

**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

POST-HEARING MEMORANDUM OF NATIVE AMERICAN TELECOM, LLC

Introduction

Native American Telecom, LLC (“NAT”) submits this post-hearing memorandum in support of its application, to the extent required, for a certificate of authority to provide intrastate interexchange access service that originates or terminates off the Crow Creek Reservation.

As the Commission is aware, this proceeding has been marked by resistance from certain long-distance phone companies who, for their own financial reasons, initially opposed the application. All of that opposition has now been withdrawn or gone silent except for Sprint, whose “representative” readily admitted at the hearing that Sprint’s opposition is motivated by its financial obligations to NAT, not the best interests of the Crow Creek Sioux Tribe or the citizens of South Dakota.

This proceeding has also been marked by the perseverance of NAT despite the challenges of operating on a Reservation with significant rural poverty. Counsel for this Commission observed at the hearing that applicants for CLEC authority are generally start-ups, in the red, requiring a bond to protect customers.¹ Here, though, NAT has been operating successfully for over four years. Its network works, and its management has operated the company effectively, with each of its three owners actively participating in management and the company’s board.

¹ Hearing Transcript (“Trans.”), p. 573-574.

Financially, its three owners and first big customer have supported NAT over the last four years, allowing it to purchase new spectrum to build-out the rest of its network and notwithstanding its large outstanding receivables from Sprint and a few other long distance carriers.

That it is in the public interest for the Commission to grant the Crow Creek Sioux Tribe the opportunity to continue to build-out its network cannot be disputed. A rural community with chronic unemployment and, as a practical matter, no access to affordable phone and Internet service before NAT, the Tribe now has service in Fort Thompson. With a certificate and this proceeding behind it, NAT will be able to use the recently purchased new spectrum to build-out the remainder of its network and deliver phone, broadband, 911, and video services to the rest of the Reservation.

No other company is even attempting to serve this community in a way that its members can afford – certainly not Sprint or any other intervener. Thus if NAT does not succeed, the worst that could happen is that a population that had no service would go back to receiving no service. With NAT, they have service and an opportunity for that service to continue and expand.

I. SUMMARY OF THE EVIDENCE.

A. NAT's Technical, Financial, And Managerial Capabilities.

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.” This statute also requires that “[a] telecommunications company has the burden to prove in its application that it has *sufficient technical, financial and managerial capabilities* to offer the telecommunications services described in its application. . . .” *Id.* At the hearing on February 24-25, 2014, NAT met its

burden with what was essentially irrefutable evidence.

The Commission has in this proceeding information not typically available to it when it evaluates whether an applicant has the technical, financial, and managerial capabilities to offer the telecommunication services for which it is applying. In this matter, NAT has been successfully operating since 2009 pursuant to the Order of the Crow Creek Utility Authority and a federal tariff. *See* Hearing Exhibits (“Exh.”) 2, 17. It has done so without incident, complied with all applicable laws and regulations, and has the gratitude of the Chairman of the Crow Creek Sioux Tribe. *See* Exhs. 3, 4, 7, 9, 10-12; *see also* testimony of Tribal Chairman Brandon Sazue, Trans., pp. 61-105. Even Sprint’s representative and “expert,” Randy Farrar, testified that NAT was in compliance with all applicable rules and was charging “just and reasonable” rates under the Federal Communication Commission’s Connect America Fund’s Order of November 2011 (“CAF Order”). Trans., pp. 539-540.

On the technical side, Sprint’s witness also agreed that NAT had the technical capability to provide the services contemplated in the application. Trans., p. 581. On its financial capabilities, NAT has four years of operations behind it, and the following uncontested evidence was presented at the hearing:

- NAT has three committed owners – the Crow Creek Sioux Tribe, Wide Voice Communications, and Native American Telecom Enterprises – who have together provided all of the financial, managerial, and technical support it has needed to operate successfully for over four years without accumulating any outside debt. *See* Exh. 1, Exhibit C (Financial Statements); Exh. 13.
- NAT has Free Conferencing Corporation as a substantial, large first customer on which it is supporting its business while it expands, and the President and CEO of that business travelled to South Dakota to testify at the hearing, where he made clear that he supported NAT and would not allow it to fail.²

² At the hearing, Commissioner Hanson observed, “When Mr. Erickson testified you’ll recall that he stated that he was not about to allow NAT to fail. And really it’s obviously in his hands whether they succeed or fail. Would you, under all circumstances -- the way his business model is set up it’s very much in his own personal interest to make sure that NAT does not fail....” Trans., p. 582.

