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December 10, 2008

Patricia Van Gerpen, Executive Director
South Dakota Public Utilities Commission
500 East Capitol Avenue
Pierre, South Dakota 57501

Re: Docket TC08-110
Native American Telecom

Dear Patty:

Attached for filing please find Intervenors Response to Motion to Dismiss in regards to the above-referenced matter.

Very truly,

RITER, ROGERS, WATTIER
& NORTHRUP, LLP

BY: 
Darla Pollman Rogers

DPR/cs

Attachment

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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) DOCKET NO. TC08-110
TO PROVIDE LOCAL EXCHANGE)
SERVICE ON THE CROW CREEK)
INDIAN RESERVATION)

INTERVENORS RESPONSE TO MOTION TO DISMISS

Midstate Communications (Midstate), Venture Communications Cooperative (Venture), and South Dakota Telecommunications Association (SDTA) (collectively referred to as Intervenors) hereby jointly respond to the Motion to Dismiss filed by Native American Telecom, LLC (Native Telecom).

BACKGROUND

On September 9, 2008, Native Telecom filed an Application for authority to provide local exchange service on the Crow Creek Indian Reservation pursuant to A.R.S.D. 20:10:32:03 and 20:10:32:15. In its Petition, Native Telecom requests authority to provide local exchange service on the Crow Creek Indian reservation, which would include Midstate's and Venture's service areas. Midstate and Venture are rural telecommunications companies that hold a certificate of authority to provide local exchange service in the geographic area where Native Telecom seeks to provide local exchange service. Midstate and Venture were granted Intervention in this matter on October 21, 2008, as was SDTA.

On October 28, 2008, the Crow Creek Utility Authority (CCUA) issued an Order Granting Native Telecom authority to provide telecommunications services on the

reservation subject to the jurisdiction of the laws of the Crow Creek Sioux Tribe. Midstate and Venture were not given notice of the proceeding before the CCUA nor an opportunity to be heard at the proceeding. Midstate and Venture are not subject to the jurisdiction of CCUA. On November 30, 2008, Native Telecom filed a Motion to Dismiss the Application filed before the South Dakota Public Utilities Commission (Commission) based upon the Crow Creek Sioux Tribe exercising jurisdiction over Native Telecom's provision of service only within the exterior boundaries of the reservation.

ISSUES PRESENTED

The questions before the Commission are whether the Order of CCUA negates the necessity for Native Telecom to apply for a certificate of authority from the South Dakota Public Utilities Commission to provide local exchange services on the Crow Creek reservation; and, whether Native Telecom's Motion to Dismiss should be denied?

Intervenors would argue that the CCUA Order does not negate the requirement of Native Telecom to apply for a certificate of authority from the Commission, and that the Commission should deny Native Telecom's Motion to Dismiss.

ARGUMENT

I. Services to be Offered

It is not clear at this stage of the proceedings exactly what type of services Native Telecom proposes to provide, or how, physically, Native Telecom proposes to offer the services. In its Application and in its Motion to Dismiss, Native Telecom stated it seeks to provide facilities-based basic telephone and advanced broadband services. Native Telecom also stated in its Application that it is currently working with carriers to

establish connectivity for the exchange of telecommunications traffic and with equipment vendors for the technology, including advanced wireless broadband technology, to be used to provide service to customers. (App. Par. 8(b)). Native Telecom further stated it will “deploy its own facilities using advanced wireless technology and/or fiber optic and other wireline technology to serve customers,” and that it seeks authority to provide local exchange service “to compliment its provision of advanced broadband services and other services.” (App. Par. 8(c) and (d)).

It is also unclear at this stage of the proceedings what type of entity Native Telecom is. From the documents submitted with the Application, Native Telecom appears to be a limited liability company, initially formed by non-tribal members, that is authorized to do business in the state of South Dakota. There is nothing submitted to date that would indicate Native Telecom is a tribal organization or entity. As a South Dakota limited liability company that is authorized to do business in South Dakota, Native Telecom would not be exempt from compliance with laws, rules, and regulations governing any other South Dakota company, including such things as certification (SDCL § 49-31-3 and § 49-31-69) and taxation (SDCL ch. 49-1A).

