



Dustin Johnson, Chair  
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## SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

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January 20, 2009

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Re: In the Matter of the Application of Native American  
Telecom, LLC for a Certificate of Authority to Provide  
Local Exchange Service on the Crow Creek Indian  
Reservation  
Docket TC08-110

Dear Folks:

Attached you will each find a copy of Staff's Response to Motion to Dismiss with reference to the above captioned matter. This is intended as service upon you by mail.

Very truly yours,

Karen E. Cremer  
Staff Attorney  
South Dakota Public Utilities Commission

Enc.

**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA**

<b>IN THE MATTER OF THE APPLICATION OF )</b>	<b>STAFF'S RESPONSE TO</b>
<b>NATIVE AMERICAN TELECOM, LLC FOR A )</b>	<b>MOTION TO DISMISS</b>
<b>CERTIFICATE OF AUTHORITY TO PROVIDE )</b>	
<b>LOCAL EXCHANGE SERVICE ON THE CROW )</b>	<b>TC08-110</b>
<b>CREEK INDIAN RESERVATION )</b>	

**STATEMENT OF THE CASE**

On December 1, 2008, Native American Telecom, LLC (NAT) filed a Motion to Dismiss in the above-captioned matter. On December 10, 2008, Midstate Communications, Venture Communications Cooperative, and South Dakota Telecommunications Authority (Intervenors) filed its Response to Motion to Dismiss. On December 18, 2008, NAT filed a Reply of NAT to Intervenors' Response to Motion to Dismiss. This brief constitutes Staff's Response to the above-filed documents.

**ARGUMENT AND AUTHORITIES**

The issue to be decided in this matter is whether NAT has the right to voluntarily dismiss its filing for an application for a certificate of authority to provide local exchange services on the Crow Creek Indian Reservation?

NAT filed an Application for a Certificate of Authority on September 8, 2008. Its Motion to Dismiss was filed on December 1, 2008. Before the matter of granting or denying the certificate of authority was formally brought before the Commission, NAT sought a dismissal of its application. Intervenors filed to oppose such a dismissal.

As a general rule, a plaintiff has an absolute right to dismiss an action, where no counterclaim has been interposed and there is no special reason why the dismissal should not be granted. Deere & Webber v. Hinckley, 106 N.W. 138 (SD1906). The Commission's rule on withdrawal and voluntary dismissal, set forth below, has been substantially complied with by NAT, therefore, NAT is entitled to such relief as a matter of right and the application should be dismissed.

**20:10:01:02.04. Withdrawal and dismissal of pleading prior to final order.** A pleading may be dismissed or withdrawn prior to entry of a final order by the commission if a stipulated agreement is filed and the commission does not find that the public interest requires the proceeding to be continued. The commission may also dismiss a pleading at the request of an interested party or on its own motion, stating the reasons in its order.

In this matter, the Intervenors have raised many concerns, but there exists no special reason that the dismissal should not be granted. This docket, which is a filing for a certificate of authority, is not the forum to determine the issues that the Intervenors believe may exist. SDCL 49-31-3, the statute governing the granting of a certificate of authority, states, *inter alia*, that the applicant has the burden to prove in its application that it has sufficient technical, financial and managerial capabilities to offer the telecommunications services described in its application. The Intervenors' concerns do not address NAT's technical, financial, or managerial capabilities. If issues of the nature described by the Intervenors factually arise at a later time; those issues can be brought before the Commission. The Intervenors would not suffer any prejudice should the Motion to Dismiss be granted.

#### CONCLUSION

As NAT has an absolute right to voluntarily dismiss its application and there is no special reason why the dismissal should not be granted, Staff recommends that the Commission grant the Motion to Dismiss and close the docket.

Dated at Pierre, South Dakota, this 20<sup>th</sup> day of January, 2009.



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Karen E. Cremer  
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CERTIFICATE OF AUTHORITY

I hereby certify that copies of Staff's Response to Motion to Dismiss were served on the following electronically, on this the 20<sup>th</sup> day of January, 2009.

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