- Other businesses, including conferencing companies and various other ventures, have approached NAT, which has deferred pursuing new business only because it wants first to resolve this proceeding and receive PUC approval – either with a grant of its certificate of authority or acknowledgement that such authority is not required. Trans., p. 220
- With the acquisition of the additional spectrum from Sprint, NAT is poised to expand its network to the rest of the Crow Creek Reservation, moving beyond the 150 households now served by its existing tower and allow it to reach up to as many as 1800 additional households with the installation of only a few additional towers. Trans., pp. 115-118, 246-247.
- NAT already has financing to build out the network to the rest of the Reservation with the new spectrum acquired from Sprint. Trans., p. 146.

The Commission has a long history of giving applicants for CLEC authority a chance to show that they can “make a go” of their business. Neither Commission staff nor anyone in the industry has been able to recall an application like this being denied. Here, there is no risk of harm to anyone should NAT falter given the aggressive attention NAT is getting from the interveners and the professional oversight of the Commission and its staff. At worst, a community with no practical access to service will lose the service it was not getting before NAT. The undisputed facts justify the granting of the authority requested.

B. NAT Presented At The Hearing Compelling Evidence That It Has The Capabilities Required For Approval And That The Granting Of Intrastate CLEC Authority Is In the Best Interest Of South Dakota.

NAT presented five (5) witnesses over the two days of hearing. Except for Carey Roesel, NAT’s consultant and expert who handles regulatory matters, NAT’s witnesses have been working, mostly without compensation, since 2009 to advance the vision of a self-sustaining, tribally owned phone company at the Crow Creek Sioux Reservation. The testimony of NAT’s witnesses is summarized below.

Brandon Sazue. Mr. Sazue is currently the Chairman of the Crow Creek Sioux Tribe and was its Chairman when NAT was organized in 2008. Mr. Sazue testified about how the

Reservation, in a rural area of a rural state, with poverty levels of 80-90%, had before NAT no technology infrastructure and no prospects for obtaining affordable phone and broadband services that are necessary to modernize the Reservation and Tribe. Trans., pp. 68-69. NAT has brought the Internet, a technology center, phone service, 911 service, and computer access to a population that prior to NAT simply could not afford them. *Id.*

Sprint's representative and "expert" advanced his opinion that the Tribe was not getting a good deal and that Free Conferencing Corporation ("Free Conferencing") was making too much money on the conferencing traffic it was delivering to NAT. However, Chairman Sazue made clear that he trusted NAT's owners and managers, that he believed the Tribe was being treated fairly, and that the Tribe was pleased with NAT's business relationship with Free Conferencing.³ Trans., pp. 100-105.

Carey Roesel. Mr. Roesel is a Vice President and consultant for Technologies Management, Inc. ("TMI"). TMI is a well-known firm that specializes in regulatory matters for the telecommunications industry and has participated in hundreds of CLEC and IXC certifications around the country. Trans., p. 374. TMI has approximately 120 companies for which it handles full compliance reporting and ensures that they have the appropriate tariffs filed and all related reports appropriately prepared and timely filed. *Id.* at 374. TMI represents the largest cable operators, large carriers, and startups. *Id.* at 375.

For NAT, TMI does its compliance reporting, rate development, and tariff work, as well as other consulting activities to ensure it is in compliance with applicable laws and regulations. Mr. Roesel made clear that, although every TMI client wants to be in compliance, and some take it more seriously than others, NAT takes compliance issues very seriously. He also testified

³ When he testified at the hearing, Sprint's "expert" acknowledged the truth of Mr. Sazue's testimony about the fair treatment of the Tribe by NAT. Trans. P. 572-573

about the nature of this proceeding, having participated in hundreds of certification proceedings. He has never seen a case contested like this matter in his seventeen years in the industry. *Id.* at 375.

In connection with his work, Mr. Roesel advised NAT about its access tariffs and rights regarding rates, including the maximum rates permissible to charge for intrastate and interstate traffic. NAT instructed TMI to use rates of the lowest priced cap LEC in South Dakota, in essence complying with what the CAF Order would require when it was later issued by the Federal Communications Commission (“FCC”). *Id.* at 379. Such rates are competitive now with rates throughout the United States. *Trans.*, p. 384. Mr. Roesel also explained that with a direct connection, which NAT has always said it would make available to Sprint or other carriers and which it has stipulated to do with Qwest, the access rate would be reduced to \$.001974. *Id.* at 433. Such a connection would make NAT the least expensive place to terminate a call in any major area in America. *Id.*

Also, even with respect to mileage, NAT did not take advantage of the highest possible mileage rate. *Id.* at 381. Therefore, the notion advanced by some that NAT, or even Free Conferencing, are pursuing this application in South Dakota or continuing to support a tribally owned phone company solely to take advantage of high switched access rates or the mileage fees associated with rural America, is just not the case.⁴

⁴ Randy Farrar, Sprint’s representative and “expert,” agreed that Mr. Roesel was correct that a direct connection would reduce the access rate to \$.002. *Trans.*, p. 544.

