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 LOCAL EXCHANGE SERVICE WITHIN THE STUDY AREA OF MIDSTATE COMMUNICATIONS, INC.	Docket No. TC11-087

NATIVE AMERICAN TELECOM, LLC'S MEMORANDUM IN OPPOSITION TO CENTURYLINK'S AND SPRINT'S MOTIONS TO COMPEL DISCOVERY

INTRODUCTION

Native American Telecom, LLC ("NAT"), through its counsel, submits this memorandum in opposition to CenturyLink's and Sprint's motions to compel discovery.

FACTS

A. Procedural History Of This Case

On October 11, 2011, NAT filed its Application for Certificate of Authority ("Initial Application") with the South Dakota Public Utilities Commission ("Commission"). NAT's Initial Application sought authority to provide local exchange and interexchange service within the Crow Creek Sioux Tribe Reservation ("Reservation"), which is within the existing study area of Midstate Communications, Inc. ("Midstate").

On November 30, 2011, Commission Staff served a series of Data Requests on NAT. NAT provided complete and timely Responses to these Data Requests.

On January 27, 2012, NAT filed its Revised Application for Certificate of Authority ("Revised Application") with the Commission. NAT's Revised Application also seeks authority to provide local exchange and interexchange service within the boundaries of the Reservation and within Midstate's existing study area. On January 31, 2012, NAT's Revised Application was "deemed complete" by the Commission's Staff.[1]

B. CenturyLink's And Sprint's Intervention Is Based Exclusively Upon "Access Stimulation"

It is undisputed that the *only reason* CenturyLink and Sprint have intervened in this *routine and limited certification matter* is the issue of "access stimulation." (*See* Intervention Petitions of CenturyLink and Sprint). Unfortunately, CenturyLink and Sprint have attempted to mislead the Commission by depicting "access stimulation" as improper and subject to an extensive "investigation and hearing" in this limited certification matter. However, as the Commission is well-aware, the

[1] The Commission should note that NAT and intervenors Midstate and the South Dakota Telecommunications Association ("SDTA") recently entered into a stipulation. This stipulation reflects that Midstate and the SDTA do not object to NAT's request for a waiver pursuant to ARSD 20:10:32:15 (Rural service area -- Additional service obligations). This stipulation was filed with the Commission on March 27, 2012.

Federal Communication Commission ("FCC") recently recognized the legality of "access stimulation" and adopted rules governing its practice. Therefore, whether NAT intends to engage in "access stimulation" is irrelevant and beyond the scope of this certification matter.

In November of 2011, the FCC released its long-awaited Final Rule which addresses "access stimulation" and "revenue sharing agreements."[2] *Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers,* 76 Fed. Reg. 73830, 2011 WL 5909863 (November 29, 2011) (to be codified at 47 C.F.R. pts. 0, 1, 20, 36, 51, 54, 61, 64, and 69) ("Final Rule").

In its Final Rule, the FCC specifically recognizes the legality of "access stimulation." In fact, the FCC's Final Rule adopts a "bright line definition" to identify when an "access stimulating" Local Exchange Carrier ("LEC") must re-file its interstate access tariffs at rates that are presumptively consistent with the Federal Communications Act.

The first condition is met where a LEC has entered into an access

[2] The FCC's nearly-800 page Final Rule can be found at www.fcc.gov.

revenue sharing agreement.[3] The second condition is met where a LEC either has had (a) a three-to-one interstate terminating-to-originating traffic ratio in a calendar month; or (b) a greater than 100 percent increase in interstate originating and/or terminating switched access Minutes of Use ("MOU") in a month compared to the same month in the preceding year.[4] (Final Rule, ¶¶ 658, 667, 675-678).

If a LEC meets both conditions of this definition, it must file a revised tariff and benchmark its tariffed access rates to the rates of the price cap LEC with the lowest interstate switched access rates in the

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[3] This "revenue sharing" condition of the definition is met when a rate-of-return LEC or a Competitive Local Exchange Carrier ("CLEC"):

> [H]as an access revenue sharing agreement, whether express, implied, written or oral, that, over the course of the agreement, would directly or indirectly result in a net payment to the other party (including affiliates) to the agreement, in which payment by the rate-of-return LEC or competitive LEC is based on the billing or collection of access charges from interexchange carriers or wireless carriers. When determining whether there is a net payment under this rule, all payments, discounts, credits, services, features, functions, and other items of value, regardless of form, provided by the rate-of-return LEC or competitive LEC to the other party to the agreement shall be taken into account.

(Final Rule, ¶ 669).

[4] In turn, *IXCs will be permitted to file complaints* based on evidence from their traffic records that a LEC has exceeded either of the traffic measurements of the second condition (*i.e.*, that the second condition has been met). (Final Rule, ¶ 659).

state. (Final Rule, ¶ 679). Specifically, the Final Rule requires a CLEC to file its revised interstate switched access tariff within 45 days of meeting the definition, or within 45 days of the effective date of the rule if on that date it meets the definition. A CLEC whose rates are already at or below the rate to which they would have to benchmark in the re-filed tariff will not be required to make a tariff filing.[5] (Final Rule, ¶ 691).

The FCC's Final Rule rejects CenturyLink's and Sprint's long-standing claim that "access stimulation" and "revenue sharing" violates the Federal Communications Act. In fact, the FCC declares just the opposite:

> [W]e do not declare revenue sharing to be a *per se* violation of section 201(b) of the Act. A ban on all revenue sharing arrangements could be overly broad, and no party has suggested a way to overcome this shortcoming. *Nor do we find that parties have demonstrated that traffic directed to access stimulators should not be subject to tariffed access charges in all cases.*

(Final Rule, ¶ 672) (emphasis added).[6]

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[5] The FCC's Final Rule became effective on December 29, 2011. Although beyond the scope of this certification proceeding, the Commission should note that NAT's current tariff with the FCC became effective on August 23, 2011. In this tariff, NAT properly benchmarked its interstate switched access rate to that of Qwest/CenturyLink's access rate. In other words, *several months before the FCC's Final Rule became effective, NAT's current tariff fully complied with the FCC's Final Rule.*

[6] The FCC also rejected several of CenturyLink's and Sprint's (and its fellow IXCs') suggestions, including (1) adopting a benchmark rate of $0.0007 ("We will not adopt a benchmarking rate of $0.0007 in instances

CenturyLink's and Sprint's entire reason for intervening in this certification matter is based on attempting to "police" a practice ("access stimulation") that the FCC has deemed to be appropriate as long as certain guidelines are followed. If CenturyLink and Sprint believe that NAT's "access stimulation" activities do not comply with the FCC's Final Rule, it is entitled to commence a dispute action with the FCC (or the Commission). *See* Final Rule, ¶ 659 (stating that IXCs will be permitted to file a complaint if it believes that a LEC failed to comply with the Final Rule's guidelines). However, CenturyLink's and Sprint's efforts to engage in "access stimulation gamesmanship" in this routine and limited certification matter is inappropriate and violates the Commission's rules.

