  
3 ~~agreement with a free service calling company. Thus, by NAT's admission that it will be~~  
4 ~~engaging in access stimulation as defined in the Connect America order there is ample~~  
5 ~~evidence that NAT will continue to split its access revenues with companies such as Free~~  
6 ~~Conferencing at a percentage that siphons 75% of access revenues from IXC's to an entity~~  
7 ~~that is not providing any access services at all.~~

8  
9 Q. ~~DOES NAT'S BUSINESS MODEL HAVE IMPLICATIONS ON ITS REQUEST~~  
10 ~~FOR CERTIFICATION?~~

11 A. ~~Absolutely. There are at least two concerns for this Commission to consider related to~~  
12 ~~NAT's reliance on access stimulation. The first concern goes directly to the requirements~~  
13 ~~in the South Dakota statutes and administrative rules that the company requesting~~  
14 ~~certification demonstrate that it has sufficient technical, financial, and managerial~~  
15 ~~capabilities to provide the local exchange services applied for.<sup>30</sup> A second concern has to~~  
16 ~~do with deciding whether the public interest is served by certifying a carrier whose true~~  
17 ~~focus is serving only free conference calling services rather than providing traditional local~~  
18 ~~exchange service.~~

19  
20 Q. ~~PLEASE DESCRIBE THE CONCERNS RELATED TO NAT DEMONSTRATING~~  
21 ~~IT POSSESSES SUFFICIENT TECHNICAL, FINANCIAL AND MANAGERIAL~~  
22 ~~CAPABILITIES.~~

<sup>30</sup> ~~FDCL 49-04-01 and FDCL 49-04-02.~~

1 A. ~~NAT's near total reliance on access stimulation revenues raises serious questions about its~~  
2 ~~financial viability. During the United States District Court hearing referenced above, it~~  
3 ~~was revealed that NAT's finances are in a rather precarious state due to Sprint withholding~~  
4 ~~payment. In fact, NAT's counsel stated at the hearing that if Sprint does not pay NAT, it is~~  
5 ~~likely to either file bankruptcy or go out of business.<sup>31</sup> Attached as Exhibit WRE 6 is the~~  
6 ~~relevant excerpt from the District Court transcript. The future appears even less promising~~  
7 ~~as NAT's access stimulation scheme becomes increasingly unviable as IXC's insist that~~  
8 ~~access stimulators comply with the terms and conditions in their tariffs and as the FCC's~~  
9 ~~intercarrier compensation rates transition to a bill and keep basis. In light of these~~  
10 ~~developments, it is not at all clear that NAT possesses the financial capability necessary for~~  
11 ~~approval of its certification request.~~

12  
13 Q. ~~ARE THERE ANY OTHER INDICATIONS THAT LEGS INVOLVED IN ACCESS~~  
14 ~~STIMULATION SCHEMES DO NOT HAVE THE FINANCIAL CAPABILITY TO~~  
15 ~~PROVIDE TELECOMMUNICATIONS SERVICES?~~

16 A. ~~Yes. Traffic pumping schemes have resulted in claims brought by IXCs, including Qwest,~~  
17 ~~requesting a return of monies illegally obtained by the LEC. But, Qwest's experience has~~  
18 ~~shown that traffic pumping LECs fail to take fiscally responsible steps to cover their~~  
19 ~~potential liabilities. The very nature of their arrangements with free service calling~~  
20 ~~companies indicates that a traffic pumping LEC may not be able to cover its potential~~  
21 ~~liabilities. Under their contracts with free service calling companies, when a traffic~~

<sup>31</sup> ~~Civ. No. 11-10, United States District Court, District of South Dakota, Southern Division, Sprint Communications Company, L.P., Plaintiff v. Major Telecommunications Telecom LEC, Dkt. Lopez, in his official capacity as Special Judge of Tribal Court and Crow Creek Sioux Tribal Court, Defendants. Transcript of Motion Hearing, March 3, 2011, pp. 206, 208.~~

1 ~~pumping LEC receives monies from an LXC, it immediately tenders usually half, and in the~~  
2 ~~case of NAT, 75%, of the money to its free service calling company partners. Thus, the~~  
3 ~~traffic pumping LEC fails to retain the monies that are in dispute and potentially subject to~~  
4 ~~audit. Or, the traffic pumping LEC may attempt to move the monies out of reach of the~~  
5 ~~LXCs, by distributions to its owners, some of whom include family trusts, or by converting~~  
6 ~~the funds into illiquid facilities and plants. Under these circumstances, the traffic pumping~~  
7 ~~LEC fails in its duties of operating and managing itself in a financially responsible manner~~  
8 ~~that reserves funds for its contingent liabilities.~~

9  
10 Q. ~~PLEASE DISCUSS THE PUBLIC POLICY CONSIDERATIONS OF THE NAT~~  
11 ~~APPLICATION.~~

12 A. ~~As I stated above, there are real concerns related to whether approving NAT's certification~~  
13 ~~request is in the public interest. Given NAT's past practices and its admission that it will~~  
14 ~~be engaging in access stimulation in the area where it is requesting certification, the~~  
15 ~~Commission must question whether providing service to free conference calling services,~~  
16 ~~as opposed to providing traditional local exchange service, is truly in the public interest. It~~  
17 ~~is telling that the testimony filed by NAT in this case fails to address, or even mention,~~  
18 ~~access stimulation as a service it will be providing, despite the fact that it currently~~  
19 ~~constitutes nearly the entirety of its business.~~

20  
21 ~~NAT touts the economic, social and educational impacts of its business on the Crow Creek~~  
22 ~~Reservation, but the FCC rejected this very argument as a justification for access~~  
23 ~~stimulation in its Connect America order, stating:~~

1 ~~Several parties claim that access stimulation offers economic development~~  
2 ~~benefits, including the expansion of broadband services to rural communities and~~  
3 ~~tribal lands. Although expanding broadband services in rural and Tribal lands is~~  
4 ~~important, we agree with other commenters that how access revenues are used is~~  
5 ~~not relevant in determining whether switched access rates are just and reasonable~~  
6 ~~in accordance with section 201(b). In addition, excess revenues that are shared in~~  
7 ~~access stimulation schemes provide additional proof that the LEC's rates are~~  
8 ~~above cost. Moreover, Congress created an explicit universal service fund to spur~~  
9 ~~investment and deployment in rural, high cost, and insular areas, and the~~  
10 ~~Commission is taking action here and in other proceedings to facilitate such~~  
11 ~~deployment.<sup>37</sup> (Footnotes omitted).~~

12  
13 ~~Taking the economic, social, and educational impacts on the Crow Creek Reservation out of~~  
14 ~~the equation, it is not clear that NAT's providing service to free conference calling services~~  
15 ~~does anything to serve the public interest.~~

16  
17 **~~V. MILEAGE PUMPING~~**

18  
19 **~~Q. ARE YOU CONCERNED ABOUT THE PROSPECT THAT TRAFFIC PUMPING~~**  
20 **~~SCHEMES WILL ENGAGE IN A FORM OF MILEAGE PUMPING?~~**  
21 **A. Yes.** ~~As I noted earlier, it has come to Qwest's attention that some traffic pumping LECs'~~  
22 ~~intend to designate distant points of interconnection between the LEC and IXCs, and then~~  
23 ~~charge a usage based, per minute transport rate, and a transport rate premised upon~~  
24 ~~mileage. Charging inflated transport charges, even though the LEC is charging the~~  
25 ~~termination rates prescribed by the FCC in the Connect America order, could result in a~~  
26 ~~financially viable traffic pumping scheme for the LEC. In short, a mileage pumping~~  
27 ~~scheme has similar components to the traffic pumping schemes of the recent past. High~~

<sup>37</sup> ~~See the Matter of Connecticut Telephone Fund, (Report and Order and Further Notice of Proposed Rulemaking),~~  
~~FCC 11-161 (released November 10, 2011), at ¶ 666.~~

1 ~~traffic volumes, per minute charges, and sharing of revenues with an entity that did not~~  
2 ~~provide any of the access services.~~

3  
4 **Q. ~~DOES QWEST HAVE A RECOMMENDATION TO HELP LIMIT MILEAGE~~**  
5 **~~PUMPING?~~**

6 ~~A. Yes. It is a common industry practice for LECs to allow IXC to directly connect to the~~  
7 ~~end office of the LEC in order to allow the IXC to save on common transport and tandem~~  
8 ~~switching charges. This type of dedicated connection is known as "Direct End Office~~  
9 ~~Transport (DEOT)" or "Direct Trunked Transport (DTT)." Typically, the LEC offers DTT~~  
10 ~~to an IXC by leasing a facility connected between the IXC's Point of Presence (POP) and~~  
11 ~~the LEC's end office. The LEC's charges typically include a non-recurring connection~~  
12 ~~charge, a fixed monthly charge, and a variable charge based upon the distance between the~~  
13 ~~IXC's POP and the LEC's end office. DTT service thus allows an IXC that delivers~~  
14 ~~relatively high volumes of traffic to the LEC's exchange to save from paying per minute~~  
15 ~~tandem switching and transport charges. Qwest Corporation, as a local exchange carrier,~~  
16 ~~offers DTT throughout its incumbent region, including in South Dakota, to any requesting~~  
17 ~~IXC.~~

18  
19 ~~Qwest recommends that this Commission, if it should grant NAT's certificate, condition its~~  
20 ~~certificate upon the requirement that NAT provide DTT to any requesting IXC at~~  
21 ~~reasonable rates, terms and conditions.~~

22

1 ~~Q. HAS THE FCC RULED THAT CLECS ARE OBLIGATED TO OFFER DTT TO~~  
2 ~~EXCS THAT WANT TO DELIVER TRAFFIC DIRECTLY?~~

3 A. ~~Yes, in the PrairieWave case, after stating that CLECs have the ability to charge for tandem~~  
4 ~~switching under certain circumstances, the FCC stated that this ability is premised upon~~  
5 ~~allowing IXCs to interconnect through DTT. The FCC stated as follows:~~

6 ~~Our decision here is premised on the assumption that a competitive LEC~~  
7 ~~will permit an IXC to install direct trunking from the LEC's point of~~  
8 ~~presence to the competitive LEC's end office, thereby bypassing any~~  
9 ~~tandem function. So long as an IXC may elect to direct trunk to the~~  
10 ~~competitive LEC end offices, and thereby avoid the tandem switching~~  
11 ~~function and associated charges, there should be limited incentive for~~  
12 ~~competitive LECs to route calls unnecessarily through multiple switches,~~  
13 ~~as suggested by AT&T.<sup>33</sup>~~  
14

15 ~~Q. DOES NAT CURRENTLY OFFER DTT THROUGH ITS SOUTH DAKOTA~~  
16 ~~INTRASTATE ACCESS TARIFF?~~

17 A. ~~Yes. However, the tariff does not provide a rate for DTT. Section 3.8.1 B.1 states that~~  
18 ~~"All elements of Direct Trunked Transport are priced on an Individual Case Basis (ICB)."~~  
19 ~~Thus Qwest cannot determine whether the DTT rate is reasonable or not.~~

21 ~~Q. DOES QWEST HAVE A PROPOSAL FOR WHAT WOULD BE A REASONABLE~~  
22 ~~RATE FOR DTT?~~

23 A. ~~Yes. As discussed above, the FCC in the Connect America order required LECs engaging~~  
24 ~~in access stimulation to apply the access rates of the price cap carrier, which in South~~  
25 ~~Dakota is Qwest Corporation. Qwest's proposal that its DTT rates should apply to any~~

<sup>33</sup> ~~Final Report and Order on Petition for Review of the Commission's Decision in PrairieWave Telecommunications, Inc. Petition for Waiver of Sections 64.26(b) and (c) and the Alternative Section 64.26(c)(2) of the Commission's Rules, CC Docket No. 06-262, Released February 14, 2008, at ¶ 27.~~

1 ~~LEC engaging in access stimulation in this state. Qwest's rates for DTT include only a~~  
2 ~~non-recurring charge, a fixed monthly rate, and a rate that varies by the distance between~~  
3 ~~points of interconnection. Qwest does not charge a usage based, per minute charge for~~  
4 ~~DTT and thus the arbitrage dangers of mileage pumping will be avoided.~~

6 ~~VI. QWEST'S RECOMMENDATIONS~~

8 ~~Q. WHAT IS QWEST RECOMMENDING THAT THIS COMMISSION DO WITH~~  
9 ~~REGARD TO NAT'S CERTIFICATION REQUEST?~~

10 A. ~~For all of the reasons cited previously, Qwest believes it is in the public interest for the~~  
11 ~~Commission to deny NAT's request. Such a denial would send a clear message that~~  
12 ~~certification is to be granted only to provide legitimate local exchange service, not to~~  
13 ~~engage in arbitrage schemes such as access stimulation.~~

14 ~~Q. ARE THERE OTHER OPTIONS AVAILABLE TO THE COMMISSION?~~

15 A. ~~Yes. South Dakota Code 20:10:32:07 offers one such option. ARSD 20:10:32:07 states:~~

16 ~~ARSD 20:10:32:07. Certification subject to commission imposed terms and~~  
17 ~~conditions. In addition to the requirements imposed by this chapter on providers~~  
18 ~~of local exchange services, the commission, in granting a certificate of authority~~  
19 ~~to provide local exchange services, may impose additional terms and conditions,~~  
20 ~~on a competitively neutral basis, that it finds necessary to preserve and advance~~  
21 ~~universal service, protect the public safety and welfare, ensure the continued~~  
22 ~~quality of service, and safeguard the rights of consumers. The preservation and~~  
23 ~~advancement of universal service shall be a primary concern.~~

25 ~~Using South Dakota Code 20:10:32:07 as its underlying authority, if the Commission~~  
26 ~~chooses to grant NAT a certificate, then, for the reasons stated above, Qwest recommends~~  
27 ~~that it be conditioned upon the requirement that NAT offer DTT connections to its end~~

1 ~~offer to any requesting IXC at the same rates, terms and conditions that Qwest~~  
2 ~~Corporation offers in South Dakota in order to prevent NAT from engaging in any form of~~  
3 ~~mileage pumping scheme.~~

4  
5 **Q. DOES THIS CONCLUDE YOUR TESTIMONY?**

6 **A. Yes it does. Thank you.**

**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA**

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. )

Docket No. TC11-087

**CENTURYLINK'S STATEMENT OF MATERIAL FACTS AND RESPONSE TO  
NAT'S STATEMENT OF UNDISPUTED FACTS**

Qwest Communications Company, LLC, a Delaware Limited Liability Company, doing business as "CenturyLink QCC" ("CenturyLink"), through counsel, pursuant to SDLC § 15-6-56 (c) (2) hereby submits its Statement of Material Facts as to which CenturyLink contends creates genuine issues of fact to be tried. In a separate section, CenturyLink also responds to NAT's "Statement of Undisputed Material Facts."