Mr. Farrar also testified that “*mileage is what makes rural America so attractive.*” *Trans.*, p. 575. That concept, like much of Mr. Farrar’s testimony, is not just the product of an uninformed, pre-determined view of a subject he seems to know little about, but is factually wrong as to NAT and its principals. Free Conferencing, as Mr. Erickson testified, actually had its first location in California, and continues to spread traffic to locations around the country. Also, after the CAF Order, Mr. Roesel provided uncontested testimony that NAT’s rates, both with mileage charges and especially if carriers elect to avoid them with direct connections, are competitive with or lower than LECs in urban areas. *Trans.*, pp. 432-433.

At the hearing, counsel for the Commission indicated that it was the Commission's staff's preference for the CLEC applicant to obtain its certificate of authority first and then come back with a second filing on the switched access tariff. Trans., p. 413. Mr. Roesel made clear that such a filing will be substantially similar to the tariff already filed under the Tribal authority and thus consistent with its reasonable, and low, terms, conditions, and rates. Trans., p. 394. NAT's rates will remain the lowest rates in South Dakota and connections will be available at rates as low as rates available across the country.

In the end, Mr. Roesel's testimony made clear that NAT is in compliance with all of its regulatory obligations and does everything it can to comply with its obligations in a highly regulated business. *Id.* at 429-430. "There's a high level of commitment to compliance at Native American," he said. *Id.*

Gene DeJordy. Mr. DeJordy has thirty years of experience in the telecommunications and technology industry. Exh. 3. He has a law degree from The Catholic University of America, a Master of Science degree from George Washington University, and a bachelor degree from the University of Maryland. *Id.* He was a lawyer for the FCC and served on the Rural Task Force responsible for providing recommendations to the FCC on universal service policies and rules, and has been a frequent speaker at several industry and government symposiums. *Id.*

At the hearing, Mr. DeJordy described how NAT came to be created, as follows:

It was my experience at the time based upon working with Western Wireless and other companies that if you had a singular focus on providing service in rural areas, that you would be able to provide services that are more tailored to the needs of those consumers. That's what previously Western Wireless did when I worked for them, and it is what we envisioned for Native American Telecom in South Dakota. Once we established the company, we took a closer look at the areas that we specifically wanted to serve, and we -- at the same time we had developed a close relationship with the Crow Creek Sioux Tribe. That led to the reorganization of Native American Telecom from a company that I owned to a

company that was owned majority by the Crow Creek Sioux Tribe and also had as partners Wide Voice Communications, Inc.

And the key to that partnership was, you know, the tribal involvement in the business. We felt that it was very important to have a company that was going to be one focused on the Crow Creek Sioux Tribe Reservation but also to address their needs. And many of the needs are pretty well documented. But what's not addressed is how do you address those needs? And that's what Native American Telecom's purpose was is how to address those needs. And so the partnership consisted of the Crow Creek Sioux Tribe, 51 percent, a company that I established to have its ownership interest in that company, which was Native American Telecom Enterprise, and Wide Voice Communications.

Trans., p. 110-111.

Sprint's representative and "expert" contended that NAT was created solely to serve Free Conferencing Corporation. Chairman Sazue categorically rejected that idea, and the founder of the company addressed the same issue in response to a question from the Commission:

COMMISSIONER FIEGEN: So it appears you certainly have a passion for rural South Dakota and unique needs. When you started your company what did your business model and your strategic plan and your financing look like?

THE WITNESS: Well, it probably didn't look too good in some sense. Because I remember I went to work for a company Western Wireless in 1995. And at that time there was really no service in rural areas of the country. And John Stanton, who ran that company, was purchasing all of these rural licenses because nobody wanted them. People felt at that time no one was going to get wireless service in rural areas. Nobody wanted it for some reason.

So, you know, I have an appreciation for the fact that, you know, if you -- if you provide a service that's specifically tailored to the needs of people that you're trying to serve, then they're going to want the service that you have.

So, you know, with that in mind, when we started Native American Telecom, it was funded primarily by myself. And then -- and then we were working with different entities like Wide Voice who had shared our vision of serving rural areas. And many entities didn't have that vision.

I mean, I was approached by numerous carriers that wanted to deliver traffic to us but not [build] it out and provide service in rural areas. They just wanted to

deliver the traffic and collect the money. That was not our vision, and it wasn't the vision that we wanted our partners to have.

