

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA**

IN THE MATTER OF THE PETITION BY)
NORTH AMERICAN LOCAL LLC FOR)
RECLASSIFICATION AS A FACILITIES BASED) **TC23-046**
ELIGIBLE TELECOMMUNICATIONS CARRIER)
)

**SDTA RESPONSE TO STAFF’S POSITION ON SDTA’S MOTION TO
COMPEL DISCOVERY FROM NORTH AMERICAN LOCAL, LLC**

The South Dakota Telecommunications Association (SDTA), pursuant to ARSD 20:10:01:22.01 and SDCL 15-6-37(a), filed a Motion to Compel Discovery in the above captioned docket. On February 26, 2024, the Commission Staff (Staff) filed comments and recommendations. NAL did not file a response to SDTA’s Motion to Compel. In this document, SDTA provides argument and addition information responsive to questions raised or positions taken by Staff on SDTA Discovery Request 3 (b)(c), 4 and 7.¹

SDTA REQUEST 3: Provide a copy of all documents and communications provided to or received from USAC with respect to the provision of ACP services in South Dakota. This request includes, but is not limited to:

- b. A copy of all documents filed as a part of the annual ACP certification process.**
- c. A copy of all documents submitted to USAC through the Affordable Connectivity Claims System.**

NAL Response: *NAL objects to this request for “all documents” as being overly broad and unduly burdensome. Without waiving this objection, attached is a copy of FCC’s Broadband Benefit Program Carrier Participation Approval for South Dakota dated September 16, 2021.*

Staff’s Position: Staff recommends that more information be requested before the Commission rules on 3(b) and 3(c).

¹ Staff supported SDTA’s Motion to Compel Discovery Request 2 and 3(a). SDTA does not, therefore, address Request 2 and 3(a) in this responsive filing.

SDTA Response:

Request 3(b) seeks a copy of all information and filings NAL made with USAC regarding the ACP annual certification process. There are two types of annual recertification, with USAC, that all ACP providers must abide by.

47 CFR §54.1801(f) requires:

An officer of the participating provider who oversees Affordable Connectivity Program business activities shall annually certify, under the penalty of perjury, that the participating provider has policies and procedures in place to comply with all Affordable Connectivity Program rules and procedures. This annual certification shall be made in a manner prescribed by the Wireline Competition Bureau and the Administrator.

47 CFR §54.1806(f) requires:

Participating providers shall re-certify annually all Affordable Connectivity Program subscribers whose initial eligibility was verified through the participating provider's approved alternative verification process or through a school, except where the Administrator using the National Verifier is responsible for the annual recertification of Affordable Connectivity Program subscribers. The Administrator using the National Verifier will re-certify the eligibility of all other Affordable Connectivity Program subscribers. Affordable Connectivity Program subscribers who are also enrolled in Lifeline may rely on a successful recertification for the Lifeline program to satisfy this requirement.

(This CFR goes on to specify how providers or USAC shall confirm subscriber eligibility.)

It is reasonable to believe that if USAC had any questions about NAL's ongoing compliance with ACP rules and regulations, it would show up in the annual ACP recertification process. The Commission must make an affirmative finding that granting a request for ETC designation is in the public interest². A provider's ability to meet, or not meet, all regulatory and programmatic requirements should be relevant to the Commission when making such an

² 47 USC §214

assessment and has been considered by the Commission in prior dockets.³ The ability to meet prior or existing regulatory requirements is indicative of NAL's ability to meet future Commission regulatory requirements if ETC certification is granted. The ability to meet regulatory requirements is directly tied to the public interest. It is not in the public interest to grant ETC designation to a company if past performance indicates it is incapable of meeting regulatory filing obligations that come with the privilege of participating in USAC programs.

