

STATE OF SOUTH DAKOTA)
): §
COUNTY OF BUFFALO)

IN CIRCUIT COURT
FIRST JUDICIAL CIRCUIT

CIV. 12-06

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.

**PUBLIC UTILITIES COMMISSION'S
MEMORANDUM IN SUPPORT OF ITS
JOINER IN QWEST COMMUNICATIONS
COMPANY LLC DOING BUSINESS AS
CENTURYLINK QCC'S MOTION
TO DISMISS APPEAL AND
SUPPLEMENT TO MOTION TO DISMISS**

The South Dakota Public Utilities Commission (Commission), by and through its counsel, submits the following Memorandum in Support of Its Joinder in Qwest Communications Company LLC doing business as CenturyLink QCC's (CenturyLink's) Motion to Dismiss Appeal and Supplement to Motion to Dismiss.

PROCEDURAL HISTORY

On October 11, 2011, the 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. In its application, NAT requested a certificate of authority to provide local exchange and interexchange service within the study area of Midstate Communications, Inc. (Midstate), pursuant to ARSD 20:10:32:15, 20:10:24:02, and 20:10:32:03. NAT stated that it is "a tribally-owned full-service telecommunications carrier operating on the Crow Creek Sioux Tribe Indian Reservation pursuant to an *Order Granting Approval To Provide Telecommunications Service* by the Crow Creek Sioux Tribe Crow Creek Utility Authority dated October 28, 2008." NAT stated that "[t]hrough this application, NAT seeks to expand its authority to include areas within Midstate's study area off of the Crow Creek reservation."

Petitions to intervene in this docket were filed by Midstate, CenturyLink, AT&T Communications of the Midwest, Inc. (AT&T), Sprint Communications Company, L.P. (Sprint), and the South Dakota Telecommunications Association (SDTA). 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 31, 2012, the Commission granted the 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 February 17, 2012, NAT filed its direct testimony. 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. In the Stipulation, it was stated that NAT "intends to provide service only within Midstate's Fort Thompson exchange, all of which is located on the Crow Creek Sioux Reservation." The Stipulation further stated that "[w]hile the boundaries of the Crow Creek Sioux Reservation extend beyond the Fort Thompson exchange, NAT's services will be limited to the Fort Thompson exchange."

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. On April 20, 2012, NAT filed its reply testimony. On May 4, 2012, the Commission issued an Order Denying Motion for Summary Judgment; Order Granting Motions to Compel; Order Granting in Part and Denying in Part Motion to

Compel. On May 7, 2012, NAT served a Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises in Civil Action on the Commission. On May 16, 2012, the Commission issued an Order Quashing Subpoena. After NAT filed its appeal, the hearing on this case that was scheduled for June 7, 2012 was cancelled by order dated May 29, 2012. CenturyLink subsequently filed a Motion to Dismiss Appeal and a Supplement to Motion to Dismiss. The Commission supports and joins in CenturyLink's motion to dismiss.

ARGUMENT

NAT is appealing intermediate agency orders of the Commission that the Commission has issued throughout the course of this proceeding which regards NAT's application for a Certificate of Authority to provide telecommunications services in South Dakota. Those orders are: Order Granting Intervention, Order Quashing Subpoena, and Order Denying Motion for Summary Judgment; Order Granting Motions to Compel; Order Granting in Part and Denying in Part Motion to Compel.

NAT's appeal of these Commission orders constitutes an appeal of intermediate agency orders. As an appeal of an intermediate agency order, NAT must demonstrate, pursuant to SDCL 1-26-30, that review of the final Commission decision would not provide an adequate remedy. This statute provides as follows:

1-26-30. Right to judicial review of contested cases--Preliminary agency actions. 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.

(emphasis added)

The South Dakota Supreme Court has declared that “[w]hen the legislature provides for appeal to circuit court from an administrative agency, the circuit court’s appellate jurisdiction depends on compliance with conditions precedent set by the legislature.” *Clagget v. Dept of Revenue*, 464 N.W.2d 212, 214 (S.D. 1990). Accordingly, under SDCL 1-26-30, a condition precedent to obtaining review of an intermediate agency ruling requires NAT to show that review of the final agency decision would not provide an adequate remedy. No such showing by NAT can be made in this case since the Commission’s final decision regarding NAT’s application for a certificate of authority will provide an adequate remedy.

The Commission agrees with CenturyLink that this Court does not have jurisdiction over this appeal of intermediate agency decisions. The provisions of SDCL 1-26-30 are jurisdictional and must be met. As noted by CenturyLink, in a case involving a very similar statute, the Supreme Court of Iowa found that the failure of the appellant to show that review of the final agency action would not provide an adequate remedy was a jurisdictional defect. *Richards v. Iowa State Commerce Commission*, 270 N.W. 2d 616, 619 (Iowa 1978). In *Richards*, the statute in question provided, in relevant part, as follows:

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.

Id.

Due to a lack of showing that review of the final agency action would be inadequate, the Iowa Supreme Court found that the trial court should have dismissed the petition for judicial review. *Id.* at 624. The Court stated that “[s]ince review of agency action is purely statutory the ‘procedure prescribed by the statutes must be followed in seeking the review especially those particulars which are jurisdictional or mandatory . . .

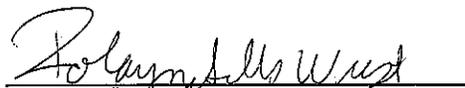
.” *Id.* at 619 (quoting 2 Am.Jur.2d Administrative Law § 716 at 618.) The Iowa Court further recognized that “[a] contrary rule ‘would inundate the courts with innumerable appeals, initiated without statutory foundation, and frequently of a petty or unmeritorious character.’” *Richards*, 270 N.W.2d at 619 (quoting *McAuliffe v. Carlson*, 30 Conn. Supp. 118, 121, 303 A.2d 746, 748.)

NAT’s appeal regards intermediate Commission orders. None of these orders require review by an appellate court at this stage of the proceeding because review of the Commission’s final decision will provide an adequate remedy. And, as noted by the court in *Richards*, final review “would appear to provide a more complete remedy than intermediate review” since all of the issues in the case could then be decided. *Richards*, 270 N.W.2d at 621. No irreparable harm will be suffered by NAT if this appeal is dismissed. The Commission will proceed to a contested case hearing. After the hearing, the Commission will issue its decision regarding the application. Any party (whether it is one of the intervenors or is NAT) that may be aggrieved by this final decision will be entitled to judicial review at that time. *See* SDCL 1-26-30.

CONCLUSION

For all of the reasons set forth above, the Commission respectfully requests that the Court dismiss this appeal.

Dated at Pierre, South Dakota, this 19th day of June, 2012.



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