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when the definition is met, as is suggested by a few parties. The $0.0007 rate originated as a negotiated rate in reciprocal compensation arrangements for ISP-bound traffic, and there is insufficient evidence to justify abandoning competitive LEC benchmarking entirely"); (2) adopting an immediate bill-and-keep system ("Nor will we immediately apply bill-and-keep, as some parties have urged. We adopt a bill-and-keep methodology for intercarrier compensation below, but decline to mandate a flash cut to bill-and-keep here"); and (3) detariffing certain CLEC access charges ("Additionally, we reject the suggestion that we detariff [CLEC] access charges if they meet the access stimulation definition. Our benchmarking approach addresses access stimulation within the parameters of the existing access charge regulatory structure"). (Final Rule, ¶ 692).

LAW & ANALYSIS

I. THE COMMISSION SHOULD DENY CENTURYLINK'S AND SPRINT'S MOTIONS TO COMPEL DISCOVERY

A. The Commission's Legal Framework For Reviewing NAT's Revised Application Is Clear And Specific

i.) SDCL 49-31-3

SDCL 49-31-3 provides that "[e]ach telecommunications company that plans to offer or provide *interexchange telecommunications service* shall file an application for a certificate of authority with the commission pursuant to this section." (emphasis added). This statutory provision also requires that "[t]elecommunications companies seeking to provide any *local exchange service* shall submit an application for certification by the commission pursuant to §§ 49-31-1 through 49-31-89. . . ." *Id.* (emphasis added). Finally, "[t]he commission shall, by rules promulgated pursuant to chapter 1-26, *prescribe the necessary procedures* to implement this section."[7] *Id.* (emphasis added).

ii.) ARSD 20:10:24:02 (Interexchange Services)

As a result of SDCL 49-31-3's delegation authority, the Commission has prescribed the "necessary procedures" regarding interexchange services. Specifically, ARSD 20:10:24:02 provides that

[7] SDCL 49-31-3 also clarifies that "[t]he commission may rule upon a telecommunications company's application for a certificate of authority with or without hearing."

"[e]ach telecommunications company required to apply for a certificate of authority with the commission . . . for *interexchange service* shall provide the following information with the company's application. . . ." (emphasis added). The Commission's rules then require that a telecommunications company provide information in twenty (20) very specific categories. ARSD 20:10:24:02(1-20). NAT has provided this precise information to the Commission and NAT's Revised Application has been "deemed complete" by the Commission's Staff.

iii.) ARSD 20:10:32:03 (Local Exchange Services)

As a result of SDCL 49-31-3's delegation authority, the Commission has also prescribed the "necessary procedures" regarding local exchange services. ARSD 20:10:32:03 provides that "[a] telecommunications company required to apply for a certificate of authority for *local exchange services* . . . shall submit a written application and provide . . . [specific] information. . . ." (emphasis added). The Commission's rules then require that a telecommunications company provide information in twenty-five (25) very specific areas. ARSD 20:10:32:03(1-25). Once again, NAT has provided this precise information to the Commission and NAT's Revised Application has been "deemed complete" by the Commission's Staff.

B. The Commission's Rules Do Not Allow CenturyLink and Sprint To Conduct Discovery In This Matter

SDCL 49-1-11 states that the Commission "may promulgate rules pursuant to chapter 1-26 concerning: . . . (4) Regulation of proceedings before the commission, including forms, notices, *applications*, pleadings, orders to show cause and the service thereof. . . ." (emphasis added).

Pursuant to this authority, the Commission promulgated ARSD 20:10:01:01.02, which provides:

> **Use of rules of civil procedure.** 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.

(emphasis added).

As noted previously, the Commission has adopted *its own precise and specific rules* with respect to an applicant's request to provide interexchange telecommunications services and local exchange services in South Dakota. *See* ARSD 20:10:24:02 (Interexchange Services) and ARSD 20:10:32:03 (Local Exchange Services).

Most importantly for purposes of this proceeding, the Commission's own rules *clearly prohibit* CenturyLink and Sprint from requiring NAT to produce discovery. ARSD 20:10:24:02(20) states that an applicant for interexchange services may only be asked to produce "[o]ther information

requested by the commission needed to demonstrate that the applicant has sufficient technical, financial, and managerial capabilities to provide the interexchange services it intends to offer. . . ." (emphasis added). Similarly, ARSD 20:10:32:03(25) states that an applicant for local exchange services may only be asked to produce "[o]ther information *requested by the commission* needed to demonstrate that the applicant has sufficient technical, financial, and managerial capabilities to provide the local exchange services it intends to offer. . . ." (emphasis added).

As such, the Commission's own rules prohibit the type of "discovery gamesmanship" that CenturyLink and Sprint are playing. Under its rules, only the *Commission* can request further information from NAT regarding its Revised Application. And as stated earlier, shortly after NAT filed its Initial Application, the Commission's Staff served its own set of Data Requests upon NAT. NAT provided complete and timely Responses to these Data Requests. After NAT filed its Revised Application, the Commission's Staff did not serve additional Data Requests, presumably because the Commission's Staff did not believe it necessary to request any further information from NAT. Soon after, NAT's Revised Application was "deemed complete" by the Commission's Staff.

The Commission's specific rules for reviewing a certificate of authority application preclude "gamesmanship" by an applicant's potential competitors and are based on sound practical principles. Consistent with the Federal Communications Act's purpose,[8] the Commission has consistently viewed competition in the telecommunications industry as a benefit to the residents of South Dakota and has approved innumerable applications since 1997.

The Commission has established simple rules for applicants because the Commission recognizes the benefits of competition for South Dakota residents. South Dakota law does not envision the kind of elaborate (and unnecessarily drawn-out) proceedings that CenturyLink and Sprint propose. The Commission must review NAT's application in a manner consistent with the Commission's own rules. And while the Commission affords an opportunity to request a hearing on an application before granting a certificate of authority, it appears that a hearing has never been requested or held for decades (if ever) in South Dakota. *See, e.g.*, http://puc.sd.gov/Dockets/Telecom/default.aspx (providing a complete listing of the Commission's telecommunications

[8] The Telecommunications Act was enacted to "promote competition and reduce regulation in order to secure lower prices and higher quality services for . . . consumers and encourage the rapid deployment of new telecommunications technologies."

dockets – including certificate of authority applications - from 1997-2012).

