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

REPLY MEMORANDUM IN SUPPORT OF NATIVE AMERICAN TELECOM, LLC'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Native American Telecom, LLC ("NAT"), through its counsel and pursuant to SDCL 15-6-56 and ARSD 20:10:01:01.02, submits this reply memorandum in support of its motion for summary judgment.[1]

[1] The Commission should note that Midstate Communications, Inc. ("Midstate") and the South Dakota Telecommunications Association ("SDTA") *do not object* to the Commission granting NAT's motion for summary judgment in this certification matter proceeding.

Also, as the Commission is aware, NAT, Midstate and the 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.

There is no basis to delay NAT's entry into the proposed service area. NAT has submitted its Revised Application with all required supporting information. NAT's Revised Application has been "deemed complete" by the Commission's Staff. NAT has met all of the legal requirements for receiving a Certificate of Authority from the Commission. Therefore, the Commission should grant NAT's motion for summary judgment.

LAW & ANALYSIS

I. IT IS UNDISPUTED THAT NAT HAS SATISFIED THE COMMISSION'S LEGAL FRAMEWORK FOR RECEIVING A CERTIFICATE OF AUTHORITY

A. NAT Has Provided The Commission With All Information Required Under South Dakota Law And The Commission's Rules

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." *Id.* (emphasis added). And indeed, as a result of SDCL 49-31-3's delegation authority, the Commission has prescribed the "necessary procedures" regarding interexchange service and local exchange service.

First, ARSD 20:10:24:02 provides that "[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) specific categories. ARSD 20:10:24:02(1-20). NAT has provided this precise information to the Commission and its Revised Application has been "deemed complete" by the Commission's Staff.

Second, 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) specific areas. ARSD 20:10:32:03(1-25). NAT has provided this precise information to the Commission and its Revised Application has been "deemed complete" by the Commission's Staff.

Third, ARSD 20:10:32:06 provides that "[i]n 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 [eleven specific factors]." ARSD 20:10:32:06(1-11). Once again, NAT has provided this precise information required for the Commission's review and its Revised Application has been "deemed complete" by the Commission's Staff.

In sum, NAT has fulfilled each and every one of the Commission's legal requirements. NAT has followed the *exact legal framework* that has been followed by hundreds of previous applicants. Therefore, the Commission should grant NAT's motion for summary judgment.

B. There Is No Basis To Treat NAT Differently From Any Other Applicant And Further Delay Competition

The Commission has consistently viewed competition in telecommunications services as a benefit to the residents of South Dakota and has approved the applications of numerous Competitive Local Exchange Carriers ("CLEC"). Since competitive telephone services were first introduced in South Dakota, our state's residents have benefited through lower prices, greater choice, and availability of a broader range of often innovative services. Granting NAT's Revised Application will help bring these benefits of competition to a significant

number of Tribal members who until now may not have had the opportunity to enjoy such benefits.

The Commission has established a simple regulatory procedure for CLECs because the Commission recognizes the benefits of competition to South Dakota residents. South Dakota law does not envision the kind of elaborate proceeding or investigation of a CLEC's offerings that the intervenors propose. The Commission must review a CLEC's application in a manner consistent with the applicable statutory and administrative laws. And while the Commission affords an opportunity to request a hearing on a CLEC application before a certificate of authority is granted, 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 dockets – including CLEC applications - from 1997 thru 2012).

By enacting the straightforward CLEC application framework, the Commission has streamlined entry regulation and opted to expedite competition in South Dakota by regulating *conduct rather than entry*. CenturyLink and Sprint propose an unprecedented level of *entry regulation* that is inconsistent with the Commission's framework. These two companies seek an extensive and unwarranted evidentiary investigation into the nature of NAT's services. However, CenturyLink's

and Sprint's imaginative array of "issues" overreaches any entry regulation under South Dakota law.

NAT is only required to abide by the Commission's rules of entry. NAT has complied with each and every one of these rules. Consistent with South Dakota's market-based approach to CLEC regulation, the Commission should not waste time and resources entertaining CenturyLink's and Sprint's "claims" prior to entry.

The wide-ranging "investigation" envisioned by CenturyLink and Sprint can have only one purpose: to erect a massive regulatory barrier that delays competitive entry. Such delay may serve the interests of CenturyLink and Sprint, but it does not serve the public good and is inconsistent with the Commission's framework. These companie's actions also frustrate the Commission's efforts in carrying out its role to open the local exchange and exchange access markets to competition.