So when we partnered with Wide Voice they provided the funding to help build out the network.

Trans.pp, 191-192.

The Crow Creek Sioux Tribe's major economic activity is cattle ranching, farming, and tribal government with employment primarily by the Crow Creek Sioux Tribe, Lode Star Casino, Bureau of Indian Affairs and the Indian Health Service. In 2008, however, the Crow Creek Sioux Tribe adopted a "Telecommunications Plan To Further Business, Economic, Social and Educational Development" ("Telecommunications Plan") on the Crow Creek Reservation. Exh. 3., p. 8; *see also* Telecommunications Plan, Exhibit E to DeJordy Pre-Filed testimony (Exh. 3). Under this Telecommunications Plan, the Crow Creek Sioux Tribe has taken several initiatives to further "tribal self-sufficiency and economic development" on the Crow Creek Reservation by, among other things, deploying an advanced telecommunications infrastructure to (i) attract new businesses necessary to generate economic development, employment opportunities, and revenue, and (ii) address the social and educational needs on the Reservation, including the need for greater access to information and services necessary for tribal members.

Mr. DeJordy testified that, after receiving authority from the Tribal Utility Commission, *see* Exh. 2, NAT built the antenna tower and other network facilities needed to serve Fort Thomson using the Wi-max spectrum. The ongoing litigation and the attempt by certain interveners to use their opposition in this proceeding to advance their litigation agendas drained some of NAT's resources and prevented it from expanding its network beyond Fort Thompson. Trans., p. 112-113. NAT currently serves only 150 households, because its network is limited to Fort Thompson. *Id.*; *see also* pp. 246-247.

However, in October 2013, NAT purchased from Sprint 10 megahertz of spectrum in the PCS band that can serve the entire Reservation with just a few cell sites, instead of the 20-30 sites that the Wi-max technology would have required. Trans., p. 115, 246-247. The purchase was approved by the FCC in November 2013. Trans., p. 116. NAT has now entered into an agreement with Tazca-Connects, a multinational company that provides telecommunications equipment and technology solutions for rural areas. Trans., p. 117-118.

At the hearing, Sprint attempted to question NAT's long-term prospects in light of the FCC's CAF Order and the country's move to a "bill and keep" system that will eliminate some revenues for LECs. Neither Sprint nor anyone else disputed certain essential facts about the new spectrum acquired by NAT about which Mr. DeJordy testified: (1) a contract has been signed to expand NAT's network, thereby reaching the more than 2000⁵ households that could not previously receive service;⁶ (2) there is financing in place for the expansion; (3) monthly subscriber fees for the equipment is only \$5.95 per month; and (4) the Tribe is committed to the delivery of service to the rest of the Reservation and will subsidize those households which cannot afford the service. Trans., 138-144, 146, 181-182.

Mr. DeJory also testified that NAT, like every CLEC in America, is exploring and constantly reexamining its business prospects in the ever-changing telecommunications

⁵ There are 2500 potential residential subscribers, including both tribal and non-tribal members on the Reservation. Trans., p. 138.

⁶ At the hearing, Commission Nelson observed how NAT's customer base seemed to have stagnated at 150 householders, and he was right. Trans., p. 151. The stagnation was a product of two things: the limited geographic scope of the network to Fort Thompson and the burden placed on NAT by this proceeding and the artificial diversion of resources caused by the litigation strategy of certain carriers. See Trans., p. 154-155; see also pp. 246-247. (NAT notes that various carriers have acted responsibly and, after vetting NAT, its operations, and its rates, are meeting their obligations and have either not intervened or have withdrawn oppositions to the application.)

Also, in respect to this application process, households on NAT's service currently cannot use their phones to make intrastate calls beyond the Reservation. This limitation stifles expansion for residential service until this application is resolved but is especially problematic for any effort to market NAT to businesses on the Reservation, who generally need to call in-state suppliers, employees, and others as routine parts of their operations. Trans., pp. 304-305.

environment. NAT has recently been approved for contracting with the United States government. Exh. 3., pp. 9-10. It also has the opportunity to participate in Universal Service funding opportunities, like the recently announced Connect America Fund Rural Broadband Experiment, which includes funding for unserved census blocks on the Crow Creek Reservation. *Id.* It also has potential new business from the expansion of its network, roaming fees, video, the Buy Indian Act, its Hub Zone application that is under review, the Tribal 8(a) application, and numerous other companies that want to locate in rural areas of South Dakota that have contacted NAT but which NAT has put off until this proceeding is resolved. Trans., pp. 118- 119.

