

**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)	Docket No. TC11-087
within the Study Area of Midstate)	
Communications, Inc.)	

CENTURYLINK'S REPLY BRIEF IN SUPPORT OF ITS MOTION TO COMPEL

Qwest Communications Company, LLC, a Delaware Limited Liability Company, doing business as "CenturyLink QCC" ("CenturyLink"), through counsel, hereby submits its Reply Brief in Support of its Motion To Compel, in which CenturyLink seeks an order compelling Native American Telecom, LLC ("NAT") to respond fully to CenturyLink Data Requests 1.13, 1.14, 1.15, 2.1, 2.2, and 2.3.

Introduction

NAT goes to enormous lengths to prevent the production of information to the parties and ultimately the Commission of NAT's plans to charge access to its customer-IXCs for calls delivered to free service calling companies. There is no dispute that NAT will deliver calls to free service calling companies and attempt to charge IXCs some amount of access under its new certificate, and the evidence in this case thus far is that NAT will pay 75% of such access charges back to the free service calling companies.¹ It is plain to CenturyLink that NAT's contentions -- that the services to be provided under the requested certificate will be in the public interest

¹ Direct Testimony of William R. Easton, at 16.

and that it has the requisite managerial capability -- lack a degree of credibility, when "captured" IXC customers such as CenturyLink are not able to obtain the full story behind NAT's plans to charge access for calls to free service calling companies.

NAT incorrectly defines the scope of issues relevant to this proceeding. NAT misstates its contention that only the Commission may request information, and that such information is limited by the rules. Rather, all parties may seek discovery under South Dakota rules, and there is nothing precluding production of information of how NAT intends to charge access under its certificate, in fact, the very rules cited by NAT authorize such requests. Further, NAT mischaracterizes the Connect America order, as well as ignores the FCC's discussion of potential "mileage pumping" abuses, which go to the heart of CenturyLink's recommendations that, if a certificate is granted, it be conditioned upon the requirement that NAT provide Direct Trunked Transport at reasonable rates and terms, specifically, the same rates and terms offered by CenturyLink to its IXC customers.

NAT mischaracterizes CenturyLink's interest in this case.

A constant theme of NAT's advocacy in its Response to CenturyLink's Motion to Compel and in other briefs is its characterization of CenturyLink as a "competitor." As CenturyLink has shown, in its Petition to Intervene and in the Direct Testimony of William Easton, CenturyLink is an interexchange carrier and thus is a "customer" of the access services provided by local exchange carriers, including NAT. Access services include originating and terminating switched access, tandem switching, and transport. Indeed, IXCs can be distinguished from traditional retail customers of a LEC's services, because IXCs are involuntary customers of a LEC's access

services. That is, if a long distance end user that has chosen CenturyLink as its IXC makes a call to a number served by NAT as a local exchange carrier, then CenturyLink is forced to use NAT's access services. CenturyLink is not able to block calls or otherwise choose not to use NAT's access services. Thus, the interests of IXCs as involuntary customers accentuate their concerns that the rates, terms and conditions of NAT's access services are just and reasonable.

NAT's attempt to classify CenturyLink as a potential "competitor," and that CenturyLink's motives in this case are "competitive," are false. CenturyLink does not provide local services in the area that is the subject of the application. Rather, CenturyLink as an IXC has been the victim of traffic pumping and access stimulation schemes for the past several years in South Dakota and other states, and its interest in this docket is to stop these abuses from being perpetrated upon it.

Contrary to NAT's arguments, Commission rules do not limit the information to be considered in a certification proceeding.

NAT repeatedly argues that Commission rules governing certification applications restrict and limit the information that shall be considered. Citing ARSD 20:10:32:03 and ARSD 20:10:24:02, NAT says that it must produce "only" the data identified in the specific rules for local and long distance applications, and thus CenturyLink's discovery requests are beyond the scope of information that NAT must provide in this docket. NAT has mis-cited the rules.

Nowhere in those rules is the word "only" used, and nowhere does it say that the items listed in the rules are the only information that an applicant must produce in a certification proceeding.

The introductory language to Rule 20:10:32:03 says:

A telecommunications company required to apply for a certificate of authority for local exchange services from the commission shall submit a written

application and provide the following information unless the commission grants a waiver to omit a specific item of information:

NAT has inserted the word "only" as its interpretation. Instead, these rules should be read as establishing a minimum for an applicant, not a maximum.

Second, even if one considers only the items listed in the rules, CenturyLink's requests fall within them. That is, item 11 under the interexchange rules require an applicant to provide:

(11) Information concerning how the applicant plans to bill and collect charges from customers:

And the rules for local service applicants obligate the production of:

8) A list and specific description of the types of services the applicant seeks to offer and how the services will be provided including:

(d) Information identifying the types of services it seeks authority to provide by reference to the general nature of the service;

(14) A description of how the applicant intends to market its local exchange services, its target market, whether the applicant engages in multilevel marketing, and copies of any company brochures that will be used to assist in sale of the services;

(18) Information concerning how the applicant plans to bill and collect charges from customers who subscribe to its proposed local exchange services;

(21) Information concerning how the applicant will make available to any person information concerning the applicant's current rates, terms, and conditions for all of its telecommunications services;

Five of the six discovery requests that are the subject of CenturyLink's Motion to Compel ask for information falling within these categories,² because, CenturyLink is seeking information on how NAT plans to bill for access services for calls delivered to free service calling companies.