CenturyLink's and Sprint's demand for a drawn-out inquiry only serves to delay competitive entry into the market. NAT's CLEC certification process has already been delayed far beyond what has been normal for the Commission. These two companies have shown no reason why NAT's Revised Application should be denied on the basis of any of the grounds identified in the Commission's rules. NAT has met all of the requirements for CLEC certification in South Dakota. Therefore, NAT

asks the Commission to act expeditiously in resolving the narrow issue before it and grant NAT's Motion for Summary Judgment.

C. CenturyLink's And Sprint's Opposition To NAT's Motion For Summary Judgment 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 generally* Intervention Petitions of CenturyLink and Sprint; CenturyLink's Brief in Opposition to NAT's Motion for Summary Judgment; Sprint's Brief in Opposition to NAT's Motion for Summary Judgment).

CenturyLink's and Sprint's responsive briefs attempt 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 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 *revenue sharing agreement*.[3] The second condition is met where a LEC either has had (a) a three-to-one interstate terminating-to-originating

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

[3] This "revenue sharing" condition of the definition is met when a rate-of-return LEC or 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

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 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).

> 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).

[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***

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]

Qwest/CenturyLink's access rate. *See* Affidavit of Jeff Holoubek in Support of NAT's Motion for Summary Judgment, ¶ 3. *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 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).

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.

II. THE COMMISSION MUST GRANT NAT'S MOTION FOR SUMMARY JUDGMENT

A. Affidavits Submitted In Opposition To Summary Judgment And Comprised Of Ultimate Conclusions Of Fact Or Law, Or Are Otherwise Inadmissible, Must Be Stricken

It is well-settled that affidavits must be supported by specific facts that are admissible in evidence and based on first-hand knowledge. *See* SDCL 15-6-56(e) (Affidavits must "be made on personal knowledge, . . . [and] set forth such facts as would be admissible in evidence. . . ."). A party opposing summary judgment "may not rest upon the mere allegations or denials . . . [but] must set forth specific facts showing that there is a genuine issue for trial." *Id.* If a party does not respond in this

way, "summary judgment . . . shall be entered against [them]." *Id. See also Firemen's Fund Ins. Co. v. Thien,* 8 F.3d 1307, 1310 (8th Cir.1993) (inadmissible material is not "properly available to defeat . . . [a summary judgment] motion").

Affidavits also become improper when they contain "self-serving" statements or conclusions of either law or fact. *See e.g., BellSouth Telecomms., Inc. v. W.R. Grace & Co. – Conn.,* 77 F.3d 603, 615 (2nd Cir. 1996) (finding that the district court's disregard of affidavits that advocated conclusions of law was proper); *Hampton Inns, Inc. v. Ameritel Inns, Inc.*, 1995 WL 762148, at *6 (D. Idaho – October 19, 1995) ("An affiant's opinion that . . . consists largely of legal conclusions does not conform to the dictates of Rule 56(e) and is not sufficient to raise a genuine issue of fact"). In other words, it is clear that "*an expert may not state his . . . opinion as to legal standards nor may he . . . state legal conclusions drawn by applying the law to the facts*." *VIM, Inc. v. Somerset Hotel Assoc.,* 19 F.Supp.2d 422, 427 n. 4 (W.D.Pa. 1998) (emphasis added).

Additionally, when an expert submits an affidavit that simply opines as to his personal views of a legal issue, it must be stricken from consideration. To hold otherwise would permit a party (and its expert) to improperly assume the role of the court. *See e.g., A&M Records, Inc. v.*

Napster, Inc., 2000 WL 1170106, at *8 (N.D. Ca. Aug. 10, 2000) (striking the declaration of a university professor that "merely offers a combination of legal opinion and editorial comment on Internet policy"); *Hampton Inns, Inc.,* 1995 WL 762148, at *16 (striking portions of an expert's declaration and holding that "[experts] may harbor different views of what they perceive to be the status of the law [in a particular area], . . . but it is the function of [the court] – not retained . . . experts – to discern the legal standard to be applied in [a] case"); *Wahad v. FBI,* 179 F.R.D. 429, 435 (S.D.N.Y. 1998) (striking portions of an affidavit which were "fraught with improper legal conclusions, ultimate facts, conclusory statements, and inadmissible hearsay").

