

**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 )  
INTEREXCHANGE TELECOMMUNICATIONS )  
SERVICES AND LOCAL EXCHANGE SERVICES )  
IN SOUTH DAKOTA )

**STAFF'S INITIAL  
POST-HEARING BRIEF**

**TC11-087**

The South Dakota Public Utilities Commission staff (Staff), by and through its counsel, submits its initial brief in the above-captioned matter.

**PRELIMINARY STATEMENT**

Throughout this brief, the Applicant Native American Telecom, LLC will be referred to as "NAT." Intervenor Sprint Communications Company L.P. will be referred to as "Sprint." Intervenor Midstate Communications, Inc. will be referred to as "Midstate." Intervenor South Dakota Telecommunications Association will be referred to as "SDTA." Qwest Communications Company LLC dba CenturyLink will be referred to as "CenturyLink." All references to the transcript will be designated as "TR" followed by the appropriate page number. All references to exhibits will be designated as "(Party) Exh" followed by the appropriate exhibit number.

**PROCEDURAL BACKGROUND**

On October 11, 2011, the South Dakota Public Utilities Commission (Commission) received an application from Native American Telecom, LLC (NAT) for a certificate of authority to provide interexchange long distance service and local exchange services in South Dakota. On October 13, 2011, the Commission electronically transmitted notice of the filing and the intervention deadline of October 28, 2011, to interested individuals and entities.

On October 13, 2011, the Commission received a Petition to Intervene by Midstate Communications, Inc. (Midstate). On October 26, 2011, the Commission received a Petition to Intervene by AT&T Communications of the Midwest, Inc. (AT&T). On October 28, 2011, the Commission received a Petition to Intervene from Sprint Communications Company, L.P. (Sprint), Qwest Communications Company LLC dba CenturyLink (CenturyLink), and South Dakota

Telecommunications Association (SDTA). On November 1, 2011, CenturyLink re-filed its Petition to Intervene. On November 14, 2011, NAT filed its responses to the petitions for intervention. On November 18, 2011, CenturyLink filed a reply. On November 21, 2011, NAT filed a Notice of Supplemental Authority. On November 22, 2011, the Commission voted unanimously to grant intervention to Midstate, AT&T, Sprint, CenturyLink, and SDTA. On January 12, 2012, NAT filed a Motion Requesting a Protective Order Requiring the Parties and Intervenors to Comply with a Confidentiality Agreement which the Commission granted on January 31, 2012.

On January 27, 2012, NAT filed a revised Application for Certificate of Authority. On February 22, 2012, the Commission issued an Order for and Notice of Procedural Schedule and Hearing. On March 26, 2012, NAT filed a Motion for Summary Judgment. On March 27, 2012, a Stipulation By and Between NAT, Midstate, and SDTA (Stipulation) was filed. By order dated April 5, 2012, the Commission issued an Amended Order for and Notice of Procedural Schedule and Hearing, which scheduled this matter for June 7, 2012. On May 4, 2012, the Commission issued an Order Denying Motion for Summary Judgment; Order Granting Motions to Compel; Order Granting in Part and Denying in Part Motion to Compel.<sup>1</sup> On May 18, 2012, CenturyLink filed a letter stating that the parties had reached an agreement for a continuance of the hearing set for June 7, 2012.

On June 3, 2013, NAT filed an Amended Application for Certificate of Authority. In its amended application, NAT requested a certificate of authority “to provide intrastate interexchange access service for traffic that originates or terminates off of the Crow Creek reservation within the state of South Dakota, pursuant to ARSD 20:10:32:03, 20:10:32:15, and 20:10:24:02.” By order dated July 3, 2013, the Commission issued a revised procedural schedule that was agreed to by the parties.

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<sup>1</sup> On May 14, 2012, NAT filed a Notice of Appeal in circuit court regarding the Commission’s Order Granting Intervention and the Order Denying Motion for Summary Judgment; Order Granting Motions to Compel; Order Granting in Part and Denying in Part Motion to Compel. On May 31, 2012, NAT filed a Second Notice of Appeal regarding the Commission’s Order Quashing Subpoena. By order dated October 17, 2012, the Buffalo County circuit court dismissed the appeal. See CIV. 12-06.

