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

NATIVE AMERICAN TELECOM, LLC'S MEMORANDUM IN OPPOSITION TO CENTURYLINK'S AND SPRINT'S MOTIONS TO COMPEL DISCOVERY

INTRODUCTION

Native American Telecom, LLC ("NAT"), through its counsel, submits this memorandum in opposition to CenturyLink's and Sprint's motions to compel discovery.

FACTS

A. Procedural History Of This Case

On October 11, 2011, NAT filed its Application for Certificate of Authority ("Initial Application") with the South Dakota Public Utilities Commission ("Commission"). NAT's Initial Application sought authority to provide local exchange and interexchange service within the Crow Creek Sioux Tribe Reservation ("Reservation"), which is within the existing study area of Midstate Communications, Inc. ("Midstate").

On November 30, 2011, Commission Staff served a series of Data Requests on NAT. NAT provided complete and timely Responses to these Data Requests.

On January 27, 2012, NAT filed its Revised Application for Certificate of Authority ("Revised Application") with the Commission. NAT's Revised Application also seeks authority to provide local exchange and interexchange service within the boundaries of the Reservation and within Midstate's existing study area. On January 31, 2012, NAT's Revised Application was "deemed complete" by the Commission's Staff.[1]

B. CenturyLink's And Sprint's Intervention Is Based Exclusively Upon "Access Stimulation"

It is undisputed that the *only reason* CenturyLink and Sprint have intervened in this *routine and limited certification matter* is the issue of "access stimulation." (*See* Intervention Petitions of CenturyLink and Sprint). Unfortunately, CenturyLink and Sprint have attempted to mislead the Commission by depicting "access stimulation" as improper and subject to an extensive "investigation and hearing" in this limited certification matter. However, as the Commission is well-aware, the

[1] The Commission should note that NAT and intervenors Midstate and the South Dakota Telecommunications Association ("SDTA") recently entered into a stipulation. This stipulation reflects that Midstate and the SDTA do not object to NAT's request for a waiver pursuant to ARSD 20:10:32:15 (Rural service area -- Additional service obligations). This stipulation was filed with the Commission on March 27, 2012.

Federal Communication Commission ("FCC") recently recognized the legality of "access stimulation" and adopted rules governing its practice. Therefore, whether NAT intends to engage in "access stimulation" is irrelevant and beyond the scope of this certification matter.

In November of 2011, the FCC released its long-awaited Final Rule which addresses "access stimulation" and "revenue sharing agreements."[2] *Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers*, 76 Fed. Reg. 73830, 2011 WL 5909863 (November 29, 2011) (to be codified at 47 C.F.R. pts. 0, 1, 20, 36, 51, 54, 61, 64, and 69) ("Final Rule").

In its Final Rule, the FCC specifically recognizes the legality of "access stimulation." In fact, the FCC's Final Rule adopts a "bright line definition" to identify when an "access stimulating" Local Exchange Carrier ("LEC") must re-file its interstate access tariffs at rates that are presumptively consistent with the Federal Communications Act.

The first condition is met where a LEC has entered into an access

[2] The FCC's nearly-800 page Final Rule can be found at www.fcc.gov.

revenue sharing agreement.[3] The second condition is met where a LEC either has had (a) a three-to-one interstate terminating-to-originating traffic ratio in a calendar month; or (b) a greater than 100 percent increase in interstate originating and/or terminating switched access Minutes of Use ("MOU") in a month compared to the same month in the preceding year.[4] (Final Rule, ¶¶ 658, 667, 675-678).

If a LEC meets both conditions of this definition, it must file a revised tariff and benchmark its tariffed access rates to the rates of the price cap LEC with the lowest interstate switched access rates in the

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[3] This "revenue sharing" condition of the definition is met when a rate-of-return LEC or a Competitive Local Exchange Carrier ("CLEC"):

> [H]as an access revenue sharing agreement, whether express, implied, written or oral, that, over the course of the agreement, would directly or indirectly result in a net payment to the other party (including affiliates) to the agreement, in which payment by the rate-of-return LEC or competitive LEC is based on the billing or collection of access charges from interexchange carriers or wireless carriers. When determining whether there is a net payment under this rule, all payments, discounts, credits, services, features, functions, and other items of value, regardless of form, provided by the rate-of-return LEC or competitive LEC to the other party to the agreement shall be taken into account.

(Final Rule, ¶ 669).

[4] In turn, *IXCs will be permitted to file complaints* based on evidence from their traffic records that a LEC has exceeded either of the traffic measurements of the second condition (*i.e.*, that the second condition has been met). (Final Rule, ¶ 659).

state. (Final Rule, ¶ 679). Specifically, the Final Rule requires a CLEC to file its revised interstate switched access tariff within 45 days of meeting the definition, or within 45 days of the effective date of the rule if on that date it meets the definition. A CLEC whose rates are already at or below the rate to which they would have to benchmark in the re-filed tariff will not be required to make a tariff filing.[5] (Final Rule, ¶ 691).

The FCC's Final Rule rejects CenturyLink's and Sprint's long-standing claim that "access stimulation" and "revenue sharing" violates the Federal Communications Act. In fact, the FCC declares just the opposite:

> [W]e do not declare revenue sharing to be a *per se* violation of section 201(b) of the Act. A ban on all revenue sharing arrangements could be overly broad, and no party has suggested a way to overcome this shortcoming. *Nor do we find that parties have demonstrated that traffic directed to access stimulators should not be subject to tariffed access charges in all cases.*

(Final Rule, ¶ 672) (emphasis added).[6]

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[5] The FCC's Final Rule became effective on December 29, 2011. Although beyond the scope of this certification proceeding, the Commission should note that NAT's current tariff with the FCC became effective on August 23, 2011. In this tariff, NAT properly benchmarked its interstate switched access rate to that of Qwest/CenturyLink's access rate. In other words, *several months before the FCC's Final Rule became effective, NAT's current tariff fully complied with the FCC's Final Rule.*

[6] The FCC also rejected several of CenturyLink's and Sprint's (and its fellow IXCs') suggestions, including (1) adopting a benchmark rate of $0.0007 ("We will not adopt a benchmarking rate of $0.0007 in instances

CenturyLink's and Sprint's entire reason for intervening in this certification matter is based on attempting to "police" a practice ("access stimulation") that the FCC has deemed to be appropriate as long as certain guidelines are followed. If CenturyLink and Sprint believe that NAT's "access stimulation" activities do not comply with the FCC's Final Rule, it is entitled to commence a dispute action with the FCC (or the Commission). *See* Final Rule, ¶ 659 (stating that IXCs will be permitted to file a complaint if it believes that a LEC failed to comply with the Final Rule's guidelines). However, CenturyLink's and Sprint's efforts to engage in "access stimulation gamesmanship" in this routine and limited certification matter is inappropriate and violates the Commission's rules.