Therefore, the affidavits submitted by CenturyLink and Sprint in opposition to NAT's motion for summary judgment must be carefully reviewed. If the Commission determines that any portion of these affidavits fail to comply with SDCL 15-6-56(e), these portions cannot be considered in determining whether a "genuine issue of material fact" exists to defeat NAT's summary judgment motion. Very simply, "[a]n expert who supplies nothing but a bottom line supplies nothing of value to the judicial process." *Mid-State Fertilizer Co. v. Exchange National Bank of Chicago,* 877 F.2d 1333, 1339 (7th Cir.1989).

B. Numerous Portions Of William Easton's Testimony Must Be Stricken Because It Is Comprised Solely Of Improper Legal Analyses, Legal Conclusions, And Irrelevant, Speculative, And Conclusory Assertions

For purposes of NAT's motion for summary judgment, the Commission must exclude significant portions of the "legal brief" styled as the "Direct Testimony of William R. Easton" ("Easton Testimony") because it provides little more than Easton's "legal review and analysis" and bottom line opinions.[7]

The Commission cannot consider **Page 2 (Lines 10-23) through Page 4 (Lines 1-6)** of Easton's testimony because he doesn't provide any

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[7] CenturyLink submitted the Easton Testimony for the Commission's consideration. The Easton Testimony was filed with the Commission on March 26, 2012. CenturyLink's "Statement of Material Facts" ("SUMF") in opposition to NAT's motion for summary judgment relies *exclusively* on "facts" contained in the Easton Testimony. As such, CenturyLink's SUMF ¶¶ 1-38; ¶¶40-42; and ¶¶ 44-65 (filed with the Commission on April 11, 2012) must also be excluded by the Commission.

Finally, portions of CenturyLink's "Response to NAT's Statement of Undisputed Material Facts" ("CenturyLink's Response to NAT's SUMF") ¶¶ 3, 4, 11, 14, 20, 24, 25, 27, 28, 29, 30, 31, 33, 34, 36, 38, 39, 44, 49, 51, 52, 54, and 72 must also be excluded by the Commission (and thus admitted) because these paragraphs are based on Easton's "legal analysis and review," and are irrelevant, speculative, conclusory, and fail to cite to an appropriate part of the record. *See* SDCL 15-6-56(c) ("The opposing party must respond to each numbered paragraph in the moving party's statement with a separately numbered response and *appropriate citations to the record*") (emphasis added).

admissible "facts."[8] Instead, Easton improperly presents the Commission with the "purpose" of his testimony and his own personal "legal review and analysis" of the following:

- the "importance of this case";
- the decisions of the Iowa Utilities Board and FCC;
- the FCC's *Connect America* Order;
- the "public interest harms" of "access stimulation";
- the "contextual background on "access stimulation."
- "regulatory rulings and interpretations of [access stimulation]"
- the *Connect America* order; and
- "mileage pumping."

This testimony is also inadmissible as irrelevant in this proceeding.

The Commission cannot consider **Page 4 (Lines 7-22) through Page 5 (Lines 1-7)** of Easton's testimony because he doesn't provide any admissible "facts." Instead, Easton improperly presents the Commission with his own personal "legal review and analysis" of the "background of access stimulation." This testimony is also inadmissible as irrelevant in this proceeding.

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[8] For the Commission's convenience, NAT has provided the portions of the Easton Testimony, CenturyLink's SUMF, and CenturyLink's Response to NAT's SUMF that are inadmissible and must be stricken. These inadmissible provisions are specified by an appropriate "~~strike through~~" designation and attached as "Exhibit 1" to this reply brief.

The Commission cannot consider **Page 5 (Lines 8-21) through Page 7 (Lines 1-19)** of Easton's testimony because he doesn't provide any admissible "facts." Once again, Easton improperly presents the Commission with his own personal "legal review and analysis" of the "reason that access stimulation constitutes arbitrage and is contrary to public policy." This testimony is also inadmissible as irrelevant in this proceeding.

The Commission cannot consider **Page 7 (Lines 20-22) through Page 8 (Lines 1-8)** of Easton's testimony because he doesn't provide any admissible "facts." Once again, Easton improperly presents the Commission with his own personal "legal review and analysis" of the "policy significance of revenue sharing agreements." This testimony is also inadmissible as irrelevant in this proceeding.

The Commission cannot consider **Page 8 (Lines 9-31)** of Easton's testimony because he doesn't provide any admissible "facts." Once again, Easton improperly presents the Commission with his own personal "legal review and analysis" of the "FCC's rulings regarding access stimulation." This testimony is also inadmissible as irrelevant in this proceeding.