On August 23, 2013, NAT filed a Notice of Change in Corporate Structure.<sup>2</sup> On September 20, 2013, CCT<sup>3</sup> filed a Motion for Leave to Take Deposition of Sprint's Expert Randy G. Farrar. CCT also filed a Motion for Grant of Temporary Authority, or in the Alternative, Expedited Decision. By order dated October 23, 2013, the Commission granted CCT's Motion for Leave to Take Deposition and denied CCT's Motion for Grant of Temporary Authority, or in the Alternative, Expedited Decision. By order dated November 8, 2013, the hearing was set for December 11-12, 2013.

On December 3, 2013, NAT<sup>4</sup> filed a Motion for Continuance of Contested Case Hearing. NAT requested that the hearing be continued because Sprint refused to make its witness, Randy Farrar, available for a deposition on December 5, 2013. On December 4, 2013, NAT filed a letter stating "all the parties to this docket have stipulated to NAT's motion that this contested case hearing be continued by the Commission to a future date." By order dated December 6, 2013, the Commission granted the motion (Commissioner Nelson, dissenting). On December 31, 2013, the Commission issued an Amended Order for and Notice of Hearing.

On February 18, 2014, CenturyLink filed a Stipulation as to CenturyLink's Withdrawal from Docket. On February 24, 2014, the Commission heard CenturyLink's request for approval of the Stipulation as to CenturyLink's Withdrawal from Docket. The Commission voted unanimously to approve the Stipulation as to CenturyLink's Withdrawal from Docket. The contested case hearing was held as scheduled.

### **ISSUE**

The issue, as stated in the Commission's Amended Order for and Notice of Hearing, is whether to grant NAT a certificate of authority. NAT has requested authority to provide intrastate interexchange access service for traffic that originates or terminates off of the Crow Creek

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<sup>2</sup> The notice stated that NAT "has recently merged into a tribally-chartered Limited Liability Corporation – Crow Creek Telecom, LLC – which is majority-owned and controlled by the Crow Creek Sioux Tribe, and is an arm of the Crow Creek Sioux Tribe. As a result of this merger, all of the rights and assets of NAT, including any rights formerly held by NAT in these proceedings, are now held by Crow Creek Telecom, LLC."

<sup>3</sup> The parties began to refer to NAT as CCT based on NAT's Notice of Change in Corporate Structure.

<sup>4</sup> In its motion, NAT reverted to referring to itself as NAT instead of CCT.

reservation within the state of South Dakota.

### **STATEMENT OF THE CASE**

On June 3, 2013, NAT filed an Amended Application for Certificate of Authority (Amended Application). NAT Exh 1. In its Amended Application, NAT requested a certificate of authority “to provide intrastate interexchange access service for traffic that originates or terminates off of the Crow Creek reservation within the state of South Dakota, pursuant to ARSD 20:10:32:03, 20:10:32:15, and 20:10:24:02.” NAT seeks to operate as a telecommunications company to provide telecommunications services including local exchange services, intraLATA services, and interLATA services within Midstate Communications, Inc.’s Fort Thompson exchange, all of which is located on the Crow Creek Sioux Tribe Reservation. NAT 1, pg.1, pg. 8; Midstate/SDTA Exh 1; Midstate/SDTA Exh 2, pg. 5. NAT’s Amended Application also requested “a waiver of any requirement to serve the entire study area of rural telephone companies to the extent one applies in ARSD 20:10:32:15.” NAT Exh 1, pg. 8.

In support of its Amended Application, NAT filed testimony for the following witnesses:

Gene DeJordy, February 7 and 19, 2014 (NAT Exh 3);

Carey Roesel, February 7, 2014 (NAT Exh 4); February 17, 2012 (NAT Exh 7);

David Erickson, February 7, 2014 (NAT Exh 5); April 20, 2012 (NAT Exh 9);

Jeff Holoubek, February 7, 2014 (NAT Exh 6); February 17, 2012 (NAT Exh 8);

April 20, 2012 (NAT Exh 10); July 26, 2013 (NAT Exh 11);

Brandon Sazue, July 26, 2013 (NAT Exh 12).