**CENTURYLINK'S STATEMENT OF MATERIAL FACTS**

1. ~~Access stimulation, or traffic pumping, is the term used to describe situations where rural local exchange carriers enter into an arrangement with high call volume operations such as free conference calling, chat lines, adult entertainment calls and other "free" calls with the ultimate objective of deriving revenues solely from interexchange carriers. Easton Direct at 4.~~
2. ~~The conference call or chat line operators, also known as free calling companies, place their equipment in the central office of the local exchange carrier, and the local exchange carrier assigns local numbers to the free service calling companies. Easton Direct at 4.~~
3. ~~Because the free service calling companies offer their conference or chat services to customers across the nation for free, this arrangement greatly stimulates the amount of traffic to the equipment of the free service calling~~

~~companies, and thus inflates the access minutes terminating to the local exchange carrier. Easton Direct at 4.~~

4. ~~The local exchange carrier bills switched access to the interexchange carrier of the person who places the call to the free service calling company at its tariffed rate, which in rural areas in some states is often several times higher than in non-rural areas and exchanges. Easton Direct at 4.~~
5. ~~The local exchange carrier then provides a kickback to the free service calling company, typically about half, of the access revenues that the local exchange carrier collects from the interexchange carriers. Easton Direct at 5.~~
6. ~~The local exchange carrier and the free calling companies more than covers their costs and profits from the shared revenues. Easton Direct at 5.~~
7. ~~The end result of paragraphs 1 through 6 above is that the IXCs pay higher access charges that provide enormous profits to the free service calling companies and the traffic pumping LECs. Easton Direct at 5.~~
8. ~~Access stimulation constitutes arbitrage and is contrary to public policy. Easton Direct at 5.~~
9. ~~IXCs must deliver traffic to the numbers and exchanges called by their end-user customers. Easton Direct at 5.~~
10. ~~The FCC has directed interexchange carriers to deliver all such traffic in order to promote and safeguard the ability of callers to reach their intended destinations. Easton Direct at 5.~~
11. ~~Qwest and other interexchange carriers are not permitted to block calls destined to traffic pumping LECs, and Qwest never has. Thus, Qwest and other IXCs are forced to deliver the traffic to the traffic pumping LEC exchanges, and traffic pumping LECs manipulate this forced arrangement to attempt to impose inflated switched access charges upon the IXCs. Easton Direct at 5.~~
12. ~~Traffic pumping LECs abuse the regulatory structure underlying switched access rates in rural exchanges. Easton Direct at 5.~~

13. ~~Historically, switched access rates in rural areas have been set at rates significantly higher than in non-rural areas in order to provide support to a rural carrier providing essential, basic services in high cost areas. That is, the rates are higher to subsidize the high cost of providing basic services to rural residents and businesses. Easton Direct at 5-6.~~
14. ~~IXCs have been generally amenable to paying the higher rates in consideration of these policies and because traffic volumes to rural areas are relatively low. Easton Direct at 6.~~
15. ~~The traffic pumping LECs abuse this laudable structure by placing the conference calling equipment in rural exchanges, generating exponentially higher traffic volumes to the exchange, which combined with their high rural switched access rates lead to increasingly large invoices to IXCs. Easton Direct at 6.~~
16. ~~An example of the above is that, in certain rural exchanges where Qwest typically would receive invoices of about a thousand dollars per month before traffic pumping, after certain LECs commenced traffic pumping schemes, Qwest would receive invoices for several hundred thousands of dollars, for just one month. Easton Direct at 6.~~
17. ~~When one multiplies the months by the number of LECs engaging in traffic pumping, the result is tens and hundreds of millions of dollars in increased access charges as a result of this scheme. Easton Direct at 6.~~
18. ~~Thus, the public interest component of higher switched access rates in rural areas—to support basic services to rural residences and businesses—is abused by traffic pumping LECs that bill millions of dollars out of IXCs for their own profit and that of their free service calling company partners. Easton Direct at 6.~~
19. ~~The FCC has attempted to remove the incentive of high terminating switched access rates for LECs engaging in access stimulation in the Connect America order; however, it appears that traffic pumping LECs such as NAT intend to continue this practice, likely supporting their schemes through high transport rates in the place of terminating switched access rates. Easton Direct at 6.~~

20. ~~It is against public policy that entities that do not use or subscribe to a service be forced to support the costs and enormous profits of the providers of the service. Easton Direct at 7.~~
21. ~~That is, IXCs do not use the services provided by the free service calling companies, such as conference calling or chat line services; rather, it is the end user callers that consume these services. Easton Direct at 7.~~
22. ~~But, the IXCs are forced to deliver and thus incur the switched access charges that are shared with the free service calling companies, and thus the IXCs support the costs and bestow huge profits upon the free service calling companies. Easton Direct at 7.~~
23. ~~IXCs are not permitted to pass on the specific costs of traffic pumping to the individual end user customers that are placing calls to the free service calling companies. Easton Direct at 7.~~
24. ~~IXC's current charges to their end user customers are not calculated based on traffic pumping traffic patterns, although, as IXCs incur the enormous cost of traffic pumping LEC's switched access bills, all their customers ultimately must absorb these costs through higher rates. Easton Direct at 7.~~
25. ~~Thus, despite the marketing of the underlying calling services as "free," there is little that is free about them. Easton Direct at 7.~~
26. ~~The Commission and IXCs should be wary of any scheme in which a rural LEC is attempting to generate large volumes of minutes for calls to free service calling companies and in which the LEC intends to invoice IXCs on a usage or per minute basis. Easton Direct at 7.~~
27. ~~There is an important policy significance of an agreement to share revenues between the LEC and the free service calling companies. Easton Direct at 7-8.~~
28. ~~The sharing of access revenues between the LEC and the free service calling companies means that such revenues are being used for more than simply covering the costs of the LEC to provide service. Easton Direct at 8.~~

29. ~~And such revenues are not being used to support basic services to legitimate residential and business customers in rural areas. Easton Direct at 8.~~
30. ~~When access revenues are shared to support and provide large profits to free service calling companies, the LEC is charging in excess of the rates appropriate to further valid public interests and is misusing the regulatory system that tightly controls access rates. Easton Direct at 8.~~
31. ~~In its February 8, 2011, Connect America Fund Notice of Proposed Rule Making and Further Notice of Proposed Rulemaking, the FCC described such traffic pumping arrangements as an "arbitrage scheme." Easton Direct at 8.~~
32. ~~The overriding intent of the FCC is to reduce traffic pumping by the elimination of traffic pumping and arbitrage incentives. Easton Direct at 10.~~
33. ~~The FCC consistently recognizes that access stimulation results in unjust and unreasonable rates to IXC and presents several other policies supporting the issuance of access stimulation rules. Easton Direct at 10.~~
34. ~~The Connect America order acknowledged evidence in its record of another form of arbitrage—"mileage pumping," in which "service providers designate distant points of interconnection to inflate the mileage used to compute the transport charges." Easton Direct at 13.~~
35. ~~Despite the FCC's admonitions against traffic pumping practices, it has come to the attention of Quest that certain traffic pumping LECs are indeed planning on charging access rates with high transport rates. Easton Direct at 13.~~
36. ~~Thus, abuse of terminating access rates may be replaced by new schemes in which high transport rates are charged for calls delivered to free service calling companies. Easton Direct at 13.~~
37. ~~Ongoing litigation has yielded information that confirms not only that NAT is engaged in access stimulation, but also that it represents the vast majority of its business. Easton Direct at 14.~~
38. ~~Without its access stimulation scheme, NAT would likely not exist. Easton Direct at 14.~~
39. ~~The Treasurer of Crow Creek Sioux tribe acknowledged the significance of free conference calling services to the NAT business model stating "Well, if it wasn't for FreeConferenceCall, there really wouldn't be a NAT." Easton Direct at 15.~~

40. ~~The controller for both NAT and Free Conferencing Corporation testified in the same hearing that there is a marketing fee agreement between the two parties whereby Free Conferencing Corporation gets 75% of the access revenues generated and NAT retains the remaining 25%. Easton Direct at 16.~~
41. ~~This percentage split grants a higher percentage to the free service calling company than Mr. Easton has seen in other cases. Easton Direct at 16.~~
42. ~~This percentage split demonstrates that a significant portion of access revenues will be directed toward an entity that is not providing the access service itself, and thus suggests that the rates charged by NAT for either termination or transport of calls to its free service calling companies is unjust, unreasonable, and constitutes an arbitrage scheme. Easton Direct at 16.~~
43. In its discovery responses, NAT states that it will be engaging in access stimulation in the area for which is requesting certification. Easton Direct at 16.
44. ~~By NAT's admission that it will be engaging in access stimulation as defined in the Connect America order there is ample evidence that NAT will continue to split its access revenues with companies such as Free Conferencing at a percentage that siphons 75% of access revenues from IXC's to an entity that is not providing any access services at all. Easton Direct at 17.~~
45. ~~Traffic pumping schemes have resulted in claims brought by IXC's including Qwest, requesting a return of monies illegally obtained by the LEC. Easton Direct at 18.~~
46. ~~Qwest's experience has shown that traffic pumping LEC's fail to take fiscally responsible steps to cover their potential liabilities. Easton Direct at 18.~~
47. ~~Under their contracts with free service calling companies, when a traffic pumping LEC receives monies from an IXC, it immediately tenders usually half, and in the case of NAT 75% of the money to its free service calling company partners. Easton Direct at 18-19.~~
48. ~~Thus, the traffic pumping LEC fails to retain the monies that are in dispute and potentially subject to refund.~~
49. ~~Or, the traffic pumping LEC may attempt to move the monies out of reach of the IXC's, by distributions to its owners, some of whom include family trusts, or by converting the funds into illiquid facilities and plant. Easton Direct at 19.~~

50. ~~Under these circumstances, the traffic pumping LEC fails in its duties of operating and managing itself in a financially responsible manner that reserves funds for its contingent liabilities. Easton Direct at 19.~~
51. ~~It has come to Qwest's attention that traffic pumping LECs intend to designate distant points of interconnection between the LEC and IXCs, and then charge a usage-based, per minute transport rate, and a transport rate premised upon mileage. Easton Direct at 20.~~
52. ~~Charging inflated transport charges, even though the LEC is charging the termination rates prescribed by the FCC in the Connect America order, could result in a financially viable traffic pumping scheme for the LEC. Easton Direct at 20.~~
53. ~~A mileage pumping scheme has similar components to the traffic pumping schemes of the recent past—high traffic volumes, per minute charges, and sharing of revenues with an entity that did not provide any of the access services. Easton Direct at 20-21.~~
54. ~~It is a common industry practice for LECs to allow IXCs to directly connect to the end office of the LEC in order to allow the IXC to save on common transport and tandem switching charges. This type of dedicated connection is known as "Direct End Office Transport (DEOT)" or "Direct Trunked Transport (DTT)." Easton Direct at 21.~~
55. ~~Typically, the LEC offers DTT to an IXC by leasing a facility connected between the IXC's Point of Presence (POP) and the LEC's end office. Easton Direct at 21.~~
56. ~~The LEC's charges for DTT typically include a non-recurring connection charge, a fixed monthly charge, and a variable charge based upon the distance between the IXC's POP and the LEC's end office. Easton Direct at 21.~~
57. ~~DTT service thus allows an IXC that delivers relatively high volumes of traffic to the LEC's exchange to save from paying per minute tandem switching and transport charges. Easton Direct at 21.~~
58. ~~Qwest Corporation, as a local exchange carrier, offers DTT throughout its incumbent region, including in South Dakota, to any requesting IXC. Easton Direct at 21.~~

59. ~~Qwest recommends that this Commission, if it should grant NAT's certificate, condition its certificate upon the requirement that NAT provide DTT to any requesting IXC at reasonable rates, terms and conditions. Easton Direct at 24.~~
60. ~~NAT's tariff does not provide a rate for DTT. Easton Direct at 22.~~
61. ~~Section 2.2.1 B.1 of NAT's access tariff states that "All elements of Direct Trunked Transport are priced on an Individual Case Basis (ICB)." Easton Direct at 22.~~
62. ~~The FCC in the Connect America order required LECs engaging in access stimulation to apply the access rates of the price cap carrier, which in South Dakota is Qwest Corporation. Easton Direct at 22.~~
63. ~~Qwest's rates for DTT include only a non-recurring charge, a fixed monthly rate, and a rate that varies by the distance between points of interconnection. Easton Direct at 25.~~
64. ~~Qwest does not charge a usage-based, per minute charge for DTT, and thus the arbitrage dangers of mileage pumping will be avoided. Easton Direct at 22.~~
65. ~~Qwest proposes that its DTT rates should apply to any LEC engaging in access stimulation in this state. Easton Direct at 22-23.~~

**CENTURYLINK'S RESPONSE TO NAT'S STATEMENT OF UNDISPUTED MATERIAL FACTS**

1. On October 11, 2011, NAT filed its Application for Certificate of Authority ("Application") with the South Dakota Public Utilities Commission ("Commission").

CENTURYLINK RESPONSE: Undisputed.

2. Exhibit A to this Application contains NAT's "Certificate of Organization – Limited Liability Company" from the South Dakota Secretary of State's Office. (Application-Exhibit A).

CENTURYLINK RESPONSE: Undisputed.

3. Exhibit B to this Application contains a listing of NAT's key management personnel. (Application-Exhibit B).

CENTURYLINK RESPONSE: CenturyLink does not dispute that Exhibit B to NAT's Revised Application purports to be a listing of NAT's key management personnel, ~~but Sprint has placed into the record facts showing that David Erickson is also part of NAT's management. Farrar Direct, at 9-10.~~

4. Exhibit C to this Application contains NAT's confidential financial statements. (Application-Exhibit C).

CENTURYLINK RESPONSE: CenturyLink does not dispute that Exhibit C to NAT's Revised Application contains certain confidential financial information. ~~But, Sprint contends that such information is not complete and accurate. Farrar Direct, p. 26.~~

5. On November 30, 2011, Commission Staff served a series of Data Requests on NAT. (Affidavit of Scott R. Swier in Support of NAT's Motion for Summary Judgment, ¶ 2).

CENTURYLINK RESPONSE: Undisputed.

6. NAT's Response Data to the Commission Staff's Data Requests was December 21, 2011. (Affidavit of Scott R. Swier in Support of NAT's Motion for Summary Judgment, ¶ 3).

CENTURYLINK RESPONSE: Undisputed.

7. NAT provided its Responses to the Commission Staff's Data Requests in a timely manner. (Affidavit of Scott R. Swier in Support of NAT's Motion for Summary Judgment, ¶ 4).

CENTURYLINK RESPONSE: Undisputed.

8. On January 27, 2012, NAT filed its Revised Application for Certificate of Authority ("Revised Application") with the Commission.

CENTURYLINK RESPONSE: Undisputed.

9. NAT's Revised Application incorporates the original Application's Exhibits A-C. (Revised Application).

CENTURYLINK RESPONSE: Undisputed.

10. NAT's Revised Application seeks authority to provide local exchange and interexchange service within the Crow Creek Sioux Tribe Reservation ("Reservation") which is within the study area of Midstate Communications, Inc. ("Midstate"). (Revised Application, page 1).

CENTURYLINK RESPONSE: Undisputed.

11. NAT's Revised Application provides all information required by ARSD 20:10:32:03. (Revised Application).

CENTURYLINK RESPONSE: ~~Centurylink disputes the inference that NAT has provided all the information necessary to address all of the relevant issues in this docket as framed by the pleadings and Commission orders. As stated in Centurylink's Brief in Opposition to NAT's Motion for Summary Judgment, the issues in this docket include whether NAT's access stimulation activities are within the public interest and whether certain conditions should be placed upon that NAT's certificate, if granted. NAT has not submitted any information to the Commission addressing these issues.~~

12. On January 31, 2012, NAT's Revised Application was "deemed complete" by the Commission's Staff. (Affidavit of Scott R. Swier in Support of NAT's Motion for Summary Judgment, ¶ 5).

CENTURYLINK RESPONSE: Undisputed.

13. NAT's business address is 253 Ree Circle, Fort Thompson, South Dakota 57339, Telephone: 949-842-4478, Facsimile: 562-432-5250, Web page: NativeAmericanTelecom.com. (Revised Application, page 2; Direct Testimony of Jeff Holoubek on Behalf of NAT, page 3) (hereinafter "Holoubek Testimony, page -").

CENTURYLINK RESPONSE: Undisputed.

14. NAT is a tribally-owned telecommunications company organized as a limited liability company under the laws of South Dakota. (Revised Application, pages 2-3; Holoubek Testimony, page 3).

CENTURYLINK RESPONSE: CenturyLink does not dispute that NAT is owned in part by the Crow Creek Sioux Tribe, ~~but it notes that Sprint has filed testimony in support of its position that NAT is a sham entity. Former Direct, pp. 9-10.~~

15. NAT's principal office is located at 253 Ree Circle, Fort Thompson, South Dakota 57339. (Revised Application, page 2; Holoubek Testimony, page 4).

CENTURYLINK RESPONSE: Undisputed.

16. NAT's registered agent is Scott R. Swier, 133 N. Main Street, P.O. Box 256, Avon, South Dakota 57315. (Revised Application, page 2; Holoubek Testimony, page 4).

CENTURYLINK RESPONSE: Undisputed.

17. NAT has a certificate of authority from the South Dakota Secretary of State to transact business in South Dakota. (Revised Application, page 4 and Exhibit A; Holoubek Testimony, page 4).

CENTURYLINK RESPONSE: Undisputed.

18. NAT's Federal Tax Identification Number is 26-3283812. (Revised Application, page 12; Holoubek Testimony, page 12).

CENTURYLINK RESPONSE: Undisputed.

19. NAT's South Dakota sales tax number is 1012-1173-ST. (Revised Application, page 12; Holoubek Testimony, page 12).

CENTURYLINK RESPONSE: Undisputed.

20. NAT's ownership structure consists of the Crow Creek Sioux Tribe (51% ("Tribe"), P.O. Box 50, Fort Thompson, South Dakota 57339-0050, Native American Telecom Enterprise, LLC (25%) ("NAT Enterprise"), 747 S. 4th Ave., Sioux Falls, SD 57104, and WideVoice Communications, Inc. (24%) ("WideVoice"), 410 South Rampart, Suite 390, Las Vegas, NV 89145. (Revised Application, pages 3, 6; Holoubek Testimony, pages 4-5).