By enacting these specific and straight-forward rules, the Commission has streamlined *entry regulation* and opted to expedite competition in South Dakota. CenturyLink and Sprint propose an unprecedented level of *entry regulation* that is inconsistent with public policy and the Commission's own rules. CenturyLink and Sprint seek an extensive and unwarranted evidentiary investigation into NAT's entire business operation. However, CenturyLink's and Sprint's imaginative array of "potential issues" overreaches any *entry* regulations under South Dakota law and the Commission's rules.

Like any other applicant in the same position, NAT is only required to abide by the Commission's rules of entry. NAT has complied with each and every one of these rules. CenturyLink's and Sprint's conduct greatly exceeds the scope and purpose of the Commission's own rules in this certification matter.

CenturyLink's and Sprint's intervention has only one purpose: to erect massive regulatory and procedural barriers that delay competitive entry into the telecommunications market. Such delay undoubtedly serves CenturyLink's and Sprint's interests, but it does not serve the public good and is entirely inconsistent with the Commission's own

rules. That CenturyLink and Sprint have so vigorously advocated for this extensive form of entry regulation suggests that these companies will derive a considerable strategic and competitive advantage. CenturyLink's and Sprint's actions frustrate the Commission's efforts in carrying out its role to open the interexchange and local exchange markets to competition. The Commission should not tolerate or condone these actions.[9]

In sum, NAT has met all of the certification requirements in South Dakota. NAT has followed the Commission's rules. NAT's Revised Application has been "deemed complete" by the Commission's Staff. The Commission's rules prohibit CenturyLink's and Sprint's actions. Therefore, NAT asks the Commission to deny CenturyLink's and Sprint's respective motions to compel discovery, act expeditiously in resolving this narrow certification issue, and grant NAT's Revised Application.

C. CenturyLink's and Sprint's Discovery Requests Are Well-Beyond The Proper Scope Of Discovery In This Matter

The Commission's rules *clearly prohibit* CenturyLink and Sprint from requiring NAT to produce discovery in this matter. *See* ARSD

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[9] CenturyLink's and Sprint's conduct has resulted in NAT's certification process being delayed far beyond any similar proceeding in the Commission's recent history. *See, e.g.*, http://puc.sd.gov/Dockets/Telecom/default.aspx (providing a complete listing of the Commission's telecommunications dockets – including certification applications - from 1997-2012).

20:10:24:02(20) and ARSD 20:10:32:03(25) (limiting discovery to information "*requested by the commission*"). However, if the Commission disregards its own rules, and discovery is allowed to proceed, the Commission should severely curtail CenturyLink's and Sprint's "discovery gamesmanship."

It is clear that the Commission's review of NAT's Revised Application for *interexchange service* is limited to those facts specifically encompassed by ARSD 20:10:24:02(1-20). This rule requires that NAT provide the Commission with following information:

> **(1) The applicant's name, address, telephone number, facsimile number, web page URL, and E-mail address;**
>
> **(2) A description of the legal and organizational structure of the applicant's company;**
>
> **(3) The name under which the applicant will provide interexchange services if different than in subdivision (1) of this section;**
>
> **(4) A copy of the applicant's certificate of authority to transact business in South Dakota from the Secretary of State;**
>
> **(5) The location of the applicant's principal office, if any, in this state and the name and address of its current registered agent, if applicable;**
>
> **(6) A list and specific description of the telecommunications services the applicant intends to offer;**
>
> **(7) A detailed statement of how the applicant will provide its services;**

(8) A service area map or narrative description indicating with particularity the geographic area proposed to be served by the applicant;

(9) For the most recent 12 month period, financial statements of the applicant including a balance sheet, income statement, and cash flow statement. The applicant shall provide audited financial statements, if available;

(10) The names, addresses, telephone number, facsimile number, E-mail address, and toll free number of the applicant's representatives to whom all inquiries must be made regarding complaints and regulatory matters and a description of how the applicant handles customer service matters;

(11) Information concerning how the applicant plans to bill and collect charges from customers;

(12) Information concerning the applicant's policies relating to solicitation of new customers and a description of the efforts the applicant shall use to prevent the unauthorized switching of interexchange customers;

(13) Information concerning how the applicant will make available to any person information concerning the applicant's current rates, terms, and conditions for all of its telecommunications services;

(14) Information concerning how the applicant will notify a customer of any materially adverse change to any rate, term, or condition of any telecommunications service being provided to the customer. The notification must be made at least thirty days in advance of the change;

(15) A list of the states in which the applicant is registered or certified to provide telecommunications services, whether the applicant has ever been denied registration or certification in any state and the reasons for any such denial, a statement as to whether or not the applicant is in good standing with the appropriate regulatory agency in the states where it is registered or certified, and a detailed explanation of why the applicant is not in good standing in a given state, if applicable;

(16) A description of how the applicant intends to market its services, its target market, whether the applicant engages in any multilevel marketing, and copies of any company brochures used to assist in the sale of services;

(17) Federal tax identification number and South Dakota sales tax number;

(18) The number and nature of complaints filed against the applicant with any state or federal regulatory commission regarding the unauthorized switching of a customer's telecommunications provider and the act of charging customers for services that have not been ordered;

(19) A written request for waiver of those rules the applicant believes to be inapplicable; and

(20) Other information *requested by the commission* needed to demonstrate that the applicant has sufficient technical, financial, and managerial capabilities to provide the interexchange services it intends to offer consistent with the requirements of this chapter and other applicable rules and laws.

(emphasis added).

NAT has provided the Commission with *complete responses to each and every one of these information categories*. Indeed, the Commission's Staff has already deemed NAT's Revised Application to be "complete." As such, regarding interexchange services, if the Commission allows additional discovery, CenturyLink's and Sprint's discovery requests must be supported by "good cause," "relevant to the subject matter involved" and "reasonably calculated to lead to the discovery of admissible evidence." ARSD 20:10:01:22.01; SDCL 15-6-26(b)(1).

