THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF SOUTH DAKOTA

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IN THE MATTER OF THE APPLICATION OF NATIVE AMERICAN TELECOM, LLC FOR A CERTIFICATE OF AUTHORITY TO PROVIDE INTEREXCHANGE TELECOMMUNICATIONS SERVICES AND LOCAL EXCHANGE SERVICES IN SOUTH DAKOTA

TC11-087

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Transcript of Recorded Proceedings
November 22, 2011

ORIGINAL

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BEFORE THE PUBLIC UTILITIES COMMISSION,
GARY HANSON, CHAIRMAN
CHRIS NELSON, COMMISSIONER
KRISTIE FIEGEN, COMMISSIONER

APPEARANCES

Scott Swier, Native American Telecom
Tom Welk, CenturyLink
Richard Coit, South Dakota Telecom Association
Phil Schenkenberg, Sprint
Meredith Moore, MidState

Reported By Cheri McComsey Wittler, RPR, CRR

CHAIRMAN HANSON: TC11-087, in the matter of application of Native American Telecom for a COA to provide interexchange telecommunication services and local exchange services in South Dakota.

The question before the Commission is shall the Commission grant intervention to MidState, AT&T, Sprint, Qwest, and SDTA.

At this time Mr. Swier -- Mr. Swier is not on the phone.

MR. SWIER: No. I'm here, Mr. Chair.

CHAIRMAN HANSON: Thank you.

MR. SWIER: Mr. Chair, first of all, to start, we have not objected to the Petition For Intervention from MidState. And also yesterday Mr. Coit and I discussed Native American Telecom no longer objects to the Petition To Intervene of SDTA either.

CHAIRMAN HANSON: So MidState and SDTA, you do not have objection to?

MR. SWIER: That's correct, Mr. Chair.

CHAIRMAN HANSON: However, with AT&T, Sprint, and Qwest you still object?

MR. SWIER: We do. And, Mr. Chair, I can proceed with that argument if you'd like at this time.

CHAIRMAN HANSON: Please do.

MR. SWIER: Mr. Chair, members of the committee,

members of the Commission, the three IXCs in this case, AT&T, Sprint, and Qwest, have requested intervention status on NAT's Certificate of Application for interexchange telecommunication services and local exchange services.

AT&T's primary reason for intervention is that it is required to pay intrastate access fees to competitive local exchange carriers throughout the state. And it has concerns with what it terms to be NAT's revenues. Sprint's primary reason for intervention is that it's concerned with the pending litigation between the parties, which is in TC10-26 and also it's inquisitive regarding NAT's financial status.

Qwest's Petition For Intervention is limited to simply saying that they're concerned with access stimulation and revenue sharing agreements. And based on those reasons, the IXCs believe they should be granted intervention status here.

And I think that there are four very clear reasons why the IXCs in this case should not be granted intervention. Number one is, as the Commission is aware, this is a very limited docket. The only issue in this docket is whether NAT should be granted a Certificate of Authority to provide interexchange services and local exchange services in South Dakota. That's the only issue

that we're -- that's in this particular docket.

And as the Commission is aware, in granting or denying certificate of authorities, your review is limited to financial, technical, and managerial abilities of the Applicant. So it's a very specific, a very precise, a very limited docket that is before you in this case. And there is simply no nexus between the IXCs' concerns and the limited scope of this document.

MidState is the proper party to intervene here. NAT is looking to expand in MidState's study area. And I will inform the Commission that Ms. Moore, who is MidState's attorney, Ms. Moore and I have already been in contact, and we are very optimistic that MidState and SDTA and NAT are hopefully going to be able to reach an agreement very soon on this particular CLEC application.

I think the parties have worked great together so far, and we're very optimistic that we are going to reach an agreement.

The second reason that I think that the Commission should deny the Petition To Intervene is the big news that we all got late on Friday where the FCC released its long awaited report and order to reform the Universal Service Fund and intercarrier compensation.

And in my Notice of Supplemental Authority that

I filed yesterday it's very clear that after years of study the FCC has now recognized the legality and legitimacy of access stimulation and revenue sharing agreements. And the Order adopts a very bright line definition of access stimulation.

And it says that access stimulation and revenue sharing are perfectly legal. The only issue is at what rate those type of agreements are going to be compensated at.

So I think those two issues have now been definitively decided by the FCC and that order now seems to completely eviscerate the IXCs' longstanding claims that revenue sharing agreements and access stimulation violates the Federal Communications Act.