Midstate and SDTA did not prefile any testimony. Midstate and SDTA did place into the evidentiary record, *inter alia*, a Stipulation that clarifies the exchange area in which NAT intends to provide service as well as Midstate Communications’ Study Area Boundary Map. Midstate/SDTA Exh 1; Midstate/SDTA Exh 3.

In support of its opposition to granting NAT a certificate of authority, Sprint filed testimony of Randy Farrar on August 30, 2013 (Sprint Exh 1, 2); December 4, 2013 (Sprint Exh 20, 21); February 14, 2014 (Sprint 28, 29).

## LEGAL AUTHORITY

An applicant requesting a certificate of authority must demonstrate, pursuant to SDCL 49-31-3 and 49-31-71, that it has sufficient technical, financial, and managerial capabilities to offer the telecommunications services described in its application. Depending on its request, the applicant must address the Commission's rules as found in ARSD 20:10:24:02 (Certificate of authority for interexchange service-Application requirements) and/or 20:10:32:03 (Certificate of authority for local exchange service-Application requirements). As a part of those rules, the applicant can request a waiver to omit a specific item of information. Also, pursuant to ARSD 20:10:32:18, an applicant seeking authority to provide local exchange services in the service area of a rural telephone company may petition the commission for a waiver from having to satisfy the eligible telecommunications service requirements as set forth in 47 U.S.C. § 214 (e)(1) and applicable federal requirements. SDCL 49-31-3 and 49-31-71 state as follows:

**49-31-3. General supervision of telecommunications companies offering common carrier services by commission where not preempted--Filing application with commission--Demonstration of capabilities--Rules--Offering services without certificate of authority as misdemeanor.** 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.

Each 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. Telecommunications 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. The commission shall have the exclusive authority to grant a certificate of authority. Each telecommunications company shall submit a two hundred fifty dollar application fee with its application which shall be deposited into the gross receipts tax fund established pursuant to § 49-1A-2. Unless an evidentiary hearing is required by the commission, the commission shall act on an application for a certificate of authority to provide interexchange telecommunications service within sixty days of receiving a complete application. If an evidentiary hearing is required, the commission shall act on the application within one hundred twenty days of receipt of a complete application. 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 before the commission may grant a certificate of authority. The commission may rule upon a telecommunications company's application for a certificate of authority with or without hearing.

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. The commission shall, by rules promulgated pursuant to chapter 1-26, prescribe the necessary procedures to implement this section. A telecommunications company that had lawful authority immediately prior to July 1, 1998, to provide interexchange telecommunications services shall continue to have such authority. Any certificate of authority to provide such telecommunications service may not be sold, assigned, leased, or transferred without commission approval. The offering of such telecommunications services by a telecommunications company without a certificate of authority or inconsistent with this section is a Class 1 misdemeanor.

(emphasis added).

**49-31-71. Certificate of authority--Notice and hearing.** The commission shall issue a certificate of authority for local exchange service to the applying telecommunications company, if, after notice and opportunity for hearing pursuant to chapter 1-26, the applicant has demonstrated sufficient technical, financial, and managerial capabilities to provide the local exchange services applied for. 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.

(emphasis added).

In addition to the above-referenced statutes, the Commission also considers the rules set forth below in making its determination for granting a certificate of authority:

**20:10:24:03. Denial of application for certificate of authority for interexchange service.** If an application filed pursuant to SDCL 49-31-3 for interexchange telecommunications is incomplete, inaccurate, false, or misleading, the commission shall reject the application. If the commission finds that the applicant is not financially, technically, or managerially able to provide the contemplated service, the commission shall deny the application for certification.

