

**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)	Docket No. TC11-087
within the Study Area of Midstate)	
Communications, Inc.)	

**QWEST COMMUNICATIONS COMPANY, LLC DBA
CENTURYLINK QCC'S RESPONSE TO NAT'S MOTION
TO STRIKE THE TESTIMONY OF WILLIAM EASTON**

CenturyLink submits this response to Native American Telecom's Motion to Strike the Testimony of William Easton. NAT's motion is largely identical to arguments it made in its motion for summary judgment¹ when it suggested that the Commission should ignore Mr. Easton's testimony and grant NAT summary judgment. The Commission rejected those arguments when it denied NAT's motion for summary judgment² and should do so again here.

I. Mr. Easton's Testimony Properly Addresses The Managerial And Financial Capabilities Of NAT And properly Suggests Conditions That The Commission Should Impose To Ensure Any Certification Order Is In The Public Interest.

NAT's motion again attempts to define the issues in this proceeding as limited to whether or not NAT has the technical, financial and managerial capabilities to offer telecommunications services.³ As CenturyLink argued in connection with NAT's summary judgment motion, Commission authority to review this application includes the ability to

¹ NAT Motion for Summary Judgment filed April 16, 2012, pp 14-23.

² Order Denying Motion for Summary Judgment; Order Granting Motions to Compel; Order Granting in Part and Denying in Part Motion to Compel (May 4, 2012), <http://www.puc.sd.gov/commission/orders/telecom/2012/tc11-087odmsjogmcogpdpmc.pdf>.

³ Memorandum in Support of NAT's Motion to Strike at 1.

address public interest, and NAT's narrow description of the Commission's authority in this case is contrary to South Dakota Statute. SDCL 49-31-3 provides:

The commission has general supervision and control of all telecommunications companies offering common carrier services within the state to the extent such business is not otherwise regulated by federal law or regulation. The commission shall inquire into any complaints, unjust discrimination, neglect, or violation of the laws of the state governing such companies. The commission may exercise powers necessary to properly supervise and control such companies.

As stated by the South Dakota Supreme Court, "this court has determined that the underlying basis for this regulation is to protect the public interest:

Public service commissions are generally empowered to, and are created with the intention that they should regulate public utilities insofar as the powers and operations of such utilities affect the public interest and welfare.⁴

Under South Dakota statutes and this Commission's rules, a carrier applying for a certificate to offer services in this state shoulders the burden to prove that it has "sufficient technical, financial and managerial capabilities to offer the telecommunications services described in its application before the commission may grant a certificate of authority." SDCL 49-31-3. *See also* ARSD 20:10:32:05 and SDCL 49-31-71. "Any certificate of authority granted by the commission may be suspended or revoked pursuant to chapter 1-26 for a willful violation of the laws of this state, a willful failure to comply with a rule or order of the commission, or other good cause." SDCL 49-31-3. CenturyLink submits that the standards of certificate revocation are instructive to, and should mirror, the standards for an initial application.⁵

⁴ *In the Matter of the Establishment of Switched Access Rates for US WEST Communications, Inc. v. AT&T Communications of the Midwest, Inc.*, 618 N.W.2d 847, 852 (SD 2000), quoting *Northwestern Bell Telephone Co., Chicago & NW Transportation*, 245 N.W.2d 639, 642 (SD 1976).

⁵ Rejection by other commissions has addressed the meaning of "managerial ability" and the "public interest" in the context of certification proceedings and a LECs traffic pumping activities. The Iowa Board recently addressed whether it should revoke the certification of an Iowa traffic pumping LEC known as Great Lakes. *In re: Great Lakes Communications, LLC*, Docket No. SPU-2011-0004, Final Order, issued March 30, 2012, at 14-15, 22-23. The Utah Commission has also considered whether traffic pumping activities satisfy the public interest standard in the context of a certification proceeding and imposed conditions.

In addition, South Dakota statutes authorize the imposition of conditions upon a carrier seeking certification:

In granting a certificate of authority to provide local exchange service, the commission may impose terms and conditions, on a competitively neutral basis, that it finds consistent with preserving and advancing universal service, protecting the public safety and welfare, ensuring the continued quality of service, and safeguarding the rights of consumers.