Request 3(c) seeks a copy of all documents submitted to USAC through the Affordable Connectivity Claims System. ACP is designed as an internet provider reimbursement program. For each eligible household that receives the benefit, the provider may seek reimbursement from USAC. 47 CFR §54.1808 details the information that a participating provider must submit through the Affordable Connectivity Claims System to receive the reimbursement.⁴ It is reasonable to believe that if NAL had any difficulty complying with ACP refund rules, that difficulty will be reflected in Affordable Connectivity Claims System filings. SDTA relies upon the same argument made regarding Request 3b as explained above. That is: a provider's ability to meet, or not meet, all regulatory and programmatic requirements should be relevant to the Commission when making a public interest determination and has been considered by the Commission in prior dockets.⁵ The ability to meet prior or existing regulatory requirements is

³ See TC21-001, March 21, 2022, Commission Order, Paragraph 88 where other regulatory filings and compliance in other states was determined relevant in an ETC docket filing. In this case, SDTA requests only ACP regulatory compliance filings pertaining to the state of SD.

⁴ The USAC web address for the claims system can be found here: <https://www.usac.org/about/affordable-connectivity-program/acp-processes/file-acp-reimbursement-claims/>

⁵ See TC21-001, March 21, 2022, Commission Order, Paragraph 88 where other regulatory filings and compliance in other states was determined relevant in an ETC docket filing. In this case, SDTA requests only ACP regulatory compliance filings pertaining to the state of SD.

indicative of NAL's ability to meet future Commission regulatory requirements if ETC certification is granted. Regulatory compliance is relevant when examining the public interest. It is not in the public interest to grant ETC designation to a company if past performance indicates it is incapable of meeting regulatory filing obligations that come with the privilege of participating in USAC programs.

Annual certification filings and claims system documents filed with USAC for purposes of NAL's participation in ACP could lead to information that is relevant to this proceeding and the Commission should order NAL produce the same.

REQUEST 4: List and describe all NAL owned facilities in other states. In your answer, specify the state in which the facilities are located.

NAL Response: *NAL objects to this request as it seeks information that is not relevant to NAL's request with respect to its South Dakota facilities.*

Staff's Position: Staff does not support SDTA's request and finds it irrelevant. SDTA respectfully disagreed with Staff's recommendation to the Commission.

SDTA Response:

As a preliminary matter, it is worth noting that NAL has "opened the door" to the discovery of information pertaining to its facilities in other states. NAL used the existence of alleged facilities in other states to support a prior request for "facilities-based" designation. Specifically, in TC19-009, in its May 7, 2022, Request for Clarification, NAL submitted that it has "deployed a centralized network architecture using a switch located in Florida, interconnection connectivity to each state, and last mile facilities of other carriers to reach end user customers, all of which is part of the record in this proceeding."⁶ In that filing, NAL goes

⁶ The location of the switch was later corrected in a filed Erratum.

on to explain that state commissions in North Dakota, Minnesota, Wisconsin, Alabama and in Michigan considered it a facilities-based provider. NAL clearly finds the existence of “facilities” in other states to be relevant. To compel production of a list and description of NAL owned facilities in other states will lead to an understanding of whether NAL’s representation of its facilities in other states was factually correct. SDTA alleges that NAL did not accurately represent the status of its facilities to this Commission.⁷ And whether NAL did the same thing in other states is relevant to assess whether granting the requested ETC Petition is in the public interest. SDTA did not, in its discovery request, ask for detailed technical information or engineering plans. Rather, SDTA asked for a description of the facilities owned by NAL to facilitate a basic review of representations made by NAL to other regulatory bodies.

In addition, the Commission must ascertain whether NAL has the technical ability to provide the supported Lifeline services.⁸ The technical needs and necessary expertise as a reseller of services is very different than what is required to operate, maintain and deliver facility-based services. Experience in other states and past performance is indicative of future performance. If certification is granted, NAL customers will rely upon NAL to manage, maintain and operate facilities in a way that reliable service, including emergency services are available. As a facilities operator providing a service through its own facilities, NAL cannot rely upon underlying carriers to make it happen. Rather, NAL is responsible, and this Commission must determine whether NAL is up to the task. In prior dockets this Commission found evidence (or lack thereof) of similar business experience to be relevant and should follow suit in this

⁷ See February 27, 2024, SDTA filing in docket TC23-046, SDTA Reply.