Similarly, the Commission's review of NAT's Revised Application for *local exchange service* is limited to those facts specifically encompassed by ARSD 20:10:32:03(1-25). This rule requires that NAT provide the Commission with following information:

> **(1) The applicant's name, address, telephone number, facsimile number, web page URL, and E-mail address;**
>
> **(2) A description of the legal and organizational structure of the applicant's company;**
>
> **(3) The name under which applicant will provide local exchange services if different than in subdivision (1) of this section;**
>
> **(4) The location of the applicant's principal office, if any, in this state and the name and address of its current registered agent, if applicable;**
>
> **(5) A copy of its certificate of authority to transact business in South Dakota from the secretary of state;**
>
> **(6) A description of the applicant's experience providing any telecommunications services in South Dakota or in other jurisdictions, including the types of services provided, and the dates and nature of state or federal authorization to provide the services;**
>
> **(7) Names and addresses of applicant's affiliates, subsidiaries, and parent organizations, if any;**
>
> **(8) A list and specific description of the types of services the applicant seeks to offer and how the services will be provided including:**
>
> > **(a) Information indicating the classes of customers the applicant intends to serve;**

(b) Information indicating the extent to and time-frame by which applicant will provide service through the use of its own facilities, the purchase of unbundled network elements, or resale;

(c) A description of all facilities that the applicant will utilize to furnish the proposed local exchange services, including any facilities of underlying carriers; and

(d) Information identifying the types of services it seeks authority to provide by reference to the general nature of the service;

(9) A service area map or narrative description indicating with particularity the geographic area proposed to be served by the applicant;

(10) Information regarding the technical competence of the applicant to provide its proposed local exchange services including:

(a) A description of the education and experience of the applicant's management personnel who will oversee the proposed local exchange services; and

(b) Information regarding policies, personnel, or arrangements made by the applicant which demonstrates the applicant's ability to respond to customer complaints and inquiries promptly and to perform facility and equipment maintenance necessary to ensure compliance with any commission quality of service requirements;

(11) Information explaining how the applicant will provide customers with access to emergency services such as 911 or enhanced 911, operator services, interexchange services, directory assistance, and telecommunications relay services;

(12) For the most recent 12 month period, financial statements of the applicant consisting of balance sheets, income statements, and cash flow statements. The applicant shall provide audited financial statements, if available;

(13) Information detailing the following matters associated with interconnection to provide proposed local exchange services:

(a) The identity of all local exchange carriers with which the applicant plans to interconnect;

(b) The likely timing of initiation of interconnection service and a statement as to when negotiations for interconnection started or when negotiations are likely to start; and

(c) A copy of any request for interconnection made by the applicant to any local exchange carrier;

(14) A description of how the applicant intends to market its local exchange services, its target market, whether the applicant engages in multilevel marketing, and copies of any company brochures that will be used to assist in sale of the services;

(15) If the applicant is seeking authority to provide local exchange service in the service area of a rural telephone company, the date by which the applicant expects to meet the service obligations imposed pursuant to § 20:10:32:15 and applicant's plans for meeting the service obligations;

(16) A list of the states in which the applicant is registered or certified to provide telecommunications services, whether the applicant has ever been denied registration or certification in any state and the reasons for any such denial, a statement as to whether or not the applicant is in good standing with the appropriate regulatory agency in the states where it is registered or certified, and a detailed explanation of why the applicant is not in good standing in a given state, if applicable;

(17) The names, addresses, telephone numbers, E-mail addresses, and facsimile numbers of the applicant's representatives to whom all inquiries must be made regarding customer complaints and other regulatory matters;

(18) Information concerning how the applicant plans to bill and collect charges from customers who subscribe to its proposed local exchange services;

(19) Information concerning the applicant's policies relating to solicitation of new customers and a description of the efforts the applicant shall use to prevent the unauthorized switching of local service customers by the applicant, its employees, or agents;

(20) The number and nature of complaints filed against the applicant with any state or federal commission regarding the unauthorized switching of a customer's telecommunications provider and the act of charging customers for services that have not been ordered;

(21) Information concerning how the applicant will make available to any person information concerning the applicant's current rates, terms, and conditions for all of its telecommunications services;

(22) Information concerning how the applicant will notify a customer of any materially adverse change to any rate, term, or condition of any telecommunications service being provided to the customer. The notification must be made at least thirty days in advance of the change;

(23) A written request for waiver of those rules believed to be inapplicable;

(24) Federal tax identification number and South Dakota sales tax number; and

(25) Other information *requested by the commission* needed to demonstrate that the applicant has sufficient technical, financial, and managerial capabilities to provide the local exchange services it intends to offer consistent with the requirements of this chapter and other applicable rules and laws.

(emphasis added).

NAT has also provided the Commission with *complete responses to each and every one of these information categories*. As such, regarding local exchange service, if the Commission allows additional discovery, CenturyLink's and Sprint's discovery requests must be supported by "good cause," "relevant to the subject matter involved" and "reasonably calculated to lead to the discovery of admissible evidence." ARSD 20:10:01:22.01; SDCL 15-6-26(b)(1).

Finally, ARSD 20:10:32:06 sets forth the Commission's standard for reviewing a local exchange service application:

> **A certificate of authority to provide *local exchange service* may not be granted unless the applicant establishes sufficient technical, financial, and managerial ability to provide the local exchange services described in its application *consistent with the requirements of this chapter and other applicable laws, rules, and commission orders.* If an application is incomplete, inaccurate, false, or misleading, the commission shall reject the application. In determining if an applicant has sufficient technical, financial, and managerial capabilities and whether to grant a certificate of authority for local exchange services the commission shall consider:**
>
> **(1) If the applicant has an actual intent to provide local exchange services in South Dakota;**
>
> **(2) Prior experience of the applicant or the applicant's principals or employees in providing telecommunications services or related services in South Dakota or other jurisdictions, including the extent to which that experience relates to and is comparable to service plans outlined in the filed application;**

(3) The applicant's personnel, staffing, equipment, and procedures, including the extent to which these are adequate to ensure compliance with the commission's rules and orders relating to service obligations, service quality, customer service, and other relevant areas;

(4) The nature and location of any proposed or existing facilities which the applicant intends to use in providing local exchange services;

(5) If the applicant intends to resell local exchange services or enter into facility arrangements with other telecommunications carriers, when the necessary arrangements will be in place;

(6) The applicant's marketing plans and its plan and resources for receiving and responding to customer inquiries and complaints;

(7) If the applicant has sufficient financial resources to support the provisioning of local exchange service in a manner that ensures the continued quality of telecommunications services and safeguards consumer and public interests;

(8) If the applicant, in providing its local exchange services, will be able to provide all customers with access to interexchange services, operator services, directory assistance, directory listings, and emergency services such as 911 and enhanced 911;

(9) If the applicant is seeking authority to provide local exchange services in the service area of a rural telephone company, if the applicant's plans for meeting the additional service obligations imposed in rural telephone company service areas pursuant to § 20:10:32:15 are adequate and demonstrate that the applicant will in fact meet such obligations;

(10) The extent to which the applicant, applicant's

affiliates, or applicant's principals have been subject to any civil, criminal, or administrative action in connection with the provisioning of telecommunications services; and

(11) Any other factors relevant to determining the applicant's technical, financial, and managerial capability to provide the services described in the application *consistent with the requirements of this chapter and other applicable laws, rules, and commission orders.*

(emphasis added).

