STATE OF SOUTH DAKOTA)
:SS
COUNTY OF BUFFALO)

IN CIRCUIT COURT

FIRST JUDICIAL CIRCUIT

CIV. 12-_____

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.

MOTION TO DISMISS APPEAL

Qwest Communications Company, LLC, doing business as "CenturyLink QCC" (hereinafter referred to as "CenturyLink"), by and through its undersigned attorneys, respectfully moves the Court to dismiss the appeal filed by Native American Telecom, Inc. ("NAT"), because the Circuit Court lacks subject matter jurisdiction according to SDCL 15-6-12(b)(1). The reasons and bases of this motion are as follows:

1. NAT has applied for a certificate of authority to conduct business as a competitive local exchange carrier. See NAT's Application for Certificate of Authority, PUC Docket No. TC 11-087 (http://puc.sd.gov/commission/dockets/telecom/2011/TC11-087/application.pdf). A contested case hearing on NAT's application was set to occur on June 7 and 8, 2012, in Pierre, but by agreement of the parties that hearing will not occur because NAT has sought to appeal intermediate orders entered by the PUC. Specifically, NAT seeks to appeal four intermediate decisions of the South Dakota Public Utilities Commission ("PUC"): (a) an order entered by the PUC on November 30, 2011 granting intervention; (b) an order entered by the PUC on May 4, 2012 denying NAT's motion for summary judgment; (c) an order dated May 4, 2012 granting two motions to compel discovery from NAT; and, (d) an order dated May 4, 2012 granting in part and denying in part a motion to compel discovery. Copies of the aforementioned orders are

attached to this motion for the Court's convenience. No final order adjudicating all issues pertaining to all parties has been entered in Docket No. TC 11-087.

2. NAT seeks an intermediate appeal based on SDCL 1-26-30, which states:

> A person who has exhausted all administrative remedies available within any agency or a party who is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter. If a rehearing is authorized by law or administrative rule, failure to request a rehearing will not be considered a failure to exhaust all administrative remedies and will not prevent an otherwise final decision from becoming final for purposes of such judicial review. This section does not limit utilization of or the scope of judicial review available under other means of review, redress, or relief, when provided by law. **A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy.**

NAT seeks to invoke the last sentence of the statute, which has been emphasized in bold typeface.

3. According to ARSD 20:10:01:01.02:

> Except to the extent a provision is not appropriately applied to an agency proceeding or is in conflict with SDCL chapter 1-26, another statute governing the proceeding, or the commission's rules, the rules of civil procedure as used in the circuit courts of this state shall apply.

4. The PUC's rulings on the above-referenced motions that are the subject of NAT's appeal are all intermediate orders, because they do not finally and completely adjudicate all issues of fact and law on the motions. *Action Carrier v. United Nat. Ins. Co.*, 2005 S.D. 57, ¶ 25, 697 N.W.2d 387, 393. Likewise, these orders do not affect a substantial right because all parties' appeal rights are preserved pending a final decision in the docket. *Id.* The South Dakota Supreme Court "has recognized the policy underlying the finality requirement is that litigation should not proceed piecemeal." *Smith v. Tobin*, 311 N.W.2d 209, 210 (SD 1981). Accordingly, under SDCL 15-26A-3, no appeal from these orders would exist as a matter of right.

3. SDCL 1-26-30 does not provide an absolute, unconditional right to judicial review of a preliminary, procedural, or intermediate agency action. Intermediate review is available **only** if review of the final decision would not provide an adequate remedy.

4. Although it appears the South Dakota Supreme Court has not had an opportunity to interpret the operative last sentence of SDCL 1-26-30, the Court has had opportunities to examine what constitutes "adequate remedy" in other contexts.

- In *South Dakota Bd. Of Regents v. Heege*, 428 N.W.2d 535 (SD 1988), the Court examined exhaustion of administrative remedies which is also required in SDCL 1-26-30. Failure to exhaust administrative remedies where required is a jurisdictional defect. 428 N.W.2d at 539. As the Supreme Court noted, there are exceptions to the exhaustion requirement, one of which is that exhaustion is not required where a party faces impending irreparable harm and the agency cannot grant adequate or timely relief. *Id.* The Court held that the petitioning party had not suffered irreparable harm and that any further fact finding should be conducted by the Department of Labor. *Id.* at 541-542.