Prior to making a determination on Native Telecom’s Motion to Dismiss, the Commission must first ascertain what type of entity Native Telecom is and how Native Telecom is physically proposing to offer services. Intervenors have served Interrogatories and Requests for Production on Native Telecom requesting service agreements and other related documents that specifically identify what type of entity Native Telecom is, and that describe how services are to be implemented by Native Telecom. Staff may have issued data requests that flush out these issues as well. Until

that information is provided and the Commission has had an opportunity to review it, the Commission should deny Native Telecom's Motion to Dismiss.

II. Information Submitted by Native Telecom to Date

Based on the documents provided by Native Telecom to date, this Commission should deny Native Telecom's Motion to Dismiss. Native Telecom's Motion appears to rely on two grounds: (1) that the Crow Creek Tribe has exercised jurisdiction over Native Telecom's provision of service; and (2) Native Telecom will provide service only within the exterior boundaries of the reservation. Neither of these grounds warrants granting of the Motion to Dismiss.

A. Order of Crow Creek Utility Authority

On October 28, 2008, the CCUA apparently issued an Order granting approval to Native Telecom to provide telecommunications services on the Crow Creek Reservation. This Order does not, however, relieve Native Telecom of the obligation to apply for a certificate of authority from the Commission for several reasons.

First of all, it is unclear from the Order itself what type of authority was granted, and whether the CCUA has in place sufficient rules and standards to govern granting of authority to provide telecommunications services. As noted above, Intervenors were not parties to any tribal proceedings, even though Intervenors may certainly be affected by Native Telecom's provisioning of services within a portion of their service areas. The Order merely states in a footnote and without citation or authority, that the grant of authority to provide telecommunications service on the Crow Creek reservation "is akin to competitive local exchange carrier (CLEC) approval provided to carriers outside of

reservations.” That is not sufficient grounds for this Commission to concede exclusive jurisdiction to the CCUA by granting the current motion.

Furthermore, South Dakota statutes give the Commission the authority to “exercise powers necessary to properly supervise and control” all telecommunications companies offering common carrier services within the State. SDCL § 49-31-3 also requires each telecommunications company that plans to offer local exchange services to submit an application for certification to the Commission, and that the Commission “shall have the exclusive authority to grant a certificate of authority.” (emphasis added). SDCL § 49-31-69 clearly states that “No telecommunications company may...offer or otherwise provide local exchange service in this state prior to receiving a certificate of authority to provide the service from the commission.” (emphasis added). Intervenors are not aware of any federal law or regulation that takes away the exclusive authority of the Commission to grant a certificate of authority to provide local exchange services in the state of South Dakota.

The South Dakota Supreme Court supports the authority of the Commission to regulate telecommunications services. As it has opined before, “the regulatory scheme of telecommunications services specifically grants the Commission authority and jurisdiction over intrastate facilities. *See* 47 U.S.C. § 152(b) The authority of the Commission is extensive and crucial to the overall regulatory scheme. *See* SDCL ch. 49-31. Among other things, it has ‘general supervision and control of all telecommunications companies offering common carrier services within the state to the extent such business is not otherwise regulated by federal law or regulation.’” SDCL 49-31-3. *Cheyenne River Sioux Tribe Telephone Authority v. Public Utilities Commission of South Dakota*,

1999 SD 60, 595 NW 2d 604 Native Telecom has pointed to no other law or regulation that would preempt the authority by this Commission.

In addition, there are non-tribal members that live within the reservation boundaries and clear precedent indicates the Tribe does not have authority over non-tribal members. Native Telecom has not indicated how it will determine if a potential customer is a tribal or non-tribal member.

