

<b>IN THE MATTER OF THE PETITION OF )          NORTH AMERICAN LOCAL, LLC FOR )          APPROVAL OF RECLASSIFICATION AS A )          FACILITIES-BASED ELIGIBLE )          TELECOMMUNICATIONS CARRIER )</b>	<b>PUC STAFF’S BRIEF            TC23-046</b>
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**BRIEF REGARDING THE SOUTH DAKOTA TELECOMMUNICATIONS  
 ASSOCIATION’S MOTION TO DISMISS NORTH AMERICAN LOCAL, LLC’S  
 PETITION FOR RECLASSIFICATION OR, IN THE ALTERNATIVE, MOTION FOR  
 CLARIFICATION**

INTRODUCTION

In 2021, the South Dakota Public Utilities Commission (“Commission”) issued an Order Approving Settlement Stipulation; Order Granting Lifeline-Only Eligible Telecommunications Carrier Designation in Non-Rural and Certain Tribal Lands’ Service Areas (“2019 Order”) in Docket No. TC19-009. This Settlement Stipulation (hereinafter “2019 Stipulation”) came about as a result of the South Dakota Telecommunications Association’s (“SDTA”) intervention in North American Local, LLC’s (“NAL”) 2019 Application for Designation as an Eligible Telecommunications Carrier (“ETC”) for Purposes of Providing Lifeline Only Service in South Dakota.

An understanding of the background for NAL’s 2023 Petition (TC23-046) is necessary to fully understand SDTA’s motions before the Commission. It has become abundantly clear that NAL’s desire in the 2019 Application was to receive Universal Service support to provide Lifeline services to low-income customers in South Dakota. *See North American Local, LLC’s Letter regarding Clarification of the October 5, 2021, Commission Order, TC19-009; North American Local, LLC’s Request for Clarification, TC19-009.* However, the Universal Service Administration Company (“USAC”) reviewed the 2019 Order and found that NAL was not eligible for Lifeline support. Federal law states in part that, in order to qualify for Lifeline

support, a carrier must utilize its own facilities or a combination of its own facilities and resale of another carrier's services. 47 C.F.R. § 54.201(d)(1). Alternatively, a carrier may be exempt from the facilities requirement so long as the carrier has a Lifeline compliance plan approved with the Federal Communications Commission ("FCC"). *In the Matter of Lifeline and Link Up Reform and Modernization, et al.*, Report and Order and Further Notice of Proposed Rulemaking, FCC 12-11, n 982, February 6, 2012.

Based on the 2019 Order, USAC considers NAL to be a wireless reseller and not a facilities-based provider. For this reason, and because NAL does not have an FCC-approved compliance plan, USAC determined that NAL did not qualify for universal service support and therefore could not provide Lifeline services in South Dakota. NAL has provided Affordable Connectivity Program ("ACP") services in South Dakota since its designation as an ETC in 2021.

In 2023, NAL filed a Petition asking the Commission to "reclassify" NAL as a facilities-based ETC in South Dakota. NAL's Petition states, among other things, that NAL has invested in facilities in South Dakota and therefore should be reclassified so that it may qualify for Lifeline funding. SDTA was granted intervention and has been participating in discovery with NAL. SDTA now brings this Motion to Dismiss or, in the alternative, Motion for Clarification of NAL's Petition for Reclassification.

### ANALYSIS

SDTA states the Commission should grant its Motion because:

- (i) In TC19-009 NAL agreed and stipulated that it would operate as a wireless reseller. NAL's Petition in TC23-046 is in violation of the stipulation.
- (ii) The Commission's Order in TC19-009 was based upon the stipulated fact that NAL operates as a wireless reseller.
- (iii) South Dakota law does not provide for a "reclassification" process.

SDTA Motion, Page 1.

South Dakota Administrative Rules state, “Except to the extent a provision is not appropriately applied to an agency proceeding or is in conflict with SDCL chapter 1-26, another statute governing the proceeding, or the commission’s rules, the rules of civil procedure as used in the circuit courts of this state shall apply.” ARSD 20:10:01:01.02. This motion to dismiss is rooted in ARSD 20:10:01:02.04, which states “The commission may also dismiss a pleading at the request of an interested party or on its own motion, stating the reasons in its order.”

*a. Contentions (i) and (ii)*

SDTA’s first contention is that the Petition should be dismissed because it violates the 2019 Stipulation in which NAL agreed it would operate as a wireless reseller. The second contention is that the Commission’s Order granting NAL an ETC in TC19-009 was based on the stipulation that NAL would operate as a wireless reseller. These contentions are interrelated and will be addressed in the following paragraphs.

The administrative rules provide the following language about stipulations in proceedings before the Commission:

The parties to any proceeding or investigation before the commission may, by stipulation in writing filed with the commission or entered on the record, agree upon the facts or any portion thereof involved in the controversy. Such stipulation shall be regarded and used as evidence at the hearing. However, the commission may refuse to be bound by such stipulation and make such investigation and require such additional evidence as it may deem necessary.