CENTURYLINK RESPONSE: CenturyLink does not dispute this is the ownership structure set forth in the joint venture agreement, ~~but Sprint has filed testimony denying that the Tribe is effectively an "owner" exercising the rights normally held by one with 51% ownership. Farrar Direct, pp 9-19.~~

21. The Tribe is a federally-recognized Indian tribe with its tribal headquarters located on the Crow Creek Sioux Tribe Reservation ("Reservation") in Fort Thompson, South Dakota. (Revised Application, page 3).

CENTURYLINK RESPONSE: Undisputed.

22. NAT Enterprise is a telecommunications development company. (Revised Application, page 3).

CENTURYLINK RESPONSE: Because this statement is not verified or otherwise supported by sworn testimony, there is no appropriate citation to the record and thus is not an undisputed fact for purposes of summary judgment. SDCL 15-6-56(c)(1).

23. WideVoice is a telecommunications engineering company.

CENTURYLINK RESPONSE: Because this statement is not verified or otherwise supported by sworn testimony, there is no appropriate citation to the record and thus is not an undisputed fact for purposes of summary judgment. SDCL 15-6-56(c)(1).

24. NAT seeks to provide facilities-based telephone service to compliment its advanced broadband services. (Revised Application, page 1).

CENTURYLINK RESPONSE: ~~CenturyLink disputes this statement. As shown in Mr. Easton's Testimony, NAT has admitted that it will engage in "access stimulation" activities in the area in which it seeks certification, and that the intended goal of such schemes is to obtain inflated access revenues from IXCs such as CenturyLink, not to compliment NAT's advanced broadband services. See Easton Direct, pp. 4-5, 16.~~

25. NAT proposes to offer local exchange and interexchange service within the Reservation, which is within the study area of Midstate. (Revised Application, page 6; Holoubek Testimony, page 13).

CENTURYLINK RESPONSE: ~~CenturyLink disputes the completeness of this statement. As shown in Mr. Easton's Testimony, NAT has admitted that it will engage in "access stimulation" activities in the area in which it seeks certification, and that the intended goal of such schemes is to obtain inflated access revenues from IXCs such as~~

~~CenturyLink not to compliment NAT's advanced broadband services. See Eastern Direct, pp. 4-5, 16.~~

26. NAT will provide service through its own facilities. (Revised Application, page 6; Holoubek Testimony, pages 8, 10).

CENTURYLINK RESPONSE: Undisputed.

27. NAT is currently interconnected with Midstate and other carriers for the exchange of telecommunications traffic. (Revised Application, page 6; Holoubek Testimony, page 8).

CENTURYLINK RESPONSE: CenturyLink does not dispute that NAT may be currently interconnected with Midstate. ~~CenturyLink disputes that NAT is offering reasonable rates, terms and conditions by which CenturyLink could connect to NAT's end office through Direct Trunked Transport and thus is requesting that the Commission impose such conditions upon NAT's certificate, if granted. See Eastern Direct, at 20-29.~~

28. NAT is using WiMAX (Worldwide Interoperability for Microwave Access) technology operating in the 3.65 GHz licensed spectrum providing service to residential, small business, hospitality and public safety. (Revised Application, pages 6-7; Holoubek Testimony, page 8).

CENTURYLINK RESPONSE: Undisputed. ~~However, CenturyLink disputes the absence of NAT addressing or providing any information about its facilities and services used in connection with its admitted access stimulation activities, issues well within this docket as framed by the pleadings. See CenturyLink's Response in Opposition to NAT's Motion for Summary Judgment.~~

29. The network supports high-speed broadband services, voice service, data and Internet access, and multimedia. (Revised Application, page 7; Holoubek Testimony, page 8).

~~CENTURYLINK RESPONSE: CenturyLink disputes the completeness of this statement. As shown in Mr. Easton's Testimony, NAT has admitted that it will engage in "access stimulation" activities in the area in which it seeks certification, and that the intended goal of such schemes is to obtain inflated access revenues from IXCs such as CenturyLink. See Easton Direct, pp. 4-5, 16.~~

30. Through the use of advanced antenna and radio technology with OFDM1 OFDMA (Orthogonal Frequency Division Multiplexing), NAT is able to deliver wireless IP (Internet Protocol) voice and data communications. (Revised Application, page 7; Holoubek Testimony, page 9).

~~CENTURYLINK RESPONSE: CenturyLink disputes the completeness of this statement. As shown in Mr. Easton's Testimony, NAT has admitted that it will engage in "access stimulation" activities in the area in which it seeks certification, and that the intended goal of such schemes is to obtain inflated access revenues from IXCs such as CenturyLink. See Easton Direct, pp. 4-5, 16.~~

31. This 4G technology offers flexible, scalable and economically viable solutions that are key components to deploying in vast rural environments, such as the Reservation. (Revised Application, page 7; Holoubek Testimony, page 9).

~~CENTURYLINK RESPONSE: CenturyLink disputes the completeness of this statement. As shown in Mr. Easton's Testimony, NAT has admitted that it will engage in "access stimulation" activities in the area in which it seeks certification, and that the intended goal of such schemes is to obtain inflated access revenues from IXCs such as CenturyLink. See Easton Direct, pp. 4-5, 16.~~

32. NAT has established a toll-free number and email address for all customer inquiries and complaints, and has a physical location on the Reservation to handle customer complaints and inquiries within twenty-four (24) hours. (Revised Application, page 8; Holoubek Testimony, pages 9-10).

CENTURYLINK RESPONSE: Undisputed.

33. NAT has established connectivity with telecommunications carriers to provide its customers with access to 911, operator services, interexchange services, directory assistance, and telecommunications relay services. (Revised Application, page 8).

CENTURYLINK RESPONSE: ~~CenturyLink disputes this statement because NAT's connectivity with IXCs is also for the purpose of engaging in traffic pumping schemes. See Easton Direct at 4-5, 16.~~

34. NAT will target its direct marketing efforts to only those individuals and organizations within the Reservation. (Revised Application, page 9; Holoubek Testimony, page 10).

CENTURYLINK RESPONSE: ~~CenturyLink disputes this statement because of the absence of any reference by NAT to its free service calling company partner and the scheme between the two to engage in access stimulation. See Easton Direct, at 14-17.~~

35. As a newly-formed limited liability company, NAT is not registered or certificated to provide telecommunications services in other states, nor has NAT applied for or ever been denied authority to provide telecommunications services in other states. (Revised Application, page 10; Holoubek Testimony, page 11).

CENTURYLINK RESPONSE: Undisputed.

36. NAT will utilize advertising designed to market its services. (Revised Application, page 10; Holoubek Testimony, page 11).

CENTURYLINK RESPONSE: ~~CenturyLink disputes this statement because of the absence of any reference by NAT to its free service calling company partner and the scheme between the two to engage in access stimulation. See Easton Direct, at 14-17.~~

37. NAT will not solicit customers via telemarketing. (Revised Application, page 10; Holoubek Testimony, page 11).

CENTURYLINK RESPONSE: Undisputed.

38. NAT will require all personnel to be trained in NAT's policies and procedures to ensure affirmative customer selection of service from NAT. (Revised Application, pages 10-11; Holoubek Testimony, page 11).

CENTURYLINK RESPONSE: ~~Disputed: CenturyLink, as a "customer" of access services, is forced to use NAT's access services — there is no "affirmative selection" of access services by IXCs. See Easton Direct at 5.~~

39. NAT will require customers to complete an order form and/or a Letter of Authorization ("LOA") selecting NAT as the customer's carrier, if a consumer is switching local service providers. (Revised Application, page 11; Holoubek Testimony, page 11).

CENTURYLINK RESPONSE: Undisputed as to non-IXCs. ~~However, CenturyLink, as a "customer" of access services, is forced to use NAT's access services — there is no "selection" of access services by IXCs. See Easton Direct at 5.~~

40. NAT will comply with all state and federal rules prohibiting the slamming of customers. (Revised Application, page 11; Holoubek Testimony, page 11).

CENTURYLINK RESPONSE: Undisputed, as to the term: "slamming."

41. NAT has never had a complaint filed against it with any state or federal commission regarding the unauthorized switching of a customer's telecommunications provider and the act of charging customers for services that have not been ordered. (Revised Application, page 11; Holoubek Testimony, page 11).

CENTURYLINK RESPONSE: Undisputed.

42. NAT will post the current rates, terms and conditions for its local and interexchange services offered in South Dakota on its website located at [www.NativeAmericanTelecom.com](http://www.NativeAmericanTelecom.com). (Revised Application, page 11; Holoubek Testimony, page 12).

CENTURYLINK RESPONSE: Undisputed.

43. NAT will notify customers by mail, email or telephone, depending upon the customer's expressed preference, as to how notification should be made, to apprise them of any changes in rates, terms and conditions of service. (Revised Application, page 11; Holoubek Testimony, page 12).

CENTURYLINK RESPONSE: Undisputed as to non-IXC "customers."

44. NAT is a tribally-owned telecommunications carrier currently providing service on the Reservation. (Revised Application, page 3; Holoubek Testimony, page 4).

CENTURYLINK RESPONSE: ~~See Response to Number 14, above.~~

45. In 1997, the Crow Creek Sioux Tribal Council established the Crow Creek Sioux Tribe Utility Authority ("Tribal Utility Authority") for the purpose of planning and overseeing utility services on the Reservation and to promote the use of these services "to improve the health and welfare of the residents." (Revised Application, page 4; Holoubek Testimony, page 5).

CENTURYLINK RESPONSE: Undisputed.

46. On October 28, 2008, the Tribal Utility Authority entered its *Order Granting Approval to Provide Telecommunications Service* ("Approval Order"). (Revised Application, page 4; Holoubek Testimony, page 5).

CENTURYLINK RESPONSE: Undisputed.

47. Under this Approval Order, NAT was "granted authority to provide telecommunications service on the . . . Reservation subject to the jurisdiction of the laws of the Crow Creek Sioux Tribe." (Revised Application, page 4; Holoubek Testimony, pages 5-6).

CENTURYLINK RESPONSE: Undisputed

48. NAT currently provides service on the Reservation pursuant to this Approval Order. (Revised Application, page 3; Holoubek Testimony, page 4).

CENTURYLINK RESPONSE: CenturyLink does not dispute that NAT currently provides service on the Reservation.

49. NAT currently provides high-speed Internet access, basic telephone, and long-distance services on and within the Reservation. (Revised Application, page 3; Holoubek Testimony, page 5).

CENTURYLINK RESPONSE: ~~CenturyLink disputes the completeness of this statement. As shown in Mr. Easton's Testimony, NAT has admitted that it will engage in "access stimulation" activities in the area in which it seeks certification, and that the intended goal of such schemes is to obtain inflated access revenues from IXCs such as CenturyLink. See Easton Direct, pp. 4-5, 16.~~

50. NAT has physical offices, telecommunications equipment, and telecommunications towers on the Reservation. (Revised Application, page 5; Holoubek Testimony, page 6).

CENTURYLINK RESPONSE: Undisputed.

51. NAT provides a computer training facility with free Internet and telephone service to tribal members. (Revised Application, page 5; Holoubek Testimony, page 6).

CENTURYLINK RESPONSE: ~~Disputed on the basis of Sprint's evidence that the computer training facility has not opened. Farrar Direct, Ex. 4, p. 150.~~

52. NAT provides 110 high-speed broadband and telephone installations at residential and business locations on the Reservation. (Revised Application, page 5; Holoubek Testimony, page 7).

CENTURYLINK RESPONSE: ~~CenturyLink disputes the completeness of this statement. As shown in Mr. Easton's Testimony, NAT has admitted that it will engage in "access~~

~~stimulation" activities in the area in which it seeks certification, and that the intended goal of such schemes is to obtain inflated access revenues from IXCs such as CenturyLink. See Easton Direct, pp. 4-5, 16.~~

53. NAT has established an Internet Library with six (6) work stations that provide computer/Internet opportunities for residents that do not otherwise have access to computers. (Revised Application, page 5; Holoubek Testimony, page 7).

CENTURYLINK RESPONSE: Undisputed.

54. NAT has years of managerial and technical experience in providing the telecommunications services proposed in its Revised Application. (Holoubek Testimony, page 13).

CENTURYLINK RESPONSE: ~~CenturyLink disputes the inference that NAT's managerial capabilities should be considered without reference to its access stimulation activities, and whether acting contrary to the public interest shows an absence of managerial ability. See CenturyLink's Brief in Opposition to NAT's Motion for Summary Judgment -- Legal Standards Governing Nat's Application For Certification.~~

55. Patrick Chicas ("Chicas") is the Chief Technical Officer for NAT. (Application-Exhibit B).

CENTURYLINK RESPONSE: Undisputed.

56. Chicas' business address is 410 South Rampart, Suite 390, Las Vegas, Nevada 89145.

CENTURYLINK RESPONSE: Undisputed.

57. Chicas has overall responsibility for NAT's strategic guidance, network operations, and network planning and engineering. (Application-Exhibit B).

CENTURYLINK RESPONSE: Undisputed.

58. Chicas also serves as President and a Managing Director for Wide Voice, LLC. (Application-Exhibit B).

CENTURYLINK RESPONSE: Undisputed.

59. From September 2003 to April 2009, Chicas was a co-founder and Chief Technology Officer of Commpartners, Inc., a nationwide CLEC. (Application-Exhibit B).

CENTURYLINK RESPONSE: Undisputed.

60. From August 2000 to November 2003, Chicas was the president, co-chairman, and a member of the board at Rubicon Media Group, a sector pioneering Internet publishing concern recently sold to Advanstar Communications, Inc. (Application-Exhibit B).

CENTURYLINK RESPONSE: Undisputed.

61. From March 1999 to August 2000, Chicas was the vice president for Data Services at Mpower Communications. (Application-Exhibit B).

CENTURYLINK RESPONSE: Undisputed.

62. While at Mpower, Chicas designed the company's entire IP infrastructure and the first production VoIP (Voice Over Internet Protocol) network for small business services. (Application-Exhibit B).

CENTURYLINK RESPONSE: Undisputed.

63. From January 1997 to September 1998, Chicas was the first executive hire and vice president of operations at Digital Island, Inc. (Application-Exhibit B).

CENTURYLINK RESPONSE: Undisputed.

64. Chicas also has prior telecommunications experience with Pacific Bell (now AT&T), PacTel Cellular (now Verizon), and GTE Mobilnet (now Verizon). (Application-Exhibit B).

CENTURYLINK RESPONSE: Undisputed.

65. Jeff Holoubek ("Holoubek") is NAT's acting president. (Application-Exhibit B; Holoubek Testimony, page 2).

CENTURYLINK RESPONSE: Undisputed.

66. Holoubek received his law degree from the Boston University School of Law. (Application-Exhibit B; Holoubek Testimony, page 3).

CENTURYLINK RESPONSE: Undisputed.

67. Holoubek received his Masters of Business Administration (M.B.A.) from California State University-Fullerton. (Application-Exhibit B; Holoubek Testimony, page 3).

CENTURYLINK RESPONSE: Undisputed.

68. Holoubek holds Bachelor of Arts degrees in Accounting, Finance, and Philosophy. (Holoubek Testimony, page 3).

CENTURYLINK RESPONSE: Undisputed.

69. NAT is not a publicly-held entity. (Holoubek Testimony, page 14).

CENTURYLINK RESPONSE: Undisputed.

70. NAT has provided its "confidential financial documents" for the Commission's analysis and review. (Holoubek Testimony, page 14).

CENTURYLINK RESPONSE: Undisputed.

71. The "confidential financial documents" provided by NAT to the Commission include (1) NAT's Balance Statements and (2) NAT's Profit & Loss Statements (through December 31, 2011). (Affidavit of Scott R. Swier in Support of NAT's Motion for Summary Judgment, ¶ 6).

CENTURYLINK RESPONSE: Undisputed.

72. NAT is committed and prepared to allocate the necessary resources to provide high-quality telecommunications services to its customers. (Holoubek Testimony, page 14).

~~CENTURYLINK RESPONSE: CenturyLink disputes the completeness of this statement. As shown in Mr. Easton's Testimony, NAT has admitted that it will engage in "access stimulation" activities in the area in which it seeks certification, and that the intended goal of such schemes is to obtain inflated access revenues from IXCs such as CenturyLink. See Easton Direct, pp. 4-5, 16.~~

Dated: April 11, 2012.