B. Exterior Boundaries of the Crow Creek Reservation

The second ground Native Telecom relies upon in support of its Motion to Dismiss is also not sufficient to grant Native Telecom's Motion.

Native Telecom has indicated it plans to limit its service to consumers residing within the exterior boundaries of the Crow Creek reservation (Motion to Dismiss, p.2). However, the exterior boundaries of the Indian reservations are not well-defined in South Dakota and are often a source of dispute between the Tribe and the state of South Dakota. That issue would need to be addressed by this Commission. Native Telecom's Motion to Dismiss also fails to address how it will accomplish limiting service to within reservation boundaries, as a practical matter. For example, if a customer travels outside of the reservation boundaries with a telephone or a laptop computer, how can services be limited solely to areas within the reservation boundaries? To the extent that Native Telecom will be using wireless technology to provide service (as it indicates will be the case), radio waves do not respect geopolitical boundaries, but instead propagate across such borders. How will this aspect of the service be limited?

A second issue that surfaces is service to non-tribal members who live within the exterior boundaries of the reservation. The Motion to Dismiss and the Order from the

CCUA clearly state that the authority is granted to provide services on the Crow Creek reservation. Clear case law precedent, however, indicates that the Tribe does not have jurisdiction over non-tribal members.

In 2001 the Federal Communications Commission (FCC) issued a Memorandum Opinion and Order that undertook a jurisdictional analysis to determine whether the FCC or the Commission should decide if Western Wireless was eligible to receive federal universal service support for providing telephone service to residents of the Pine Ridge Reservation in South Dakota. In re: Western Wireless Corporation Petition for Designation as an Eligible Telecommunications Carrier for the Pine Ridge Reservation in South Dakota, FCC 01-284. In that case, Western Wireless filed a Petition requesting ETC designation before the FCC. In the Petition, Western Wireless asserted that the FCC should make ETC determinations because the Commission lacked jurisdiction over its provision of service on the Reservation. The Commission opposed the petition and argued Western Wireless was subject to its general regulatory authority under State law.

In its analysis the FCC discussed the seminal case of Montana v. United States, which sets out the guiding principle that Indian tribes generally lack jurisdiction to regulate non-members on the reservation with two exceptions. Montana v. United States, 450 U.S. 544 (1981) The first exception is “a tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements.” *Id* at 565. The second exception is “a tribe may . . . exercise civil authority over the conduct of non-Indians on fee lands within its reservation

when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.” Id at 566.

In the Western Wireless case, the FCC carefully reviewed the service agreement between the Oglala Sioux Tribe and Western Wireless and determined the first exception noted above was met because of Western Wireless’s consensual relationship with the tribe. Specifically, the FCC looked at the express representation by Western Wireless that it would submit to the Tribe’s regulatory authority and the Tribe had rights to participate extensively in administering the contract. For example, the Tribe would assist in developing the service plan, deploying infrastructure, and establishing basic service rates as well as requiring Western Wireless to give hiring preferences and training to tribal members.

The FCC also held, however, that the tribe did not have jurisdiction over Western Wireless’ service to non-tribal members on the Reservation (Par. 22). The FCC thus required Western Wireless to apply for ETC designation for non-tribal members on the reservation to the South Dakota Public Utilities Commission (Par. 27).

In the matter at hand, Intervenors have served Interrogatories and Requests for Production on Native Telecom requesting the service agreements and other related documents identifying how the services are to be implemented by Native Telecom. To date, Intervenors have not received responses to the Interrogatories and Requests for Production¹. Until this additional information is provided, it is impossible for this Commission to determine if the FCC’s analysis in the Western Wireless ETC Docket is appropriate in the current docket. Even if such an analysis is appropriate, it would only address the provisioning of service to tribal members residing on the Crow Creek

¹ Interrogatories and Requests for Production were served on November 14, 2008.

reservation, not the provision of service to non-tribal members residing on the Crow Creek Reservation. The United State's Supreme Court has indicated that the tribal sovereignty interest generally does not apply to non-tribal members, particularly on non-Indian fee land. Western Wireless, (citing Nevada v. Hicks, 2001 WL 703914 (2001)).

