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 **SPRINT'S MEMORANDUM IN OPPOSITION TO CCT'S MOTION FOR GRANT OF TEMPORARY AUTHORITY, OR IN THE ALTERNATIVE, EXPEDITED DECISION**

INTRODUCTION

Sprint Communications Company L.P. ("Sprint") submits this memorandum in opposition to Crow Creek Telecom, LLC f/k/a Native American Telecom, LLC's ("CCT") Motion for Grant of Temporary Authority, or in the Alternative, Expedited Decision ("Motion").

A. CCT COULD HAVE BROUGHT THIS CASE TO HEARING BY NOW

CCT has made much of the fact that this case has been pending for nearly two years. *See, e.g.*, Motion at 3. Yet CCT cannot dodge blame for this timing. CCT's initial application was filed on October 11, 2011, but it amended its application **3.5 months** later on January 27, 2012. Then, instead of providing discovery and proceeding to hearing on June 7, 2012, CCT unsuccessfully opposed intervenors' discovery, unsuccessfully demanded discovery from intervenors, and unsuccessfully appealed to district court, all of which caused a delay of more than **8 months**. When the case was jumpstarted by Sprint in late 2012, CCT failed to abide by the Commission's order

compelling discovery, and then mooted the new procedural schedule by amending its application again on May 31, 2013. This caused another **6 month** delay.

Finally, CCT sought new discovery on Sprint very late in the process and then voluntarily moved the October 2013 hearing dates because it had done so. Mr. Swier took the position on a September 17 call that the October hearing could not go forward, and after a follow up call on September 23, he sent an email that read:

> As per NAT's and Sprint's telephone call with Karen Cremer and Patrick Steffensen earlier this morning, please be advised that the October 22-24, 2013 hearing dates in this matter have been continued. A new procedural schedule/hearing date will need to be entered in the near future.

October 3, 2013 Schenkenberg Aff. ¶ 2 and Ex. A. This caused a delay of at least an additional **2 months**. On September 23, Staff circulated two proposed sets of December hearing dates and asked for parties to advise on their availability. *See* Oct. 3, 2013 Schenkenberg Aff. Ex. B. As of this filing, CCT had not even responded to that email, and so apparently has no interest in bringing the matter to a hearing in December. *Id.* ¶ 3.

While this case has been pending for far too long, the months have added up due to CCT's actions and inactions. Because CCT could have litigated this case to hearing by now, the Commission should not break (or even bend) its rules to make up for this delay.

B. THE COMMISSION'S RULES DO NOT ALLOW IT TO AWARD TEMPORARY AUTHORITY

CCT points to no statute or rule that authorizes the Commission to award CCT a temporary certificate of authority. The Commission cannot, and should not, proceed without proper authority.

The Commission is a creature of statute. SDCL § 49-31-3 and § 49-31-71 direct the Commission to authorize a telecommunications company to provide a regulated service only by granting an application. That statute requires a party planning to provide service to file an application and prove it qualifies for a certificate. The Commission may require a hearing to evaluate the facts (which it has done), and an entity that provides such a service before authority is awarded commits a misdemeanor offense. SDCL § 49-31-3 does not authorize the Commission to award temporary authority, nor does it allow an applicant to provide regulated service while an application is pending.

Similarly, the Commission's rules have no provisions that advance CCT's cause. Instead, a certificate of authority "may not be granted unless the applicant establishes sufficient technical, financial, and managerial ability" to provide the services for which seeks certification. ARSD 20:10:32:06. And, there is no rule that would allow a decision to made on an incomplete record, or certification to be awarded retroactively.

In the absence of authority to bypass the Commission's established processes and grant a temporary certificate, the Commission should deny CCT's Motion.