Jeff Holoubek. Mr. Holoubek currently serves as the acting President of NAT. It was never intended that he hold the position for any period longer than necessary to complete this proceeding and the litigation with Sprint, before turning daily management over to the Tribe. Trans., p. 232.

For years, companies have been reaching out to Mr. Holoubek about new business, but his response has always been to defer until this proceeding is completed. NAT decided it would not be prudent to expand with this proceeding pending or while it was trying to accommodate the concerns of the Commission. Trans., p. 220. Although NAT did not believe it needed a certificate of authority from the Commission, others did, and the Commission itself indicated that it thought NAT needed Commission authority. NAT deferred expanding its business in deference to the Commission's wishes. *Id.*

Free Conferencing is currently the anchor customer for NAT, but NAT has gone out of its way not to provide preferential treatment to Free Conferencing. Even Sprint's "expert" testified that Free Conferencing's 75-25% allocation of revenues for its conferencing traffic is consistent with the industry standard. Trans., p. 561. Also, NAT bills Free Conferencing for usage based

on the highest port usage per month, when reasonable arguments could be made for averaging or other methods of calculating charges. Trans., p. 277.

Sprint, on the other hand, has been connecting calls to NAT since 2009 with no intention of paying termination access fees. Trans., p. 310-311. The CAF Order prohibits “self help,” but Sprint currently owes NAT \$2 million. Exh. 33, ¶ 700; Trans., p. 310-311.

Mr. Holoubek testified that NAT has also gone to great lengths to ensure it is complying with applicable laws and regulations. Thus, Mr. Holoubek was scrupulous in tracking down the proper way to handle NAT’s status as a tribally owned company that had determined not to charge members for the services. NAT paid USAC charges for universal service fees even though it was not clear they were payable. NAT then reached out to USAC, which determined that NAT was a *de minimus* filer that did not owe anything for 2010, and NAT received a refund for 2010. Trans., pp. 312-314. Still, in an abundance of caution, NAT decided not to refund Free Conferencing its contribution of close to \$10,000 related to that overpayment.

Mr. Holoubek also testified that NAT has consistently been open with all of its owners, that all significant decisions have been made unanimously by all three owners, including the Tribe, and that it has been dedicated to openness and compliance with regulators, the Tribe, and everyone’s common interests. Trans., pp. 255, 312-314.

David Erickson. Mr. Erickson testified that Free Conferencing is the fastest growing and largest privately held conferencing company in the world. Trans., p. 330. It is operating in 56 countries with plans to expand to 80. *Id.* It is well known in the industry that the lion’s share of the traffic from “free” conferencing companies comes from what had been customers of companies that charged organizer fees. Trans., p. 331.

Because it has been building its business from customers who came to Free

Conferencing's service from pay services, these customers will become paying customers again if and when the "free" model ends when the FCC's "bill and keep" system come into full effect. In fact, given Free Conferencing's success, customer satisfaction, and high level of service, Mr. Erickson sees the regulatory change as an advantage to his company because it will eliminate the "free" model and force all conferencing users to pay for conferencing services. Trans., pp. 332-333.

Mr. Erickson affirmed that, not only will Free Conferencing thrive with any change in the conferencing market, it intends to remain loyal to its partners, including NAT. Trans., pp333-334. The company already does substantial business with NAT, and intends to continue to do business there. "The equipment that we have on that Reservation is capable of doing audio, video, and data conferencing. It's some of the most sophisticated equipment in the world, in the entire world. It's high definition. It's the best." Trans., p. 334.

As an experienced businessman and a director of NAT, Mr. Erickson also testified how having Free Conferencing as the first, anchor customer was a major benefit to NAT, which was in a position to use it to move forward with the technology it is using for Free Conferencing to attract other major customers. Trans., pp. 334-335. Wide Voice (the phone company, not the entity that owns an interest in NAT), had Free Conferencing as its first and only customer for a long time and began attracting other customers. Now it serves Skype, Vonage, and Microsoft. *Id.*

During his testimony, Mr. Erickson also repeatedly reaffirmed his and his company's commitment to NAT. "I believe in what's happening there. I believe that they have the ability to serve me. I have the belief that they have the ability to serve other people. ...It's a quality network. It has high uptime. All of the minutes are done on the Reservation , on the bridges, on

the Reservation.... The Native Americans have advantages with our Federal Government, and I would like to see them take advantage of it. And I believe if they did, they could do much better than a Wide Voice, much better than some of the other companies I work with.” Trans., pp. 335-336; *see also* pp. 359-360 (NAT can co-brand conferencing services for sale to government to take advantage of Buy Indian Act); p. 363 (“And I’m not giving up on good partners. I’m not moving out of there.”).