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when the definition is met, as is suggested by a few parties. The $0.0007 rate originated as a negotiated rate in reciprocal compensation arrangements for ISP-bound traffic, and there is insufficient evidence to justify abandoning competitive LEC benchmarking entirely"); (2) adopting an immediate bill-and-keep system ("Nor will we immediately apply bill-and-keep, as some parties have urged. We adopt a bill-and-keep methodology for intercarrier compensation below, but decline to mandate a flash cut to bill-and-keep here"); and (3) detariffing certain CLEC access charges ("Additionally, we reject the suggestion that we detariff [CLEC] access charges if they meet the access stimulation definition. Our benchmarking approach addresses access stimulation within the parameters of the existing access charge regulatory structure"). (Final Rule, ¶ 692).

LAW & ANALYSIS

I. THE COMMISSION SHOULD DENY CENTURYLINK'S AND SPRINT'S MOTIONS TO COMPEL DISCOVERY

A. The Commission's Legal Framework For Reviewing NAT's Revised Application Is Clear And Specific

i.) SDCL 49-31-3

SDCL 49-31-3 provides that "[e]ach 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." (emphasis added). This statutory provision also requires that "[t]elecommunications 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. . . ." *Id.* (emphasis added). Finally, "[t]he commission shall, by rules promulgated pursuant to chapter 1-26, *prescribe the necessary procedures* to implement this section."[7] *Id.* (emphasis added).

ii.) ARSD 20:10:24:02 (Interexchange Services)

As a result of SDCL 49-31-3's delegation authority, the Commission has prescribed the "necessary procedures" regarding interexchange services. Specifically, ARSD 20:10:24:02 provides that

[7] SDCL 49-31-3 also clarifies that "[t]he commission may rule upon a telecommunications company's application for a certificate of authority with or without hearing."

"[e]ach telecommunications company required to apply for a certificate of authority with the commission . . . for *interexchange service* shall provide the following information with the company's application. . . ." (emphasis added). The Commission's rules then require that a telecommunications company provide information in twenty (20) very specific categories. ARSD 20:10:24:02(1-20). NAT has provided this precise information to the Commission and NAT's Revised Application has been "deemed complete" by the Commission's Staff.

iii.) ARSD 20:10:32:03 (Local Exchange Services)

As a result of SDCL 49-31-3's delegation authority, the Commission has also prescribed the "necessary procedures" regarding local exchange services. ARSD 20:10:32:03 provides that "[a] telecommunications company required to apply for a certificate of authority for *local exchange services* . . . shall submit a written application and provide . . . [specific] information. . . ." (emphasis added). The Commission's rules then require that a telecommunications company provide information in twenty-five (25) very specific areas. ARSD 20:10:32:03(1-25). Once again, NAT has provided this precise information to the Commission and NAT's Revised Application has been "deemed complete" by the Commission's Staff.

B. The Commission's Rules Do Not Allow CenturyLink and Sprint To Conduct Discovery In This Matter

SDCL 49-1-11 states that the Commission "may promulgate rules pursuant to chapter 1-26 concerning: . . . (4) Regulation of proceedings before the commission, including forms, notices, *applications*, pleadings, orders to show cause and the service thereof. . . ." (emphasis added).

Pursuant to this authority, the Commission promulgated ARSD 20:10:01:01.02, which provides:

> **Use of rules of civil procedure.** 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.

(emphasis added).

As noted previously, the Commission has adopted *its own precise and specific rules* with respect to an applicant's request to provide interexchange telecommunications services and local exchange services in South Dakota. *See* ARSD 20:10:24:02 (Interexchange Services) and ARSD 20:10:32:03 (Local Exchange Services).

Most importantly for purposes of this proceeding, the Commission's own rules *clearly prohibit* CenturyLink and Sprint from requiring NAT to produce discovery. ARSD 20:10:24:02(20) states that an applicant for interexchange services may only be asked to produce "[o]ther information

requested by the commission needed to demonstrate that the applicant has sufficient technical, financial, and managerial capabilities to provide the interexchange services it intends to offer. . . ." (emphasis added). Similarly, ARSD 20:10:32:03(25) states that an applicant for local exchange services may only be asked to produce "[o]ther information *requested by the commission* needed to demonstrate that the applicant has sufficient technical, financial, and managerial capabilities to provide the local exchange services it intends to offer. . . ." (emphasis added).

As such, the Commission's own rules prohibit the type of "discovery gamesmanship" that CenturyLink and Sprint are playing. Under its rules, only the *Commission* can request further information from NAT regarding its Revised Application. And as stated earlier, shortly after NAT filed its Initial Application, the Commission's Staff served its own set of Data Requests upon NAT. NAT provided complete and timely Responses to these Data Requests. After NAT filed its Revised Application, the Commission's Staff did not serve additional Data Requests, presumably because the Commission's Staff did not believe it necessary to request any further information from NAT. Soon after, NAT's Revised Application was "deemed complete" by the Commission's Staff.

The Commission's specific rules for reviewing a certificate of authority application preclude "gamesmanship" by an applicant's potential competitors and are based on sound practical principles. Consistent with the Federal Communications Act's purpose,[8] the Commission has consistently viewed competition in the telecommunications industry as a benefit to the residents of South Dakota and has approved innumerable applications since 1997.

The Commission has established simple rules for applicants because the Commission recognizes the benefits of competition for South Dakota residents. South Dakota law does not envision the kind of elaborate (and unnecessarily drawn-out) proceedings that CenturyLink and Sprint propose. The Commission must review NAT's application in a manner consistent with the Commission's own rules. And while the Commission affords an opportunity to request a hearing on an application before granting a certificate of authority, it appears that a hearing has never been requested or held for decades (if ever) in South Dakota. *See, e.g.*, http://puc.sd.gov/Dockets/Telecom/default.aspx (providing a complete listing of the Commission's telecommunications

[8] The Telecommunications Act was enacted to "promote competition and reduce regulation in order to secure lower prices and higher quality services for . . . consumers and encourage the rapid deployment of new telecommunications technologies."

dockets – including certificate of authority applications - from 1997-2012).