C. CCT'S CLAIMS THAT IT HAS BEEN BLOCKING INTRASTATE CALLS SINCE APRIL 2013 ARE NOT TRUE

In an April 2013 filing in Docket TC10-26, NAT/CCT made the following representation of fact:

> During the Commission's recent April 9, 2013 hearing, NAT learned that a customer's provision of services to its customers that involve a "605" South Dakota area code calling another "605" South Dakota area code, outside the Reservation's borders, may qualify as intrastate service, even though all of the calls terminate on the Reservation and all of NAT's services to that customer are offered within the Reservation's boundaries. Upon learning of

> this possibility, NAT immediately took steps to cease calls made between "605" South Dakota area code customers, because NAT does not desire to offend the Commission or take the chance that such activity may be considered a violation of South Dakota law.

NAT's Mem. in Response to Sprint's Supplemental Authority at 6-7 (April 24, 2013). As a basis for CCT's current Motion, it argues that a grant of temporary authority would serve the public interest by bringing this call blocking to an end. Motion at 1, 3.

As has been the case frequently in this proceeding, CCT's statements do not square with the facts. NAT/CCT did not block intrastate calls immediately following the April 9, 2013 hearing. In fact, call completion data for the month of August shows calls were made from 605 numbers in South Dakota, routed through the Sprint network, delivered via SDN to CCT, and completed to Free Conferencing numbers. *See* Oct. 2 Affidavit of Amy Clouser Aff. ¶¶ 2-3 and Attachment A. The Commission should deny CCT's Motion because the premise of its Motion lacks factual support, and is demonstrably false.

D. CCT IS NOT ENTITLED TO PRELIMINARY RELIEF

In court, litigants seeking preliminary relief must demonstrate that they are likely to prevail on the merits (among other things). *See, e.g., Planned Parenthood v. Daugaard*, 799 F. Supp. 2d 1048, 1053 (D.S.D. 2011). CCT has made no such showing, and there are four key reasons why it would be inappropriate for the Commission, on the present record, to find that CCT is likely to prevail on its request for a certificate.[1]

[1] By making this argument, Sprint does not concede that a likelihood of success would justify a grant of CCT's motion. Instead, Sprint simply points out – as it would on a

1. CCT has asked for a temporary certificate that does not track its 2013 Application

First, CCT's Motion asks the Commission to "grant CCT temporary authority to originate and terminate intrastate telecommunications services traffic that either originates or terminates off Reservation." CCT's Motion at 3-4. As described by CCT, then, it seeks authority to provide intrastate interexchange services to Tribal members or Free Conferencing.

Yet CCT's 2013 application does not request authority to provide any services to Tribal members or Free Conferencing. Instead, the application asks for authority to provide "intrastate interexchange access service" – a service provided to IXCs. 2013 2013 Application at 1. NAT/CCT's May 31 responses to Staff's discovery requests could not be more clear: "NAT requests authority to provide interexchange *access* services and not interexchange *long distance* service …." *See* NAT's Response to Staff's Data Request 2-2 (filed as Ex. RGF-13 to Randy Farrar's Aug. 30, 2013 Direct Testimony) (emphasis in original).

That Commission cannot grant CCT temporary authority that does not track what it sought in its application.

2. CCT's 2013 Application does not ask for authority to provide any service described by the Commission's Rules

On its face, CCT's application makes a request that cannot be granted consistent with Commission's rules. As noted in the above section, CCT seeks authority to provide

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summary judgment motion for instance – that there are compelling reasons for the Commission to hold judgment on the merits until a contested hearing is held.

"access services." There is no such authority. SDCL § 49-31-3 directs carriers to seek authority to provide "interexchange telecommunications service" and/or "local exchange service." The Commission's Rules address those same services. ARSD 20:10:24:02 sets a process for a carrier to obtain a certificate to provide interexchange service, and ARSD 20:10:32:02 sets a process for a carrier to obtain a certificate to provide local exchange service. There is no rule that authorizes the Commission to grant a certificate to provide access service.

The statute and rules make sense because access service is not a standalone service, but is, instead, one of the functionalities provided by a certificated local exchange carrier. A local exchange carrier is obligated to provide access to the public switched network, access to 911 service, access to a local directory, access to operator services, access to relay service, access to an unlisted number, and access to interexchange services. ARSD 20:10:32:10. To be compensated for this access, a certificated local exchange carrier is allowed to file a tariff, subject to the rate limitations imposed by law:

> A competitive local exchange carrier shall charge intrastate switched access rates that do not exceed the intrastate switched access rate of the Regional Bell Operating Company operating in the state.