It's clear now that NAT's longstanding position that these are perfectly legitimate and legal business plans is now really undisputed.

For the Commission's information, since August of this year, August 2011, Native American Telecom has benchmarked its tariffed interstate rates to the rate of the price cap LEC with the lowest switched access rate in South Dakota. In other words, since August NAT has been doing exactly what the FCC ordered it must do in Friday's order. So NAT has been ahead of the game by months anticipating the FCC's order.

Also the precedent that this Commission would set of allowing IXCs to intervene in limited dockets like Certificates of Application are going to open the door to potentially all kinds of issues. Again, MidState is the party here who potentially has an effect on their business.

The IXCs simply don't meet the Commission's standard for intervention. And if the Commission opens the door to this intervention, it really opens the door to any party intervening in any telecommunications case, which really doesn't provide any teeth to the intervention standard, and it could potentially lead to issues down the line.

Very simply, the IXCs simply don't meet the Commission's definition for intervention, the requirements for intervention. We'd ask that the Commission, of course, recognize the agreement between MidState and SDTA, that their intervention be allowed -- hopefully an agreement is reached in the next few weeks -- and deny the IXCs' Motions To Intervene.

Thank you.

CHAIRMAN HANSON: Okay. Thank you. I'll remind the parties that this is a request for intervention, and we don't necessarily need to argue the points of the docket itself. Merely that we're looking at whether or

not parties should intervene. So you don't need to point counter point. Appreciate that.

I know you might feel compelled to, but we're interested in just the intervention itself.

Mr. Van Camp.

MR. VAN CAMP: Thank you, Mr. Chairman. Bill Van Camp on behalf of AT&T. Thanks for that admonition because I had taken the bait and was ready to respond, but I will not.

On the limited purpose for which we're here today is whether or not AT&T and the other IXCs should be granted status as interveners in this party, I'll point out that the nexus that's referenced by counsel is found in the Administrative Rule where AT&Ts and IXCs adversely impacted conceivably by the granting of the Certificate of Authority in that its position is separate and distinct from that of the general public, we must pay CLECS in this state for access by no action of our own.

We cannot control who our customers call and where calls are routed and we have obligations to carry that traffic and, thus, we pay those fees.

And the status of Native American, should it be granted, its Certificate of Authority will impact us directly and certainly could have impact on the services that we provide and the cost which we provide services in

the State of South Dakota.

Now he's correct that the standards laid out for the Commission are limited in granting the decision to issue the Certificate of Authority, but I would argue, of course, as your statutes and rules show that the burden is on Native American to prove that they meet those standards. The burden is not on the Commission to simply approve them on a presentation by Native American. And as an Intervener with status granted by statute we have a right to be a participant in that.

Further, I would argue that generally under a Certificate of Authority a party is subject at any time to the Commission suspending that or revoking it for violations of state law and the revenue that he -- that Mr. Swier addressed in our position clearly goes to the belief that we have that there are certain services provided by Native American that probably do not fit within the intrastate laws in South Dakota separate and distinct from that issue that we're not going to talk about, Commissioner Hanson.

So we think that some of those issues need to be addressed in this docket and clearly as an IXC we believe we have the right to do so under the administrative rule and statute.

Thank you.

CHAIRMAN HANSON: Thank you, Mr. Van Camp. Mr. Welk representing CenturyLink, Qwest. Do you have --

MR. WELK: Thank you, Mr. Chairman and Commissioners. I believe this is the first time I've appeared before the new constituted Commission, and I thank you for the opportunity.

I will not repeat what Mr. Van Camp said. I will not address all of the plethora of issues that Mr. Swier -- but I will remind the Commission, because you see these interventions quite frequently, that the Commission enacted a regulation but the Administrative Procedures Act, which is basically the rubric in which you operate under the auspices of the legislature has an intervention provision that allows that any person whose pecuniary interest would be directly or immediately affected to have the opportunity to be a party.

And obviously the payment of interexchange services by the IXC clearly meets that. It's something that's separate from the public.

So I don't have anything further to ask. This is a Certificate of Authority. This is an intervention. We're not dealing with the merits today. And that's all I have on the merits of the intervention, other than what's in our papers.

But I would like to address one other issue that

was peculiar to Qwest regarding its Petition that I think especially with two new Commissioners that has been an issue that I've dealt with for I was thinking about the last 25 years I've appeared before the Commission. And that's the practice of law by the attorneys.

