

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

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In the Matter of the Application of Native	)	
American Telecom, LLC for a Certificate of	)	
Authority to Provide Local Exchange Service	)	Docket No. TC11-087
within the Study Area of Midstate	)	
Communications, Inc.	)	

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**CENTURYLINK’S MOTION TO COMPEL DISCOVERY RESPONSES FROM  
NATIVE AMERICAN TELECOM**

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Qwest Communications Company, LLC, a Delaware Limited Liability Company, doing business as “CenturyLink” (“CenturyLink”), through counsel, pursuant to SDLC 15-6-37 (a) (2), hereby moves the South Dakota Public Utilities Commission to issue an order compelling Native American Telecom, LLC (“NAT”), to respond fully to discovery requests as identified below. In support of its Motion, CenturyLink states as follows:

**INTRODUCTION**

1. As an introduction and as described more fully below, NAT is engaging in plainly obstructionist conduct in its failure to comply with the most basic of discovery requests from CenturyLink. Three of the discovery requests, all asking for documents and information reviewed by NAT’s consultant in the preparation of his testimony, are among the most straightforward and non-controversial discovery requests made in any litigation, and NAT’s responses that such requests are outside the scope of this docket, and that NAT does not understand the meaning of words used in CenturyLink’s request such as “data” or “information,” are patently unreasonable. Further, NAT’s failure to provide responses to

CenturyLink's other requests that are the subject of this Motion – for information relating to how NAT intends to make money from interexchange carriers such as CenturyLink though its admitted plans to engage in access stimulation – are well within the applicable discovery standard that such requests are reasonably calculated to lead to the discovery of admissible evidence, as framed by the pleading in this docket.

#### LEGAL AUTHORITIES GOVERNING DISCOVERY

2. Applying the discovery rules from the state rules of civil procedure,<sup>1</sup> SDCL 15-6-37 (a) (2) authorizes a party to move the Commission for an order compelling another party to answer an interrogatory or request for documents. As affirmed in the attached Affidavit, and as evidenced by the email communications between counsel, the undersigned hereby certifies compliance with SDLC 15-6-37 (a) (2), that he has in good faith conferred or attempted to confer with opposing counsel in an effort of obtain the requested discovery without the need for Commission action; however, those efforts have been unsuccessful.<sup>2</sup>

3. The scope of pretrial discovery is governed by SDCL 15-6-26 (b) (1). This statute states in pertinent part:

**Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. (Emphasis added).**

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<sup>1</sup> ARSD 20:10:01:01.02 says: **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.

<sup>2</sup> See Affidavit of Todd L. Lundy, attached as Exhibit 7.

The South Dakota Supreme Court has consistently held that the discovery rules are to be construed liberally and in favor of broad discovery. Bean v. Best, 80 N.W.2d 565 (SD 1957). A party “may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action.” Id.

4. A broad construction of the discovery rules is necessary to satisfy the three distinct purposes of discovery: (1) narrow the issues; (2) obtain evidence for use at trial; and (3) secure information that may lead to admissible evidence at trial. Kaarup v. St. Paul Fire and Marine Ins. Co., 436 N.W.2d 17, 19-20 (SD 1989) (citation omitted). In South Dakota, “[t]he scope of pretrial discovery is, for the most part, broadly construed.” Kaarup, 436 NW2d at 19 (citing Bean v. Best, 80 NW2d 565 (SD 1957)). SDCL 15-6-26 (b) provides that “[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action....” Accordingly, “[t]he proper standard for ruling on a discovery motion is whether the information sought is ‘relevant to the subject matter involved in the pending action....’” Kaarup, 436 NW2d at 20 (quoting SDCL 15-6-26 (b) (1)). “This phraseology implies a broad construction of ‘relevancy’ at the discovery stage because one of the purposes of discovery is to examine information that may lead to admissible evidence at trial.” Id. (citing 8 C. Wright and A. Miller, Federal Practice and Procedure, § 2008 (1970)).

5. As demonstrated in the sections below, the discovery requests that are the subject of this Motion are well within the scope of relevant issues in this docket as framed by the pleadings, and NAT’s failure to respond, based either upon the scope of discovery or based upon objections to the language used in CenturyLink’s requests is not reasonable and conflicts with South Dakota’s rules of discovery.

## **NAT SHOULD BE COMPELLED TO RESPOND TO CENTURYLINK'S DISCOVERY REQUESTS**

6. On February 24, 2012, CenturyLink served a First Set and a Second Set of Discovery Requests upon NAT. The First Set was a modest 15 in number and was limited to the area in which NAT was requesting certification. The Second Set focused upon the filed testimony of its consultant, Mr. Carey Roesel, and in general requested the documents, information, and data used by Mr. Roesel in his analysis and preparation of this testimony. This Motion to Compel will begin with NAT's failure to respond to three questions within the Second Set of Discovery Requests.