C. The Testimony Of Sprint’s “Representative” and “Expert.”

Sprint, the only intervener who offered evidence in opposition to NAT’s application, presented one witness to support what everyone agrees is an unprecedented effort by a national carrier to contest a local CLEC application. That witness, Randy Farrar, was presented both as a “representative” to state Sprint’s positions for the Commission and as an “expert.” Trans., p. 476. As a representative, Farrar repeatedly made clear that, although Sprint advances a “public policy” argument, its only agenda in this proceeding is the money it owes NAT and the litigation pending in the U.S. District Court. Trans., pp. 479, 480.

To advance its litigation agenda, Farrar claimed that (1) NAT does not have the managerial or financial capability to deliver the services addressed in the application; and (2) granting the application is against “public policy” because Free Conferencing is an “access stimulator.” His testimony on these topics was frequently inconsistent with reality and certainly was not credible.

Regarding NAT’s managerial and financial capability, Sprint has the resources to have had a true business expert evaluate NAT and its business prospects – indeed, Sprint had *four* lawyers at counsel table during NAT’s hearing. Instead, Farrar offered testimony on NAT’s “financial” capability by reviewing only a balance sheet and a cash flow statement. By his own admission, Farrar did not visit the business, or inquire about, let alone analyze, any of its plans for

the future. Trans, pp. 501-502. He did not attempt to understand NAT's market, i.e. how many households were hooked up and how many were still available to be sold, basic issues that Commissioner Nelson asked about after just hearing an hour of testimony. *Id.* at 503. In forming his "opinion," Farrar did not know why NAT had only 150 households hooked up, that only Fort Thompson was served by the existing tower, or any of the information in the depositions conducted by Sprint's own counsel. *Id.* at 503-506, 512. Farrar spent over a year on this case, but did nothing that a true expert attempting to evaluate NAT's prospects would have done. *Id.* Farrar also did not consider the \$2 million that Sprint owes NAT in his financial analysis. Trans., p. 494-495.

To conclude that NAT did not have the financial or managerial capacity to run its system, Farrar was oblivious to the fact that it had been doing just that for the last four years. Thus, at the hearing, Chairman Hanson asked this mostly rhetorical question of Sprint's witness:

Speaking of the managerial structure, doesn't the fact that they've been able to operate for an extended period of time reflect upon their capability of whether they would be able to continue from a managerial standpoint, notwithstanding the potential change of personnel?

Trans., p. 579-580.

On "public policy," Farrar admitted that NAT and Free Conferencing were complying with the CAF Order and the laws and regulations of the FCC and South Dakota. He admitted that the CAF Order represented the policy of the United States and that state tariffs consistent with South Dakota and PUC laws and regulations represent the public policy of the State. Nevertheless, as discussed below, Farrar actually testified that this Commission should make a special rule for NAT alone and deny its application because "access stimulation" is something that "sounds bad." He also advocated that, although the CAF Order sets out a regulatory framework that delineates the nature of interstate tariffs that meet certain triggers for "access

stimulation,” companies should ignore those lawful tariffs and refuse to pay LECs despite the lawful nature of them.

Specifically, Farrar embraced the CAF Order, which is NAT’s Exhibit 33. The FCC noted in the CAF Order that “several parties have urged us to declare revenue sharing to be a violation” of the Federal Communication Act, including Sprint. *Id.*, ¶ 672, *see also* note 1113 on p. 213 referencing Sprint’s comments to the FCC. The FCC declined and instead adopted a “definition to identify when an access stimulating LEC must refile its interstate access tariffs at rates that are presumptively consistent with the Act [i.e. just and reasonable].” Exh. 33, ¶ 667. The agency created a trigger or “definition” which if met requires a competitive LEC to “benchmark its tariffed access rates to the rates of the price cap LEC with the lowest interstate switched access rates in the state.” *Id.*, ¶ 679. The FCC concluded its discussion of Arbitrage and access stimulation by noting that several parties requested that it address the long distance carriers not paying for interstate switched access services. The FCC did not address this issue by imposing any new obligations in the Order, but did “caution parties of their payment obligations under tariffs and contracts to which they are a party.” Exh. 33, ¶ 700. It also reiterated, “[w]e do not endorse such withholding of payment outside the context of any applicable tariff dispute resolution provisions.” *Id.*

With this background, Farrar gave remarkable testimony as to what he and Sprint contend this Commission’s position should be on the “public policy” of NAT’s application. First, Farrar confirms that NAT complies with the law and the public policy of the United States:

- Q: So in this situation here Native American Telecom has their tariff that's consistent with the new triggers, is it not?
- A. Yes. And that's one part of this eight-year transition.
- Q. Right.