ARSD 20:10:24:03 (emphasis added).

CCT is proposing to skip a step. It seeks authority to provide access service without having authority to provide the underlying, and necessary, local exchange service. For this reason, CCT will not likely succeed on the merits of its application, and so should not be provided a temporary certificate.

3. Sprint has produced compelling evidence that CCT is a sham entity and is not financially viable

Third, the Commission cannot find that CCT will succeed on the merits of this case given the compelling evidence Sprint has put forth that CCT is a sham entity and not financially viable. Until the Commission has received and evaluated this evidence, it would be inappropriate for it to authorize CCT to provide any regulated service.

Mr. Farrar documented and recounted how CCT was set up and has been run to enrich David Erickson's companies Free Conferencing and Widevoice, with little, if any, benefit felt by the Tribe. Aug. 30, 2013 Farrar Test. at 13-27 (documenting sham entity allegations). Mr. Farrar also showed that, based on an analysis of the CCT's financial information, that CCT is currently losing money, and cannot be profitable as time goes on. *Id.* at 27-45 (explaining financial analyses). The only reason for CCT to continue operating is to allow Free Conferencing, Widevoice, and NATE to make as much money as possible before CCT is left with no money and ongoing traffic pumping business plan.[2] This does not serve the public interest and should prompt the Commission to deny CCT's application.

The Commission should find CCT has not demonstrated that it will succeed on the merits, and should deny its motion for a temporary certificate.

[2] As the FCC has said, "Access stimulation imposes undue costs on consumers, inefficiently diverting capital away from more productive uses such as broadband deployment." *CAF Order*, ¶ 663.

4. There are open questions regarding CCT's corporate reorganization

The pending application was filed in the name of "Native American Telecom, LLC," and that remains the name in the caption. Yet, any temporary certificate would be issued in the name of CCT. The Commission has little information about CCT and has received no testimony on the corporate reorganization. Nor has there been any demonstration that the statements in the application apply equally to this newly created entity.

Significantly, CCT is unable to comply with the certification requirement that it provide:

> A copy of the applicant's certificate of authority to transact business in South Dakota from the Secretary of State.

ARSD 20:10:24:02(4); ARSD 20:10:32:03(5). As documented on Exhibits C and D of the Oct. 3 Schenkenberg Affidavit, CCT is not registered with the Secretary of State, and NAT is no longer active. CCT is asking the Commission to award temporary authority to an entity that is not authorized to do business in the state.

It is not evident, and Sprint does not concede, that CCT's authorization to do business from the Tribe would allow it to do business with non-Tribal members (like Free Conferencing), or to provide access or other services for calls that extend beyond the Reservation. To the contrary, if needs authority from the Commission to provide for-hire telecommunications services, then it would seem clear that it would need to be authorized by the state to conduct that business. At this juncture, then, CCT's application is incomplete, and the Commission should not award a temporary certificate.

E. CCT HAS WAIVED ANY CLAIM FOR AN EXPEDITED HEARING

When CCT amended its application in May 2013, it agreed to a hearing date in October 2013. Now, it has voluntarily agreed to push that hearing date back at least until December in order to obtain additional discovery from Sprint. By choosing to forgo an October hearing in favor of discovery, it has waived any claim for an expedited hearing. The Commission can be sure that Sprint, as other parties, will continue to work diligently to set a hearing and bring this matter to resolution.

CONCLUSION

Sprint respectfully requests that the Commission deny CCT's Motion.

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BRIGGS AND MORGAN, P.A.

s/Philip R. Schenkenberg

Philip R. Schenkenberg
Scott G. Knudson
2200 IDS Center
Minneapolis, MN 55402
(612) 977-8400

TOBIN LAW OFFICES
Tom D. Tobin
PO Box 730
422 Main Street
Winner, SD 57580
(605) 842-2500

Counsel for Sprint Communications Company L.P.