The Commission cannot consider **Page 9 (Lines 1-18)** of Easton's testimony because he doesn't provide any admissible "facts." Once

again, Easton improperly presents the Commission with his own personal "legal review and analysis" of "state regulators having investigated and curbing 'access stimulation.'" This testimony is also inadmissible as irrelevant in this proceeding.

The Commission cannot consider **Page 9 (Lines 19-21) through Page 12 (Lines 1-7)** of Easton's testimony because he doesn't provide any admissible "facts." Once again, Easton improperly presents the Commission with his own personal "legal review and analysis" of "how the *Connect America* Order addresses 'access stimulation.'" This testimony is also inadmissible as irrelevant in this proceeding.

The Commission cannot consider **Page 12 (Lines 8-26) through Page 13 (Lines 1-14)** of Easton's testimony because he doesn't provide any admissible "facts." Once again, Easton improperly presents the Commission with his own personal "legal review and analysis" of the "FCC's further clarification of the *Connect America* Order." This testimony is also inadmissible as irrelevant in this proceeding.

The Commission cannot consider **Page 13 (Lines 15-26)** of Easton's testimony because he doesn't provide any admissible "facts." Once again, Easton improperly presents the Commission with his own personal "legal review and analysis" of whether the "*Connect America* Order eliminated concerns about 'access stimulation.'" This testimony is

also inadmissible as irrelevant in this proceeding.

The Commission cannot consider **Page 14 (Lines 1-6)** of Easton's testimony because he doesn't provide any admissible "facts." Once again, Easton improperly presents the Commission with his own personal "legal review and analysis" of whether "there are pending court cases concerning 'access stimulation.'" This testimony is also inadmissible as irrelevant in this proceeding.

The Commission cannot consider **Page 14 (Lines 7-23) through Page 15 (Lines 1-7)** of Easton's testimony because he doesn't provide any admissible "facts." Once again, Easton improperly presents the Commission with his own personal "legal review and analysis" of "NAT and access stimulation." This testimony is also inadmissible as irrelevant, conclusory, and speculative in this proceeding.

The Commission cannot consider **Page 15 (Lines 8-19)** of Easton's testimony because he doesn't provide any admissible "facts." Once again, Easton improperly presents the Commission with his own personal "legal review and analysis" of "NAT's link with free conference calling services." This testimony is also inadmissible as irrelevant in this proceeding.

The Commission cannot consider **Page 16 (Lines 1-12)** of Easton's testimony because he doesn't provide any admissible "facts." Once

again, Easton improperly presents the Commission with his own personal "legal review and analysis" of the "financial linkage between NAT and other companies." This testimony is also inadmissible as irrelevant in this proceeding.

The Commission cannot consider **Page 16 (Lines 20-21) through Page 17 (Lines 1-8)** of Easton's testimony because he doesn't provide any admissible "facts." Once again, Easton improperly presents the Commission with his own personal "legal review and analysis" of whether "NAT will continue to have revenue sharing agreements with FCSCs." This testimony is also inadmissible as irrelevant, conclusory, and speculative in this proceeding.

The Commission cannot consider **Page 17 (Lines 9-19)** of Easton's testimony because he doesn't provide any admissible "facts." Once again, Easton improperly presents the Commission with his own personal "legal review and analysis" of whether "NAT's business model with have implications on its request for certification." This testimony is also inadmissible as irrelevant, conclusory, and speculative in this proceeding.

The Commission cannot consider **Page 17 (Lines 20-22) through Page 18 (Lines 1-12)** of Easton's testimony because he doesn't provide any admissible "facts." Once again, Easton improperly presents the

Commission with his own personal "legal review and analysis" of his "concerns about NAT's technical, financial, and managerial capabilities." This testimony is also inadmissible as irrelevant, conclusory, and speculative in this proceeding.

The Commission cannot consider **Page 18 (Lines 13-21) through Page 19, (Lines 1-9)** of Easton's testimony because he doesn't provide any admissible "facts." Once again, Easton improperly presents the Commission with his own personal "legal review and analysis" of "other indicators that LECS involved in 'access stimulation' do not have sufficient financial capabilities." This testimony is also inadmissible as irrelevant, conclusory, and speculative in this proceeding.

The Commission cannot consider **Page 19 (Lines 10-23) through Page 20, (Lines 1-16)** of Easton's testimony because he doesn't provide any admissible "facts." Once again, Easton improperly presents the Commission with his own personal "legal review and analysis" of the "public policy considerations of NAT's application." This testimony is also inadmissible as irrelevant, conclusory, and speculative in this proceeding.