By enacting these specific and straight-forward rules, the Commission has streamlined *entry regulation* and opted to expedite competition in South Dakota. CenturyLink and Sprint propose an unprecedented level of *entry regulation* that is inconsistent with public policy and the Commission's own rules. CenturyLink and Sprint seek an extensive and unwarranted evidentiary investigation into NAT's entire business operation. However, CenturyLink's and Sprint's imaginative array of "potential issues" overreaches any *entry* regulations under South Dakota law and the Commission's rules.

Like any other applicant in the same position, NAT is only required to abide by the Commission's rules of entry. NAT has complied with each and every one of these rules. CenturyLink's and Sprint's conduct greatly exceeds the scope and purpose of the Commission's own rules in this certification matter.

CenturyLink's and Sprint's intervention has only one purpose: to erect massive regulatory and procedural barriers that delay competitive entry into the telecommunications market. Such delay undoubtedly serves CenturyLink's and Sprint's interests, but it does not serve the public good and is entirely inconsistent with the Commission's own

rules. That CenturyLink and Sprint have so vigorously advocated for this extensive form of entry regulation suggests that these companies will derive a considerable strategic and competitive advantage. CenturyLink's and Sprint's actions frustrate the Commission's efforts in carrying out its role to open the interexchange and local exchange markets to competition. The Commission should not tolerate or condone these actions.[9]

In sum, NAT has met all of the certification requirements in South Dakota. NAT has followed the Commission's rules. NAT's Revised Application has been "deemed complete" by the Commission's Staff. The Commission's rules prohibit CenturyLink's and Sprint's actions. Therefore, NAT asks the Commission to deny CenturyLink's and Sprint's respective motions to compel discovery, act expeditiously in resolving this narrow certification issue, and grant NAT's Revised Application.

C. *CenturyLink's and Sprint's Discovery Requests Are Well-Beyond The Proper Scope Of Discovery In This Matter*

The Commission's rules *clearly prohibit* CenturyLink and Sprint from requiring NAT to produce discovery in this matter. *See* ARSD

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[9] CenturyLink's and Sprint's conduct has resulted in NAT's certification process being delayed far beyond any similar proceeding in the Commission's recent history. *See, e.g.,* http://puc.sd.gov/Dockets/Telecom/default.aspx (providing a complete listing of the Commission's telecommunications dockets – including certification applications - from 1997-2012).

20:10:24:02(20) and ARSD 20:10:32:03(25) (limiting discovery to information "*requested by the commission*"). However, if the Commission disregards its own rules, and discovery is allowed to proceed, the Commission should severely curtail CenturyLink's and Sprint's "discovery gamesmanship."

It is clear that the Commission's review of NAT's Revised Application for *interexchange service* is limited to those facts specifically encompassed by ARSD 20:10:24:02(1-20). This rule requires that NAT provide the Commission with following information:

> **(1) The applicant's name, address, telephone number, facsimile number, web page URL, and E-mail address;**
>
> **(2) A description of the legal and organizational structure of the applicant's company;**
>
> **(3) The name under which the applicant will provide interexchange services if different than in subdivision (1) of this section;**
>
> **(4) A copy of the applicant's certificate of authority to transact business in South Dakota from the Secretary of State;**
>
> **(5) The location of the applicant's principal office, if any, in this state and the name and address of its current registered agent, if applicable;**
>
> **(6) A list and specific description of the telecommunications services the applicant intends to offer;**
>
> **(7) A detailed statement of how the applicant will provide its services;**

(8) A service area map or narrative description indicating with particularity the geographic area proposed to be served by the applicant;

(9) For the most recent 12 month period, financial statements of the applicant including a balance sheet, income statement, and cash flow statement. The applicant shall provide audited financial statements, if available;

(10) The names, addresses, telephone number, facsimile number, E-mail address, and toll free number of the applicant's representatives to whom all inquiries must be made regarding complaints and regulatory matters and a description of how the applicant handles customer service matters;

(11) Information concerning how the applicant plans to bill and collect charges from customers;

(12) Information concerning the applicant's policies relating to solicitation of new customers and a description of the efforts the applicant shall use to prevent the unauthorized switching of interexchange customers;

(13) Information concerning how the applicant will make available to any person information concerning the applicant's current rates, terms, and conditions for all of its telecommunications services;

(14) Information concerning how the applicant will notify a customer of any materially adverse change to any rate, term, or condition of any telecommunications service being provided to the customer. The notification must be made at least thirty days in advance of the change;

(15) A list of the states in which the applicant is registered or certified to provide telecommunications services, whether the applicant has ever been denied registration or certification in any state and the reasons for any such denial, a statement as to whether or not the applicant is in good standing with the appropriate regulatory agency in the states where it is registered or certified, and a detailed explanation of why the applicant is not in good standing in a given state, if applicable;

(16) A description of how the applicant intends to market its services, its target market, whether the applicant engages in any multilevel marketing, and copies of any company brochures used to assist in the sale of services;

(17) Federal tax identification number and South Dakota sales tax number;

(18) The number and nature of complaints filed against the applicant with any state or federal regulatory commission regarding the unauthorized switching of a customer's telecommunications provider and the act of charging customers for services that have not been ordered;

(19) A written request for waiver of those rules the applicant believes to be inapplicable; and

(20) Other information *requested by the commission* needed to demonstrate that the applicant has sufficient technical, financial, and managerial capabilities to provide the interexchange services it intends to offer consistent with the requirements of this chapter and other applicable rules and laws.

(emphasis added).

NAT has provided the Commission with *complete responses to each and every one of these information categories.* Indeed, the Commission's Staff has already deemed NAT's Revised Application to be "complete." As such, regarding interexchange services, if the Commission allows additional discovery, CenturyLink's and Sprint's discovery requests must be supported by "good cause," "relevant to the subject matter involved" and "reasonably calculated to lead to the discovery of admissible evidence." ARSD 20:10:01:22.01; SDCL 15-6-26(b)(1).