A. And I've never argued -- no one's ever said that you are not consistent with the rules. But we're in a transition. Things are not going to be correct, right, just, reasonable, until at the end of that transition period.

Q. Okay. So you agree that NAT is consistent with the rules as articulated by the Federal Communications Commission?

A. As -- yes. As far as where we are in the transition period, yes. NAT is -- NAT is consistent. That doesn't mean they're -- that doesn't mean they're not a traffic pumper. It means they're a traffic pumper meeting the rules.

Q. Okay. So and those rules reflect the public policy of the United States?

A. Yes.

Q. And so they're lawfully operating the business in compliance with the public policy of the United States with respect to interstate traffic; right?

A. Yes.

Trans., p 540. Then he confirms that NAT complies with the laws and public policy of the PUC and the State of South Dakota:

Q. And with respect to the intrastate traffic that's been authorized by the Public Utilities Commission, there are state tariffs that also are at the same lowest rate in the state, are in compliance with the public policy of the State of South Dakota.

A. I would presume so, yes.

Q. And, obviously, this public policy as implemented by the Public Utilities Commission?

A. Yes.

Q. And now you're asking this Public Utilities Commission to set forth a separate public policy with respect to NAT?

A. **Yes.** Because the FCC has ruled that traffic pumping is not in the public interest. Simply because we -- we are in an eight-year transition, simply because you are complying with the rules of transition suddenly doesn't make this good public policy. The FCC has made it clear this is not good public policy, and that's why they have an eight-year transition to reduce access stimulation.

Trans., pp. 541-542. He then testifies that he wants this Commission to have a separate rule that applies to NAT but not to all of the other LECs in the state:

Q. So just so we're clear, you want these three Commissioners to have a separate rule for Native American Telecom that does not apply to all the other LECs in the state?

A. **Yes.** We are asking -- yes. We are asking this Commission to rule that what they're doing is not in the public interest, yes.

Id. Farrar then describes his personal philosophy about “access stimulation,” which has nothing to do with the law, public policy, or anything other than how it “sounds” to him:

Q. You keep saying "traffic pumping." That's not the word the FCC uses.

A. Yeah. They call it access stimulation.

Q. Okay. Do you have a personal animosity about the practice?

A. **Hard to explain that. I do think it's -- I mean, there are lots of things that are legal that just don't sound right.** You know, ticket scalping is legal, but I don't think it sounds right. I don't think it's good public policy. **I know what NAT's doing -- what Free Conferencing is doing is legal, but it just doesn't sound right.**

Trans., pp 545-546. Finally, Farrar concluded by expressing a sentiment that is actually *inconsistent* with the public policies of the United States and State of South Dakota, both of which have established a tariff system that they expect to be honored by the industry.

But Farrar thinks not:

Q. (BY MR. WALD) So a few last questions on access stimulation, and I'll move on. Is it your -- your belief is that all access stimulation is bad, even after the CAF Order?

A. Yes. All access -- all access stimulation is not in the public interest per the CAF Order.

Q. Is it your belief that no IXC should have to pay terminating access fees to anybody who's engage in access stimulation?

A. **Generally speaking, I think the answer to that question is yes. You shouldn't have to pay access on that traffic.**

Q. That would include not just Native American Telecom but any other LEC in the State of South Dakota?

A. **If they are involved in access stimulation, yes.**

Q. And that would also include the other 49 states?

A. **Yes.**

* * *

Q. My question was not about if the tariff isn't complied with. Obviously, people can dispute that. **My question is if there's a tariff applied with the CAF Order, the CAF Order post CAF -- if it involves access stimulation, you consider quote "bad" do you think carriers have to pay it?**

A. My answer's the same.

Q. You said you know of no order, but isn't a CAF an order through the constituted federal agency?

A. **Yes, it is. But that doesn't change my answer.**

Q. So it's your understanding as an expert for Sprint that post CAF Order there's no legal requirements of a telecommunications carrier to pay the tariff by a local exchange carrier that's otherwise compliant with the CAF Order?

A. My answer's the same.

Q. Because if they're a quote "bad" access stimulator?

A. My answer is the same.

Trans., pp 552-555.

Sprint and Farrar are essentially asking the Commission to adopt as the public policy of the State of South Dakota that LECs which accept lawful traffic under a lawful federal tariff should not be paid for that traffic notwithstanding the laws and regulations of the United States. That also ask that the Commission rule that existing LECs be scrutinized for their capacity to operate going forward in such an environment, as well as that this Commission should apply a different rule to NAT than to all other LECs in the State. In reality, it would be against the public policy of the State of South Dakota, as well as the United States, for the Commission to *deny* NAT's application based on Farrar's and Sprint's testimony.