The Commission cannot consider **Page 20 (Lines 17-27) through Page 21, (Lines 1-3)** of Easton's testimony because he doesn't provide any admissible "facts." Once again, Easton improperly presents the

Commission with his own personal "legal review and analysis" of his "concern about mileage pumping." This testimony is also inadmissible as irrelevant, conclusory, and speculative in this proceeding.

The Commission cannot consider **Page 21 (Lines 4-22)** of Easton's testimony because he doesn't provide any admissible "facts." Once again, Easton improperly presents the Commission with his own personal "legal review and analysis" of his "recommendation to this Commission regarding 'mileage pumping.'" This testimony is also inadmissible as irrelevant, conclusory, and speculative in this proceeding.

The Commission cannot consider **Page 22 (Lines 1-14)** of Easton's testimony because he doesn't provide any admissible "facts." Once again, Easton improperly presents the Commission with his own personal "legal review and analysis" of how the "FCC has ruled that CLECs are obligated to offer DTT to IXCs." This testimony is also inadmissible as irrelevant, conclusory, and speculative in this proceeding.

The Commission cannot consider **Page 22 (Lines 15-20)** of Easton's testimony because he doesn't provide any admissible "facts." Once again, Easton improperly presents the Commission with his own personal "legal review and analysis" of whether "NAT currently offers DTT

through its South Dakota intrastate tariff." This testimony is also inadmissible as irrelevant in this proceeding.

The Commission cannot consider **Page 22 (Lines 21-25) through Page 23 (Lines 1-5)** of Easton's testimony because he doesn't provide any admissible "facts." Once again, Easton improperly presents the Commission with his own personal "legal review and analysis" and simply provides "Qwest's proposal for a reasonable DTT rate." This testimony is also inadmissible as irrelevant, conclusory, and speculative in this proceeding.

The Commission cannot consider **Page 23 (Lines 1-6) through Page 24 (Lines 1-4)** of Easton's testimony because he doesn't provide any admissible "facts." Once again, Easton improperly presents the Commission with his own personal "legal review and analysis" of "what the Commission should do with regard to NAT's certification request" and "other options available to the Commission." This testimony is also inadmissible as irrelevant, conclusory, and speculative in this proceeding.

In sum, Easton's "testimony" is nothing more than a twenty-four (24) page legal brief, largely derived from his personal "legal review and analysis." While his "sworn" statements may have a place in telecommunications journals, law review journals, and policy debates, it

has no place in this certification proceeding and cannot be relied upon by the Commission in reviewing NAT's motion for summary judgment.

C. Numerous Portions Of Randy G. Farrar's Testimony Must Be Stricken Because It is Comprised Solely Of Improper Legal Analyses, Legal Conclusions, And Irrelevant, Speculative, And Conclusory Assertions

For purposes of NAT's motion for summary judgment, the Commission must exclude significant portions of the "legal brief" styled as the "Direct Testimony of Randy G. Farrar" ("Farrar Testimony") because it provides little more than Farrar's "legal review and analysis" and bottom line opinions.[9]

The Commission cannot consider **Page 5 (Line 19) through Page 7 (Lines 1-23)** of Farrar's testimony because he doesn't provide any

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[9] Sprint submitted the Farrar Testimony for the Commission's consideration. The Farrar Testimony was filed with the Commission on March 26, 2012. Numerous portions of the Farrar Testimony must be excluded by the Commission. Sprint's "Response to NAT's Undisputed Statement of Facts" ("Sprint's Response to NAT's SUMF") relies *exclusively* on "facts" contained in the Farrar Testimony. As such, portions of Sprint's Response to NAT's SUMF ¶¶ 3, 4, 11, 14, 20, 24, 26, 27, 28, 29, 30, 31, 33, 34, 44, 45, 46, 47, 48, 50, 51, 52, 70, 71, and 72 must also be excluded by the Commission (and thus admitted) because these paragraphs are based on Farrar's "legal analysis and review," and are irrelevant, speculative, and conclusory.

Several of Sprint's "responses" also fail to cite to an appropriate part of the record. *See* SDCL 15-6-56(c) ("The opposing party must respond to each numbered paragraph in the moving party's statement with a separately numbered response and *appropriate citations to the record*") (emphasis added).

admissible "facts."[10] Farrar improperly presents the Commission with his own personal "legal review and analysis" of the "purpose of his testimony." This testimony is also inadmissible as irrelevant, conclusory, and speculative in this proceeding.