Similarly, the Commission's review of NAT's Revised Application for *local exchange service* is limited to those facts specifically encompassed by ARSD 20:10:32:03(1-25). This rule requires that NAT provide the Commission with following information:

> **(1) The applicant's name, address, telephone number, facsimile number, web page URL, and E-mail address;**
>
> **(2) A description of the legal and organizational structure of the applicant's company;**
>
> **(3) The name under which applicant will provide local exchange services if different than in subdivision (1) of this section;**
>
> **(4) The location of the applicant's principal office, if any, in this state and the name and address of its current registered agent, if applicable;**
>
> **(5) A copy of its certificate of authority to transact business in South Dakota from the secretary of state;**
>
> **(6) A description of the applicant's experience providing any telecommunications services in South Dakota or in other jurisdictions, including the types of services provided, and the dates and nature of state or federal authorization to provide the services;**
>
> **(7) Names and addresses of applicant's affiliates, subsidiaries, and parent organizations, if any;**
>
> **(8) A list and specific description of the types of services the applicant seeks to offer and how the services will be provided including:**
>
> > **(a) Information indicating the classes of customers the applicant intends to serve;**

(b) Information indicating the extent to and time-frame by which applicant will provide service through the use of its own facilities, the purchase of unbundled network elements, or resale;

(c) A description of all facilities that the applicant will utilize to furnish the proposed local exchange services, including any facilities of underlying carriers; and

(d) Information identifying the types of services it seeks authority to provide by reference to the general nature of the service;

(9) A service area map or narrative description indicating with particularity the geographic area proposed to be served by the applicant;

(10) Information regarding the technical competence of the applicant to provide its proposed local exchange services including:

(a) A description of the education and experience of the applicant's management personnel who will oversee the proposed local exchange services; and

(b) Information regarding policies, personnel, or arrangements made by the applicant which demonstrates the applicant's ability to respond to customer complaints and inquiries promptly and to perform facility and equipment maintenance necessary to ensure compliance with any commission quality of service requirements;

(11) Information explaining how the applicant will provide customers with access to emergency services such as 911 or enhanced 911, operator services, interexchange services, directory assistance, and telecommunications relay services;

(12) For the most recent 12 month period, financial statements of the applicant consisting of balance sheets, income statements, and cash flow statements. The applicant shall provide audited financial statements, if available;

(13) Information detailing the following matters associated with interconnection to provide proposed local exchange services:

(a) The identity of all local exchange carriers with which the applicant plans to interconnect;

(b) The likely timing of initiation of interconnection service and a statement as to when negotiations for interconnection started or when negotiations are likely to start; and

(c) A copy of any request for interconnection made by the applicant to any local exchange carrier;

(14) A description of how the applicant intends to market its local exchange services, its target market, whether the applicant engages in multilevel marketing, and copies of any company brochures that will be used to assist in sale of the services;

(15) If the applicant is seeking authority to provide local exchange service in the service area of a rural telephone company, the date by which the applicant expects to meet the service obligations imposed pursuant to § 20:10:32:15 and applicant's plans for meeting the service obligations;

(16) A list of the states in which the applicant is registered or certified to provide telecommunications services, whether the applicant has ever been denied registration or certification in any state and the reasons for any such denial, a statement as to whether or not the applicant is in good standing with the appropriate regulatory agency in the states where it is registered or certified, and a detailed explanation of why the applicant is not in good standing in a given state, if applicable;

(17) The names, addresses, telephone numbers, E-mail addresses, and facsimile numbers of the applicant's representatives to whom all inquiries must be made regarding customer complaints and other regulatory matters;

(18) Information concerning how the applicant plans to bill and collect charges from customers who subscribe to its proposed local exchange services;

(19) Information concerning the applicant's policies relating to solicitation of new customers and a description of the efforts the applicant shall use to prevent the unauthorized switching of local service customers by the applicant, its employees, or agents;

(20) The number and nature of complaints filed against the applicant with any state or federal commission regarding the unauthorized switching of a customer's telecommunications provider and the act of charging customers for services that have not been ordered;

(21) Information concerning how the applicant will make available to any person information concerning the applicant's current rates, terms, and conditions for all of its telecommunications services;

(22) Information concerning how the applicant will notify a customer of any materially adverse change to any rate, term, or condition of any telecommunications service being provided to the customer. The notification must be made at least thirty days in advance of the change;

(23) A written request for waiver of those rules believed to be inapplicable;

(24) Federal tax identification number and South Dakota sales tax number; and

(25) Other information *requested by the commission* needed to demonstrate that the applicant has sufficient technical, financial, and managerial capabilities to provide the local exchange services it intends to offer consistent with the requirements of this chapter and other applicable rules and laws.

(emphasis added).

NAT has also provided the Commission with *complete responses to each and every one of these information categories.* As such, regarding local exchange service, if the Commission allows additional discovery, CenturyLink's and Sprint's discovery requests must be supported by "good cause," "relevant to the subject matter involved" and "reasonably calculated to lead to the discovery of admissible evidence." ARSD 20:10:01:22.01; SDCL 15-6-26(b)(1).

Finally, ARSD 20:10:32:06 sets forth the Commission's standard for reviewing a local exchange service application:

> **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.*

(emphasis added).

NAT has also provided *complete responses* for the Commission to review NAT's Revised Application under this decisional criteria. Therefore, if the Commission allows additional discovery, CenturyLink's and Sprint's discovery requests must be consistent with the Commission's rules, supported by "good cause," "relevant to the subject matter involved" and "reasonably calculated to lead to the discovery of admissible evidence." ARSD 20:10:01:22.01; SDCL 15-6-26(b)(1)). It is clear, however, that CenturyLink's and Sprint's discovery requests do not meet these threshold standards.

i.) CenturyLink's Discovery Requests

CenturyLink's motion to compel initially focuses on discovering the details of NAT's "access stimulation" activities, "how NAT intends to make money," and NAT's relationships with "Free Calling Service Companies" ("FCSCs"). (CenturyLink's motion to compel discovery, pages 2, 8-10).

Specifically, CenturyLink's discovery requests 1.13,[10] 1.14[11], and 1.15[12] seek information regarding these topics.

It is simply absurd for CenturyLink to even request that NAT provide its business plan and divulge "how it intends to make money" in this application proceeding. The Commission's rules do not require that NAT provide information to its competitors regarding "how it intends to make money." Rather, the Commission's rules require NAT to produce "financial statements . . . including a balance sheet, income statement, and cash flow statement [for the most recent 12 month period]." *See* ARSD 20:10:24:02(9) and ARSD 20:10:32:03(12). NAT has fully complied with these rules and these financial statements have been provided for the Commission's review.