It is important to note that the Western Wireless case applies only to application for ETC designation under Section 214(e) (6) of the Act and certainly does not negate the requirement that Native Telecom apply for a certificate of authority. It is also important to note that Intervenors Midstate and Venture are rural telephone companies, and as such are entitled to certain rural safeguards. 47 U.S.C. § 253. It is the responsibility of the Commission to oversee competition in rural local exchange service areas to ensure that the rural safeguards are met. SDCL § 49-31-73. The Western Wireless case demonstrates that at a minimum, the Commission would retain jurisdiction over Native Telecom to the extent that it serves non-tribal members residing on the Crow Creek Reservation. In its Application, Native Telecom clearly expressed its intent to provide services to non-tribal members: "Native Telecom will provide service to all individuals and organizations residing or doing business within the exterior boundaries of the Crow Creek Reservation." (App. Par 8(a)). In addition, the Commission should also retain jurisdiction of Native Telecom to ensure that rural safeguards are upheld in Intervenors' local exchange areas, as Venture and Midstate are rural telephone companies. Based upon all of the unique facts before the Commission and the Western Wireless and other case precedent, the Commission should deny Native Telecom's Motion to Dismiss.

III. Common Carrier Requirements

The Western Wireless case points out another reason why Native Telecom's Motion to Dismiss is premature and should not be granted. In its Motion to Dismiss and in the documents filed to date, Native Telecom has clearly indicated that it will be a common carrier. In the Application, Native Telecom stated it "will meet the service requirements imposed on eligible telecommunications carriers ("ETC's") pursuant to 47 U.S.C. Section 241(e)(1)," and of the Commission's rules (A.R.S.D. § 20:10:32:15). In the Order of the CCUA, it is stated that "Native Telecom proposes to provide basic telephone service consistent with the federal universal service requirements of 47 U.S.C. § 214(3)." Furthermore, Native Telecom stated its intention to seek designation as an ETC under 47 U.S.C. § 214(e) (App, Par. 15).

Pursuant to 47 U.S.C. § 214, only common carriers are eligible to be designated as an ETC. Common carriers are also subject to regulation under sections 201 and 202 of the Act. Section 202(a) makes it "unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices....or services for or in connection with like communication service....or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage."

In its Motion to Dismiss, Native Telecom does not address providing services to non-tribal members. If Native Telecom does intend to provide services to non-tribal members residing on the Crow Creek Reservation, as stated in its Application, the Commission at a minimum clearly has jurisdiction and regulatory oversight over Native

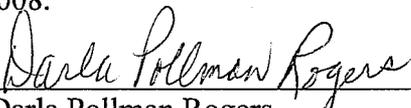
Telecom's provisioning of telecommunications services to non-tribal members. If it is Native Telecom's intention to provide services only to tribal members residing within the external boundaries of the Crow Creek Reservation, Native Telecom has failed to clarify how it will accomplish that, and how it will accomplish that without violating the common carrier nondiscrimination requirements (and the Constitutional prohibition on discrimination).

For all of the foregoing reasons, Intervenors urge the Commission to find that it has concurrent jurisdiction over Native Telecom, and to deny Native Telecom's Motion to Dismiss.

REQUEST FOR EVIDENTIARY HEARING

Due to the complex factual and legal issues surrounding Native Telecom's Application for a Certificate of Authority and subsequent Motion to Dismiss, Intervenors respectfully request the Commission to conduct an evidentiary hearing in this docket.

Dated this tenth day of December, 2008.



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of RESPONSE TO MOTION TO DISMISS was served via the method(s) indicated below, on the 10th day of December, 2008, addressed to:

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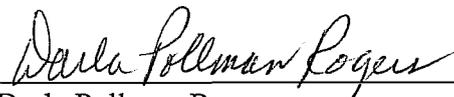
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Dated this 10th day of December, 2008.



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