The Commission cannot consider **Page 8 (Lines 11-21)** of Farrar's testimony because he doesn't provide any admissible "facts." Farrar improperly presents the Commission with his own personal "legal review and analysis" of "non-tribal member service." This testimony is also inadmissible as irrelevant, conclusory, and speculative in this proceeding.

The Commission cannot consider **Page 9 (Lines 2-8)** of Farrar's testimony because he doesn't provide any admissible "facts." Farrar improperly presents the Commission with his own personal "legal review and analysis" of the Commission's "certification requirements." This testimony is also inadmissible as irrelevant, conclusory, and speculative in this proceeding.

The Commission cannot consider **Page 9 (Lines 9-15)** of Farrar's testimony because he doesn't provide any admissible "facts." Farrar

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[10] For the Commission's convenience, NAT has provided the portions of the Farrar Testimony and Sprint's Response to NAT's SUMF that are inadmissible and must be stricken. These inadmissible provisions are specified by an appropriate "~~strike through~~" designation and attached as "Exhibit 2" to this reply brief.

improperly presents the Commission with his own personal "legal review and analysis" of whether he believes NAT's application is "in the public interest." This testimony is also inadmissible as irrelevant, conclusory, and speculative in this proceeding.

The Commission cannot consider **Page 9 (Lines 16-17)** of Farrar's testimony because he doesn't provide any admissible "facts." Farrar improperly presents the Commission with his own personal "legal review and analysis" of whether NAT is a "sham entity." This testimony is also inadmissible as irrelevant, conclusory, and speculative in this proceeding.

The Commission cannot consider **Page 11 (Lines 5-13)** of Farrar's testimony because he doesn't provide any admissible "facts." Farrar improperly presents the Commission with his own personal "legal review and analysis" of whether NAT "benefits" the Tribe. This testimony is also inadmissible as irrelevant, conclusory, and speculative in this proceeding.

The Commission cannot consider **Page 12 (Lines 4-6)** of Farrar's testimony because he doesn't provide any admissible "facts." Farrar improperly presents the Commission with his own personal "legal review and analysis" of whether NAT "benefits" the Tribe. This testimony is also inadmissible as irrelevant, conclusory, and speculative in this

proceeding.

The Commission cannot consider **Page 12 (Lines 7-23)** of Farrar's testimony because he doesn't provide any admissible "facts." Farrar improperly presents the Commission with his own personal "legal review and analysis" of whether NAT "benefits" the Tribe. This testimony is also inadmissible as irrelevant, conclusory, and speculative in this proceeding.

The Commission cannot consider **Page 12 (Lines 24-27) through Page 13 (Lines 1-29)** of Farrar's testimony because he doesn't provide any admissible "facts." This testimony is also inadmissible as irrelevant, conclusory, and speculative in this proceeding.

The Commission cannot consider **Page 14 (Lines 1-17)** of Farrar's testimony because he doesn't provide any admissible "facts." Farrar improperly presents the Commission with his own personal "legal review and analysis" of the Tribe's "decision making control." This testimony is also inadmissible as irrelevant, conclusory, and speculative in this proceeding.

The Commission cannot consider **Page 15 (Lines 1-32) through Page 16 (Lines 1-21)** of Farrar's testimony because he doesn't provide any admissible "facts." Farrar improperly presents the Commission with his own personal "legal review and analysis" of NAT's Joint Venture

Agreement. This testimony is also inadmissible as irrelevant, conclusory, and speculative in this proceeding.

The Commission cannot consider **Page 16 (Lines 22-28 through Page 17 (Lines 1-5)** of Farrar's testimony because he doesn't provide any admissible "facts." Farrar improperly presents the Commission with his own personal "legal review and analysis" of NAT's Joint Venture Agreement. This testimony is also inadmissible as irrelevant, conclusory, and speculative in this proceeding.

The Commission cannot consider **Page 17 (Lines 6-19 through Page 18 (Lines 1-19)** of Farrar's testimony because he doesn't provide any admissible "facts." Farrar improperly presents the Commission with his own personal "legal review and analysis" of Free Conferencing Corporation's "role" with NAT. This testimony is also inadmissible as irrelevant, conclusory, and speculative in this proceeding.

The Commission cannot consider **Page 19 (Lines 1-18)** of Farrar's testimony because he doesn't provide any admissible "facts." Farrar improperly presents the Commission with his own personal "legal review and analysis" of NAT being a "sham entity." This testimony is also inadmissible as irrelevant, conclusory, and speculative in this proceeding.