**20:10:32:06. Rejection of incomplete application -- Decision criteria for granting a certificate of authority.** A certificate of authority to provide local exchange service may not be granted unless the applicant establishes sufficient technical, financial, and managerial ability to provide the local exchange services described in its application consistent with the requirements of this chapter and other applicable laws, rules, and commission orders. If an application is incomplete, inaccurate, false, or misleading, the commission shall reject the application. In 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:

(1) If the applicant has an actual intent to provide local exchange services in South Dakota;

(2) Prior experience of the applicant or the applicant's principals or employees in providing telecommunications services or related services in South Dakota or other jurisdictions, including the extent to which that experience relates to and is comparable to service plans outlined in the filed application;

(3) The applicant's personnel, staffing, equipment, and procedures, including the extent to which these are adequate to ensure compliance with the commission's rules and orders relating to service obligations, service quality, customer service, and other relevant areas;

(4) The nature and location of any proposed or existing facilities which the applicant intends to use in providing local exchange services;

(5) If the applicant intends to resell local exchange services or enter into facility arrangements with other telecommunications carriers, when the necessary arrangements will be in place;

(6) The applicant's marketing plans and its plan and resources for receiving and responding to customer inquiries and complaints;

(7) If the applicant has sufficient financial resources to support the provisioning of local exchange service in a manner that ensures the continued quality of telecommunications services and safeguards consumer and public interests;

(8) If the applicant, in providing its local exchange services, will be able to provide all customers with access to interexchange services, operator services, directory assistance, directory listings, and emergency services such as 911 and enhanced 911;

(9) If the applicant is seeking authority to provide local exchange services in the service area of a rural telephone company, if the applicant's plans for meeting the additional service obligations imposed in rural telephone company service areas pursuant to § 20:10:32:15 are adequate and demonstrate that the applicant will in fact meet such obligations;

(10) The extent to which the applicant, applicant's affiliates, or applicant's principals have been subject to any civil, criminal, or administrative action in connection with the provisioning of telecommunications services; and

(11) Any other factors relevant to determining the applicant's technical, financial, and managerial capability to provide the services described in the application consistent with the requirements of this chapter and other applicable laws, rules, and commission orders.

**20:10:32:07. 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.

As with all applications for a certificate of authority, Staff has reviewed the Amended Application to ensure compliance with ARSD 20:10:24:02 and 20:10:32:03. NAT has submitted a response for each of those rules.

NAT's Amended Application provided its technical capabilities. According to the Amended Application, NAT is using WiMAX technology in the 3.65 GHZ licensed spectrum. The network supports high-speed broadband services, voice service, data and Internet access, and multimedia. Using advanced antenna and radio technology with OFDM/OFDMA, NAT is able to deliver wireless IP voice and data communications. NAT Exh 1, pg. 7. At the hearing Sprint acknowledged that NAT demonstrated sufficient technical capabilities to provide telecommunications services. TR 470, lines 2-4.

The question then becomes whether NAT has demonstrated sufficient financial and managerial capabilities to provide the telecommunications services requested in its Amended Application.

As previously stated, NAT has provided responses for the items found in both ARSD 20:10:24:02 and 20:10:32:03. The responses are similar to the responses Staff has reviewed in other dockets requesting a certificate of authority. What is different in this case is the amount of financial information that was available for Staff's review. Normally an applicant submits only one year of its most recent financial information. In this matter, Staff reviewed four years of financial statements. In accordance with ARSD 20:10:24:02(9) and 20:10:32:03(12), NAT submitted its balance sheet, income statement, and cash flow statement for 2012. NAT Exh 1, Exhibit C, pgs. 20-23; NAT Exh 6, exhibit 1 (confidential). NAT also submitted an income statement and balance sheet for 2013. NAT Exh 13. Furthermore, NAT witness Gene DeJordy provided testimony regarding NAT's financial projections. NAT Exh 3, exhibit E (confidential).

As for its managerial capabilities, NAT submitted Key Management Personnel biographies in accordance with ARSD 20:10:24:02 and 20:10:32:03(6). NAT Exh 1, pgs. 16-19. NAT also summarized the management experience of its key personnel in both its written and oral testimonies. NAT Exh 3, 5, 6, 8, 9, 10, and 11. NAT's witnesses also testified as to their experience in operating a telecommunications company on the Crow Creek Sioux Tribe Reservation for the past four years.

Staff will not attempt to argue the facts for either NAT or Sprint but rather will let the parties



make their own arguments as to what the evidence as found in the hearing record has demonstrated regarding the question of NAT's financial and managerial capabilities. If appropriate, Staff will make a recommendation in its reply brief.

Dated at Pierre, South Dakota, this 4<sup>th</sup> day of April, 2014.

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