Respectfully submitted,

By: /s/ Todd Lundy  
Todd L. Lundy (Admitted Pro Hac Vice)  
CenturyLink Law Department  
1801 California St., #1000  
Denver, CO 80202  
Telephone: 303-992-2510  
todd.lundy@centurylink.com

And

Christopher W. Madsen  
Boyce, Greenfield, Pashby & Welk, L.L.P.  
300 S. Main Avenue  
P.O. Box 5015  
Sioux Falls, SD 57117-5015  
Main: (605) 336-2424  
Direct: (605) 731-0202  
Fax: (605) 334-0618

**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA**

IN THE MATTER OF THE APPLICATION ) Docket No. TC11-087  
OF NATIVE AMERICAN TELECOM, LLC )  
FOR A CERTIFICATE OF AUTHORITY TO )  
PROVIDE LOCAL EXCHANGE SERVICE )  
WITHIN THE STUDY AREA OF )  
MIDSTATE COMMUNICATIONS, INC. )

**Sprint Communications Company L.P.**

**Direct Testimony of Randy G. Farrar**

**Filed March 26, 2012**

**PUBLIC VERSION**

1254



## Table of Contents

I.	Introduction .....	1
II.	Purpose and Scope of Testimony .....	5
III.	NAT-CC Is Providing Service Without a Certificate .....	7
IV.	NAT-CC Is a Sham Entity .....	9
V.	Financial Analysis .....	19
	A. CCST Profitability .....	19
	B. NATE, WideVoice, and Free Conference Profitability .....	24
	C. CCST Vs. NATE, WideVoice, and Free Conference Profitability .....	27
	D. Future Financial Viability of NAT-CC .....	28
VI.	Summary and Conclusion .....	34



1           and special access, reciprocal compensation and other  
2           telecommunications issues at both the state and federal level.

3           - 2005 to 2011: Senior Manager – Interconnection Support. I provided  
4           interconnection support, and financial, economic, and policy analysis  
5           concerning interconnection and reciprocal compensation issues.

6           - 1997 to 2005: Senior Manager – Network Costs. I was an instructor  
7           for numerous training sessions designed to support corporate policy on  
8           pricing and costing theory, and to educate and support the use of  
9           various costing models. I was responsible for the development and  
10          support of switching, transport, and financial cost models concerning  
11          reciprocal compensation, unbundled network elements, and wholesale  
12          discounts.

13          - 1992 to 1997: Manager - Network Costing and Pricing. I performed  
14          financial analyses for various business cases, analyzing the profitability  
15          of entering new markets and expanding existing markets, including  
16          Custom Calling, Centrex, CLASS and Advanced Intelligent Network  
17          features, CPE products, Public Telephone and COCOT, and intra-  
18          Local Access and Transport Area ("LATA") toll. Within this time frame,  
19          I was a member of the USTA's Economic Analysis Training Work  
20          Group (1994 to 1995).

21          - 1987 to 1992: Manager - Local Exchange Costing. Within this time  
22          frame I was a member of the United States Telephone Association's

1 (USTA) New Services and Technologies Issues Subcommittee (1989  
2 to 1992).

3 - 1986 to 1987: Manager - Local Exchange Pricing. I investigated  
4 alternate forms of pricing and rate design, including usage sensitive  
5 rates, extended area service alternatives, intraLATA toll pricing, and  
6 lifeline rates.

7 - 1983 to 1986: Manager - Rate of Return, which included presentation  
8 of written and/or oral testimony before state public utilities  
9 commissions in Iowa, Nebraska, South Carolina, and Oregon.

10

11 I was employed by the Public Utilities Commission of Ohio from 1978 to  
12 1983. My positions were Financial Analyst (1978 - 1980) and Senior  
13 Financial Analyst (1980-1983). My duties included the preparation of Staff  
14 Reports of Investigation concerning rate of return and cost of capital. I also  
15 designed rate structures, evaluated construction works in progress,  
16 measured productivity, evaluated treatment of canceled plant, and  
17 performed financial analyses for electric, gas, telephone, and water utilities.  
18 I presented written and oral testimony on behalf of the Commission Staff in  
19 over twenty rate cases.

20

21 **Q. What are your responsibilities in your current position?**

22 A. I provide financial, economic, and analysis concerning policy,  
23 interconnection, switched and special access, reciprocal compensation, and

1 other telecommunications issues at both the state and federal level. I  
2 maintain a working understanding of the interconnection and intercarrier  
3 compensation provisions of the Communications Act of 1934 as amended  
4 most recently by the Telecommunications Act of 1996 ("the Act" or "the  
5 1996 Act") and the resulting rules and regulations of the Federal  
6 Communications Commission ("FCC").

7

8 **Q. Have you provided testimony before other regulatory agencies?**

9 A. Yes. In addition to my previously referenced testifying experience, since  
10 1995 I have presented written or oral testimonies or affidavits before twenty-  
11 seven state regulatory agencies (Illinois, Pennsylvania, New Jersey, Florida,  
12 North Carolina, Nevada, Texas, Georgia, Arizona, New York, Oklahoma,  
13 Missouri, Virginia, Iowa, Kentucky, Ohio, South Dakota, Tennessee,  
14 Minnesota, Arkansas, Oregon, Colorado, Alabama, Louisiana, California,  
15 Wisconsin, and Connecticut) and the FCC, concerning interconnection  
16 issues, reciprocal compensation, access reform, universal service, the  
17 avoided costs of resold services, local competition issues such as the cost  
18 of unbundled network elements, and economic burden analyses in the  
19 context of Incumbent Local Exchange Carrier ("ILEC")-claimed rural  
20 exemptions.

21

1 **II. Purpose and Scope of Testimony**

2

3 **Q. On whose behalf are you testifying?**

4 A. I am testifying on behalf of Sprint Communications Company L.P. ("Sprint"),  
5 a subsidiary of Sprint Nextel Corporation.

6

7 **Q. What is the purpose of this proceeding?**

8 A. On October 11, 2011, Native American Telecom, LLC ("NAT-CC")<sup>1</sup> applied  
9 to the South Dakota Public Utilities Commission ("Commission") for a state  
10 Certificate of Authority to provide competitive local exchange service on the  
11 Crow Creek Reservation. This is the second time that NAT-CC has applied  
12 for such a Certificate, the first time being on September 8, 2008; but, that  
13 application was voluntarily withdrawn after Sprint and other parties  
14 intervened to oppose that application.

15

16 This hearing is to determine whether NAT-CC's second request should be  
17 granted.

18

19 ~~**Q. What is the purpose of your Direct Testimony?**~~

---

<sup>1</sup> The acronym "NAT-CC," i.e., NAT-Crow Creek, is used in the April 1, 2009 *Joint Venture Agreement* to reference Native American Telecom, LLC. This testimony will use that acronym to better distinguish NAT-CC from NATE (Native American Telecom Enterprise, LLC), a non-tribal entity.

1 ~~A. The purpose of my Direct Testimony is to demonstrate to the Commission~~  
2 ~~that NAT-CC is a sham entity, established for the sole purpose of "traffic~~  
3 ~~pumping." It is not in the public interest to grant this Certificate.~~  
4  
5 ~~First, as pointed out by the FCC in its recent Connect America Order,<sup>2</sup>~~  
6 ~~"traffic pumping" is not in the public interest. As discussed in Section V.B,~~  
7 ~~the FCC has taken deliberate steps to end the practice~~  
8  
9 ~~Second, the Joint Venture Agreement<sup>3</sup> between (1) the Crow Creek Sioux~~  
10 ~~Tribe ("CCST"), (2) Native American Telecom Enterprise, LLC ("NATE"),~~  
11 ~~and (3) WideVoice Communications, Inc. ("WideVoice" or "WVO"), is~~  
12 ~~deliberately and intentionally designed for only one purpose – to promote~~  
13 ~~NAT-CC's "traffic pumping" business and to enrich NATE and WideVoice.~~  
14  
15 ~~Third, the Service Agreement between NAT-CC and Free Conference is~~  
16 ~~deliberately and intentionally designed for only one purpose – to promote~~  
17 ~~NAT-CC's "traffic pumping" business and to enrich Free Conference.<sup>4</sup>~~  
18

<sup>2</sup> ~~In the Matter of Connect America Fund, et al; WC Docket No. 10-90, et al; FCC 11-161; Report and Order and Further Notice of Proposed Rulemaking, Adopted October 27, 2011, Released November 19, 2011 (Connect America Order).~~

<sup>3</sup> ~~Joint Venture Agreement, April 1, 2009, By And Between Crow Creek Sioux Tribe And Native American Telecom Enterprise, LLC And WideVoice Communications, Inc. ("Joint Venture Agreement"). See Exhibit RCF-1.~~

<sup>4</sup> ~~Service Agreement By and Between: Native American Telecom – Crow Creek and Free Conferencing Corporation, effective July 1, 2009 – June 30, 2012 (Service Agreement). See Exhibit RCF-2.~~

1 ~~Fourth, NAT CC's "traffic pumping" business harms Sprint and Sprint's~~  
2 ~~customers (many of whom live in South Dakota) by increasing its costs of~~  
3 ~~doing business; e.g., forcing Sprint to augment its transport facilities, by~~  
4 ~~increasing its legal and regulatory expenses, and by billing Sprint grossly~~  
5 ~~inflated amounts of switched access traffic.~~

6  
7 ~~Finally, and most importantly, NAT CC provides virtually no financial benefit~~  
8 ~~to CCST. NAT CC exists to benefit only three entities: NATE, WideVoice,~~  
9 ~~and Free Conference. Due to actions taken by the FCC in the Connect-~~  
10 ~~America Order, the NAT CC business model will be made unsustainable in~~  
11 ~~four or five years. At that time, NAT CC will be forced to exit the South~~  
12 ~~Dakota market, leaving CCST with negligible benefits and potentially,~~  
13 ~~significant liabilities.~~

14  
15 ~~III. NAT CC is Providing Service Without a Certificate~~

16  
17 ~~Q. Does NAT CC have a Certificate of Authority to provide competitive~~  
18 ~~local exchange service to non-tribal members on the Crow Creek~~  
19 ~~Reservation?~~

20 ~~A. No, NAT CC does not have a Certificate of Authority to provide competitive~~  
21 ~~local exchange service to non-tribal members on the Crow Creek~~  
22 ~~Reservation.~~

23

1 Q. Has NAT-CC requested such a Certificate?

2 A. Yes, NAT-CC has request such a Certificate on two occasions. First, on  
3 September 8, 2008, NAT-CC applied to the Commission for a Certificate.  
4 However, on October 28, 2008, after NAT-CC obtained authorization from  
5 the Tribal Utility Authority, NAT-CC withdrew its application from the  
6 Commission.

7  
8 Second, on October 11, 2011, NAT-CC reapplied to the Commission for a  
9 Certificate. This hearing is a result of that second application.

10

11 Q. ~~Is NAT-CC providing service to a non-tribal member without a~~  
12 ~~Certificate?~~

13 A. ~~Yes, NAT-CC has been providing service to Free Conference, a non-tribal~~  
14 ~~member, without a Certificate since approximately December 2009.<sup>5</sup> Note~~  
15 ~~that NAT-CC affirmed that Free Conference is not a tribal member.<sup>6</sup> Also,~~  
16 ~~NAT-CC contends that it does not have to determine whether its services~~  
17 ~~are being provided to non-tribal members or to customers of CCST.<sup>7</sup>~~

18

19 ~~In NAT-CC's current application, it is essentially asking the Commission for~~  
20 ~~permission to continue doing what it has been doing, without permission, for~~  
21 ~~more than two years.~~

<sup>5</sup> It is Sprint's position that Free Conference is not an end user.

<sup>6</sup> See NAT-CC's response to Sprint Request For Admission No. 2, Exhibit RGF-3.

<sup>7</sup> NAT-CC's Response to Sprint's Discovery Requests Nos. 1 and 3, and Request for Admission No. 1, Exhibit RGF-5.

1

2 Q. ~~Does NAT-CC require a Certificate in order to provide service to a~~  
3 ~~non-tribal member?~~

4 A. ~~Sprint has taken the position that NAT-CC needs a Certificate to provide~~  
5 ~~service to non-tribal members. Ultimately, that is a legal question that~~  
6 ~~Sprint's attorneys will brief. However, apparently NAT-CC now believes it~~  
7 ~~needs such a Certificate why else would NAT-CC make the application?~~

8

9 Q. ~~Do you believe it is in the public interest to give a Certificate to a~~  
10 ~~company that has been willfully operating, perhaps illegally, without a~~  
11 ~~certificate for over two years?~~

12 A. ~~No, I do not believe it is in the public interest to give a Certificate to a~~  
13 ~~company that has been willfully operating, perhaps illegally, without a~~  
14 ~~certificate for over two years.~~

15

16 ~~IV. NAT-CC is a Sham Entity~~

17

18 Q. Please describe the creation of NAT-CC and the *Joint Venture*  
19 *Agreement*.

20 A. On August 26, 2008, NAT-CC was organized under the laws of South  
21 Dakota by the Los Angeles office of Legalzoom.com Inc. Per the NAT-CC  
22 Articles of Incorporation, its two founders were Gene DeJordy and Tom

1 Reiman, who are non-tribal members. Thus, NAT-CC was initially created  
2 without any involvement by the CCST.<sup>8</sup>

3  
4 On September 8, 2008, NAT-CC applied to the Commission for a state  
5 Certificate of Authority to provide competitive local exchange service on the  
6 Crow Creek Reservation. That application described NAT-CC as "a joint  
7 venture with the Crow Creek Sioux Tribe ... to provide service only within  
8 the exterior boundaries of the Crow Creek Indian Reservation."

9  
10 On October 28, 2008, NAT-CC obtained authorization from the Tribal Utility  
11 Authority to provide LEC services within the Crow Creek Indian Reservation.  
12 NAT-CC then withdrew its application for a certificate from the Commission.

13  
14 On April 1, 2009, the NAT-CC *Joint Venture Agreement* was signed by  
15 CCST, NATE, and WideVoice.

16  
17 In April/May 2009, NAT-CC and Free Conference signed a *Service*  
18 *Agreement* making Free Conference the sole provider of conferencing  
19 service for NAT-CC.<sup>9</sup>

20

---

<sup>8</sup> Preliminary Injunction Transcript, Sprint Communications Company L.P. v. Native American Telecom, U.S. Court Dist. Of S.D., Case 10-4110, (Oct. 14, 2010) ("Oct. 24, 2010 Tr."), Exhibit RGF-4. See also NAT Articles of Organization, Exhibit RGF-5.

<sup>9</sup> *Service Agreement*, paragraph 6.

1 On October 11, 2011, for the second time NAT-CC applied to the  
2 Commission for a state Certificate of Authority to provide competitive local  
3 exchange service on the Crow Creek Reservation.  
4

5 ~~Q. The Direct Testimonies of Jeff Holoubek and Carey Reesol on behalf of~~  
6 ~~NAT-CC both describe the benefits to the CCST provided by NAT-CC.~~  
7 ~~Do you agree with the conclusion of their testimonies?~~

8 A. ~~No. I believe that NAT-CC has brought very little benefit to the CCST, at too~~  
9 ~~high of a cost. NAT-CC has, however, provided significant financial benefit~~  
10 ~~to NATE, WideVoice, Free Conference. In fact, it would appear from the~~  
11 ~~terms of the Joint Venture Agreement, that the sole purpose of NAT-CC is~~  
12 ~~to enrich NATE, WideVoice, and Free Conference.~~

13  
14 Q. Please describe the ownership interest in Native American Telecom  
15 ("NAT-CC").

16 A. Per the *Joint Venture Agreement* dated April 1, 2009. NAT-CC has the  
17 following legal ownership:

- 18 • CCST owns 51% of NAT-CC,
- 19 • NATE, which is owned by non-tribal members Tom Reiman and  
20 Gene DeJordy, owns 25% of NAT-CC, and
- 21 • WideVoice, which is a Nevada corporation that operates an end  
22 office switch in California, owns 24% of NAT-CC. It is owned by

1 non-tribal members including Dave Erickson (who also owns Free  
2 Conference, the sole provider of conferencing services for NAT-CC).