And it happened in this case because we had in-house counsel for Qwest file a Petition To Intervene. An objection was made by Mr. Swier. We were then contacted and rectified that by filing it under my name and Mr. Madsen's name. And the there has been no prejudice because of the inadvertent filing.

But mine is more of a policy issue for the Commission, and that is -- and to give you a little bit of history, the issue of how out-of-state counsel appear before you is an issue that's been inconsistent over the years because of the nature of the dockets the Commission has.

You deal, as you've already seen in your early tenure, the new Commissioners, with some minor matters with very substantive issues to minor tariff revisions, and the telecommunications companies that appear before you, some have offices in South Dakota, some don't. They have in-state counsel, out-of-state counsel, and we really don't understand the rules for the Commission regarding when resident counsel may be required.

In prior dockets we've always kind of had this unwritten rule that if there was a contested matter, that resident counsel was required to appear. And that's the way it's always been as far as I remember in my 25 years' history. And part of your history arises for sometimes you have agencies or entities that might be profit or nonprofit that really don't have an attorney. And so the Commission has had to grapple with a myriad of issues.

And I would just ask the Commission either through rule or an order -- and it's not part of this docket -- that we address that for the benefit of all the telecommunications companies so that we know what the rules are with regard to when resident counsel has to appear.

I think it would be impractical for a number of companies that are out of state to have resident counsel appear on minor tariff revisions, to incur the expense of going through paying the $200 fee, having someone on the phone.

And so there are issues that need to be legitimately addressed by the Commission. But I'd ask you in some other docket, some other time, to address that so we can have some clarity as we go forward.

So thank you, Mr. Chairman, for giving me the opportunity to make those comments.

CHAIRMAN HANSON: Thank you, Mr. Welk. Point's well taken. Appreciate it very much.

Mr. Schenkenberg, are you still on the line with Sprint?

MR. SCHENKENBERG: I am, Mr. Chairman, members of the Commission.

Sprint has no further argument. We would concur in the statements made by AT&T, Qwest (Inaudible) the intervention standards and the interests that interexchange carriers like Sprint and Qwest and AT&T have, and we'd ask that Sprint be allowed to intervene.

Thank you.

CHAIRMAN HANSON: Thank you.

Ms. Moore, you don't appear to have any challenge here. Is there anything that you feel that you need to say?

MS. MOORE: No. Thank you, Mr. Chairman. MidState has a statutory right to intervene under Administrative Rules of South Dakota, and we would simply ask that the Commission honor that particular legislative rule acknowledgment in this particular case and grant the intervention.

Thank you.

CHAIRMAN HANSON: Thank you, Ms. Moore. And, Mr. Coit, Mr. Swier has taken you out of the do not play

with list.

MR. COIT: And I do appreciate the fact that NAT and Mr. Swier have decided not to object to our Petition To Intervene.

I would like to, though, just offer a little bit more comment than what we offered in our Petition as to why we feel as a state association we have an interest in this particular docket that might go beyond what MidState's as a company's particular interests are.

And first, obviously, this is an application for a Certificate of Authority to provide local exchange service involving a rural service area. MidState is a rural telephone company, one of our members, and they obviously provide service in an area that is classified as a rural service area or study area under the 1996 Act.

When the 1996 Act came into effect basically, you know, it ushered in local exchange competition into a lot of areas where there was no competition for local exchange service. And there were all kinds of rules put in that Act in terms of, you know, how certification proceedings, how competitive entry situations were to be addressed.

And there were specific statutes or provisions in the 1996 Act that deal with entry, competitive entry into rural service areas.

And under Section 253 of that Act states have the ability to impose on a competitively neutral basis and consistent with Section 254, which is the Universal Service Section, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecom services, and safeguard the rights of consumers.

More specifically, pursuant to Section 253(f), which we have through the years referred to as kind of the rural safeguard provision in the Federal Act and also under our State Statute Section 43-31-73 if the Applicant seeking a COA proposes to provide local exchange services in the service area of a rural telephone company, this Commission to effectively prevent and protect rural consumers from the negative consequences associated with cherry picking, cream skimming, that sort of thing, has the authority to require as a condition on the Certificate of Authority that the competitive LEC effectively meet the same service obligations that are imposed on ETCs or eligible telecommunications carriers.

That particular rural safeguard is at issue in this proceeding, and it's for that reason primarily that we are seeking intervention in this docket. And we actually believe now looking at the -- you know, at least

based on the brief review that we've been able to do at this point of the FCC's USF and ICC Order that issues surrounding that particular rural safeguard involving Certificates of Authority that extend to entire rural study areas take on an added significance.