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[10] CenturyLink's discovery request 1.13 demands "all documents evidencing communication between you and any FCSC relating to calls that may be delivered to, or transported through, the area that is the subject of its Application for Certificate of Authority."

[11] CenturyLink's discovery request 1.14 demands "all contracts, agreements or other documentation of understanding or arrangement between you and any FCSC relating in any way to calls delivered to, or transported through, the area that is the subject of NAT's Application for Certificate of Authority."

[12] CenturyLink's discovery request 1.15 demands "all documents, memos, or correspondence addressing, discussing, analyzing, referencing or otherwise relating to business plans, strategies, goals, or methods of obtaining monies or revenues from interexchange carriers in the area that is the subject of NAT's Application for Certificate of Authority, for calls that may be delivered or transported to FCSCs."

The Commission's rules also do not require that NAT provide information regarding NAT's relationships with "FCSCs" or "access stimulation." As noted earlier, the FCC has already ruled that "access stimulation" is a legal practice so long as certain guidelines are followed. If NAT fails to comply with the FCC's "access stimulation" guidelines, CenturyLink can commence a proper action with the FCC (or the Commission).

CenturyLink's requests for this information only further its efforts to engage in "gamesmanship" as this "access stimulation" and "financial information" discovery is improper under the Commission's rules, not "relevant to the subject matter involved," and not "reasonably calculated to lead to the discovery of admissible evidence." SDCL 15-6-26(b)(1).

CenturyLink next requests that NAT produce information regarding Carey Roesel. (CenturyLink's motion to compel discovery, pages 4-8). Specifically, CenturyLink's discovery requests 2.2[13] and 2.3[14] seek information from Mr. Roesel regarding "FCSCs" and "access stimulation."

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[13] CenturyLink's discovery request 2.2 demands "all documents reviewed or analyzed by Carey Roesel in preparation and drafting of his Direct Testimony relating to NAT's 'access stimulation' activities or its delivery of calls to FCSCs."

[14] CenturyLink's discovery request 2.3 demands "all documents reviewed or analyzed by Carey Roesel in preparation and drafting of his Direct Testimony relating to any charges, billings or invoices to interexchange carriers that may result from the delivery or transport of calls by NAT to FCSCs."

Again, the Commission's rules do not require that NAT provide information from Mr. Roesel regarding "FCSCs" or "access stimulation" in this certification matter. This is especially true since "access stimulation" is now recognized as a legal practice so long as the FCC's guidelines are followed.

It should be noted that CenturyLink also attempts to mislead the Commission by opining that its discovery requests 2.2 and 2.3 seek "information [Mr. Roesel] reviewed and analyzed relating to access stimulation. . . ." (CenturyLink's motion to compel, page 5). As CenturyLink is well-aware, Mr. Roesel's written testimony *never even references* "FCSCs" or "access stimulation." (*See* Direct Testimony of Carey Roesel, pages 1-10). Rather, Mr. Roesel's written testimony is limited to those categories of information encompassed by ARSD 20:10:24:02 and ARSD 20:10:32:03.

CenturyLink's conduct has unfortunately resulted in NAT's certification process being delayed far beyond any similar proceeding in the Commission's recent history. *See, e.g.,* http://puc.sd.gov/Dockets/Telecom/default.aspx (providing a complete listing of the Commission's telecommunications dockets – including CLEC applications - from 1997-2012). The Commission should follow its own rules, recognize that CenturyLink is attempting to improperly

"police" conduct ("access stimulation") that has been deemed legal by the FCC, and end CenturyLink's efforts to engage in costly and time-consuming "gamesmanship" that is irrelevant and beyond the scope of this certification matter.

ii.) Sprint's Discovery Requests

Sprint's discovery requests are even more improper, onerous, and unreasonable than CenturyLink's. Sprint's motion to compel focuses on "test[ing] NAT's statements in its Application and testimony" and "ensuring that the standards for certification are met." (Sprint's motion to compel, page 1). In other words, Sprint wants the Commission to entirely disregard its own rules and establish Sprint (and presumably CenturyLink) as a "Super Commission" for certification matters.

First, Sprint erroneously claims that the Commission Staff's "deemed complete" decision was "rubber stamped." (*See* Sprint's motion to compel, page 5) ("This requires a critical analysis of facts, not, as NAT perceives, a simple rubber stamping of an application that has been deemed complete by the [Commission's] Staff.") NAT has never alleged that the Commission's review of its Revised Application should be "rubber stamped." However, NAT believes that the Commission's review should be consistent with the Commission's rules.

Second, Sprint states that "NAT [has] provided very little by way of substantive response[s]" in this matter. (*See* Sprint's motion to compel, page 5) ("[Sprint wants] to ensure that NAT meets the standards of ARSD 20:10:32:03, ARSD 20:10:32:06, and ARSD 20:10:24:02. NAT provided very little by way of substantive response to these questions. . . ."). This is simply incorrect. NAT is not required to provide additional information to Sprint so that Sprint can determine whether the information meets Sprint's "standards of acceptability." Instead, NAT is only required to submit what every other applicant must submit - information that complies with the Commission's rules. And NAT has done exactly that, as demonstrated by the fact that NAT's Revised Application has been "deemed complete" by the Commission's Staff.[15]

Third, Sprint submits that it is entitled to discovery to determine whether NAT has been operating without a certificate from the Commission. (Sprint's motion to compel, page 5). As the Commission is aware, Sprint and NAT recently engaged in litigation over the complex issues of tribal sovereignty and tribal authority in the telecommunications arena. (*See* SDPUC TC 10-026). In SDPUC TC 10-026, NAT had received a certificate of authority from the Crow Creek

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[15] If Sprint does not believe that the Commission's rules are adequate, Sprint can proceed as any other person or entity may proceed – by attempting to modify the Commission's rules through the administrative rules process.

Tribal Utility Authority. NAT believed, pursuant to this tribal certificate of authority, that its activities within the boundaries of the Crow Creek Reservation complied with the laws of tribal sovereignty and tribal authority. Ultimately, the Commission found that it had the authority to regulate NAT's intrastate telecommunications activities. (*See* SDPUC TC 10-026).

In response to the Commission's decision, NAT filed its Initial Application and Revised Application. And indeed, if this certification matter would have progressed in a manner similar to the hundreds of previous certification applications reviewed by the Commission, NAT would have obtained its certificate of authority months ago. However, in the utmost deference to the Commission and its certification rules (and as Sprint and CenturyLink are aware) NAT has agreed not to "bill" Sprint or CenturyLink for any intrastate access fees until this certification matter is decided by the Commission.