3  
4 ~~However, as discussed below, CCST's 51% ownership results in little~~  
5 ~~meaningful control over NAT-CC, and has resulted in no financial benefit.~~

6  
7 ~~Q Does CCST receive any meaningful financial benefit from NAT-CC~~  
8 ~~under the terms of the Joint Venture Agreement?~~

9 A. ~~No. While the terms of the Joint Venture Agreement assigns 51%~~  
10 ~~ownership to CCST, in reality CCST receives no financial benefit.~~

11  
12 ~~First, NATE & WideVoice get to skim off 15% of "Gross Revenue" before~~  
13 ~~CCST sees a dime. Specifically, the Joint Venture Agreement states:~~

14 ~~**Section 6.06 WVC and NATE Cost Passthrough Escrow for**~~  
15 ~~**On Going Operation and Maintenance Costs:**~~  
16 ~~NATE and WVC will incur expenses related to the operation and~~  
17 ~~maintenance of the Crow Creek telecommunications network that may~~  
18 ~~not be readily segregated from the other operation and maintenance~~  
19 ~~expenses incurred by NATE and WVC. To cover such expenses, 15%~~  
20 ~~of gross revenue of NAT-CC shall be set aside and placed in an~~  
21 ~~escrow account for the benefit of NATE and WVC. (Bold emphasis~~  
22 ~~added except title.)~~

23  
24 ~~Second, NAT-CC has agreed to pay up to 85% of the switched access~~  
25 ~~revenue it receives directly to Free Conference, which is owned and~~  
26 ~~controlled by the same parties as WideVoice. Specifically, the Service~~  
27 ~~Agreement states:~~

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29

~~9. Marketing Fee and Payment Terms. NAT-CC shall pay FCC a marketing fee at a rate per minute of IXC traffic terminating on FCC's equipment in accordance with the schedule set forth on Exhibit B.~~

~~Exhibit B - Marketing Fee Schedule~~

<del>Minutes Per Month</del>	<del>Rate per Minute</del>
<del>0 - 15,000,000</del>	<del>(73% of Gross Tariff)</del>
<del>15,000,001 - 25,000,000</del>	<del>(85% of Gross Tariff)</del>
<del>25,000,001 and above</del>	<del>(95% of Gross Tariff)</del>

~~Third, it is not clear if CCST receives any of the switched access revenues not paid directly to Free Conference. CCST is only allowed its share of predefined "Net Profits," which are narrowly defined by the Joint Venture Agreement. Specifically, the Joint Venture Agreement states.~~

~~Section 6.04 Net Profits.~~

~~Net Profits is defined as: (1) revenue generated from the provision of service to end user customers, including payments and universal service support, but does not include other sources of revenue, such as access charges, related to services provided by third party businesses to locate on the reservation unless separately identified as NAT-CC revenue in an arrangement with third party businesses; minus (2) costs associated with the build-out, operation and maintenance of the telecommunications network on the Crow Creek reservation, including repayment of debt, interest, taxes, and maintenance and operations expenses. (Bold emphasis added - except title)~~

~~In addition, CCST may be denied any "end user" revenue which Free Conference, a "third party business, may pay to NAT-CC.~~

1 ~~It also appears that CCST may not be able to realize any ongoing financial~~  
2 ~~benefit from end-user revenues generated from tribal members living on the~~  
3 ~~reservations because tribal members receive service at no charge.<sup>10</sup>~~

4  
5 ~~These financial restrictions on CCST are particularly important in light of the~~  
6 ~~ongoing disputes between NAT-CC and the IXCs. In its 2011 FCC Form~~  
7 ~~499-A (which contains 2010 revenue information), NAT-CC reports~~  
8 ~~"Uncollectible revenue" of \$3,030,146 in 2010.<sup>11</sup> This is undoubtedly billed,~~  
9 ~~but uncollected charges to the IXCs in 2010. In the unlikely scenario that~~  
10 ~~NAT-CC collects any of these charges,<sup>12</sup> it is not clear whether CCST would~~  
11 ~~receive any of this revenue per the terms of the Joint Venture Agreement.~~

12  
13 Q. ~~Does CCST have any meaningful decision making or operational~~  
14 ~~control over NAT-CC, or ability to influence financial decisions?~~

15 A. ~~No. CCST has virtually no meaningful control over NAT-CC, despite its~~  
16 ~~51% legal ownership.~~

17

<sup>10</sup> Preliminary Injunction Transcript, *Sprint Communications Company L.P. v. Native American Telecom*; U.S. District Court, District of South Dakota, Case 10-4110, March 3, 2011 ("Mar. 3, 2011 Tr.") Tr. P. 150, Exhibit RGF-6.

<sup>11</sup> NAT-CC's 2011 FCC Form 499-A, Line 421: Uncollectible revenue/bad debt expense associated with gross billed revenues amounts shown on Line 419 [See Instructions], Exhibit RGF-7.

<sup>12</sup> The FCC's *Connect America Order* does not address retroactive payments.

1 ~~First, despite 51% ownership, the terms of the Joint Venture Agreement~~  
2 ~~give CCST only three of the nine seats on the Board of Directors.~~

3 ~~Specifically, the Joint Venture Agreement states:~~

4 ~~**Section 8.01 Board of Directors.**~~

5 ~~The Board of Directors shall consist of Nine (9) members. Three (3)~~  
6 ~~members of NAT-CC's Board of Directors shall be designated by~~  
7 ~~CCST.~~

8  
9 ~~Second, CCST has no control over the day to day operations of the~~  
10 ~~NAT-CC network, even when it directly affects the Crow Creek Indian~~  
11 ~~Reservation and its Citizens. This control is reserved solely in the hands of~~  
12 ~~NATE. If a dispute arises on this issue, CCST has only three of nine votes.~~

13 ~~Specifically, the Joint Venture Agreement states:~~

14 ~~**Section 6.07 Voting Rights.**~~

15 ~~(b) Regarding decisions affecting the regular and ordinary operations~~  
16 ~~of the CLEC and the CLEC network, NATE shall have the authority~~  
17 ~~to make decisions concerning the regular and ordinary~~  
18 ~~operations of the CLEC and CLEC Network as it affects the Crow~~  
19 ~~Creek Indian Reservation, its Citizens and Customers. Where~~  
20 ~~disagreements, disputes or conflicts arise regarding the operations of~~  
21 ~~the CLEC and CLEC Network, resolution will be accomplished through~~  
22 ~~a Majority Rule vote of the designated Board of Directors, each director~~  
23 ~~having one equally weighted vote. (Bold emphasis added, except~~  
24 ~~title).~~

25  
26 ~~Third, CCST has no control over the technical aspects of the NAT-CC~~  
27 ~~network, including "traffic pumping." This control is reserved solely in the~~  
28 ~~hands of WideVoice. If a dispute arises on this issue, CCST has only three~~  
29 ~~of nine votes. Specifically, the Joint Venture Agreement states:~~

30 ~~**Section 6.07 Voting Rights.**~~

31 ~~(c) WVC shall have authority over the normal operations of NAT-CC as~~  
32 ~~it affects the technical aspects of NAT-CC including but not limited to~~

1 ~~traffic flow over the Network. Where disagreements, disputes or~~  
2 ~~conflicts arise regarding the operations of the CLEC and CLEC~~  
3 ~~Network, resolution will be accomplished through a Majority Rule Vote~~  
4 ~~of the designated Board of Directors, each director having one equally~~  
5 ~~weighted vote. (Bold emphasis added - except title.)~~  
6

7 ~~Note that the reference to "traffic flow over the Network" includes NAT CC's~~  
8 ~~"traffic pumping" business, in which NATE and WideVoice maintain total~~  
9 ~~operational and financial control under the terms of the Joint Venture~~  
10 ~~Agreement.~~

11  
12 ~~Finally, CCST only has 51% voting rights in matters that deal directly with~~  
13 ~~tribal matters. Specifically, the Joint Venture Agreement states:~~

14 ~~Section 6.07 Voting Rights.~~  
15 ~~(a) Regarding decisions affecting the physical health and financial~~  
16 ~~success and wellbeing of the Crow Creek Indians Reservation and~~  
17 ~~its Citizens, CCST shall have 51% ....~~  
18

19 ~~However, given the previous limitations of CCST's involvement in NAT-CC's~~  
20 ~~operations, this "right" is essentially meaningless.~~

21  
22 Q. ~~What is your conclusion concerning the terms of the Joint Venture~~  
23 ~~Agreement and the testimony of Jeff Holubek and Gary Roesel on~~  
24 ~~behalf of NAT-CC?~~

25 A. ~~Despite NAT-CC being described as a joint, tribally-owned venture,~~  
26 ~~designed to bring financial benefits to CCST, the Joint Venture Agreement~~  
27 ~~is, in fact, deliberately and intentionally designed to leave all meaningful~~  
28 ~~control in the hands of NATE and WideVoice.~~

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19

~~More importantly, the Joint Venture Agreement is deliberately and intentionally designed to leave all financial benefit in the hands of NATE, WideVoice, and Free Conference.~~

~~Q. Please discuss the role of Free Conference in NAT-CC.~~

~~A. The role of Free Conference cannot be understated and is key to understanding how and why NAT-CC was created.~~

- ~~• Per the Service Agreement, Free Conference is the sole provider of conferencing services for NAT-CC.<sup>13</sup>~~
- ~~• Free Conference, which provides the "free" conferencing services essential to "traffic pumping," is owned and controlled by Dave Erickson.<sup>14</sup>~~
- ~~• Dave Erickson owns and controls WideVoice, which in turn means that Dave Erickson owns and controls a significant portion of NAT-CC.<sup>15</sup>~~
- ~~• In July 2010, Mr. Carlos Costero, an employee of Free Conferencing, took over as controller for NAT-CC. He acts as controller for NAT-CC, Free Conferencing, WideVoice, and three other entities owned by Dave Erickson.<sup>16</sup> He is not being paid by NAT-CC.<sup>17</sup> Mr. Costero~~

<sup>13</sup> Service Agreement, paragraph 6.  
<sup>14</sup> Mar. 3, 2011 Tr. p. 67.  
<sup>15</sup> Mar. 3, 2011 Tr. p. 67.  
<sup>16</sup> Mar. 3, 2011 Tr. p. 13-16, 20-21.  
<sup>17</sup> Mar. 3, 2011 Tr. p. 20.

1 ~~opened two new NAT-CC bank accounts, for which only WideVoice~~  
2 ~~employees have access (and NATE employees do not).<sup>18</sup>~~  
3 • ~~In 2010, Mr. Jeff Holoubek, the Director of Legal and Finance for Free~~  
4 ~~Conferencing, became President of NAT-CC without even a vote taken~~  
5 ~~by the NAT-CC Board of Directors.<sup>19</sup>~~  
6 • ~~In 2010 and 2011, WideVoice made loans to NAT-CC in order to pay~~  
7 ~~for day to day operations.<sup>20</sup> When AT&T made a large payment to~~  
8 ~~NAT-CC in January 2011, Mr. Holoubek simply directed Mr. Cestero to~~  
9 ~~use most of that payment to payback some of the WideVoice loans.<sup>21</sup>~~  
10 ~~This is not in accordance with the Service Agreement that requires that~~  
11 ~~75% - 95% of this amount be paid to Free Conference, and the~~  
12 ~~balance retained by NAT-CC.~~  
13 • ~~Free Conference is the only conference calling company with which~~  
14 ~~NAT-CC is in business. In fact, the Service Agreement prohibits~~  
15 ~~NAT-CC from doing business with any other conference calling~~  
16 ~~company.<sup>22</sup> In 2010 and 2011, NAT-CC paid Free Conference [Begin~~  
17 ~~Confidential] \$ [REDACTED] in "Marketing Fees,"<sup>23</sup> which is actually a~~  
18 ~~sharing of switched access revenues [End Confidential].~~  
19

<sup>18</sup> Mar 3, 2011 Tr. p. 70.

<sup>19</sup> Mar 3, 2011 Tr. p. 68.

<sup>20</sup> March 3, 2011 Tr. Exh. 26.

<sup>21</sup> March 3, 2011 Tr. p. 98.

<sup>22</sup> Service Agreement, paragraph 6.

<sup>23</sup> NAT-CC's 2010 and 2011 Financial Statements, Exhibit RGF-8.

1 Q. ~~What other evidence is there that NAT CC was established as a sham~~  
2 ~~entity for the purpose of bilking Sprint and other IXCs as part of its~~  
3 ~~traffic pumping scheme?~~

4 A. ~~As referenced above, NAT CC does not charge traditional end users for~~  
5 ~~service. Also, according to the Service Agreement, NAT CC is not charging~~  
6 ~~anything for services and connectivity it provides to Free Conference.<sup>24</sup>~~

7 ~~NAT CC's business plan is to rely on the billing of access charges to IXCs.~~

8 ~~Mr. Reiman testified on this point. Specifically, he stated:~~

9 ~~[w]e bill [the IXCs], and that's how this whole big picture works. That's~~  
10 ~~how [sic] the business model is based on.<sup>25</sup>~~  
11

12 ~~Mr. DeJordy also has commented on the point that the business was~~

13 ~~established for the purpose of billing access charges. Specifically, he~~

14 ~~stated:~~

15 ~~[the] business model is largely dependent on the use of~~  
16 ~~FreeConferenceCall and other services that use its networks to~~  
17 ~~terminate calls.<sup>26</sup>~~  
18

## 19 V. Financial Analysis

20

### 21 A. CCST Profitability

22

23 Q. Have you reviewed the financial statements for NAT CC?

<sup>24</sup> Service Agreement, at paragraph 22.

<sup>25</sup> Oct. 14, 2010 Tr. p. 66.

<sup>26</sup> <http://blog.freeconferencecall.com/?paged=7>.

1 ~~A. Yes. I have reviewed the Balance Sheet and Income Statement (Profit &~~  
2 ~~Loss) for NAT-CC for 2010 and 2011. I have concluded that, consistent~~  
3 ~~with the terms of the Joint Venture Agreement, CCST has not financially~~  
4 ~~benefitted from its ownership in NAT-CC, while NATE, WideVoice, and Free~~  
5 ~~Conference are reaping significant windfalls from NAT-CC.~~

6  
7 ~~Q. What percent ownership does the CCST have in NAT?~~

8 ~~A. As discussed above, the CCST owns 51% of NAT-CC. I will use this 51%~~  
9 ~~ownership in the following analysis.~~

10

11 ~~4. Balance Sheet~~

12

13 ~~Q. Analyzing NAT-CC's Balance Sheet as of December 31, 2011, has the~~  
14 ~~CCST financially benefitted from its ownership position in NAT-CC?~~

15 ~~A. No. Through December 31, 2011, the CCST has not financially benefitted~~  
16 ~~from its ownership in NAT-CC. In fact, the CCST has lost substantial value~~  
17 ~~from this business. As of December 31, 2011.~~

18

[Begin Confidential]

- 19 • ~~CCST's share of equity investment is \$ [REDACTED] due~~  
20 ~~primarily to [REDACTED] in 2010 and 2011,~~  
21 • ~~CCST's share of an outstanding long term debt to WideVoice~~  
22 ~~Communications is \$ [REDACTED] and~~  
23 • ~~CCST's share of "Total Assets" is only \$ [REDACTED].~~

1 [End Confidential]

2

3 Thus, as summarized in Table 1, in just two years CCST has experienced a  
4 total loss in value of [Begin Confidential] \$ [redacted] [End Confidential].

5 [Begin Confidential]

6 Table 1

7 CCST 2010 and 2011 Change in Value

8

A	B	C
Row	Description	Amount
1	Equity Investment	[redacted]
2	Loan from WVC	[redacted]
3	Total Assets	[redacted]
4	Total Value	[redacted]

9

10

[End Confidential]

11

12 Q How did you arrive at these figures?

13 A As of December 31, 2011, NAT CC reports cumulative "Retained Earnings"

14 of [Begin Confidential] \$ [redacted], "Net Income" in 2011 of

15 [redacted] \$ [redacted] and "Shareholder Distributions" of [redacted] \$ [redacted].

16 which adds to "Total Equity" of [redacted] \$ [redacted]. Thus, CCST's 51%

17 ownership means that CCST's cumulative "Total Equity" investment in

18 NAT CC is worth [redacted] \$ [redacted] (\$ [redacted] \* 51%) [End

19 Confidential].

20

21 As of December 31, 2011, NAT CC also reports an outstanding loan from

22 WideVoice [Begin Confidential] \$ [redacted]. Thus, CCST's share of this

23 long-term liability is \$ [redacted] (\$ [redacted] \* 51%) [End Confidential].

24

1 Finally, NAT-CC reports "Total Assets" of ~~[Begin Confidential] \$ [REDACTED]~~.

2 Thus, CCST's share of "Total Assets" is only \$ [REDACTED] [~~\$ [REDACTED] \* 51%~~]

3 [End Confidential].