### **Material Reviewed by NAT's Consultant in the Preparation of His Testimony**

7. On February 17, 2012, NAT filed the Direct Testimony of Carey Roesel in support of its application for certification. Mr. Roesel's testimony states that he is employed by Technologies Management, Inc., and that he has been retained by NAT as a consultant and to provide testimony in this docket. Mr. Roesel outlines the purpose of his testimony as describing "the managerial, financial, and technical ability of NAT to provide the telecommunications services as outlined in NAT's revised 'Application for a Certificate of Authority,'" and he concludes by opining that NAT does have such ability.<sup>3</sup> Other than referencing NAT's website for its rates, terms and conditions of service, and the confidential financial documents that NAT provided to the Commission, Mr. Roesel does not identify any of the documents or information that he reviewed or analyzed in the preparation of his Testimony.

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<sup>3</sup> Direct Testimony of Carey Roesel, at pp. 2, 10.

8. On February 24, 2012, CenturyLink served the following three data requests upon NAT as part of its Second Set of Discovery:

- 2.1 Please produce all documents, data, and other information reviewed or analyzed by Carey Roesel in his preparation and drafting of his Direct Testimony.
- 2.2 Please produce 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.
- 2.3 Please produce 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.

In sum, all three requests seek the documents and information Mr. Roesel reviewed and analyzed in preparing his testimony, and 2.2 and 2.3 focus upon any information he reviewed and analyzed relating to access stimulation and to the charges that NAT may invoice interexchange carriers such as CenturyLink. All three requests are couched in terms of what he reviewed "in preparation and drafting of his Direct Testimony."

9. On March 15, 2012, NAT responded, out of time, to CenturyLink's Second Set of Discovery.<sup>4</sup> NAT's Response to Request 2.1 was:

Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter. NAT also objects that the terms "facts," "data," or "other information" is vague, overbroad, and ambiguous. NAT also objects that the requested materials are beyond the scope of permissible discovery under SDCL 15-6-26(b).

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<sup>4</sup> By Stipulation, NAT's responses to CenturyLink's discovery were due March 9. NAT did not serve its responses to CenturyLink's Second Set until March 19, even though the responses were signed by both counsel and NAT's corporate representative on March 15.

10. NAT's Responses to Requests 2.2 and 2.3 were the same, and mirrored its response to 2.1, changing only its inability to interpret the words "reviewed" and "analyzed", instead of "facts," "data," or "other information."<sup>5</sup>

Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter. NAT also objects that the terms "reviewed" and "analyzed" are vague, overbroad, and ambiguous. NAT also objects that the requested materials are beyond the scope of permissible discovery under SDCL 15-6-26(b).

11. Almost immediately after receiving these responses, CenturyLink's counsel wrote to NAT's counsel, requesting an explanation as to how documents reviewed in preparation of the filing of a consultant's testimony in a particular docket could possibly not be relevant to that very docket.<sup>6</sup> NAT's counsel's response did not address the issue of relevancy; rather, the focus of his objection turned on the meaning of the language contained in CenturyLink's request. NAT's counsel stated:

Please clarify what "documents, data, and other information" CenturyLink is seeking in Data Requests 2.1 and 2.2

The information encompassed by these Data Request could include Mr. Roesel's college textbooks, continuing education materials, etc.

Please advise.<sup>7</sup>

CenturyLink again responded promptly, providing an explanation of the materials requested:

Scott, the words "documents, data, and other information" are qualified by the phrase "reviewed or analyzed by Carey Roesel in his preparation and drafting of his Direct Testimony." So, we're asking for the documents and information he reviewed from the time he started his preparation of his testimony through its completion. If Mr Roesel

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<sup>5</sup> NAT's Responses to 2.2 and 2.3 also refer to SDLC ~~16~~-6-26 (b), instead of ~~15~~-6-26 (b), but CenturyLink assumes this was an inadvertent typographical error.

<sup>6</sup> The email from CenturyLink's counsel to NAT's, dated March 19, 2012, is attached to this Motion as Exhibit 1.

<sup>7</sup> The email from NAT's counsel to CenturyLink, dated March 21, 2012, is attached as Exhibit 2.

did not review his college textbooks and Continuing Educational materials in the preparation of his testimony, then we are not asking for those. On the other hand, if he did review his college textbook in the formulation of his testimony, then we're asking for that.<sup>8</sup>

Since the above email from CenturyLink's counsel, NAT has not communicated its position regarding 2.1, 2.2, or 2.3 any further, and has not provided any substantive response to those data requests.

12. It's not clear from NAT's responses whether it still objects to these discovery requests because they are beyond the scope of relevant issues in this docket. In case it does, CenturyLink responds by asserting that discovery requests 2.1, 2.2, and 2.3 are tightly connected to the issues in this docket, by requesting the materials that NAT's consultant/witness reviewed or analyzed in preparation of his testimony. The CenturyLink discovery requests simply request the material that form the basis of testimony actually filed in the docket; it is difficult to imagine a request more closely aligned with the issues and evidence in any docket.