The Commission cannot consider **Page 19 (Lines 19-23 through Page 20 (Lines 1-10)** of Farrar's testimony because he doesn't provide any admissible "facts." Farrar improperly presents the Commission with his own personal "review and analysis" of NAT's financial statements. This testimony is also inadmissible as irrelevant, conclusory, and speculative in this proceeding.

The Commission cannot consider **Page 20 (Lines 11-23) through Page 22 (Lines 1-4)** of Farrar's testimony because he doesn't provide any admissible "facts." Farrar improperly presents the Commission with his own personal "review and analysis" of NAT's balance sheets. This testimony is also inadmissible as irrelevant, conclusory, and speculative in this proceeding.

The Commission cannot consider **Page 22 (Lines 5-22) through Page 23 (Lines 1-14)** of Farrar's testimony because he doesn't provide any admissible "facts." Farrar improperly presents the Commission with his own personal "review and analysis" of NAT's income statement. This testimony is also inadmissible as irrelevant, conclusory, and speculative in this proceeding.

The Commission cannot consider **Page 23 (Lines 15-25)** of Farrar's testimony because he doesn't provide any admissible "facts." Farrar improperly presents the Commission with his own personal "review and

analysis" of profits for the Tribe. This testimony is also inadmissible as irrelevant, conclusory, and speculative in this proceeding.

The Commission cannot consider **Page 24 (Lines 1-19) through Page 27 (Lines 1-12)** of Farrar's testimony because he doesn't provide any admissible "facts." Farrar improperly presents the Commission with his own personal "review and analysis" of NAT's owner's "profitability." This testimony is also inadmissible as irrelevant, conclusory, and speculative in this proceeding.

The Commission cannot consider **Page 27 (Lines 13-24) through Page 28 (Lines 1-6)** of Farrar's testimony because he doesn't provide any admissible "facts." Farrar improperly presents the Commission with his own personal "review and analysis" of the "relationship" between NAT's partners. This testimony is also inadmissible as irrelevant, conclusory, and speculative in this proceeding.

The Commission cannot consider **Page 28 (Lines 7-14)** of Farrar's testimony because he doesn't provide any admissible "facts." Farrar improperly presents the Commission with his own personal "legal review and analysis" of NAT's "future viability." This testimony is also inadmissible as irrelevant, conclusory, and speculative in this proceeding.

The Commission cannot consider **Page 28 (Lines 15-26) through Page 29 (Lines 1-14)** of Farrar's testimony because he doesn't provide any admissible "facts." Farrar improperly presents the Commission with his own personal "review and analysis" of how the FCC "targets 'access stimulation.'" This testimony is also inadmissible as irrelevant, conclusory, and speculative in this proceeding.

The Commission cannot consider **Page 29 (Lines 15-34) through Page 30 (Lines 1-3)** of Farrar's testimony because he doesn't provide any admissible "facts." Farrar improperly presents the Commission with his own personal "legal review and analysis" of the "FCC's premise of assisting tribal lands." This testimony is also inadmissible as irrelevant, conclusory, and speculative in this proceeding.

The Commission cannot consider **Page 30 (Lines 4-11)** of Farrar's testimony because he doesn't provide any admissible "facts." Farrar improperly presents the Commission with his own personal "legal review and analysis" of "how the FCC has addressed 'access stimulation.'" This testimony is also inadmissible as irrelevant, conclusory, and speculative in this proceeding.

The Commission cannot consider **Page 30 (Lines 12-15) through Page 32 (Lines 1-6)** of Farrar's testimony because he doesn't provide any admissible "facts." Farrar improperly presents the Commission with his

own personal "legal review and analysis" of the "effect $0.007 will have on NAT's financials." This testimony is also inadmissible as irrelevant, conclusory, and speculative in this proceeding.

The Commission cannot consider **Page 32 (Lines 7-23) through Page 33 (Lines 1-29)** of Farrar's testimony because he doesn't provide any admissible "facts." Farrar improperly presents the Commission with his own personal "legal review and analysis" of "transport rates under the *Connect America* Order." This testimony is also inadmissible as irrelevant, conclusory, and speculative in this proceeding.

The Commission cannot consider **Page 33 (Line 30) through Page 34 (Lines 1-19)** of Farrar's testimony because he doesn't provide any admissible "facts." Farrar improperly presents the Commission with his own personal "review and analysis" of his "speculation" regarding NAT's sustainability. This testimony is also inadmissible as irrelevant, conclusory, and speculative in this proceeding.