4

5 ~~2. Income Statement (Profit & Loss)~~

6

7 ~~Q. Analyzing NAT-CC's Income Statements (Profit & Loss) for 2010 and~~

8 ~~2011, has the CCST financially benefitted from its ownership position~~

9 ~~in NAT-CC?~~

10 A. ~~No, CCST has not financially benefitted from its ownership in NAT-CC. In~~

11 ~~fact, the CCST [Begin Confidential] [REDACTED] in~~

12 ~~both 2010 and 2011 [End Confidential].~~

13

14 ~~Even if NAT-CC was to report an operating profit, it is doubtful that CCST~~

15 ~~would realize any significant financial benefit. As already discussed in~~

16 ~~Section IV, under the terms of the Service Agreement, NAT-CC pays 75%~~

17 ~~95% of its access revenue directly to Free Conference.~~

18

19 ~~In addition, per the unreasonable terms of its Joint Venture Agreement,~~

20 ~~CCST is entitled to share only a small part of NAT-CC's total revenue~~

21 ~~sources.~~

22

1 ~~Specifically, the Joint Venture Agreement states that CCST is allowed only~~  
2 ~~a share of narrowly defined "Net Profits."~~

3 ~~**Section 6.04 Not Profits**~~

4 ~~Net Profits is defined as: (1) revenue generated from the provision of~~  
5 ~~service to end user customers, including payments and universal~~  
6 ~~service support, but does not include other sources of revenue, such~~  
7 ~~as access charges, related to services provided by third party~~  
8 ~~businesses to locate on the reservation unless separately identified as~~  
9 ~~NAT-CC revenue in an arrangement with third party businesses; minus~~  
10 ~~(2) costs associated with the build out, operation, and maintenance of~~  
11 ~~the telecommunications network on the Crow Creek reservation,~~  
12 ~~including repayment of debt, interest, taxes, and maintenance and~~  
13 ~~operations expenses.~~  
14

15 ~~Q. Looking at NAT-CC's 2010 and 2011 Income Statements, is there any~~  
16 ~~"Net Profits" attributable to CCST?~~

17 ~~A. NAT-CC financials indicate "End User Fee Income" of [Begin Confidential]~~  
18 ~~\$ [redacted] in 2010 and \$ [redacted] in 2011 [End Confidential]. Setting aside the~~  
19 ~~limitations on sharing "Net Profits" under the Joint Venture Agreement,~~  
20 ~~business expenses would have to be paid before CCST would receive its~~  
21 ~~51% share of its "Net Profits." Potential CCST "Net Profits" are further~~  
22 ~~limited because less than 10% of tribal members receive telephone service~~  
23 ~~from CCST,<sup>27</sup> and they receive that telephone service for free.<sup>28</sup> This is~~  
24 ~~supported by the fact that in March 2011, Peter Lengkeek, the Treasurer of~~  
25 ~~CCST, testified that CCST had received no money from NAT-CC.<sup>29</sup>~~

<sup>27</sup> See Mar. 2, 2011 Tr. pp. 151 and 154, where Mr. Lengkeek testified that there were approximately 115 installations of service. Compare that to the 2000 Census Data, included as Exhibit RGF-10, that shows a total Native American population on the CCST reservation of 1,936.

<sup>28</sup> Mar. 3, 2011 Tr. p. 150.

<sup>29</sup> Mar. 3, 2011 Tr. p. 171. "Q. My question to you was, isn't it true the Tribe has received no money from NAT. Isn't that correct? A: Yes."

1

2

~~B. NATE, WideVoice, and Free Conference Profitability.~~

3

4

~~Q. Have NATE, WideVoice, and Free Conference financially benefitted~~

5

~~from its ownership position in NAT-CC?~~

6

A. ~~Yes, NATE, WideVoice, and Free Conference have profited from their~~

7

~~investment in NAT-CC. The terms of the Joint Venture Agreement and~~

8

~~Service Agreement virtually guarantees that NATE, WideVoice, and Free~~

9

~~Conference will profit from NAT-CC. Using reasonable assumptions, I~~

10

~~estimate that in 2010 and 2011 alone, NATE, WideVoice, and Free~~

11

~~Conference collectively have realized a positive cash flow of approximately~~

12

~~[Begin Confidential] \$ [REDACTED] [End Confidential].~~

13

14

~~Q. How did you arrive at these figures?~~

15

~~A. There are at least four sources of income for NATE, WideVoice, and Free~~

16

~~Conference. First, per the terms of the unreasonable Joint Venture~~

17

~~Agreement, NATE and WideVoice get to skim off 15% of "Gross Revenues"~~

18

~~before CCST sees a dime. Specifically, the Joint Venture Agreement~~

19

~~states.~~

~~Section 6.06 WVC and NATE Cost Passthrough Escrow for  
On-Going Operation and Maintenance Costs.~~

~~NATE and WVC will incur expenses related to the operation and  
maintenance of the Crow Creek telecommunications network that may  
not be readily segregated from the other operation and maintenance  
expenses incurred by NATE and WVC. To cover such expenses, 15%  
of gross revenues of NAT-CC shall be set aside and placed in an  
escrow account for the benefit of NATE and WVC.~~

~~NAT-CC reported "Total Income" of [Begin Confidential] \$ [redacted] in  
2010 and \$ [redacted] in 2011, or a two-year total of \$ [redacted]. Note that (1)  
NAT-CC reports "Total Income" rather than the typical "Total Revenue," and  
(2) no "escrow amount" appears on the "Income Statement." Thus, it  
appears that the NAT-CC reported "Total Income" is likely calculated after  
the 15% escrow has been deducted from "Gross Revenue." The NATE and  
WideVoice escrow amount for 2010 and 2011 is approximately \$ [redacted]  
(\$ [redacted] / (1 - 15%)) = [redacted] [End Confidential].~~

~~Second, the majority of NAT-CC's operational expenses are, in fact, the  
result of services provided by WideVoice, and Free Conference. Thus,  
these expenses are, as a result, direct revenue sources to WideVoice, and  
Free Conference. NAT-CC's two-year "Marketing Expense" of [Begin  
Confidential] \$ [redacted] is, in fact, a revenue sharing arrangement paid  
directly to the Free Conference, which is owned by Dave Erickson, who also  
is an owner of WideVoice. In fact, [redacted] % of all NAT's access revenues in  
2010 and 2011 were paid directly to Free Conference Call [End  
Confidential].~~

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21

~~Third, NAT-CC's two-year "Repair and Maintenance" of [Begin Confidential] \$ [REDACTED] is most likely paid directly to NATE and WideVoice per terms of the Joint Venture Agreement.<sup>30</sup> [End Confidential]. In its responses to Sprint's Discovery Requests, NAT-CC refused to provide information on this expense item. I will assume 100% of this expense item was paid directly to NATE and WideVoice.~~

~~Fourth, according to the 2011 NAT-CC's "Balance Sheet," NAT-CC has paid a total of [Begin Confidential] \$ [REDACTED] of "Shareholder Distributions," i.e., dividends paid to the owners. At least \$ [REDACTED] of this "Shareholder Distribution" was paid directly to Mr. Raiman and Mr. DeJordy, the owners of WideVoice.<sup>31</sup> [End Confidential]~~

~~In addition, I suspect that some portion of NAT-CC's two-year "Professional Fees" of [Begin Confidential] \$ [REDACTED] and "Consulting Fees" of \$ [REDACTED] is most likely paid directly to NATE and WideVoice per terms of the Joint Venture Agreement.<sup>32</sup> [End Confidential]. However, in its responses to Sprint's Discovery Requests, NAT-CC refused to provide information on these expense items. Without further information, I have not included any of these amounts in this analysis, which makes my estimate conservative.~~

<sup>30</sup> ~~Joint Venture Agreement, Articles III and IV.~~

<sup>31</sup> ~~Mar. 3, 2011 II, p. 16-17.~~

<sup>32</sup> ~~Joint Venture Agreement, Articles III and IV.~~

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24

The following ~~Table 2 summarizes the estimated total positive cash flow of~~  
~~[Begin Confidential] \$ [REDACTED] that has been realized by NATE,~~  
~~WideVoice, and Free Conference. [End Confidential]~~

~~[Begin Confidential]~~  
~~Table 2~~  
~~NATE, WideVoice, and Free Conference~~  
~~2010 and 2011 Cash Flows~~

<del>Row</del>	<del>Description</del>	<del>Amount</del>
1	Escrow	[REDACTED]
2	Marketing Fee	[REDACTED]
3	Repair & Maintenance	[REDACTED]
4	Shareholder Distribution	[REDACTED]
5	Total	[REDACTED]

~~[End Confidential]~~

~~C. CCST Vs. NATE, WideVoice, and Free Conference~~

~~Q. What do you conclude about the financial relationship between CCST~~  
~~and NATE & WideVoice?~~

~~A. As discussed in Section IV, the Joint Venture Agreement and Service~~  
~~Agreement are intentionally designed to enrich NATE, WideVoice, and Free~~  
~~Conference, while leaving CCST with little financial benefit. Even worse,~~  
~~these contracts will likely leave CCST with a significant liability. Specifically,~~  
~~I have estimated that in 2010 and 2011 NATE, WideVoice, and Free~~  
~~Conference have realized a positive cash flow of approximately [Begin~~  
~~Confidential] \$ [REDACTED], as summarized in Table 2 [End Confidential].~~  
~~This cash has gone directly to entities such as Free Conference and Wide~~

1 ~~Voice located or operating in California and Nevada. None of this cash will~~  
2 ~~ever benefit the CCST.~~

3  
4 ~~In contrast, CCST has accumulated value of [Begin Confidential] [REDACTED]~~  
5 ~~as summarized in Table 1 [End Confidential].~~

6

7 ~~D. Future Financial Viability of NAT CC~~

8

9 ~~Q. Do you believe that NAT CC is a financially viable entity in the future?~~

10 ~~A. No, I do not believe that NAT CC is a financially viable entity in the future.~~

11 ~~As already discussed, NAT CC was established for one reason only, "traffic~~  
12 ~~pumping." In recent FCC decisions, the FCC has specifically targeted~~  
13 ~~"access stimulation," its term for "traffic pumping."~~

14

15 ~~Q. How has the FCC targeted "traffic pumping?"~~

16 ~~A. In the FCC's recent Connect America Order, the FCC has an entire section~~  
17 ~~itled "Rules To Reduce Access Stimulation." In this Order, the FCC~~  
18 ~~recognizes the harmful effects of traffic pumping. For example, the FCC~~  
19 ~~explicitly states:~~

20

21

22

23

24

25

26

~~The record confirms the need for prompt Commission action to~~  
~~address the adverse effects of access stimulation. (¶ 662)~~

~~Access stimulation imposes undue costs on consumers, inefficiently~~  
~~diverting capital away from more productive uses such as broadband~~  
~~deployment. (¶ 663)~~

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32  
33  
34

~~The record indicates that a significant amount of access traffic is going to LECs engaging in access stimulation. When carriers pay more access charges as a result of access stimulation schemes, the amount of capital available to invest in broadband deployment and other network investments that would benefit consumers is substantially reduced. (¶ 664)~~

~~Access stimulation also harms competition by giving companies that offer a "free" calling service a competitive advantage over companies that charge their customers for the service. (¶ 665)~~

~~... excess revenues that are shared in access stimulation schemes provide additional proof that the LEC's rates are above cost. (¶ 666)~~

~~Q. Has the FCC explicitly rejected NAT-CC's premise that assisting Tribal lands somehow justifies "traffic pumping?"~~

~~A. Yes. NAT-CC's premise is essentially a "Robin Hood" defense - it's alright to "rob the bank" as long as the stolen funds are put to good use. However, the FCC has explicitly rejected NAT-CC's premise that assisting Tribal lands somehow justifies "traffic pumping." Explicitly, the FCC stated:~~

~~Several parties claim that access stimulation offers economic development benefits, including the expansion of broadband services to rural communities and tribal lands. Although expanding broadband services in rural and Tribal lands is important, we agree with other commenters that how access revenues are used is not relevant in determining whether switched access rates are just and reasonable in accordance with section 201(h). Moreover, Congress created an explicit universal service fund to spur investment and deployment in rural, high cost, and insular areas, and the Commission is taking action here and in other proceedings to facilitate such deployment. (¶ 666)~~

~~For example, the Connect America Order has set aside \$50 million of the Phase I Mobility Fund in 2012 specifically for tribal areas, and \$100 million~~

1 ~~of the Phase II Mobility Fund annual budget in future years specifically for~~  
2 ~~tribal areas.~~

3

4 ~~Q. How has the FCC addressed the problem of "traffic pumping?"~~

5 ~~A. The FCC established a process where traffic pumping CLECs such as~~  
6 ~~NAT-CC will have to reduce their rates on all intrastate and interstate traffic.~~  
7 ~~In just over four years from now, by July 1, 2016, NAT-CC will have to~~  
8 ~~reduce its rates for all interstate traffic, including "traffic pumping," to~~  
9 ~~\$0.0007. By July 1, 2017, all traffic will be exchanged on a Bill and Keep~~  
10 ~~basis, essentially a \$0.0000 rate.<sup>33</sup>~~

11

12 ~~Q. What effect will a rate of \$0.0007 have on NAT-CC's financials?~~

13 ~~A. At a rate of \$0.0007, NAT-CC's business model will almost certainly fail.~~  
14 ~~Table 3, below, restates NAT-CC's 2014 Income Statement assuming all~~  
15 ~~IXCs pay the 2016 rate of \$0.0007.~~

<sup>33</sup> Under a Bill and Keep arrangement, carriers do not bill each other for terminating the other carrier's traffic. In other words, two carriers exchange each other's traffic without compensation from the other carrier. Instead, all compensation is received from each carrier's own end-users.

1  
2  
3  
4  
5

~~[Begin Confidential]~~

~~Table 3  
NAT-CC 2014 Income Statement  
Revised for July 2016 Rate of \$0.0007~~

Row	Description	2011 Income Statement		Assumptions
		Actual	At \$0.0007	
1	Minutes			
2	Sprint			13% of IXC total
3	Total Industry			Cell D2 / 13%
4	Rate		\$ 0.0007	July 2016 rate
5				
6	Gross Revenues			Cell D3 * D4
7	15% Escrow			Cell D6 * 15%
8	Revenues			Cell D6 - D7
9				
10	Expenses			
11	Marketing			Cell D8 * 75%
12	All Other Operating Exp.			
13	Total Expenses			
14				
15	Net Income		\$ (327,032)	

6  
7  
8

~~[End Confidential]~~

9 ~~As can be seen at the 2016 rate of \$0.0007, and at current demand and~~  
 10 ~~expense levels, NAT-CC will almost certainly lose over \$300,000 per year~~  
 11 ~~under the following assumptions:~~

- 12 • ~~Sprint's actual interstate and intrastate minutes terminated to~~
- 13 ~~NAT-CC in 2014 were [Begin Confidential] [REDACTED] [End~~
- 14 ~~Confidential].~~
- 15 • ~~Sprint's minutes are equal to 13% of the total IXO industry,<sup>34</sup>~~
- 16 • ~~All IXOs pay the \$0.0007 rate on every minute,~~

<sup>34</sup> ~~Sprint Communications Company, L.P., Plaintiff, vs. Native American Telecom, LLC, and Crow Creek Sioux Tribal Court, Defendants, United States District Court, District of South Dakota, Southern Division; Civ. 10-4440-KEG; Order Denying Defendant Native American Telecom's Motion for a Preliminary Injunction; May 31, 2011, at page 14, Exhibit C-8.~~

- 1 • ~~NAT CC pays Free Conference a 75% "Marketing Fee" to Free~~  
2 ~~Conference, which is equal to lowest end of the 75% - 95% payout~~  
3 ~~range called for in the NAT CC - Free Conference Service~~  
4 ~~Agreement, and~~  
5 • ~~All Other Operating Expenses remain unchanged.~~

6  
7 ~~Q How does this analysis conclude concerning transport rates under the~~  
8 ~~ECC's Connect America Order?~~

9 ~~A This analysis assumes that by 2016, transport will not be a significant~~  
10 ~~source of revenue for NAT CC under the Connect America Order. While~~  
11 ~~the FCC did not address transport rate elements, it did ask for comments~~  
12 ~~and suggestions as part of the ENRPM.~~

13  
14 ~~In addition to "traffic pumping," NAT CC is also engaged in "mileage,~~  
15 ~~pumping" a deceptive practice of placing the conference calling company~~  
16 ~~owned conference bridge equipment as far away as possible from a tandem~~  
17 ~~switch for the sole purpose of inflating transport billings to the IXCs. In~~  
18 ~~other words, rather than designing its network in the most efficient manner~~  
19 ~~possible, as does any rational company, "mileage pumpers" such as~~  
20 ~~NAT CC intentionally and deliberately design their networks in as inefficient~~  
21 ~~manner as possible - just to inflate the transport billings. South Dakota's~~  
22 ~~geography is ideal for "mileage pumping."~~