13. And, NAT's refusal to respond based upon its lack of an understanding of the words "facts," "data," "other information," "reviewed," or "analyzed" is equally unavailing. These words have a clear and straightforward meaning, and NAT's email communication suggesting that such language may call for Mr. Roesel to produce his college textbooks is an example of applying an extreme interpretation to commonly used language. Also, it is telling that NAT fails to provide any material that Mr. Roesel in fact did review during the time period in which he was preparing his testimony that would easily be within a reasonable interpretation of the discovery requests.

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<sup>8</sup> The email from CenturyLink's counsel to NAT's, dated March 21, 2012, is attached to this Motion as Exhibit 3.

14. NAT's own discovery requests to CenturyLink show that NAT is not acting reasonably, because NAT uses the very terms to which it objects in regard to CenturyLink's discovery requests. That is, NAT's discovery requests include a definition section uses the terms "facts,"<sup>9</sup> "data,"<sup>10</sup> and "information."<sup>11</sup> Further, as stated in email communications among counsel, these terms are limited to the materials that Mr. Roesel used "in preparation and drafting of his Direct Testimony," certainly providing sufficient clarity and definition for NAT to respond.

#### **Materials Regarding Charges Nat Will Attempt To Impose Upon IXC's**

15. CenturyLink's First Set of Discovery included the following three requests:

1.13. Produce all documents evidencing communications 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.

1.14. Produce 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.

1.15. Produce 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.

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<sup>9</sup> See Exhibit 4. NAT Definition 5 says: "Describe" when used in reference to a factual situation or allegation means to state with particularity all **facts** known connected with, bearing upon, or relating in any way to the matters on which inquiry is made.

<sup>10</sup> See Exhibit 4. NAT Definition 6 says "Document," or "documentation," shall include, without limitation, any correspondence, writing, DVD, CD, graphic material, note, report, summary, manual, draft, calendar, log, photograph, plan, invoice, diary, ledger, journal, **data** or other recorded communication of any kind—regardless of medium and whether or not original or draft including additional writing thereon or attached thereto—that is responsive to the request.

<sup>11</sup> See Exhibit 4. NAT Data Request 1.34 says: Please identify any expert witness that you have employed/retained in this matter and any **factual information** provided to any expert witness that you have employed/retained in this matter.



16. NAT's Responses to 1.13, 1.14, and 1.15 were the same:

Subject to and notwithstanding the aforementioned general objections, NAT also objects to the extent the request is vague and ambiguous, seeks proprietary confidential information, and trade secrets. Moreover, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this Certificate of Authority matter.

17. Counsel for CenturyLink communicated with counsel for NAT, requesting that NAT reconsider its objections, and asserting that these requests are within the relevant issues in this docket as framed by the pleadings this docket.<sup>12</sup> NAT's response was that it will not agree to produce the requested documents, because they "are not reasonably related to the limited issue in this matter."<sup>13</sup>

18. Contrary to NAT's objections, CenturyLink's requests are well within the subject matter of this docket as framed by Commission orders and the pleadings. On November 30, 2011, the Commission granted CenturyLink's petition to intervene. The governing standard on petitions to intervene is whether the requesting party "will be bound and affected ... adversely with respect to an interest peculiar to the petitioner as distinguished an interest common to the public or to the taxpayers in general," as provided in ARSD 20:10:01:15:05. CenturyLink's petition to intervene asserted that, as an interexchange carrier, it may be the victim of an access charge scheme perpetrated by NAT for calls delivered to free service calling companies, and therefore it had an interest in the docket.<sup>14</sup> And, as admitted by NAT in its discovery responses, and as stated by CenturyLink's witness Mr. Easton, NAT will be engaging in "access

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<sup>12</sup> See Exhibit 5.

<sup>13</sup> See Exhibit 6.

<sup>14</sup> See Qwest's Re-filed Petition to Intervene, dated November 1, 2011, at ¶¶2 through 5.

stimulation” as defined by the FCC.<sup>15</sup> CenturyLink has further concerns that NAT will engage in a form of “mileage pumping,” in which LEC charges unreasonably high transport charges to IXCs.<sup>16</sup> Thus, requests 1.13, 1.14, and 1.15 sought information on NAT’s plans or intentions to charge access to IXCs for calls delivered to free service calling companies in the area that is the subject of the application for Certificate of Authority, as such intentions may be reflected in communications or agreements with free service calling companies or through internal plans and memoranda.

19. In sum, CenturyLink’s discovery requests -- to learn how NAT may attempt to engage in a scheme to charge inflated access to IXCs in the area that is the subject of NAT’s requested certificate – are closely connected to the relevant issues in this case, and NAT should respond fully.

#### CONCLUSION

20. For the reasons stated above, CenturyLink respectfully requests an order of the Commission compelling NAT to respond fully and as soon as reasonably practical to Requests numbered 2.1, 2.2, 2.3, 1.13, 1.14, and 1.15.

Dated: April 2, 2012.

Respectfully submitted,

By: /s/ Todd Lundy  
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<sup>15</sup> See Direct Testimony of William R. Easton, at pp. 14 through 18.

<sup>16</sup> Id., at pp. 20 through 22.

**And**

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of this document was delivered via e-mail on this 2<sup>nd</sup> day of April, 2012, to the following parties:

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