Questions as to whether a rural telephone -- a competitive company is actually meeting obligations, making services available throughout the entirety of the rural LEC service area has other consequences. And it's for that reason that we believe that it is important that we weigh in on this docket and ensure that the rural safeguard provisions that are there are, obviously, considered.

And, you know, one of the interesting things in this docket, if you look at the last docket that NAT filed for certification for local service authority, they actually filed a request for a waiver of the obligation to meet these ETC service requirements.

They have not done that in this case. So this case is a little bit different than before. MidState service area's over 2,000 square miles. It includes 11 exchanges. We certainly have some questions as to whether AT&T could actually provide service throughout the entirety of that area, and we have some questions as to why they are seeking certification throughout the

entirety of the MidState service area.

And for those reasons primarily, given the fact that any of these dockets certainly hold the potential to be precedent setting in some way, given the fact that kind of the rules that we're going to be faced with going forward starting in 2012 certainly look like they're going to be different, we did feel that it was important for us to be involved in this case.

And with that I guess I will conclude my comments. But I did feel it was important for me to kind of explain to you as Commissioners why we felt our interest was different.

Thank you.

CHAIRMAN HANSON: Thank you, Mr. Coit.

Ms. Cremer.

MS. CREMER: Thank you. This is Karen Cremer of Staff. The Petitioners have shown that they have met the statutory and administrative threshold for intervention and their petitions for intervention should be granted.

That would be our recommendation. Thank you.

CHAIRMAN HANSON: Thank you. And, Mr. Swier, you've heard the arguments of why they should intervene.

Do you have any final remarks pertaining to intervention?

MR. SWIER: Just real briefly I do. If you go

back from the year 2000 there has never been an IXC that has moved to Petition in an interexchange or local exchange CLEC application.

Secondly, if the IXCs believe that there's a problem with the tariffs, with whatever, they can file a Complaint. They've done that to dozens and dozens of CLECs and ILECs throughout the country, both in Federal Court and before state administrative agencies. So there's no question that they have the ability to file Complaints if they want.

Next regarding Qwest and their statement that it's unclear, first of all, their Petition -- there's no doubt it's an unauthorized paragraph law. And they filed it at the last minute through corporate counsel. They filed it at the last hour when the Commission's intervention deadline was. And Qwest indicates that it's really unclear and they think it's unclear whether this is the unauthorized practice of law.

I'd like the Commission to know that 10 years ago this very --

CHAIRMAN HANSON: Mr. Swier.

MR. SWIER: (Inaudible).

CHAIRMAN HANSON: Mr. Swier. Mr. Swier, I believe they have refiled and they have -- Mr. Madsen and Mr. Welk, who are both attorneys. So they have, in fact,

disposed of that particular argument.

MR. SWIER: Then I have nothing further then, Mr. Chair.

CHAIRMAN HANSON: Thank you.

Is there any one further who has not been called upon who is compelled to speak to this issue?

If not, I would agree that this is a limited docket, and, in fact, as far as no nexus for intervention, this Commission has always given a broad interpretation of who is allowed to intervene. And for a number of reasons.

We don't know everything that's going to be argued. And, in fact, we'd like to know everything that's going to be argued. Knowledge and information is extremely important. So we need that point counter point, and so we've always allowed a pretty broad sweep of the brush for intervention. And so I will be supporting a Motion in allowing all of the folks to intervene.

Any further discussion from the Commissioners?

If not, I will make a Motion that in TC11-087 that the Commission grant intervention to MidState, AT&T, Sprint, CenturyLink aka Qwest, and SDTA.

Is there a discussion on the Motion?

Hearing none, Commissioner Fiegen.

COMMISSIONER FIEGEN: Fiegen votes aye.

CHAIRMAN HANSON: Commissioner Nelson.

COMMISSIONER NELSON: Aye.

CHAIRMAN HANSON: Hanson votes aye. The Motion carries.

STATE OF SOUTH DAKOTA)

:SS CERTIFICATE

COUNTY OF HUGHES)

I, CHERI MCCOMSEY WITTLER, a Registered Professional Reporter, Certified Realtime Reporter and Notary Public in and for the State of South Dakota:

DO HEREBY CERTIFY that as the duly-appointed shorthand reporter, I transcribed the recording of the foregoing proceedings.

Dated at Onida, South Dakota this 5th day of June, 2012.

Cheri McComsey Wittler,
Notary Public and
Registered Professional Reporter
Certified Realtime Reporter

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