Sprint can discover whether NAT has been operating without an intrastate certificate of authority by simply asking "Has NAT been operating without an intrastate certificate of authority?" Instead, Sprint unreasonably demands that NAT produce "services, goods, or products provided to Free Conferencing Corporation," "taxes, assessments, and surcharges . . . including USF surcharges, TRS, and 911 assessments,"

and the origin of NAT's "end user fee income." (*See* Sprint's Interrogatories Nos. 2, 9, and 15). Sprint's demands are well-beyond the scope of information that NAT must provide under the Commission's rules. Sprint also fails to provide the Commission with a coherent explanation of how this information is supported by "good cause," "relevant to the subject matter involved" or "reasonably calculated to lead to the discovery of admissible evidence" in this very straight-forward certification matter. ARSD 20:10:01:22.01; SDCL 15-6-26(b)(1).

Fourth, Sprint submits that it is entitled to discover if NAT is a "sham entity." (Sprint's motion to compel, page 7). Sprint then demands that NAT produce "all documents that reflect NAT's Board of Directors' minutes, meetings, and resolutions, and bylaws," "all cash transactions and payments from NAT to Wide Voice," "all cash transactions and payments from NAT to Native American Telecom Enterprise," "the name[s]of Tribal Utility Authority members," "who maintains NAT's financial records," "where NAT's financial records are kept," "the employees and officers of Free Conferencing who provide services to NAT," and "when NAT first approach[ed] Free Conferencing to enter into a contract with NAT." (*See* Sprint's Interrogatories Nos. 22, 27, 30, 31, 36, and 38; Document Request No. 5). Once again, Sprint's demands are well-beyond the scope of information that NAT must provide under the

Commission's rules in this certification proceeding. Sprint also fails to provide the Commission with a coherent explanation of how this information is supported by "good cause," "relevant to the subject matter involved" or "reasonably calculated to lead to the discovery of admissible evidence" in this very straight-forward certification matter. ARSD 20:10:01:22.01; SDCL 15-6-26(b)(1).

Fifth, Sprint submits that it is entitled to discovery to find out "whether NAT has the financial capabilities to provide local exchange service." (Sprint's motion to compel, pages 11-17). Sprint then demands detailed financial information regarding the value of NAT's "equipment," "marketing expenses," "telephone and circuit expenses," "professional fees," "end user fee income," "access termination fee income," "CABS collection fee income," "bank accounts," other "potential economic resources," "general ledger entries and other accounting records," "bank statements," company "loans," and "business plans and cost studies for access services and high volume access services." (*See* Sprint's Interrogatories Nos. 11, 12, 13, 14, 15, 16, 17, 28, and 33; Document Requests Nos. 1, 2, 3, 7, 8, and 9).

Once again, Sprint's demands are well-beyond the scope of information that NAT must provide under the Commission's rules in a certification proceeding. NAT has provided all financial information that

is required under the Commission's rules. *See* ARSD 20:10:24:02(9) and ARSD 20:10:32:03(12) (requiring NAT to produce "financial statements . . . including a balance sheet, income statement, and cash flow statement [for the most recent 12 month period]"). Sprint also fails to provide the Commission with a coherent explanation of how this information is supported by "good cause," "relevant to the subject matter involved" or "reasonably calculated to lead to the discovery of admissible evidence" in this very straight-forward certification matter. ARSD 20:10:01:22.01; SDCL 15-6-26(b)(1).

Sixth, Sprint submits that it is entitled to discovery to "test the validity and completeness of statements made in NAT's application and testimony." (Sprint's motion to compel, pages 17-23). Sprint then demands detailed information regarding "switches," "inbound calling service equipment," "equipment location," "equipment manufacturers," "employees and work locations," "employee numbers," "organizational charts," and "call path diagrams." (*See* Sprint's Interrogatories Nos. 5, 6, 7, 18, 23, 24, 29, 41, 42, 43, and 44).

Once again, Sprint's demands are well-beyond the scope of information that NAT must provide under the Commission's rules in a certification proceeding. Sprint also fails to provide the Commission with a coherent explanation of how this information is supported by "good

cause," "relevant to the subject matter involved" or "reasonably calculated to lead to the discovery of admissible evidence" in this very straight-forward certification matter. ARSD 20:10:01:22.01; SDCL 15-6-26(b)(1).

Seventh, Sprint submits that it is entitled to "expert discovery" and demands detailed information regarding Mr. Roesel. (*See* Sprint's motion to compel, pages 23-25; Sprint's Interrogatories Nos. 19, 20, 21; Document Request No. 4). Once again, Sprint's demand is well-beyond the scope of information that NAT must provide under the Commission's rules in a certification proceeding. Sprint also fails to provide the Commission with a coherent explanation of how this information is supported by "good cause," "relevant to the subject matter involved" or "reasonably calculated to lead to the discovery of admissible evidence" in this very straight-forward certification matter. ARSD 20:10:01:22.01; SDCL 15-6-26(b)(1).

iii.) Sprint's Recent Conduct And Financial Status

It is unfortunate that Sprint's filings include derisive references to the Crow Creek Sioux Tribe's recent financial problems, NAT's financial ability to provide its proposed services, and the unsubstantiated assertion that NAT is somehow a "bad actor." (*See* Sprint's motion to compel, pages 1-26 and Exhibit B). If the Commission considers these

(irrelevant) materials in reviewing this discovery dispute and NAT's Revised Application, then the Commission must, as a matter of fairness and comparative relevancy, also consider Sprint's recent abhorrent conduct and current financial status.

For instance, despite the FCC's Final Rule, Sprint continues to assert that "access stimulation" is improper. And based on this patently incorrect assertion, Sprint still refuses to pay several South Dakota LECs for "switched access services." However, a recent decision by the Honorable Robert E. Payne in *Central Telephone Co. of Virginia, et al. v. Sprint Communications Co. of Virginia, et al.*, (Civil No. 3:09cv720 - Eastern District of Virginia) brings to light Sprint's recent conduct and "misleading" justifications in refusing to pay small rural telephone companies for switched access services.[16]

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[16] Judge Payne's decision in *Central Telephone Company of Virginia* was filed on March 2, 2011. A copy of Judge Payne's decision is attached as "Exhibit 1" to the "Declaration of Scott R. Swier in Opposition to CenturyLink's and Sprint's Motions to Compel Discovery."