The Commission cannot consider **Page 34 (Lines 20-22) through Page 35 (Lines 1-15)** of Farrar's testimony because he doesn't provide any admissible "facts." Farrar improperly presents the Commission with his own personal "legal review and analysis" of whether NAT should "be granted certification in South Dakota." Not surprisingly, his "recommendation" is "no." Of course, this testimony and

"recommendation" is also inadmissible as irrelevant, conclusory, and speculative in this proceeding.

Therefore, the above-referenced portions of both the Easton Testimony and Farrar Testimony must be disregarded because it (1) "merely offers a combination of legal opinion and editorial comment" and (2) is "fraught with improper legal conclusions, ultimate facts, conclusory statements, and inadmissible hearsay."

D. Based On The Undisputed Record In This Case, The Commission Must Grant NAT's Motion for Summary Judgment

CenturyLink's and Sprint's opposition to NAT's motion for summary judgment recites at extraordinary length facts not material to the issues relevant in this certification matter. Moreover, CenturyLink's and Sprint's submissions contain mischaracterizations of the scope of this certification proceeding.

CenturyLink's filings concede that NAT has complied with the Commission's rules on all *relevant* matters. (*See generally* "CenturyLink's Response to NAT's Statement of Undisputed Material Facts," pages 9-26). CenturyLink unconditionally admits the truth of NAT's SUMF -- ¶¶ 1, 2, 5, 6, 7, 8, 9, 10, 12, 13, 15, 16, 17, 18, 19, 21, 26, 28, 32, 35, 37, 40, 41, 42, 43, 45, 46, 47, 48, 50, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, and 71.

CenturyLink "denies" the truth of NAT's SUMF -- ¶¶ 3, 4, 11, 14, 20, 24, 25, 27, 29, 30, 31, 33, 34, 36, 38, 39, 44, 49, 51, 52, and 54. However, each of CenturyLink's "denials" is based on the Easton Testimony, which NAT has established is *clearly inadmissible* in this summary judgment matter.

Similarly, Sprint's filings also concede that NAT has complied with the Commission's rules on all relevant matters. (*See generally* "Sprint's Response to NAT's Statement of Undisputed Material Facts," pages 1-15). Sprint unconditionally admits the truth of NAT's SUMF NAT -- ¶¶ 1, 2, 5, 6, 7, 8, 9, 10, 12, 13, 15, 16, 17, 18, 19, 21, 25, 27, 32, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 49, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, and 69.

Sprint "denies" the truth of NAT's SUMF -- ¶¶ 3, 4, 11, 14, 20, 24, 26, 28, 29, 30, 31, 44, 48, 50, 51, 52, 70, 71, and 72. However, each of Sprint's "denials" is either based on (1) the Farrar Testimony, which NAT has established is *clearly inadmissible* in this summary judgment matter or (2) Sprint's claims that it should be entitled to responses to its unjustifiable discovery requests so that it can proceed with its desire to act as a "Super Commission" in evaluating NAT's Revised Application.

In sum, NAT has complied with ARSD 20:10:24:02(1-20) (requiring that a telecommunications company applying for *interexchange service*

shall provide information in twenty (20) specific categories). NAT has complied with ARSD 20:10:32:03(1-25) (requiring that a telecommunications company applying for *local exchange service* shall provide information in twenty-five (25) specific areas. NAT has complied with ARSD 20:10:32:06(1-11) (requiring that the Commission shall consider eleven (11) factors in determining whether an applicant has "sufficient technical, financial, and managerial capabilities"). NAT's Revised Application has been "deemed complete" by the Commission's Staff. The Commission must grant NAT's motion for summary judgment as there remains "no genuine issue of material fact."

CONCLUSION

There is no basis to delay NAT's entry into the proposed service area any longer. NAT has met all of the legal requirements for receiving a Certificate of Authority from the Commission. The Commission's Staff has deemed NAT's Revised Application "complete." Therefore, the Commission should (1) find the above-designated portions of the Easton Testimony and Farrar Testimony to be inadmissible; and (2) grant NAT's motion for summary judgment.

Dated this 16th day of April, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of *REPLY MEMORANDUM IN SUPPORT OF NATIVE AMERICAN TELECOM, LLC'S MOTION FOR SUMMARY JUDGMENT* was delivered *via electronic mail* on this 16th day of April, 2012, to the following parties:

Service List (SDPUC TC 11-087)

/s/ Scott R. Swier
Scott R. Swier