NAT has also provided *complete responses* for the Commission to review NAT's Revised Application under this decisional criteria. Therefore, if the Commission allows additional discovery, CenturyLink's and Sprint's discovery requests must be consistent with the Commission's rules, supported by "good cause," "relevant to the subject matter involved" and "reasonably calculated to lead to the discovery of admissible evidence." ARSD 20:10:01:22.01; SDCL 15-6-26(b)(1)). It is clear, however, that CenturyLink's and Sprint's discovery requests do not meet these threshold standards.

i.) CenturyLink's Discovery Requests

CenturyLink's motion to compel initially focuses on discovering the details of NAT's "access stimulation" activities, "how NAT intends to make money," and NAT's relationships with "Free Calling Service Companies" ("FCSCs"). (CenturyLink's motion to compel discovery, pages 2, 8-10).

Specifically, CenturyLink's discovery requests 1.13,[10] 1.14[11], and 1.15[12] seek information regarding these topics.

It is simply absurd for CenturyLink to even request that NAT provide its business plan and divulge "how it intends to make money" in this application proceeding. The Commission's rules do not require that NAT provide information to its competitors regarding "how it intends to make money." Rather, the Commission's rules require NAT to produce "financial statements . . . including a balance sheet, income statement, and cash flow statement [for the most recent 12 month period]." *See* ARSD 20:10:24:02(9) and ARSD 20:10:32:03(12). NAT has fully complied with these rules and these financial statements have been provided for the Commission's review.

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[10] CenturyLink's discovery request 1.13 demands "all documents evidencing communication between you and any FCSC relating to calls that may be delivered to, or transported through, the area that is the subject of its Application for Certificate of Authority."

[11] CenturyLink's discovery request 1.14 demands "all contracts, agreements or other documentation of understanding or arrangement between you and any FCSC relating in any way to calls delivered to, or transported through, the area that is the subject of NAT's Application for Certificate of Authority."

[12] CenturyLink's discovery request 1.15 demands "all documents, memos, or correspondence addressing, discussing, analyzing, referencing or otherwise relating to business plans, strategies, goals, or methods of obtaining monies or revenues from interexchange carriers in the area that is the subject of NAT's Application for Certificate of Authority, for calls that may be delivered or transported to FCSCs."

The Commission's rules also do not require that NAT provide information regarding NAT's relationships with "FCSCs" or "access stimulation." As noted earlier, the FCC has already ruled that "access stimulation" is a legal practice so long as certain guidelines are followed. If NAT fails to comply with the FCC's "access stimulation" guidelines, CenturyLink can commence a proper action with the FCC (or the Commission).

CenturyLink's requests for this information only further its efforts to engage in "gamesmanship" as this "access stimulation" and "financial information" discovery is improper under the Commission's rules, not "relevant to the subject matter involved," and not "reasonably calculated to lead to the discovery of admissible evidence." SDCL 15-6-26(b)(1).

CenturyLink next requests that NAT produce information regarding Carey Roesel. (CenturyLink's motion to compel discovery, pages 4-8). Specifically, CenturyLink's discovery requests 2.2[13] and 2.3[14] seek information from Mr. Roesel regarding "FCSCs" and "access stimulation."

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[13] CenturyLink's discovery request 2.2 demands "all documents reviewed or analyzed by Carey Roesel in preparation and drafting of his Direct Testimony relating to NAT's 'access stimulation' activities or its delivery of calls to FCSCs."

[14] CenturyLink's discovery request 2.3 demands "all documents reviewed or analyzed by Carey Roesel in preparation and drafting of his Direct Testimony relating to any charges, billings or invoices to interexchange carriers that may result from the delivery or transport of calls by NAT to FCSCs."

Again, the Commission's rules do not require that NAT provide information from Mr. Roesel regarding "FCSCs" or "access stimulation" in this certification matter. This is especially true since "access stimulation" is now recognized as a legal practice so long as the FCC's guidelines are followed.

It should be noted that CenturyLink also attempts to mislead the Commission by opining that its discovery requests 2.2 and 2.3 seek "information (Mr. Roesel] reviewed and analyzed relating to access stimulation. . . ." (CenturyLink's motion to compel, page 5). As CenturyLink is well-aware, Mr. Roesel's written testimony *never even references* "FCSCs" or "access stimulation." (*See* Direct Testimony of Carey Roesel, pages 1-10). Rather, Mr. Roesel's written testimony is limited to those categories of information encompassed by ARSD 20:10:24:02 and ARSD 20:10:32:03.

CenturyLink's conduct has unfortunately resulted in NAT's certification process being delayed far beyond any similar proceeding in the Commission's recent history. *See, e.g.,* http://puc.sd.gov/Dockets/Telecom/default.aspx (providing a complete listing of the Commission's telecommunications dockets – including CLEC applications - from 1997-2012). The Commission should follow its own rules, recognize that CenturyLink is attempting to improperly

"police" conduct ("access stimulation") that has been deemed legal by the FCC, and end CenturyLink's efforts to engage in costly and time-consuming "gamesmanship" that is irrelevant and beyond the scope of this certification matter.

ii.) Sprint's Discovery Requests

Sprint's discovery requests are even more improper, onerous, and unreasonable than CenturyLink's. Sprint's motion to compel focuses on "test[ing] NAT's statements in its Application and testimony" and "ensuring that the standards for certification are met." (Sprint's motion to compel, page 1). In other words, Sprint wants the Commission to entirely disregard its own rules and establish Sprint (and presumably CenturyLink) as a "Super Commission" for certification matters.

First, Sprint erroneously claims that the Commission Staff's "deemed complete" decision was "rubber stamped." (*See* Sprint's motion to compel, page 5) ("This requires a critical analysis of facts, not, as NAT perceives, a simple rubber stamping of an application that has been deemed complete by the [Commission's] Staff.") NAT has never alleged that the Commission's review of its Revised Application should be "rubber stamped." However, NAT believes that the Commission's review should be consistent with the Commission's rules.