Sprint was represented in *Central Telephone Company of Virginia* by Briggs and Morgan PA, the same Minnesota law firm that represents Sprint in this proceeding before the Commission. A copy of the "Civil Docket Report" in *Central Telephone Co. of Virginia*, showing Briggs and Morgan PA's representation, is attached as "Exhibit 2" to the "Declaration of Scott R. Swier in Opposition to CenturyLink's and Sprint's Motions to Compel Discovery."

In *Central Telephone Co. of Virginia*, a bench trial was held to address whether Sprint breached nineteen contracts it had with local telephone companies ("Plaintiffs"). (Memorandum Opinion, page 1) (hereinafter "M.O. page __"). Sprint and each of the Plaintiffs entered into Interconnection Agreements ("ICAs") pursuant to the Federal Telecommunications Act. (M.O. pages 1-2). The ICAs required Sprint to pay certain charges for so-called Voice-over Internet Protocol ("VoIP") telephone calls. (M.O. page 2.) These charges were due under a contract provision that was contained in each ICA. (M.O. page 2).

From the time the ICAs were executed (in 2004 and 2005) until June 2009, Sprint paid these charges to Plaintiffs. (M.O. page 2). Then Sprint, like many companies at that time, *was in considerable need of cutting costs*. (M.O. pages 2-3). In June 2009, as part of its "cost cutting" endeavors, Sprint (for the first time), disputed Plaintiff's charges for VoIP traffic, contending (also for the first time) that the ICAs did not authorize the VoIP traffic charges which Sprint had paid for years.

The federal district court ruled in Plaintiffs' favor, opining that "[q]uite frankly, Sprint's justifications for refusing to pay access on VoIP-originated traffic, and its underlying interpretation of the ICAs, *defy credulity*." (M.O. page 3) (emphasis added). "The record is unmistakable: Sprint entered into contracts with the Plaintiffs wherein it agreed to pay

access charges on VoIP-originated traffic. Sprint's defense is founded on post hoc rationalizations developed by its *in-house counsel and billing division as part of Sprints' cost-cutting efforts*, and the witnesses who testified in support of the defense were *not at all credible*." (M.O. page 3) (emphasis added). "The Court finds that in refusing to pay the access charges as billed, Sprint breached its duties under the ICAs, which clearly included paying access charges for VoIP-originated traffic. . . . " (M.O. page 3).

In providing an unusually harsh chastisement of Sprint's "cost-cutting scheme," the federal district court found that Sprint conducted the following "post-hoc rationalizations" in an effort to escape its payment obligations:

- "Sprint . . . paid the Plaintiffs for termination of VoIP-originated traffic in accordance with the compensation framework laid out in [the ICAs]. In fact, Sprint did this without protest for the better part of five years. It was not until 2009, years after the execution of the ICAs, that Sprint first began disputing the Plaintiffs' access charges for VoIP-originated traffic." (M.O. page 11).

- "According to the head of Sprint's billing division, the effect on Sprint of the global economic downturn that temporarily aligned with Sprint's 2009 decision to dispute the Plaintiffs' access charges played no role in the company's abrupt change in posture of June 2009. *The evidence, however, reveals that adverse economic conditions did drive Sprint to dispute the access charges that, for years, it had paid without protest.*" (M.O. page 13) (emphasis added).

- "In the summer of 2009, Sprint, like many companies at the time, embarked on *company-wide cost-cutting efforts.* Notably, during this time period, Sprint launched a *coordinated effort* to contest access charges on VoIP-originated traffic with other carriers across the telecommunications industry. *Sprint also sought to cut costs in a wide range of other areas beyond VoIP compensation.*" (M.O. page 13 and fn. 1) (emphasis added).

- "[A] substantial part of Sprint's argument for refusing to pay the Plaintiff's access charges is that Sprint drafted the ICAs to permit it flexibility on VoIP compensation. However, the fact that Sprint has disputed access charges with other carriers, whether or not it had executed ICAs with them, warrants the inference that, in reality, *Sprint's decision to dispute access charges emanated, not from any understanding the company may have had of the ICAs' text, but from the company's decision to reduce costs.*" (M.O. page 14) (emphasis added).

- "Why Sprint would want to reduce costs – even apart from the general malaise that beset the economy in and around 2009 – is apparent from internal email correspondence. That correspondence reveals that Sprint's wholesale ventures with cable companies were floundering – 'tanking' in the words of one Sprint employee." (M.O. page 15).

- "Further evidencing Sprint's motivation in contesting the Plaintiffs' access charges is the fact that Sprint challenged the Plaintiffs' bills in stages, progressively lowering the rate at which it was willing to compensate the Plaintiffs." (M.O. page 15).

- "[A]s the record leaves no doubt, the motivating force in selecting [a lower access rate] was not that Sprint honestly perceived the [lower access rate] more appropriate than the rates at which it had been billed by the Plaintiffs. *What mattered most for Sprint, to the exclusion of all other considerations, was that the [lower access rate] permitted the greatest savings for the company.*" (M.O. page 16) (emphasis added).

- "The fact that Sprint *so cavalierly has shifted its position* on the rates . . . further illustrates that its disputes were based on *efforts to cut costs*, rather than on a legitimately held belief that [the ICAs] did not require Sprint to pay at the levels which, for years, it had paid without protest." (M.O. page 16) (emphasis added).

- "For years before mid-2009, Sprint paid the Plaintiffs' VoIP-originated traffic charges under the ICAs. Thereafter Sprint found the same duties distasteful. The company sought to cut costs, and it *expected to save at least $80 million by contesting carriers' access charges* on VoIP-originated traffic. *So essential to its cost-cutting initiatives were such savings that Sprint designated a group to monitor the realized savings and keep the company on track to meet its savings target.*" (M.O. page 17) (emphasis added).

- "It was not until the economy took a drastic downturn, and Sprint's cable ventures faltered, that Sprint chose to dispute the Plaintiffs' tariff-based access charges. The fact that Sprint willingly paid the Plaintiffs' access charges . . . and only contested them when *faced with financial hardship*, is convincing evidence that, when Sprint executed the ICAs it understood them to incorporate the tariffs." (M.O. page 26) (emphasis added).

- The Court found numerous witnesses offered by Sprint to be "*not credible,*" "*unresponsive and evasive,*" "*misleading,*" "*untrustworthy,*" "*defl]ying] credibility,*" "*misleading to the Court,*" and using "*definition[s] that escapes basic understanding.*" (M.O. pages 41-45) (emphasis added).

