

**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 INTEREXCHANGE  
TELECOMMUNICATION SERVICES AND LOCAL  
EXCHANGE SERVICES IN SOUTH DAKOTA**

) **ORDER DENYING MOTION FOR**  
) **SUMMARY JUDGMENT; ORDER**  
) **GRANTING MOTIONS TO**  
) **COMPEL; ORDER GRANTING IN**  
) **PART AND DENYING IN PART**  
) **MOTION TO COMPEL**

) **TC11-087**

On October 11, 2011, the Public Utilities Commission (Commission) received an application from Native American Telecom, LLC (NAT) for a certificate of authority to provide interexchange long distance service and local exchange services in South Dakota. On October 13, 2011, the Commission electronically transmitted notice of the filing and the intervention deadline of October 28, 2011, to interested individuals and entities. On October 13, 2011, the Commission received a Petition to Intervene by Midstate Communications, Inc. (Midstate). On October 26, 2011, the Commission received a Petition to Intervene by AT&T Communications of the Midwest, Inc. (AT&T). On October 28, 2011, the Commission received a Petition to Intervene from Sprint Communications Company, L.P. (Sprint), Qwest Communications Company LLC dba CenturyLink (CenturyLink), and South Dakota Telecommunications Association (SDTA). On November 1, 2011, CenturyLink re-filed its Petition to Intervene. On November 14, 2011, NAT filed its responses to the petitions for intervention. On November 18, 2011, CenturyLink filed CenturyLink's reply. On November 21, 2011, NAT filed a Notice of Supplemental Authority. On November 22, 2011, the Commission voted unanimously to grant intervention to Midstate, AT&T, Sprint, CenturyLink, and SDTA. On January 12, 2012, NAT filed a Motion Requesting a Protective Order Requiring the Parties and Intervenors to Comply with a Confidentiality Agreement.

On January 27, 2012, NAT filed a revised Application for Certificate of Authority. In its revised application, NAT stated that it seeks to provide local exchange and interexchange service within the Crow Creek Sioux Tribe Reservation which is within the study area of Midstate. On January 31, 2012, the Commission granted the Motion Requesting a Protective Order Requiring the Parties and Intervenors to Comply with a Confidentiality Agreement. On February 17, 2012, NAT filed its direct testimony. On February 22, 2012, the Commission issued an Order for and Notice of Procedural Schedule and Hearing. On March 26, 2012, Sprint and CenturyLink filed their direct testimony and NAT filed a Motion for Summary Judgment. On March 27, 2012, a Stipulation By and Between NAT, Midstate, and SDTA was filed. On April 2, 2012, Sprint filed a Motion to Compel and CenturyLink filed a Motion to Compel Discovery Responses. On April 3, 2012, NAT filed a Motion to Compel Discovery. Responses and replies were filed to the Motions to Compel and the Motion for Summary Judgment. By order dated April 5, 2012, the Commission issued an Amended Order for and Notice of Procedural Schedule and Hearing. On April 20, 2012, NAT filed its reply testimony.

The Commission finds that it has jurisdiction in this matter pursuant to SDCL Chapters 1-26 and 49-31.

At its regularly scheduled meeting of April 24, 2011, the Commission heard arguments regarding the Motion for Summary Judgment and the Motions to Compel. The Commission unanimously voted to deny NAT's Motion for Summary Judgment. Summary judgment is proper only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to a judgment as a matter of law." SDCL 15-6-56(c). The burden is on the moving party to clearly demonstrate "an absence of any genuine issue of material fact and an entitlement to judgment as a matter of law." *Luther*

*v. City of Winner*, 2004 SD 1, ¶ 6, 674 NW2d 339, 343 (internal citations omitted). The evidence and the favorable inferences from that evidence are viewed in a light most favorable to the nonmoving party. *Stone v. Von Eye Farms*, 2007 SD 115, ¶ 6, 741 NW2d 767, 769 (internal citations omitted). Both CenturyLink and Sprint submitted affidavits in opposition to NAT's Motion for Summary Judgment and filed statements disputing NAT's Statement of Undisputed Material Facts in Support of Motion for Summary Judgment. For example, Sprint identified issues of disputed facts with respect to NAT's compliance with the standards for certification. In addition, both CenturyLink and Sprint asserted that they were unable to fully dispute NAT's Statement of Undisputed Material Facts due to NAT's refusal to answer discovery requests served on NAT by Sprint and CenturyLink. After consideration of the arguments of the parties and a review of the documents filed in this proceeding, the Commission finds that NAT has failed to demonstrate the absence of any genuine issue of material fact.