Second, Sprint states that "NAT [has] provided very little by way of substantive response[s]" in this matter. (*See* Sprint's motion to compel, page 5) ("[Sprint wants] to ensure that NAT meets the standards of ARSD 20:10:32:03, ARSD 20:10:32:06, and ARSD 20:10:24:02. NAT provided very little by way of substantive response to these questions. . . ."). This is simply incorrect. NAT is not required to provide additional information to Sprint so that Sprint can determine whether the information meets Sprint's "standards of acceptability." Instead, NAT is only required to submit what every other applicant must submit - information that complies with the Commission's rules. And NAT has done exactly that, as demonstrated by the fact that NAT's Revised Application has been "deemed complete" by the Commission's Staff.[15]

Third, Sprint submits that it is entitled to discovery to determine whether NAT has been operating without a certificate from the Commission. (Sprint's motion to compel, page 5). As the Commission is aware, Sprint and NAT recently engaged in litigation over the complex issues of tribal sovereignty and tribal authority in the telecommunications arena. (*See* SDPUC TC 10-026). In SDPUC TC 10-026, NAT had received a certificate of authority from the Crow Creek

[15] If Sprint does not believe that the Commission's rules are adequate, Sprint can proceed as any other person or entity may proceed – by attempting to modify the Commission's rules through the administrative rules process.

Tribal Utility Authority. NAT believed, pursuant to this tribal certificate of authority, that its activities within the boundaries of the Crow Creek Reservation complied with the laws of tribal sovereignty and tribal authority. Ultimately, the Commission found that it had the authority to regulate NAT's intrastate telecommunications activities. (*See* SDPUC TC 10-026).

In response to the Commission's decision, NAT filed its Initial Application and Revised Application. And indeed, if this certification matter would have progressed in a manner similar to the hundreds of previous certification applications reviewed by the Commission, NAT would have obtained its certificate of authority months ago. However, in the utmost deference to the Commission and its certification rules (and as Sprint and CenturyLink are aware) NAT has agreed not to "bill" Sprint or CenturyLink for any intrastate access fees until this certification matter is decided by the Commission.

Sprint can discover whether NAT has been operating without an intrastate certificate of authority by simply asking "Has NAT been operating without an intrastate certificate of authority?" Instead, Sprint unreasonably demands that NAT produce "services, goods, or products provided to Free Conferencing Corporation," "taxes, assessments, and surcharges . . . including USF surcharges, TRS, and 911 assessments,"

and the origin of NAT's "end user fee income." (*See* Sprint's Interrogatories Nos. 2, 9, and 15). Sprint's demands are well-beyond the scope of information that NAT must provide under the Commission's rules. Sprint also fails to provide the Commission with a coherent explanation of how this information is supported by "good cause," "relevant to the subject matter involved" or "reasonably calculated to lead to the discovery of admissible evidence" in this very straight-forward certification matter. ARSD 20:10:01:22.01; SDCL 15-6-26(b)(1).

Fourth, Sprint submits that it is entitled to discover if NAT is a "sham entity." (Sprint's motion to compel, page 7). Sprint then demands that NAT produce "all documents that reflect NAT's Board of Directors' minutes, meetings, and resolutions, and bylaws," "all cash transactions and payments from NAT to Wide Voice," "all cash transactions and payments from NAT to Native American Telecom Enterprise," "the name[s]of Tribal Utility Authority members," "who maintains NAT's financial records," "where NAT's financial records are kept," "the employees and officers of Free Conferencing who provide services to NAT," and "when NAT first approach[ed] Free Conferencing to enter into a contract with NAT." (*See* Sprint's Interrogatories Nos. 22, 27, 30, 31, 36, and 38; Document Request No. 5). Once again, Sprint's demands are well-beyond the scope of information that NAT must provide under the

Commission's rules in this certification proceeding. Sprint also fails to provide the Commission with a coherent explanation of how this information is supported by "good cause," "relevant to the subject matter involved" or "reasonably calculated to lead to the discovery of admissible evidence" in this very straight-forward certification matter. ARSD 20:10:01:22.01; SDCL 15-6-26(b)(1).

Fifth, Sprint submits that it is entitled to discovery to find out "whether NAT has the financial capabilities to provide local exchange service." (Sprint's motion to compel, pages 11-17). Sprint then demands detailed financial information regarding the value of NAT's "equipment," "marketing expenses," "telephone and circuit expenses," "professional fees," "end user fee income," "access termination fee income," "CABS collection fee income," "bank accounts," other "potential economic resources," "general ledger entries and other accounting records," "bank statements," company "loans," and "business plans and cost studies for access services and high volume access services." (*See* Sprint's Interrogatories Nos. 11, 12, 13, 14, 15, 16, 17, 28, and 33; Document Requests Nos. 1, 2, 3, 7, 8, and 9).

Once again, Sprint's demands are well-beyond the scope of information that NAT must provide under the Commission's rules in a certification proceeding. NAT has provided all financial information that

is required under the Commission's rules. *See* ARSD 20:10:24:02(9) and ARSD 20:10:32:03(12) (requiring NAT to produce "financial statements . . . including a balance sheet, income statement, and cash flow statement [for the most recent 12 month period]"). Sprint also fails to provide the Commission with a coherent explanation of how this information is supported by "good cause," "relevant to the subject matter involved" or "reasonably calculated to lead to the discovery of admissible evidence" in this very straight-forward certification matter. ARSD 20:10:01:22.01; SDCL 15-6-26(b)(1).

Sixth, Sprint submits that it is entitled to discovery to "test the validity and completeness of statements made in NAT's application and testimony." (Sprint's motion to compel, pages 17-23). Sprint then demands detailed information regarding "switches," "inbound calling service equipment," "equipment location," "equipment manufacturers," "employees and work locations," "employee numbers," "organizational charts," and "call path diagrams." (*See* Sprint's Interrogatories Nos. 5, 6, 7, 18, 23, 24, 29, 41, 42, 43, and 44).

Once again, Sprint's demands are well-beyond the scope of information that NAT must provide under the Commission's rules in a certification proceeding. Sprint also fails to provide the Commission with a coherent explanation of how this information is supported by "good

cause," "relevant to the subject matter involved" or "reasonably calculated to lead to the discovery of admissible evidence" in this very straight-forward certification matter. ARSD 20:10:01:22.01; SDCL 15-6-26(b)(1).