- In cases involving issuance of extraordinary writs, such as writs of prohibition or writs of quo warranto, it is essential to show a lack of adequate remedy at law. In *Sorenson v. Rickman*, 486 N.W.2d 259 (SD 1992) the Supreme Court reversed issuance of a peremptory writ of prohibition because the Circuit Court failed to make a specific finding that the petitioner lacked adequate remedy at law, however, the Court noted that petitioner had an adequate remedy available in the form of South Dakota's election contest statutes. 486 N.W.2d at 261. In *McElhaney v. Anderson*, 1999 SD 98, 598 N.W.2d 203, the Supreme Court reversed the Circuit Court's decision to issue a writ of quo warranto finding the petitioner had an adequate remedy at law in the form of pursuing his grievance through the Department of Labor. 1999 SD 98, ¶ 16.

5. Other jurisdictions, which have nearly identical statutory requirements for judicial review of intermediate administrative agency decisions have addressed adequacy of remedy in regard to judicial review of intermediate agency decisions.

Under the applicable Iowa statute "A preliminary, procedural or intermediate agency action is immediately reviewable if all adequate administrative remedies have been exhausted

and review of the final agency action would not provide an adequate remedy." I.C.A. § 17A.19. The Iowa Supreme Court has had occasions to analyze adequacy of remedy of review of the final agency action.

- In *Richards v. Iowa State Commerce Comm'n*, 270 N.W.2d 616 (Iowa 1978), the Iowa Supreme Court noted that "a remedy is adequate if it is 'clear, complete, and as practical and efficient to the ends of justice and its proper administration as a remedy in equity.'" 270 N.W.2d at 620. The Court found that the issues sought to be reviewed on an intermediate basis (relating to notice and conduct of informational meetings) were preserved before the agency and could be heard on review of the final agency action. *Id.* at 621. The Court found several factors bolstered the holding, namely: (1) if the final agency action aggrieved the parties, they would have a right to seek judicial review; (2) the same relief was available in both review situations; (3) the same standard of review is applicable; and, (4) final review would appear to provide a more complete remedy because all issues could be determined. *Id.*

6. Analyzing NAT's appeal of intermediate decisions under the authority cited above demonstrates that this Court does not have jurisdiction to consider this appeal, because final review will provide NAT with adequate remedy. NAT has made no showing of any irreparable harm that results from review of these orders after a final decision is made in this docket.

a. The intervention motions could not have caused NAT any irreparable harm such that they cannot be reviewed upon a final judgment in the docket. The rulings merely granted interexchange carriers ("IXCs") such as CenturyLink a seat at the table, so to speak, in these proceedings because they are ultimately customers of providers like NAT because IXCs pay access charges assessed by local exchange carriers for long distance traffic delivered to the local exchange carrier's customers. See Petition to Intervene

(http://puc.sd.gov/commission/dockets/telecom/2011/TC11-087/qwestintervention.pdf).

b. With regard to NAT's motion for summary judgment (http://puc.sd.gov/commission/dockets/telecom/2011/TC11-087/natmotionsummaryjudgment.pdf) the PUC decided there were issues of material fact that needed to be resolved at a hearing on the merits of NAT's application.

c. As to the motions to compel discovery from NAT, the PUC found that NAT was required to provide discovery responses regarding materials reviewed by NAT's expert to provide opinions in this matter and regarding information relevant to NAT's proposed charges to IXC's. None of this material is alleged to constitute a trade secret or privileged material, and there is nothing about these materials that could cause irreparable harm upon their disclosure. Furthermore, even if NAT were to claim that disclosure may be harmful, the parties agreed upon a protective order. (http://puc.sd.gov/commission/orders/telecom/2012/TC11-087ogmporpicca.pdf). At any rate, review of the PUC's order compelling NAT to produce these discovery materials at the time a final order is entered causes NAT no irreparable harm. The same is true with regard to the PUC's denial of NAT's motion to compel discovery from CenturyLink and other IXC's. The PUC merely decided the requested materials were outside the scope of the proceedings.