ARSD 20:10:01:19. The Commission frequently approves Settlement Stipulations between interested parties in a contested case. When the Commission votes to approve a Settlement Stipulation, the Stipulation is incorporated into the Commission’s decision. In other words, the agreements and recitals contained in the Stipulation form the basis of the Commission’s ultimate

decision. In fact, the 2019 Order in this same docket states “The Commission voted unanimously to approve the Settlement Stipulation to Amend ETC Application *and Condition the ETC Designation as agreed to by the parties....*” 2019 Order, page 1 (emphasis added).

Staff argues that the 2019 Stipulation between SDTA and NAL does not require dismissal of this docket. Staff has thoroughly reviewed the 2019 Stipulation and found there are several inconsistencies worth noting. Staff agrees with SDTA that the 2019 Order was based on NAL operating as a wireless reseller. 2019 Stipulation, Recital #2. On the other hand, many of the provisions of the Stipulation contemplate the notion that NAL will be providing Lifeline services in South Dakota. *See, e.g.*, Recitals 1, 4, 5; Agreement #6b. Without an FCC-approved compliance plan or a finding that NAL is facilities-based, the provisions mentioned above are at odds with one another.

Regardless of any inconsistencies, nothing in the 2019 Stipulation or 2019 Order prevents NAL from petitioning the Commission for a change in designation. Staff does not interpret the 2019 Stipulation or 2019 Order to mean that NAL could never seek a change in designation but rather that the Stipulation and Order govern the terms of its current designation. Additionally, Staff notes that the Commission has authority to amend its past orders and, necessarily, to refuse to be bound by stipulations that the Commission has incorporated into its past orders.

b. *Contention (iii)*

SDTA’s final argument for why the Petition should be dismissed is that South Dakota law does not describe a “reclassification” process. Staff agrees that neither chapter 49 of the codified laws nor the administrative rules contemplate a “reclassification” process for an ETC. Additionally, Staff is unable to find any examples of such a process in the Commission’s docket history.

The closest thing Staff could find to NAL's request is an amended certificate of authority from SDCL § 49-31-69. This statute relates to local exchange service, a different type of service, but the application process is important here. This statute allows any telecommunications company hoping to change its authorized local exchange service territory to apply for an amended certificate of authority. "An application for an amended certificate is subject to the same requirements as an application for an initial certificate." *Id.* That language lends credence to the notion that an application for change in ETC designation should be subject to the same requirements as an application for an initial designation.

Staff notes that while NAL's application calls itself a "Petition for Reclassification", the application reads much like a new application for an ETC designation. NAL filed a supplement to its Petition that is fourteen pages long and lays out NAL's arguments as to how it satisfies the requirements for designation as a facilities-based ETC. *See generally NAL's Supplement to Petition for Reclassification As A Facilities-Based Eligible Telecommunications Carrier* (arguing NAL's application complies with 47 U.S.C. § 214(e)(2), 47 C.F.R. Part 54, and ARSD 20:10:32). However, NAL has not explained in detail how it would like the Commission to accomplish this "reclassification" that NAL desires.

SDTA's Motion to Dismiss states "NAL asks the PUC to surgically extract "reseller" language and insert "facilities based" language into an Order that is otherwise based upon all the same facts, findings, and legal conclusions as the 2019 docket." Page 4. If this is indeed the method that NAL seeks, Staff agrees with SDTA that the request is improper. Staff does not find the legal authority in South Dakota law to consider only the "facilities-based" aspect of this docket while keeping in place all other aspects of the 2019 Order. If this is the request, Staff believes a motion to dismiss would be properly granted because there is no method available in

law to accomplish the request. *See* SDCL § 15-6-12(b) (“Failure to state a claim upon which relief can be granted”).

Alternatively, if NAL intended for this Petition to be treated like any other petition for ETC designation, Staff argues the motion to dismiss is improper for the reasons stated in the paragraphs above. In that case, Staff believes the correct path forward is to examine NAL’s 2023 Petition anew and determine whether it meets the requirements of 47 U.S.C. § 214(e)(2), 47 C.F.R. Part 54, and ARSD Chapter 20:10:32. One reason for this determination is that several years have passed since the 2019 designation and circumstances with NAL or the telecommunications landscape of South Dakota may have changed. Another reason is that NAL proposes to offer a service that it has not previously offered in South Dakota, which requires a determination not only of NAL’s facilities but also its financial and technical capabilities, the public interest, and various other criteria. Considering there is no reclassification process described in law, Staff believes this method best comports with the available laws regarding ETC designation.

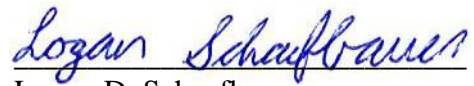
Staff believes it is necessary for NAL to provide clarification on this point before a decision on the motion to dismiss—a drastic legal procedure—is made.

#### CONCLUSION

In conclusion, Staff believes clarification and interpretation of the term “reclassification” is necessary to make a proper decision on this matter. Staff does not believe the 2019 Order prevents NAL from petitioning the Commission for a change in designation regarding its ETC status. However, the means by which NAL seeks to accomplish its goals are vital to making this decision. If the Commission decides that the Motion to Dismiss is not proper at this time, Staff

recommends the Commission treat this request as a new petition for designation as a facilities-based ETC.

Dated this 26<sup>th</sup> day of February, 2024.



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