Seventh, Sprint submits that it is entitled to "expert discovery" and demands detailed information regarding Mr. Roesel. (*See* Sprint's motion to compel, pages 23-25; Sprint's Interrogatories Nos. 19, 20, 21; Document Request No. 4). Once again, Sprint's demand is well-beyond the scope of information that NAT must provide under the Commission's rules in a certification proceeding. Sprint also fails to provide the Commission with a coherent explanation of how this information is supported by "good cause," "relevant to the subject matter involved" or "reasonably calculated to lead to the discovery of admissible evidence" in this very straight-forward certification matter. ARSD 20:10:01:22.01; SDCL 15-6-26(b)(1).

iii.) Sprint's Recent Conduct And Financial Status

It is unfortunate that Sprint's filings include derisive references to the Crow Creek Sioux Tribe's recent financial problems, NAT's financial ability to provide its proposed services, and the unsubstantiated assertion that NAT is somehow a "bad actor." (*See* Sprint's motion to compel, pages 1-26 and Exhibit B). If the Commission considers these

(irrelevant) materials in reviewing this discovery dispute and NAT's Revised Application, then the Commission must, as a matter of fairness and comparative relevancy, also consider Sprint's recent abhorrent conduct and current financial status.

For instance, despite the FCC's Final Rule, Sprint continues to assert that "access stimulation" is improper. And based on this patently incorrect assertion, Sprint still refuses to pay several South Dakota LECs for "switched access services." However, a recent decision by the Honorable Robert E. Payne in *Central Telephone Co. of Virginia, et al. v. Sprint Communications Co. of Virginia, et al.,* (Civil No. 3:09cv720 - Eastern District of Virginia) brings to light Sprint's recent conduct and "misleading" justifications in refusing to pay small rural telephone companies for switched access services.[16]

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[16] Judge Payne's decision in *Central Telephone Company of Virginia* was filed on March 2, 2011. A copy of Judge Payne's decision is attached as "Exhibit 1" to the "Declaration of Scott R. Swier in Opposition to CenturyLink's and Sprint's Motions to Compel Discovery."

Sprint was represented in *Central Telephone Company of Virginia* by Briggs and Morgan PA, the same Minnesota law firm that represents Sprint in this proceeding before the Commission. A copy of the "Civil Docket Report" in *Central Telephone Co. of Virginia*, showing Briggs and Morgan PA's representation, is attached as "Exhibit 2" to the "Declaration of Scott R. Swier in Opposition to CenturyLink's and Sprint's Motions to Compel Discovery."

In *Central Telephone Co. of Virginia,* a bench trial was held to address whether Sprint breached nineteen contracts it had with local telephone companies ("Plaintiffs"). (Memorandum Opinion, page 1) (hereinafter "M.O. page __"). Sprint and each of the Plaintiffs entered into Interconnection Agreements ("ICAs") pursuant to the Federal Telecommunications Act. (M.O. pages 1-2). The ICAs required Sprint to pay certain charges for so-called Voice-over Internet Protocol ("VoIP") telephone calls. (M.O. page 2.) These charges were due under a contract provision that was contained in each ICA. (M.O. page 2).

From the time the ICAs were executed (in 2004 and 2005) until June 2009, Sprint paid these charges to Plaintiffs. (M.O. page 2). Then Sprint, like many companies at that time, *was in considerable need of cutting costs*. (M.O. pages 2-3). In June 2009, as part of its "cost cutting" endeavors, Sprint (for the first time), disputed Plaintiff's charges for VoIP traffic, contending (also for the first time) that the ICAs did not authorize the VoIP traffic charges which Sprint had paid for years.

The federal district court ruled in Plaintiffs' favor, opining that "[q]uite frankly, Sprint's justifications for refusing to pay access on VoIP-originated traffic, and its underlying interpretation of the ICAs, *defy credulity*." (M.O. page 3) (emphasis added). "The record is unmistakable: Sprint entered into contracts with the Plaintiffs wherein it agreed to pay

access charges on VoIP-originated traffic. Sprint's defense is founded on post hoc rationalizations developed by its *in-house counsel and billing division as part of Sprints' cost-cutting efforts*, and the witnesses who testified in support of the defense were *not at all credible*." (M.O. page 3) (emphasis added). "The Court finds that in refusing to pay the access charges as billed, Sprint breached its duties under the ICAs, which clearly included paying access charges for VoIP-originated traffic. . . . " (M.O. page 3).

In providing an unusually harsh chastisement of Sprint's "cost-cutting scheme," the federal district court found that Sprint conducted the following "post-hoc rationalizations" in an effort to escape its payment obligations:

- "Sprint . . . paid the Plaintiffs for termination of VoIP-originated traffic in accordance with the compensation framework laid out in [the ICAs]. In fact, Sprint did this without protest for the better part of five years. It was not until 2009, years after the execution of the ICAs, that Sprint first began disputing the Plaintiffs' access charges for VoIP-originated traffic." (M.O. page 11).

- "According to the head of Sprint's billing division, the effect on Sprint of the global economic downturn that temporarily aligned with Sprint's 2009 decision to dispute the Plaintiffs' access charges played no role in the company's abrupt change in posture of June 2009. *The evidence, however, reveals that adverse economic conditions did drive Sprint to dispute the access charges that, for years, it had paid without protest.*" (M.O. page 13) (emphasis added).

- "In the summer of 2009, Sprint, like many companies at the time, embarked on *company-wide cost-cutting efforts*. Notably, during this time period, Sprint launched a *coordinated effort* to contest access charges on VoIP-originated traffic with other carriers across the telecommunications industry. *Sprint also sought to cut costs in a wide range of other areas beyond VoIP compensation*." (M.O. page 13 and fn. 1) (emphasis added).

- "[A] substantial part of Sprint's argument for refusing to pay the Plaintiff's access charges is that Sprint drafted the ICAs to permit it flexibility on VoIP compensation. However, the fact that Sprint has disputed access charges with other carriers, whether or not it had executed ICAs with them, warrants the inference that, in reality, *Sprint's decision to dispute access charges emanated, not from any understanding the company may have had of the ICAs' text, but from the company's decision to reduce costs*." (M.O. page 14) (emphasis added).

- "Why Sprint would want to reduce costs – even apart from the general malaise that beset the economy in and around 2009 – is apparent from internal email correspondence. That correspondence reveals that Sprint's wholesale ventures with cable companies were floundering – 'tanking' in the words of one Sprint employee." (M.O. page 15).

- "Further evidencing Sprint's motivation in contesting the Plaintiffs' access charges is the fact that Sprint challenged the Plaintiffs' bills in stages, progressively lowering the rate at which it was willing to compensate the Plaintiffs." (M.O. page 15).

- "[A]s the record leaves no doubt, the motivating force in selecting [a lower access rate] was not that Sprint honestly perceived the [lower access rate] more appropriate than the rates at which it had been billed by the Plaintiffs. *What mattered most for Sprint, to the exclusion of all other considerations, was that the [lower access rate] permitted the greatest savings for the company*." (M.O. page 16) (emphasis added).