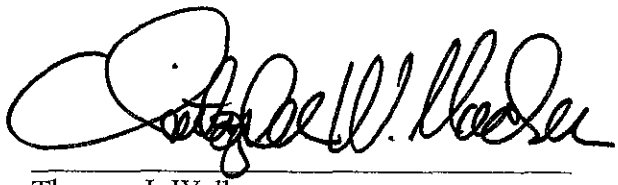
d. The issues set forth in the orders from which NAT seeks appeal are all preserved for a final appeal. Furthermore, the outcome of the contested case hearing in this matter is not a foregone conclusion. Although CenturyLink and other intervenors

contest issuance of the certificate of authority, and request the imposition of conditions upon any certificate that is granted, the PUC could very well grant NAT's application without any conditions. Such a decision would render appeal of the orders in question moot. Final review will provide a more complete remedy and promote judicial economy.

CONCLUSION

NAT is not entitled to an appeal from the PUC's intermediate orders as a matter of right. The Circuit Court does not have jurisdiction over this appeal of the intermediate decisions made by the PUC, because an appeal of the final decision in Docket No. TC 11-087 provides NAT with an adequate remedy. CenturyLink respectfully requests the Court dismiss this appeal and allow the PUC to conduct further proceedings.

Dated this 25th day of May, 2012.



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CERTIFICATE OF SERVICE

I, Christopher W. Madsen, hereby certify that I am a member of the law firm of Boyce, Greenfield, Pashby & Welk, L.L.P. and that on the 25th day of May, 2012, a true and accurate copy of this document was delivered via U.S. mail to the following parties:

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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 GRANTING INTERVENTION** **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 12, 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.

The Commission has jurisdiction in this matter pursuant to SDCL Chapters 1-26 and 49-31 and ARSD 20:10:01:15.05

At its regularly scheduled meeting of November 22, 2011, the Commission heard the arguments of the petitioners and NAT. NAT did not oppose the interventions of Midstate and SDTA. The Commission found that the Petitions to Intervene of Midstate, AT&T, Sprint, CenturyLink, and SDTA demonstrated good cause to grant intervention and voted unanimously to grant intervention to Midstate, AT&T, Sprint, CenturyLink, and SDTA. It is therefore

ORDERED, that the Petitions to Intervene of Midstate, AT&T, Sprint, CenturyLink, and SDTA is hereby granted.

Dated at Pierre, South Dakota, this 30th day of November, 2011.

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: _____

Date: Nov. 30, 2011

(OFFICIAL SEAL)

BY ORDER OF THE COMMISSION:

GARY HANSON, Chairman

CHRIS NELSON, Commissioner

KRISTIE FIEGEN , Commissioner

64:01:01:20. Reduction or abatement of taxes, interest, or penalties -- Requirements for showing widespread misapplication of tax. In order to show a widespread misunderstanding of the application of a tax to a certain transaction, the taxpayer must show documentary proof illustrating this misunderstanding among other taxpayers and written proof that the taxpayer has been in contact with the department in an effort to determine the taxes that are due.

In making a determination, the secretary may consider tax publications distributed by the department issued on the subject or that the argument raised by the taxpayer is not valid on its face or has been found to lack merit in past administrative decisions or litigation.

Source: 17 SDR 4, effective July 18, 1990; 21 SDR 219, effective July 1, 1995.

General Authority:SDCL 10-45-47.1, 10-46-35.1, 10-46A-19, 10-46B-18.

Law Implemented:SDCL 10-59-31.

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 4th 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: _____

Date: May 4th, 2012

(OFFICIAL SEAL)

BY ORDER OF THE COMMISSION:

CHRIS NELSON, Chairman

KRISTIE FIEGEN, Commissioner

GARY HANSON, Commissioner