23

1 ~~It is clear that the FCC wants to discourage the deceptive practice of~~  
2 ~~"mileage pumping." Specifically, in the Connect America Order, the FCC~~  
3 ~~states:~~

4 ~~Ultimately, we agree with concerns raised by commenters that the~~  
5 ~~continuation of transport charges in perpetuity would be~~  
6 ~~problematic. For example, the record contains allegations of~~  
7 ~~"mileage pumping," where service providers designate distant~~  
8 ~~points of interconnection to inflate the mileage used to compute~~  
9 ~~the transport charges. Further, Sprint alleges that current incumbent~~  
10 ~~LEC tariffed charges for transport are "very high and constitute a~~  
11 ~~sizeable proportion of the total terminating access charges ILECs~~  
12 ~~impose on carriers today." ... As a result, commenters suggest that~~  
13 ~~perpetuating high transport rates could undermine the~~  
14 ~~Commission's reform effort and lead to anticompetitive behavior~~  
15 ~~or regulatory arbitrage such as access stimulation. We therefore~~  
16 ~~seek comment on the appropriate treatment of, and transition for, all~~  
17 ~~tandem switching and transport rates in the ENDRM. (I 820) (Bold~~  
18 ~~emphasis added.)~~  
19

20  
21 ~~Based on this comment, it would be unreasonable to allow "traffic pumping"~~  
22 ~~and "mileage pumping" LECs such as NAT CC to continue to bill IXCs~~  
23 ~~outrageous amounts for transport across vast distances for the sole purpose~~  
24 ~~of inflating access billings.~~

25  
26 ~~Assuming the FCC follows through on its intentions to eliminate "mileage~~  
27 ~~pumping" by 2016, transport will not be a significant source of revenue for~~  
28 ~~"traffic pumping" and "mileage pumping" LECs such as NAT CC.~~

29  
30 ~~Q What do you conclude?~~

1 ~~A. As already discussed, NAT-CC's sole purpose for existence is to be a~~  
2 ~~"traffic pump." Even in the best of conditions, i.e., if NAT-CC is somehow~~  
3 ~~able to convince regulatory and legal authorities to require the IYCs to pay~~  
4 ~~NAT-CC's past and current billings, the business model will begin to~~  
5 ~~deteriorate immediately due to the forced rate reductions required by the~~  
6 ~~ECC's Connect America Order. The NAT-CC business model will almost~~  
7 ~~certainly fail by 2016 at a rate of \$0.0007, and will certainly fail by 2017,~~  
8 ~~under Bill and Keep. However, regardless of the authoritative decisions,~~  
9 ~~NATE, WideVoice, and Free Conference will continue to siphon off at least~~  
10 ~~[Begin Confidential] \$ [REDACTED] per year (one-half of the two-year estimate~~  
11 ~~of \$ [REDACTED] from Table 2) from NAT-CC's operations [End Confidential].~~  
12 ~~To the extent IYCs actually have to pay, and at a higher rate, NATE,~~  
13 ~~WideVoice, and Free Conference's windfall will be significantly greater.~~  
14  
15 ~~However, once the NAT-CC business model inevitably fails, NATE,~~  
16 ~~WideVoice, and Free Conference will exit the market, taking their~~  
17 ~~accumulated windfall with them, leaving CCGT responsible for 51% of~~  
18 ~~accumulated losses.~~

19  
20 ~~VI. Summary and Conclusion~~

21  
22 ~~Q. Should NAT-CC be granted certification in South Dakota?~~

1 ~~A. No. First, for the reasons set forth in this testimony, the Commission should~~  
2 ~~deny NAT-CC's request for a Certificate, and should prohibit further~~  
3 ~~provision of service by NAT-CC to non-tribal members in the state.~~

4  
5 ~~Second, if the Commission is inclined to grant certification, it should only do~~  
6 ~~so after imposing conditions that address the issues raised in this testimony.~~

7  
8 ~~Finally, before the Commission grants a Certificate to companies that are~~  
9 ~~established for the purpose of operating an "access pumping" scheme, the~~  
10 ~~Commission should consider establishing rules applicable to such~~  
11 ~~operations, including ways to address "mileage pumping" and the intrastate~~  
12 ~~rates that apply to this traffic. It is my opinion that high mileage and high~~  
13 ~~rates are the primary reason that "access pumping" is occurring in rural~~  
14 ~~states such as South Dakota.~~

15  
16 **Q. Does this conclude your Direct Testimony?**

17 **A. Yes, it does.**

18  
4561942v1

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA

---

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.

---

Docket No. TC11-087

**SPRINT COMMUNICATIONS  
COMPANY L.P.'S RESPONSE TO  
NATIVE AMERICAN TELECOM,  
LLC'S STATEMENT OF  
UNDISPUTED FACTS**

1. On October 11, 2011, NAT filed its Application for Certificate of Authority ("Application") with the South Dakota Public Utilities Commission ("Commission").

SPRINT'S RESPONSE: Undisputed.

2. Exhibit A to this Application contains NAT's "Certificate of Organization – Limited Liability Company" from the South Dakota Secretary of State's Office. (Application-Exhibit A).

SPRINT'S RESPONSE: Undisputed.

3. Exhibit B to this Application contains a listing of NAT's key management personnel. (Application-Exhibit B).

SPRINT'S RESPONSE: Sprint does not dispute that Exhibit B to NAT's Revised Application purports to be a listing of NAT's key management personnel, ~~but Sprint has put forth facts showing that David Erickson is also one of NAT's key management personnel. See Direct Testimony of Randy Farrar ("Farrar Direct"), pp. 9-19 (NAT is a sham entity being run for the benefit of David Erickson and his companies).~~

4. Exhibit C to this Application contains NAT's confidential financial statements. (Application-Exhibit C).

SPRINT'S RESPONSE: Sprint does not dispute that Exhibit C to NAT's Revised Application contains certain confidential financial information that NAT represents as

being accurate and complete. ~~However, as explained in Sprint's Memorandum in Support of its Motion to Compel, and as described by Mr. Farrar, the information is neither complete nor accurate, and NAT has refused to provide discovery with respect to its representations regarding its financial qualifications. Sprint's Mem. in Supp. of Motion to Compel, pp. 11-17; Farrar Direct, p. 26.~~

5. On November 30, 2011, Commission Staff served a series of Data Requests on NAT. (Affidavit of Scott R. Swier in Support of NAT's Motion for Summary Judgment, ¶ 2).

SPRINT'S RESPONSE: Undisputed.

6. NAT's Response Data to the Commission Staff's Data Requests was December 21, 2011. (Affidavit of Scott R. Swier in Support of NAT's Motion for Summary Judgment, ¶ 3).

SPRINT'S RESPONSE: Undisputed.

7. NAT provided its Responses to the Commission Staff's Data Requests in a timely manner. (Affidavit of Scott R. Swier in Support of NAT's Motion for Summary Judgment, ¶ 4).

SPRINT'S RESPONSE: Undisputed. Sprint notes that these responses are not part of the record as they were not filed.

8. On January 27, 2012, NAT filed its Revised Application for Certificate of Authority ("Revised Application") with the Commission.

SPRINT'S RESPONSE: Undisputed.

9. NAT's Revised Application incorporates the original Application's Exhibits A-C. (Revised Application).

SPRINT'S RESPONSE: Undisputed.

10. NAT's Revised Application seeks authority to provide local exchange and interexchange service within the Crow Creek Sioux Tribe Reservation ("Reservation") which is within the study area of Midstate Communications, Inc. ("Midstate"). (Revised Application, page 1).

SPRINT'S RESPONSE: Undisputed.

11. NAT's Revised Application provides all information required by ARSD 20:10:32:03. (Revised Application).

SPRINT'S RESPONSE: Sprint does not dispute that NAT's Revised Application was deemed complete by Staff, ~~and the matter sent to hearing, but denies the information contained therein is true, complete or accurate, for the reasons described by Mr. Farrar in his Direct Testimony and in Sprint's Motion to Compel, Farrar Direct, pp. 9-19, 26, Sprint's Mem. in Supp. of Motion to Compel, pp. 7-11, 11-17, 17-25. Sprint also disputes this statement as inconsistent with the rule governing summary judgment, which requires each material fact to be in a separate paragraph. SDCL § 15-6-56(c)(1). NAT's paragraph 11 is the equivalent of dozens of factual representations not identified with particularity. In addition, Sprint disputes this statement because it is not supported by "an appropriate citation to the record". SDCL § 15-6-26(e). None of the facts in the Revised Application were verified, and many were not addressed in testimony. They lack an "appropriate citation to the record," and the record lacks evidence that these statements are true. SDCL § 15-6-56(c)(1).~~

12. On January 31, 2012, NAT's Revised Application was "deemed complete" by the Commission's Staff. (Affidavit of Scott R. Swier in Support of NAT's Motion for Summary Judgment, ¶ 5).

SPRINT'S RESPONSE: Undisputed.

13. NAT's business address is 253 Ree Circle, Fort Thompson, South Dakota 57339, Telephone: 949-842-4478, Facsimile: 562-432-5250, Web page: NativeAmericanTelecom.com. (Revised Application, page 2; Direct Testimony of Jeff Holoubek on Behalf of NAT, page 3) (hereinafter "Holoubek Testimony, page --").

SPRINT'S RESPONSE: Undisputed.

14. NAT is a tribally-owned telecommunications company organized as a limited liability company under the laws of South Dakota. (Revised Application, pages 2-3; Holoubek Testimony, page 3).

SPRINT'S RESPONSE: Sprint does not dispute that NAT is owned in part by the Crow Creek Sioux Tribe, ~~but claims NAT is a sham entity being operated for the purpose of benefiting Dave Erickson and his companies. See Farrar Direct, pp. 9-19.~~

15. NAT's principal office is located at 253 Ree Circle, Fort Thompson, South Dakota 57339. (Revised Application, page 2; Holoubek Testimony, page 4).

SPRINT'S RESPONSE: Undisputed.

16. NAT's registered agent is Scott R. Swier, 133 N. Main Street, P.O. Box 256, Avon, South Dakota 57315. (Revised Application, page 2; Holoubek Testimony, page 4).

SPRINT'S RESPONSE: Undisputed.

17. NAT has a certificate of authority from the South Dakota Secretary of State to transact business in South Dakota. (Revised Application, page 4 and Exhibit A; Holoubek Testimony, page 4).

SPRINT'S RESPONSE: Undisputed.

18. NAT's Federal Tax Identification Number is 26-3283812. (Revised Application, page 12; Holoubek Testimony, page 12).

SPRINT'S RESPONSE: Undisputed.

19. NAT's South Dakota sales tax number is 1012-1173-ST. (Revised Application, page 12; Holoubek Testimony, page 12).

SPRINT'S RESPONSE: Undisputed.

20. NAT's ownership structure consists of the Crow Creek Sioux Tribe (51% ("Tribe"), P.O. Box 50, Fort Thompson, South Dakota 57339-0050, Native American Telecom Enterprise, LLC (25%) ("NAT Enterprise"), 747 S. 4th Ave., Sioux Falls, SD 57104, and WideVoice Communications, Inc. (24%) ("WideVoice"), 410 South Rampart, Suite 390, Las Vegas, NV 89145. (Revised Application, pages 3, 6; Holoubek Testimony, pages 4-5).

SPRINT'S RESPONSE: Sprint does not dispute this is the ownership structure set forth in the joint venture agreement, ~~but denies that the Tribe is effectively an "owner" exercising the rights normally held by one with 51% ownership. See Farrar Direct, pp. 9-10~~

21. The Tribe is a federally-recognized Indian tribe with its tribal headquarters located on the Crow Creek Sioux Tribe Reservation ("Reservation") in Fort Thompson, South Dakota. (Revised Application, page 3).

SPRINT'S RESPONSE: Undisputed.

22. NAT Enterprise is a telecommunications development company. (Revised Application, page 3).

SPRINT'S RESPONSE: This statement of fact is not verified or otherwise supported by sworn testimony. It therefore lacks "an appropriate citation to the record" and does not establish an undisputed fact for purposes of summary judgment. SDCL § 15-6-56(c)(1).

23. WideVoice is a telecommunications engineering company.

SPRINT'S RESPONSE: This statement of fact is not verified or otherwise supported by sworn testimony. It therefore lacks "an appropriate citation to the record" and does not establish an undisputed fact for purposes of summary judgment. SDCL § 15-6-56(c)(1).

24. NAT seeks to provide facilities-based telephone service to compliment its advanced broadband services. (Revised Application, page 1).

SPRINT'S RESPONSE: ~~Sprint disputes this statement. Sprint has proffered evidence that NAT was established and is being operated as a traffic pumping entity, and does not intend to provide facilities-based telephone service to compliment its advanced~~

~~broadband services. See Ferrar Direct, pp. 9-10; Sprint's Mem. in Supp. of Motion to Compel, pp. 7-11.~~

25. NAT proposes to offer local exchange and interexchange service within the Reservation, which is within the study area of Midstate. (Revised Application, page 6; Holoubek Testimony, page 13).

SPRINT'S RESPONSE: Undisputed.

26. NAT will provide service through its own facilities. (Revised Application, page 6; Holoubek Testimony, pages 8, 10).

SPRINT'S RESPONSE: Sprint does not dispute that NAT claims it will provide service through its own facilities. ~~However, NAT has refused to provide discovery with respect to these representations. See Sprint's Mem. in Supp. of Motion to Compel, pp. 17-23 (Interrogatories 5, 6, 7, 18, 24, 43 and 44). In addition, NAT has failed to identify how it will provide intrastate interexchange service, and has not identified any facilities that would be used to do so. See Revised Application, pp. 2-12 (providing information called for by ARSD 20:10:32:03, but not ARSD 20:10:24:02).~~

27. NAT is currently interconnected with Midstate and other carriers for the exchange of telecommunications traffic. (Revised Application, page 6; Holoubek Testimony, page 8).

SPRINT'S RESPONSE: Sprint does not dispute that NAT is currently interconnected with Midstate. ~~Sprint denies that NAT is currently connected to "other carriers" based on NAT's refusal to identify such other carriers. See Sprint's Mem. in Supp. of Motion to Compel, p. 20 (Interrogatory No. 23).~~

28. NAT is using WiMAX (Worldwide Interoperability for Microwave Access) technology operating in the 3.65 GHz licensed spectrum providing service to residential, small business, hospitality and public safety. (Revised Application, pages 6-7; Holoubek Testimony, page 8).

SPRINT'S RESPONSE: ~~Sprint disputes this statement based on NAT's refusal to provide discovery. See Sprint's Mem. in Support of Motion to Compel, p. 21 (Interrogatory No. 24).~~

29. The network supports high-speed broadband services, voice service, data and Internet access, and multimedia. (Revised Application, page 7; Holoubek Testimony, page 8).

SPRINT'S RESPONSE: ~~Sprint disputes this statement based on NAT's refusal to provide discovery. See Sprint's Mem. in Support of Motion to Compel, pp. 18-19, 22-23 (Interrogatory Nos. 5, 7, 43-44).~~

30. Through the use of advanced antenna and radio technology with OFDM1 OFDMA (Orthogonal Frequency Division Multiplexing), NAT is able to deliver wireless IP (Internet Protocol) voice and data communications. (Revised Application, page 7; Holoubek Testimony, page 9).

SPRINT'S RESPONSE: ~~Sprint disputes this statement based on NAT's refusal to provide discovery. See Sprint's Mem. in Support of Motion to Compel, pp. 18-19, 22-23 (Interrogatory Nos. 5, 7, 43-44).~~

31. This 4G technology offers flexible, scalable and economically viable solutions that are key components to deploying in vast rural environments, such as the Reservation. (Revised Application, page 7; Holoubek Testimony, page 9).

SPRINT'S RESPONSE: ~~Sprint disputes this statement based on NAT's refusal to provide discovery. See Sprint's Mem. in Support of Motion to Compel, pp. 18-19, 22-23 (Interrogatory Nos. 5, 7, 43-44).~~

32. NAT has established a toll-free number and email address for all customer inquiries and complaints, and has a physical location on the Reservation to handle customer complaints and inquiries within twenty-four (24) hours. (Revised Application, page 8; Holoubek Testimony, pages 9-10).

SPRINT'S RESPONSE: Undisputed.