The Commission's Rules also authorize the imposition of conditions in this docket.

ARSD 20:10:32:07 says:

Certification subject to commission imposed terms and conditions. In addition to the requirements imposed by this chapter on providers of local exchange services, the commission, in granting a certificate of authority to provide local exchange services, may impose additional terms and conditions, on a competitively neutral basis, that it finds necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of service, and safeguard the rights of consumers. The preservation and advancement of universal service shall be a primary concern.

Accordingly, the Commission is authorized to consider the public interest in this proceeding and the Commission has the authority to impose conditions such as those advanced by CenturyLink.

II. Easton's Testimony Meets The Standard For Admissibility In South Dakota.

NAT improperly relies on SDCL § 19-15-2 (Rule 702) of the South Dakota Rules of Evidence in support of its motion. South Dakota statutes provide the Commission with broad latitude regarding the evidence it relies upon to resolve an issue. SDCL 1-26-19 (1) provides in relevant part:

When necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not otherwise admissible thereunder may be admitted except where precluded by statute if it is of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs.

Mr. Easton offers testimony that sets forth the legal framework and policy issues that underlie CenturyLink's request that the Commission either (1) reject NAT's application

and/or (2) impose conditions related to traffic pumping or mileage pumping. NAT cites black letter law related to the qualifications of an expert but does not address any alleged deficiencies in Mr. Easton's qualifications. Under any definition, Mr. Easton's extensive history in the telecommunications business and with access charge issues in particular qualifies him to provide testimony in this case.⁶

III. The Public Interest Issues Addressed By Mr. Easton Are Proper Topics For Testimony.

NAT improperly characterizes Mr. Easton's testimony as legal analysis. In fact, the crux of Mr. Easton's testimony is to support CenturyLink's proposed conditions on any Certificate of Authority issued by the Commission and to provide support for why such conditions should be considered in the public interest. NAT's own testimony provides nearly identical analysis and has gone unchallenged in this proceeding.⁷

NAT supports its position by claiming that the legislature and not the Commission determines the public interest in South Dakota.⁸ This argument ignores the decisions of the South Dakota Supreme Court, which interpret the Commission as having the authority to determine the public interest in cases such as these.⁹ Furthermore, even on legal issues associated with statutory interpretation, South Dakota courts defer to the Commission when, like in this case, it has been delegated with "considerable discretion" to attain statutory goals.¹⁰

⁶ See Easton Direct at pp. 1-2.

⁷ See e.g. Supplemental Testimony of Carey Roesel (Feb. 7, 2014) at 4-9 (opining that NAT has a valid federal access tariff and discussing the impact of the Connect America Order); Direct Testimony of David Erickson (Feb. 7, 2014) 6 & 8 (opining that Free Conferencing's services are legal and providing an interpretation of the FCC Connect America Fund Order). Multiple additional examples exist in prior testimony filed by NAT.

⁸ Memorandum in Support of NAT's Motion to Strike at 6.

⁹ *In the Matter of the Establishment of Switched Access Rates for US WEST Communications, Inc. v. AT&T Communications of the Midwest, Inc.*, 618 N.W.2d 847, 852 (SD 2000), quoting *Northwestern Bell Telephone Co., Chicago & NW Transportation*, 245 N.W.2d 639, 642 (SD 1976).

¹⁰ *In the Matter of Northern States Power Company*, 489 N.W.2d 365, 370-71 (S.D. 1992)(deferring to the PUC's policy decision in an area within its expertise on an issue not directly resolved by statute).

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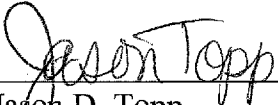

NAT's motion should be rejected because this proceeding is not a jury trial. This Commission is fully capable of taking NAT's arguments into consideration when issuing an order in this case. Such considerations should, however, be considered in connection to the weight Mr. Easton's testimony should be given rather than based on whether to allow his testimony to be introduced in the first place.

CONCLUSION

CenturyLink respectfully requests that the Commission deny NAT's motion to strike Mr. Easton's testimony.

Dated this 17th day of February, 2014.

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