⁸ 47 CFR §54.201(h)

circumstance.⁹ Customers served by the alleged NAL “facilities” in SD will rely upon the proper operation and maintenance of the NAL facilities. Without the ability to do so, customers are at risk of falling victim to the unreliable provision of service. NAL’s experience in the operation of facilities in other states is a relevant consideration. SDTA maintains its request seeks relevant information and asks the Commission to compel NAL to disclose the requested documents.

REQUEST 7: Provide a list of all South Dakota ACP customers. Include the customer’s name, address and phone number.

NAL Response: *NAL objects to this request as it seeks highly confidential business sensitive and consumer proprietary information.*

Staff’s Position: Staff recommends the Commission deny SDTA’s request stating the customer information is irrelevant or unnecessary. SDTA respectfully disagrees with Staff.

SDTA’s Position:

Several SDTA member company customers experienced ACP customer “slamming.”¹⁰ That is, the ACP eligible customer’s internet provider was switched, without the consumers consent. SDTA does not, at this time, allege that NAL itself engaged in action that caused this result. SDTA has no proof that NAL was involved or caused such a result. However, the occurrence was more frequent for customers that reside in tribal areas and receipt of the requested information will facilitate the ability for SDTA to compare a list of impacted SDTA company customers against the NAL customer list. Doing so may indicate the NAL is

⁹ See TC21-001, March 21, 2022, Commission Order, Paragraph 67 where the Commission noted lack of sufficient evidence of similar business experience. The Commission finding does not indicate the review of “business experience” was limited to South Dakota only.

¹⁰ For argument and illustrative purposes, SDTA borrows the term, “slamming.” Slamming is the illegal practice of switching a consumer’s traditional wireline telephone company for local, local toll or long-distance service without permission. [Slamming: Switching Your Authorized Telephone Company Without Permission | Federal Communications Commission \(fcc.gov\)](#)

completely innocent. If that is the case, SDTA commits to making a public record in this docket clarifying that NAL played no part in unauthorized transferring of SDTA company customer ACP benefits. However, at this time, the record demonstrates a pattern of misleading NAL filings and statements.¹¹ As such, there is reason to believe the requested information could lead to relevant information. An ETC applicant's ability to comply with all laws, rules and regulations is relevant for purposes of public interest analysis.

REQUEST FOR RELIEF

SDTA maintains that all discovery requests it made are relevant and either (1) narrow the issues; (2) seek evidence for use at PUC hearing; (3) secure information that may lead to admissible evidence at PUC hearing. Therefore, the Commission should compel NAL to answer the following discovery requests:

SDTA REQUEST 2: Provide a copy of all documents marked "Confidential" that were filed with the PUC or provided to the PUC Staff.

SDTA REQUEST 3: Provide a copy of all documents and communications provided to or received from USAC with respect to the provision of ACP services in South Dakota. This request includes, but is not limited to:

- a. The election notice sent to USAC, to enable participation in the ACP program.
- b. A copy of all documents filed as a part of the annual ACP certification process.
- c. A copy of all documents submitted to USAC through the Affordable Connectivity Claims System.

REQUEST 4: List and describe all NAL owned facilities in other states. In your answer, specify the state in which the facilities are located.

REQUEST 7: Provide a list of all South Dakota ACP customers. Include the customer's name, address and phone number.

¹¹ See February 27, 2024, SDTA filing in docket TC23-046, SDTA Reply.

Dated this 29 day of February 2024.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that: SDTA RESPONSE TO STAFF’S POSITION ON SDTA’s MOTION TO COMPEL DISCOVERY FROM NORTH AMERICAN LOCAL, LLC in PUC Docket TC23-046, and served upon the following parties electronically:

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Dated this 29 day of February, 2024

/s/ Kara Semmler

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