33. NAT has established connectivity with telecommunications carriers to provide its customers with access to 911, operator services, interexchange services, directory assistance, and telecommunications relay services. (Revised Application, page 8).

SPRINT'S RESPONSE: ~~Sprint disputes this statement because it is not supported by "an appropriate citation to the record" SDCL § 15-6-26(c)(1). The Revised Application was not verified. Sprint also disputes this statement because NAT's response to Staff Request 1-3 (Exhibit A hereto) indicates that NAT cannot provide Enhanced 911 in compliance with all rules and regulations and cannot currently offer TRS.~~

34. NAT will target its direct marketing efforts to only those individuals and organizations within the Reservation. (Revised Application, page 9; Holoubek Testimony, page 10).

SPRINT'S RESPONSE: Sprint has no basis to dispute NAT's representation that it will, in the future, target its direct marketing efforts to only those individuals and organizations within the Reservation. ~~However, the entity receiving the most calls through NAT is not an individual or organization within the Reservation, and Sprint expects this will continue.~~

35. As a newly-formed limited liability company, NAT is not registered or certificated to provide telecommunications services in other states, nor has NAT applied for or ever been denied authority to provide telecommunications services in other states. (Revised Application, page 10; Holoubek Testimony, page 11).

SPRINT'S RESPONSE: Undisputed.

36. NAT will utilize advertising designed to market its services. (Revised Application, page 10; Holoubek Testimony, page 11).

SPRINT'S RESPONSE: Undisputed.

37. NAT will not solicit customers via telemarketing. (Revised Application, page 10; Holoubek Testimony, page 11).

SPRINT'S RESPONSE: Undisputed.

38. NAT will require all personnel to be trained in NAT's policies and procedures to ensure affirmative customer selection of service from NAT. (Revised Application, pages 10-11; Holoubek Testimony, page 11).

SPRINT'S RESPONSE: Undisputed.

39. NAT will require customers to complete an order form and/or a Letter of Authorization ("LOA") selecting NAT as the customer's carrier, if a consumer is switching local service providers. (Revised Application, page 11; Holoubek Testimony, page 11).

SPRINT'S RESPONSE: Undisputed.

40. NAT will comply with all state and federal rules prohibiting the slamming of customers. (Revised Application, page 11; Holoubek Testimony, page 11).

SPRINT'S RESPONSE: Undisputed.

41. NAT has never had a complaint filed against it with any state of federal commission regarding the unauthorized switching of a customer's telecommunications provider and the act of charging customers for services that have not been ordered. (Revised Application, page 11; Holoubek Testimony, page 11).

SPRINT'S RESPONSE: Undisputed.

42. NAT will post the current rates, terms and conditions for its local and interexchange services offered in South Dakota on its website located at [www.NativeAmericanTelecom.com](http://www.NativeAmericanTelecom.com). (Revised Application, page 11; Holoubek Testimony, page 12).

SPRINT'S RESPONSE: Sprint has no basis to dispute that NAT intends to post its rates, terms and conditions.

43. NAT will notify customers by mail, email or telephone, depending upon the customer's expressed preference, as to how notification should be made, to apprise them of any changes in rates, terms and conditions of service. (Revised Application, page 11; Holoubek Testimony, page 12).

SPRINT'S RESPONSE: Undisputed.

44. NAT is a tribally-owned telecommunications carrier currently providing service on the Reservation. (Revised Application, page 3; Holoubek Testimony, page 4).

SPRINT'S RESPONSE: ~~Disputed. See supra ¶ 14 (regarding NAT's statement that it is a Tribally-owned telecommunications carrier. Sprint does not dispute that NAT is currently providing service on the Reservation.)~~

45. In 1997, the Crow Creek Sioux Tribal Council established the Crow Creek Sioux Tribe Utility Authority ("Tribal Utility Authority") for the purpose of planning and overseeing utility services on the Reservation and to promote the use of these services "to improve the health and welfare of the residents." (Revised Application, page 4; Holoubek Testimony, page 5).

SPRINT'S RESPONSE: ~~Sprint disputes this statement because Jeff Holoubek has failed to establish he has personal knowledge of the statement made and thus there is no "appropriate citations to the record." SDCL § 15-6-56(e)(1). Mr. Holoubek is not a member of the Tribe and was not associated in any way, to Sprint's knowledge, with the Tribe in 1997 or 2008. Nor has NAT produced any documentation to support this assertion.~~

46. On October 28, 2008, the Tribal Utility Authority entered its *Order Granting Approval to Provide Telecommunications Service* ("Approval Order"). (Revised Application, page 4; Holoubek Testimony, page 5).

SPRINT'S RESPONSE: ~~Sprint disputes this statement on the basis that NAT has refused to provide Sprint discovery with respect to the operations of the Tribal Utility Authority. See Sprint's Mem. in Support of Motion to Compel p. 8 (interrogatory No. 22).~~

47. Under this Approval Order, NAT was "granted authority to provide telecommunications service on the . . . Reservation subject to the jurisdiction of the laws of the Crow Creek Sioux Tribe." (Revised Application, page 4; Holoubek Testimony, pages 5-6).

SPRINT'S RESPONSE: Sprint does not dispute that the order contains those words, ~~but denies the statement on the basis that NAT has refused to provide Sprint discovery with respect to the operations of the Tribal Utility Authority. See Sprint's Mem. in Support of Motion to Compel, p. 8 (Interrogatory No. 22)~~

48. NAT currently provides service on the Reservation pursuant to this Approval Order. (Revised Application, page 3; Holoubek Testimony, page 4).

SPRINT'S RESPONSE: Sprint does not dispute that NAT currently provides service on the Reservation. ~~Sprint denies that this is pursuant to the Approval Order on the basis that NAT has refused to provide Sprint discovery with respect to the operations of the Tribal Utility Authority. See Sprint's Mem. in Support of Motion to Compel, p. 8 (Interrogatory No. 22)~~

49. NAT currently provides high-speed Internet access, basic telephone, and long-distance services on and within the Reservation. (Revised Application, page 3; Holoubek Testimony, page 5).

SPRINT'S RESPONSE: Undisputed.

50. NAT has physical offices, telecommunications equipment, and telecommunications towers on the Reservation. (Revised Application, page 5; Holoubek Testimony, page 6).

SPRINT'S RESPONSE: ~~Sprint disputes this statement on the basis that NAT has refused to provide Sprint discovery with respect to the identification and location of telecommunications equipment and telecommunications towers. See Sprint's Mem. in Support of Motion to Compel, pp. 18, 19, 22-23 (Interrogatory Nos. 5-7, 43-44).~~

51. NAT provides a computer training facility with free Internet and telephone service to tribal members. (Revised Application, page 5; Holoubek Testimony, page 6).

SPRINT'S RESPONSE: ~~Disputed. NAT's representative testified in March 2011 that the training facility (the Learning Center) was not yet opened. See Farmer Direct, Ex. 4, p. 159. Sprint asked NAT in discovery when it opened its training facility and NAT refused to answer. NAT's Response to Sprint's Interrogatory no. 32.~~

52. NAT provides 110 high-speed broadband and telephone installations at residential and business locations on the Reservation. (Revised Application, page 5; Holoubek Testimony, page 7).

SPRINT'S RESPONSE: ~~Sprint denies this statement on the basis that NAT has refused to provide Sprint discovery with respect to these alleged residential and business users. See Sprint's Mem. in Support of Motion to Compel, pp. 18-19, 22-23 (Interrogatory Nos. 5, 7, 43-44).~~

53. NAT has established an Internet Library with six (6) work stations that provide computer/Internet opportunities for residents that do not otherwise have access to computers. (Revised Application, page 5; Holoubek Testimony, page 7).

SPRINT'S RESPONSE: Undisputed.

54. NAT has years of managerial and technical experience in providing the telecommunications services proposed in its Revised Application. (Holoubek Testimony, page 13).

SPRINT'S RESPONSE: Undisputed.

55. Patrick Chicas ("Chicas") is the Chief Technical Officer for NAT. (Application-Exhibit B).

SPRINT'S RESPONSE: Sprint does not dispute this statement, but notes that this is not supported by "an appropriate citation to the record." SDCL § 15-6-26(c)(1). The Application was not verified and this statement is not found in any sworn testimony.

56. Chicas' business address is 410 South Rampart, Suite 390, Las Vegas, Nevada 89145.

SPRINT'S RESPONSE: Sprint does not dispute this statement, but notes that this is not supported by "an appropriate citation to the record." SDCL § 15-6-26(c)(1). The Application was not verified and this statement is not found in any sworn testimony.

57. Chicas has overall responsibility for NAT's strategic guidance, network operations, and network planning and engineering. (Application-Exhibit B).

SPRINT'S RESPONSE: Sprint does not dispute this statement, but notes that this is not supported by "an appropriate citation to the record." SDCL § 15-6-26(c)(1). The Application was not verified and this statement is not found in any sworn testimony.

58. Chicas also serves as President and a Managing Director for Wide Voice, LLC. (Application-Exhibit B).

SPRINT'S RESPONSE: Sprint does not dispute this statement, but notes that this is not supported by "an appropriate citation to the record." SDCL § 15-6-26(c)(1). The Application was not verified and this statement is not found in any sworn testimony.

59. From September 2003 to April 2009, Chicas was a co-founder and Chief Technology Officer of Commpartners, Inc., a nationwide CLEC. (Application-Exhibit B).

SPRINT'S RESPONSE: Sprint does not dispute this statement, but notes that this is not supported by "an appropriate citation to the record." SDCL § 15-6-26(c)(1). The Application was not verified and this statement is not found in any sworn testimony.

60. From August 2000 to November 2003, Chicas was the president, co-chairman, and a member of the board at Rubicon Media Group, a sector pioneering Internet publishing concern recently sold to Advanstar Communications, Inc. (Application-Exhibit B).

SPRINT'S RESPONSE: Sprint does not dispute this statement, but notes that this is not supported by "an appropriate citation to the record." SDCL § 15-6-26(c)(1). The Application was not verified and this statement is not found in any sworn testimony.

61. From March 1999 to August 2000, Chicas was the vice president for Data Services at Mpower Communications. (Application-Exhibit B).

SPRINT'S RESPONSE: Sprint does not dispute this statement, but notes that this is not supported by "an appropriate citation to the record." SDCL § 15-6-26(c)(1). The Application was not verified and this statement is not found in any sworn testimony.

62. While at Mpower, Chicas designed the company's entire IP infrastructure and the first production VoIP (Voice Over Internet Protocol) network for small business services. (Application-Exhibit B).

SPRINT'S RESPONSE: Sprint does not dispute this statement, but notes that this is not supported by "an appropriate citation to the record." SDCL § 15-6-26(c)(1). The Application was not verified and this statement is not found in any sworn testimony.

63. From January 1997 to September 1998, Chicas was the first executive hire and vice president of operations at Digital Island, Inc. (Application-Exhibit B).

SPRINT'S RESPONSE: Sprint does not dispute this statement, but notes that this is not supported by "an appropriate citation to the record." SDCL § 15-6-26(c)(1). The Application was not verified and this statement is not found in any sworn testimony.

64. Chicas also has prior telecommunications experience with Pacific Bell (now AT&T), PacTel Cellular (now Verizon), and GTE Mobilnet (now Verizon). (Application-Exhibit B).

SPRINT'S RESPONSE: Sprint does not dispute this statement, but notes that this is not supported by "an appropriate citation to the record." SDCL § 15-6-26(c)(1). The Application was not verified and this statement is not found in any sworn testimony.

65. Jeff Holoubek ("Holoubek") is NAT's acting president. (Application-Exhibit B; Holoubek Testimony, page 2).

SPRINT'S RESPONSE: Undisputed.

66. Holoubek received his law degree from the Boston University School of Law. (Application-Exhibit B; Holoubek Testimony, page 3).

SPRINT'S RESPONSE: Undisputed.

67. Holoubek received his Masters of Business Administration (M.B.A.) from California State University-Fullerton. (Application-Exhibit B; Holoubek Testimony, page 3).

SPRINT'S RESPONSE: Undisputed.

68. Holoubek holds Bachelor of Arts degrees in Accounting, Finance, and Philosophy. (Holoubek Testimony, page 3).

SPRINT'S RESPONSE: Undisputed.

69. NAT is not a publicly-held entity. (Holoubek Testimony, page 14).

SPRINT'S RESPONSE: Undisputed.

70. NAT has provided its "confidential financial documents" for the Commission's analysis and review. (Holoubek Testimony, page 14).

SPRINT'S RESPONSE: ~~Sprint disputes this statement on the basis that NAT has refused to provide Sprint discovery with respect to its finances. See Sprint's Mem. in Support of Motion to Compel, pp. 11-17.~~

71. The "confidential financial documents" provided by NAT to the Commission include (1) NAT's Balance Statements and (2) NAT's Profit & Loss Statements (through December 31, 2011). (Affidavit of Scott R. Swier in Support of NAT's Motion for Summary Judgment, ¶ 6).

SPRINT'S RESPONSE: ~~Sprint disputes this statement on the basis that NAT has refused to provide Sprint discovery with respect to its finances. See Sprint's Mem. in Support of Motion to Compel, pp. 11-17.~~

72. NAT is committed and prepared to allocate the necessary resources to provide high-quality telecommunications services to its customers. (Holoubek Testimony, page 14).

SPRINT'S RESPONSE: ~~Sprint denies this statement on the basis that NAT has refused to provide Sprint discovery with respect to its ability to obtain additional financing. See Sprint's Mem. in Support of Motion to Compel, p. 16 (Document Request No. 2).~~

Dated: April 11, 2012

**BRIGGS AND MORGAN, P.A.**

*s/Philip R. Schenkenberg*

Philip R. Schenkenberg

Scott G. Knudson

2200 IDS Center

Minneapolis, Minnesota 55402

(612) 977-8400

Counsel for Sprint Communications  
Company L.P.

4574273v2



Reservation and to promote the use of these services "to improve the health and welfare of the residents."

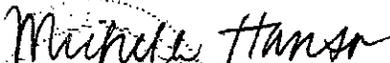
5. On October 28, 2008, the Tribal Utility Authority entered its *Order Granting Approval to Provide Telecommunications Service* ("Approval Order").

6. Under this Approval Order, Native American Telecom, LLC ("NAT") was "granted authority to provide telecommunications service on the . . . Reservation subject to the jurisdiction of the laws of the Crow Creek Sioux Tribe."

Dated this 16<sup>th</sup> day of April, 2012.

  
\_\_\_\_\_  
Tom Reiman

Subscribed and sworn to before me this 16<sup>th</sup> day of April, 2012.

  
\_\_\_\_\_  
Notary Public

Michelle Hanson  
My Commission Expires 5/10/14

My Commission Expires: \_\_\_\_\_

(SEAL)

**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of *AFFIDAVIT OF TOM REIMAN IN SUPPORT OF NATIVE AMERICAN TELECOM, LLC'S MOTION FOR SUMMARY JUDGMENT* was delivered *via electronic mail* on this 16<sup>th</sup> day of April, 2012, to the following parties:

*Service List (SDPUC TC 11-087)*

/s/ Scott R. Swier  
Scott R. Swier

**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA**

---

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.

---

Docket No. TC11-087

**DECLARATION OF JEFF HOLOUBEK  
IN SUPPORT OF NATIVE AMERICAN TELECOM, LLC'S  
MOTION FOR SUMMARY JUDGMENT**

STATE OF CALIFORNIA     )  
                                      :SS  
COUNTY OF LOS ANGELES)

Jeff Holoubek, upon information and belief, and being first duly sworn upon his oath, declares as follows:

1. I makes this Affidavit in Support of "Native American Telecom's Motion for Summary Judgment."
2. I serve as Native American Telecom, LLC's ("NAT") acting president.
3. NAT's current tariff with the FCC became effective on August 23, 2011. In this tariff, NAT benchmarked its interstate switched access rate to that of Qwest/CenturyLink's access rate in South Dakota.
4. NAT's Revised Application (filed with the Commission on January 27, 2012) and incorporated Exhibits A-C contains true and correct information.

I DECLARE, upon information and belief, that the foregoing statements are true and correct.

Dated this 16<sup>th</sup> day of April, 2012.

/s/ Jeff Holoubek  
Jeff Holoubek

**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of *DECLARATION OF JEFF HOLOUBEK IN SUPPORT OF NATIVE AMERICAN TELECOM, LLC'S MOTION FOR SUMMARY JUDGMENT* was delivered *via electronic mail* on this 16<sup>th</sup> day of April, 2012, to the following parties:

*Service List (SDPUC TC 11-087)*

/s/ Scott R. Swier  
Scott R. Swier