- "The fact that Sprint *so cavalierly has shifted its position* on the rates . . . further illustrates that its disputes were based on *efforts to cut costs*, rather than on a legitimately held belief that [the ICAs] did not require Sprint to pay at the levels which, for years, it had paid without protest." (M.O. page 16) (emphasis added).

- "For years before mid-2009, Sprint paid the Plaintiffs' VoIP-originated traffic charges under the ICAs. Thereafter Sprint found the same duties distasteful. The company sought to cut costs, and it *expected to save at least $80 million by contesting carriers' access charges* on VoIP-originated traffic. *So essential to its cost-cutting initiatives were such savings that Sprint designated a group to monitor the realized savings and keep the company on track to meet its savings target.*" (M.O. page 17) (emphasis added).

- "It was not until the economy took a drastic downturn, and Sprint's cable ventures faltered, that Sprint chose to dispute the Plaintiffs' tariff-based access charges. The fact that Sprint willingly paid the Plaintiffs' access charges . . . and only contested them when *faced with financial hardship*, is convincing evidence that, when Sprint executed the ICAs it understood them to incorporate the tariffs." (M.O. page 26) (emphasis added).

- The Court found numerous witnesses offered by Sprint to be "*not credible," "unresponsive and evasive," "misleading," "untrustworthy," "def[ying] credibility," "misleading to the Court," and using "definition[s] that escapes basic understanding."* (M.O. pages 41-45) (emphasis added).

- "If there is a common thread to Sprint's arguments, it is *obfuscation.* . . . [Sprint's] explanations represent nothing more than *smoke and mirrors*, proffered to conceal the straightforward nature of this contract dispute." (M.O. page 48) (emphasis added).

- "The record reveals . . . a company [Sprint] that, years after signing the ICAs and performing them as written, *has attempted to graft onto them an interpretation that helps its cost-cutting initiatives.*" (M.O. page 48) (emphasis added).

As a result of the Court's decision, Sprint was ordered to pay Plaintiffs millions of dollars in access fees, late charges, pre-judgment interest, post-judgment interest, and reasonable attorney's fees. (M.O. page 49-50).

Judge Payne's decision reinforces the fundamental tenet of NAT's position in this certification matter - that Sprint's "gamesmanship" is not intended to protect some "vital public interest." Rather, Sprint's conduct is a "business decision" intended to stymie competition, protect its bottom line, and "cut costs" at the expense of small, local South Dakota companies that are providing a vital service to Sprint's customers. As such, based on Sprint's conduct in the *Central Telephone Co. of Virginia* case alone, Sprint's allegations that NAT is somehow a "bad actor" is hypocritical at best, intentionally deceitful at worst.[17]

[17] CenturyLink's filings also imply that NAT is a "bad actor." The irony of these claims is also remarkable considering the recent criminal convictions of Qwest's former CEO Joe Nacchio. In 2007, Nacchio was convicted on nineteen (19) counts of insider trading after a federal jury found that he illegally sold $52 million of Qwest stock based on insider information about Qwest's deteriorating finances. Nacchio reported to a federal prison camp in Pennsylvania in April 2009. His projected release date is May 2014. A copy of several *Denver Post* articles regarding Nacchio's fraudulent "exploits" are attached as "Exhibit 3" to the "Declaration of Scott R. Swier in Opposition to CenturyLink's and Sprint's Motions to Compel Discovery."

Finally, Sprint disparages NAT's current financial status and questions whether its finances will allow NAT to "provide [telecommunications] services" in the immediate future. (Sprint's motion to compel, pages 11-17). As a matter of fairness, however, the Commission should be aware of Sprint's "tenuous" financial status and its ability to provide services in the future. Based on recent financial analyses and reports, it is entirely disingenuous for Sprint to be concerned with NAT's financial status.

In fact, just a few days ago, *DowJones NewsPlus* reported that:

- "Sprint's shares fell premarket after the research firm Sanford C. Bernstein called a bankruptcy filing 'a very legitimate risk' in downgrading the wireless carrier to underperform."
- "Sprint's shares fell 4.5% to $2.76 premarket."
- There is a significant question whether "there is any analytical framework that provides strong conviction as to whether Sprint can or cannot avoid bankruptcy over the next four years or so."
- "[T]he risk of [Sprint's] bankruptcy is rising."
- "[Sprint's] five-year credit default swaps already price in a roughly 50/50 probability of bankruptcy."
- Sprint's chances of going bankrupt "is a very legitimate risk."
- "Sprint shares are down 43% from a year earlier."
- "Sprint has said its deal with Apple to offer the computer maker's immensely popular iPhone will cost it at least $15.5 billion over four years. That limits its ability to turn a profit in that time. . . ."

- "Sprint's debt maturities through 2013 are covered and in 2014 are modest. 'But thereafter the company faces a sustained multiyear barrage of large maturities that will need to be addressed.'"[18]

Unlike Sprint, NAT does not provide this information to "make light" of Sprint's current financial predicament, but rather to provide comparative information. Surely, the continued solvency of any entity is of the utmost importance. However, for Sprint to question NAT's financial ability to provide its proposed telecommunications services, after NAT has provided all required financial documents for the Commission's review, is simply untenable.

CONCLUSION

There is no basis to delay NAT's entry into the proposed service area. NAT has met all of the legal requirements for receiving a Certificate of Authority from the Commission. NAT has submitted its Revised Application with all required supporting information. NAT's Revised Application has been "deemed complete" by the Commission's Staff. CenturyLink's and Sprint's absurd efforts clearly violate the

[18] A copy of this March 19, 2012, *DowJones* report regarding Sprint's "precarious" financial status is attached as "Exhibit 4" to the "Declaration of Scott R. Swier in Opposition to CenturyLink's and Sprint's Motions to Compel Discovery." Of course, Sprint has "refused to comment" on this *DowJones* report and its current financial problems.

Commission's rules. Competition is no less in the public interest in the area that NAT proposes to serve than in the rest of South Dakota.

Therefore, the Commission should (1) deny CenturyLink's and Sprint's respective motions to compel discovery; (2) proceed with its own independent analysis of NAT's Revised Application; (3) apply the same legal standards and procedural framework that the Commission has applied to every other competitive entry application since 1997; and (4) issue a decision granting NAT's Revised Application.

Dated this 13th day of April, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of *NATIVE AMERICAN TELECOM, LLC'S MEMORANDUM IN OPPOSITION TO CENTURYLINK'S AND SPRINT'S MOTIONS TO COMPEL DISCOVERY* was delivered *via electronic mail* on this 13th day of April, 2012, to the following parties:

Service List (SDPUC TC 11-087)

/s/ Scott R. Swier
Scott R. Swier