LAW & ANALYSIS

I. NAT HAS MET THE STATUTORY STANDARD, AND THERE IS NO CREDIBLE EVIDENCE JUSTIFYING THE DENIAL OF ITS APPLICATION.

The only issue for the Commission is whether NAT has met its burden to show that it has "sufficient technical, financial and managerial capabilities to offer the telecommunications

services described in its application. . . .” SDCL 49-31-3. Of that, there is no doubt. NAT has been operating for four years and demonstrating just those capabilities.

As the Commission’s counsel pointed out at the hearing, CLECs seeking certificates of authority are generally start-ups, in the red, and require a bond to protect customers. Trans., pp. 573-574. Here, NAT’s application is supported by years of actual performance, an entire Indian tribe and its governing authority, and two other co-owners with extensive technical, legal, and regulatory experience in telecommunications and rural phone systems. A denial of NAT’s application would be unprecedented.

There is no basis for the Commission to take such unprecedented action. As every witness for NAT testified, they are committed to the venture. NAT is not going away. A denial will lead only to a re-application or further court proceedings, neither of which is in the interest of the Commission, NAT, or the Crow Creek Sioux Tribe.

Also, the current application technically concerns only whether NAT customers will be able to make intrastate calls in addition to the interstate calls already authorized by the Tribal Utility Authority. No evidence was presented at the hearing that NAT does not have “sufficient technical, financial and managerial capabilities” to offer intrastate calls to complement its existing service.

If, despite all of the evidence presented at the hearing, the dire and unsupported predictions of Sprint were to happen and NAT were to fail, people on the Reservation who could not obtain affordable service before would lose the affordable service they could only get from NAT. If that happens, they will be no worse off, and they will at least have had phone, broadband, and 911 service while NAT was there. Perhaps during that time people will be saved with access to emergency calls provided for by NAT. The children who grow up during

that time will also have access to the Internet. Efforts by the Tribe to stimulate business may bear fruit and be supported by the technology center and broadband access.

NAT simply deserves the same opportunity as every other LEC has been given in the State of South Dakota. No evidence was submitted at the hearing that would justify denying NAT of that opportunity.

II. NAT’S APPLICATION IS CONSISTENT WITH THE PUBLIC POLICY OF SOUTH DAKOTA AND THE UNITED STATES.

NAT’s provision of affordable telecommunications services on the Crow Creek Reservation and all of the benefits realized by the Crow Creek Sioux Tribe and its members are well-documented. NAT’s approach to serving the Crow Creek Reservation is also in furtherance of national telecommunications policies. The FCC has indicated that expanding telecommunications access in Indian Country is one of its top priorities.⁷

Part of this Commission’s Mission Statement is: “The commission will exercise its authority and influence to ensure that residential and business consumers have access to utility services at fair and reasonable rates.”⁸ At the Crow Creek Reservation, tribal members did not until NAT have access to telecommunications services at rates and terms that were affordable to them. Even with universal service subsidies, the regular commercial phone companies either were not providing service to the Reservation or were doing so under conditions that could not be met by tribal members. Trans., pp. 189-190. NAT, on the other hand, is located on the Reservation. The Tribe owns 51% of the company. All decisions affecting NAT have been made by the owners on a unanimous basis. Trans., p. 255.

⁷ Attached to Mr. DeJordy’s pre-filed testimony are copies of the FCC’s report entitled “Expanding Telecommunications Access in Indian Country,” FCC report entitled “Indian Telecom Initiatives,” FCC news release entitled “Commissioner Michael J. Copps Applauds the Appointment of Geoffrey Blackwell to Lead New Initiatives for Indian Country,” and FCC news release entitled “FCC Establishes Office of Native Affairs and Policy.” Exhibits A-D to Hearing Exh. 3.

⁸ PUC Report On Telecommunications Companies’ Operations, 2011, PUC Website, p. 3.

NAT's rates are also, even for the Free Conferencing traffic, the lowest in the State of South Dakota and consistent with the CAF Order. It is undisputed that under its tariff or with a direct connection, NAT has rates that are competitive not just with other LECs in South Dakota, but with LECS throughout America. The notion that telecommunications companies are in South Dakota only because it is a rural state is from a bygone era. Even Sprint's "representative" and "expert" agreed in the testimony excerpted above that NAT is operating in a manner consistent with both the laws and the public policies of the United States and the State of South Dakota. The Commission should not deny NAT's application simply because "access stimulation" is a phrase that "sounds bad" to Mr. Farrar.

CONCLUSION

For the foregoing reasons, NAT respectfully requests that the Commission grant NAT's application.

Dated this 3rd day of April, 2014.

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