² See Dat Requests 1.13, 1.14, 1.15, 2.2, and 2.3

CenturyLink as an IXC is a true “customer” of NAT’s access services, and thus CenturyLink’s data requests fall within the rules’ requirements that an applicant provide information about the access services and charges to be billed to IXC customers.

Next, NAT’s arguments are premised upon the assumption that only the Commission or its staff may request information pertinent to the case. Untrue. The Commission granted CenturyLink’s petition to intervene, which grants CenturyLink rights as a “party.”³ And, “A party may obtain discovery from another party without commission approval.”⁴ Thus, NAT’s contention that only the Commission may obtain information about its application is refuted by Commission rules granting CenturyLink rights as a party to obtain discovery.

The FCC’s Connect America order does not legitimize access stimulation, and potential access abuses abound.

NAT attempts to diminish the importance of CenturyLink’s discovery requests by contending that access stimulation is no longer an issue to be investigated by the South Dakota Commission, because the FCC “legitimized” access stimulation in the Connect America order. NAT mischaracterizes the order by failing to acknowledge that the FCC prescribed rules for the purpose of eliminating or at least reducing access stimulation, not legitimizing it. As discussed in detail in the Testimony of Mr. Easton, the FCC went to great lengths to emphasize its objective of “reducing” access stimulation schemes, which have been “wasteful” and costly.”⁵

Further, as the Utah Commission has found, engaging in access stimulation can be a

³ ARSD 20:10:01:15:05.

⁴ ARSD 20:10:01:22.01.

⁵ Direct Testimony of William R. Easton, at 10-11.

ground upon which a certificate can be revoked.⁶ Thus, it is for the South Dakota Commission, not the FCC, to decide whether a state certificate can be used to engage in abusive access practices, a result that certainly is not foreclosed by the Connect America order.

Also, NAT completely ignores other access abuse issues identified by the FCC in the Connect America order and that are squarely at issue in this case, namely “mileage pumping.” The FCC noted the potential abuses that will occur when service providers designate distant points of interconnection to inflate the mileage used to compute transport charges.⁷ This is a major point of CenturyLink’s case and is the basis for a recommendation that conditions be imposed upon NAT’s certificate.⁸ South Dakota rules authorize the imposition of conditions upon a certificate,⁹ and thus, contrary to NAT’s narrow view of the material issues in this case, discovery directed toward the production of information leading to whether NAT may be engaging in “mileage pumping” is squarely within the relevant issues in this docket.

NAT’s Response Fails to Address Data Request 2.1

Conspicuous by its absence is any discussion by NAT in its response to CenturyLink Data Request 2.1, in which CenturyLink requests production of all documentation reviewed by its consultant, Mr. Carrey Roesel, in the preparation of his testimony filed on February 17, 2012. As stated in CenturyLink’s Motion to Compel, NAT raised objections on the grounds of relevance and that CenturyLink’s use of words such as “facts,” “data,” “information,”

⁶ In the Matter of the Consideration of the Rescission, Alteration, or Amendment of the Certificate of Authority of All American to Operate as a Competitive Local Exchange Carrier within the State of Utah, Docket No. 08-2469-01, Issued April 26, 2010, affirmed on Reconsideration, issued July 6, 2010.

⁷ In the Matter of Connect America Fund, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161 (released November 18, 2011), at ¶ 820.

⁸ Direct Testimony of William R. Easton, at 21-23.

⁹ ARSD 20:10:32:07

“reviewed,” and “analyzed” was not clear enough to NAT. Evidently, NAT has abandoned those objections, and rightly so. The relevance of this data request is not dependent and has no relationship to the dispute among the parties over the proper scope of issues in a certification docket; rather, the request is for documents reviewed by a witness for testimony that already has been filed by NAT, and thus addresses whatever issues NAT and its consultant considered relevant to its testimony. Plus, the language used by CenturyLink is sufficiently clear for NAT to understand the request. Having failed to address data request 2.1, NAT should respond to it accordingly.

NAT Should Answer CenturyLink Requests 1.13, 1.14, 1.15, 2.2, and 2.3

As CenturyLink has shown above, information relating to NAT’s provisioning of access services is highly relevant to the certification issues in this case, and they are certainly relevant to whether the Commission should impose conditions upon NAT’s certificate, if granted. Contrary to NAT’s hyperbole, CenturyLink’s requests are narrowly tailored to the discovery of information tied to access charges for NAT’s delivery of traffic to free calling companies in the area in which it seeks certification. CenturyLink is not requesting all information on how NAT “intends to make money.” NAT conveniently omitted discussion in its text of the narrowing language that CenturyLink’s requests are limited to calls to free service calling companies in the certificated area. And, thus, CenturyLink is requesting information on how and how much NAT intends to charge its involuntary customer-IXCs for access services for calls to free service calling companies. These data requests are relevant to whether NAT is planning to continue to engage in improper traffic pumping or mileage pumping schemes under the Connect America regime, and whether the Commission should impose conditions to prevent the perpetration of

such schemes.

In conclusion, CenturyLink respectfully requests an order of the Commission compelling NAT to respond fully to CenturyLink Data Requests 1.13, 1.14, 1.15, 2.1, 2.2, and 2.3.

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Respectfully submitted,

By:

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CERTIFICATE OF SERVICE

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