With respect to Sprint's Motion to Compel, the Commission unanimously voted to grant the motion. Regarding the scope of discovery, SDCL 15-6-26(b)(1) provides, in part, as follows:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

NAT asserted that the Commission's rules do not allow Sprint and CenturyLink to conduct discovery. The Commission finds that NAT's argument is without merit. Both CenturyLink and Sprint were granted intervention into this docket. The Commission points out that interveners in contested case proceedings are allowed the opportunity to conduct discovery. The last paragraph of ARSD 20:10:01:15.05 provides as follows:

A person granted leave to intervene in whole or in part is an intervener and is a party to the proceeding. As a party, an intervener is entitled to notice of hearing, to appear at the hearing, to examine and cross-examine witnesses, to present evidence in support of the person's interest, to compel attendance of witnesses and production of evidence, to submit briefs, to make and argue motions and objections, and to all other rights granted to parties by statute or this chapter.

The Commission also rejects NAT's argument that Sprint's discovery requests are beyond the proper scope of discovery in this docket. Sprint stated that its discovery requests focused on five areas: 1) requests designed to allow Sprint to prove that NAT has been violating state law by providing service to Free Conferencing; 2) requests designed to allow Sprint to obtain evidence that NAT is a sham entity; 3) requests designed to allow Sprint to investigate issues of financial capability; 4) requests designed to allow Sprint to test the validity and completeness of statements made in NAT's application and testimony; and 5) requests regarding expert discovery. With respect to the discovery requests regarding financial issues, at the meeting Sprint stated that although some of the requests referred to "all documents," Sprint would limit its requests to those documents sufficient to identify the details behind the numbers on the financial statements already submitted by NAT in the docket. The Commission finds that Sprint's discovery requests are within the proper scope of discovery in this docket.

With respect to CenturyLink's Motion to Compel Discovery Responses, the Commission unanimously voted to grant the motion. For the reasons previously stated, the Commission finds that NAT's argument that the Commission's rules do not allow Sprint and CenturyLink to conduct discovery in this matter is without merit. The Commission also rejects NAT's argument that CenturyLink's discovery requests are beyond the proper scope of discovery. CenturyLink stated that its discovery requests

focused on two areas: 1) requests regarding expert discovery; and 2) requests regarding charges NAT may attempt to impose on interexchange carriers. The Commission finds that CenturyLink's discovery requests are proper areas for discovery in this docket.

With respect to NAT's Motion to Compel Discovery from CenturyLink and Sprint, the Commission unanimously voted to deny the motion except for Data Requests 1.19 and 1.21 (limited to South Dakota) directed to Sprint. The Commission first notes that in NAT's Motion to Compel Discovery, NAT failed to state which specific responses of CenturyLink and Sprint that NAT was claiming were unresponsive. NAT merely appended the entire responses of both CenturyLink and Sprint to NAT's Motion to Compel. It was not until its reply brief, filed after CenturyLink and Sprint had responded, that NAT specified which data requests were the subject of its Motion to Compel Discovery. As support for its Motion to Compel Discovery, NAT asserted that it "has simply requested similar discovery information from CenturyLink and Sprint that these two companies are demanding from NAT. As such, neither CenturyLink nor Sprint can complain that NAT's discovery requests are somehow improper." NAT Reply Brief at 8. NAT argued that it needed answers to the same questions that Sprint and CenturyLink posed to NAT in order to conduct a "comparative analysis between itself and other companies that the Commission has already certificated...." *Id.* at 9. The Commission finds these arguments unpersuasive. This proceeding regards NAT's ability to meet the requirements to receive a certificate of authority, not the interveners' current ability to meet the requirements. Thus, with the exception of the data requests listed above and the data requests related to expert discovery (discussed below), the Commission finds that NAT's data requests were not within the proper scope of discovery in this docket. Regarding expert discovery, NAT stated at the meeting that Qwest had now adequately responded to the expert discovery requests. With respect to Sprint's responses to data requests regarding expert discovery, Sprint had stated in its reply brief that it had amended its initial responses. At the meeting, NAT stated that it had not yet reviewed those amended responses but that it would review the amended responses and determine whether they were sufficient.

It is therefore

ORDERED, that NAT's Motion for Summary Judgment is denied; and it is further

ORDERED, that Sprint and CenturyLink's Motions to Compel are granted; and it is further

ORDERED, that NAT's Motion to Compel is denied in part and granted in part.

Dated at Pierre, South Dakota, this 4<sup>th</sup> day of May, 2012.

CERTIFICATE OF SERVICE	
The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, electronically.	
By:	<u>Joy Chung</u>
Date:	<u>May 4<sup>th</sup> 2012</u>
(OFFICIAL SEAL)	

BY ORDER OF THE COMMISSION:

Chris Nelson

CHRIS NELSON, Chairman

Kristie Fiegen

KRISTIE FIEGEN, Commissioner

Gary Hanson

GARY HANSON, Commissioner