- "If there is a common thread to Sprint's arguments, it is *obfuscation*. . . . [Sprint's] explanations represent nothing more than *smoke and mirrors*, proffered to conceal the straightforward nature of this contract dispute." (M.O. page 48) (emphasis added).

- "The record reveals . . . a company [Sprint] that, years after signing the ICAs and performing them as written, *has attempted to graft onto them an interpretation that helps its cost-cutting initiatives.*" (M.O. page 48) (emphasis added).

As a result of the Court's decision, Sprint was ordered to pay Plaintiffs millions of dollars in access fees, late charges, pre-judgment interest, post-judgment interest, and reasonable attorney's fees. (M.O. page 49-50).

Judge Payne's decision reinforces the fundamental tenet of NAT's position in this certification matter - that Sprint's "gamesmanship" is not intended to protect some "vital public interest." Rather, Sprint's conduct is a "business decision" intended to stymie competition, protect its bottom line, and "cut costs" at the expense of small, local South Dakota companies that are providing a vital service to Sprint's customers. As such, based on Sprint's conduct in the *Central Telephone Co. of Virginia* case alone, Sprint's allegations that NAT is somehow a "bad actor" is hypocritical at best, intentionally deceitful at worst.[17]

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[17] CenturyLink's filings also imply that NAT is a "bad actor." The irony of these claims is also remarkable considering the recent criminal convictions of Qwest's former CEO Joe Nacchio. In 2007, Nacchio was convicted on nineteen (19) counts of insider trading after a federal jury found that he illegally sold $52 million of Qwest stock based on insider information about Qwest's deteriorating finances. Nacchio reported to a federal prison camp in Pennsylvania in April 2009. His projected release date is May 2014. A copy of several *Denver Post* articles regarding Nacchio's fraudulent "exploits" are attached as "Exhibit 3" to the "Declaration of Scott R. Swier in Opposition to CenturyLink's and Sprint's Motions to Compel Discovery."

Finally, Sprint disparages NAT's current financial status and questions whether its finances will allow NAT to "provide [telecommunications] services" in the immediate future. (Sprint's motion to compel, pages 11-17). As a matter of fairness, however, the Commission should be aware of Sprint's "tenuous" financial status and its ability to provide services in the future. Based on recent financial analyses and reports, it is entirely disingenuous for Sprint to be concerned with NAT's financial status.

In fact, just a few days ago, *DowJones NewsPlus* reported that:

- "Sprint's shares fell premarket after the research firm Sanford C. Bernstein called a bankruptcy filing 'a very legitimate risk' in downgrading the wireless carrier to underperform."
- "Sprint's shares fell 4.5% to $2.76 premarket."
- There is a significant question whether "there is any analytical framework that provides strong conviction as to whether Sprint can or cannot avoid bankruptcy over the next four years or so."
- "[T]he risk of [Sprint's] bankruptcy is rising."
- "[Sprint's] five-year credit default swaps already price in a roughly 50/50 probability of bankruptcy."
- Sprint's chances of going bankrupt "is a very legitimate risk."
- "Sprint shares are down 43% from a year earlier."
- "Sprint has said its deal with Apple to offer the computer maker's immensely popular iPhone will cost it at least $15.5 billion over four years. That limits its ability to turn a profit in that time. . . ."

- "Sprint's debt maturities through 2013 are covered and in 2014 are modest. 'But thereafter the company faces a sustained multiyear barrage of large maturities that will need to be addressed.'"[18]

Unlike Sprint, NAT does not provide this information to "make light" of Sprint's current financial predicament, but rather to provide comparative information. Surely, the continued solvency of any entity is of the utmost importance. However, for Sprint to question NAT's financial ability to provide its proposed telecommunications services, after NAT has provided all required financial documents for the Commission's review, is simply untenable.

CONCLUSION

There is no basis to delay NAT's entry into the proposed service area. NAT has met all of the legal requirements for receiving a Certificate of Authority from the Commission. NAT has submitted its Revised Application with all required supporting information. NAT's Revised Application has been "deemed complete" by the Commission's Staff. CenturyLink's and Sprint's absurd efforts clearly violate the

[18] A copy of this March 19, 2012, *DowJones* report regarding Sprint's "precarious" financial status is attached as "Exhibit 4" to the "Declaration of Scott R. Swier in Opposition to CenturyLink's and Sprint's Motions to Compel Discovery." Of course, Sprint has "refused to comment" on this *DowJones* report and its current financial problems.

Commission's rules. Competition is no less in the public interest in the area that NAT proposes to serve than in the rest of South Dakota.

Therefore, the Commission should (1) deny CenturyLink's and Sprint's respective motions to compel discovery; (2) proceed with its own independent analysis of NAT's Revised Application; (3) apply the same legal standards and procedural framework that the Commission has applied to every other competitive entry application since 1997; and (4) issue a decision granting NAT's Revised Application.

Dated this 13th day of April, 2012.

SWIER LAW FIRM, PROF. LLC

/s/ Scott R. Swier

Scott R. Swier
202 N. Main Street
P.O. Box 256
Avon, South Dakota 57315
Telephone: (605) 286-3218
Facsimile: (605) 286-3219
scott@swierlaw.com
www.SwierLaw.com
Attorneys for NAT

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of *NATIVE AMERICAN TELECOM, LLC'S MEMORANDUM IN OPPOSITION TO CENTURYLINK'S AND SPRINT'S MOTIONS TO COMPEL DISCOVERY* was delivered *via electronic mail* on this 13th day of April, 2012, to the following parties:

Service List (SDPUC TC 11-087)

/s/ Scott R. Swier
Scott R. Swier

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

DECLARATION OF SCOTT R. SWIER
IN OPPOSITION TO CENTURYLINK'S AND SPRINT'S
MOTIONS TO COMPEL DISCOVERY

My name is Scott R. Swier and I am an attorney licensed to practice law in South Dakota. I represent Native American Telecom, LLC ("NAT") in this matter. I provide this Declaration in opposition to CenturyLink's and Sprint's Motions to Compel Discovery.

I declare that the attached are true and correct copies of the following documents:

1. Exhibit 1 to my Declaration is the Honorable Robert E. Payne's (Senior United States District Judge – Eastern District of Virginia) "Memorandum Opinion" in *Central Telephone Co. of Virginia, et al. v. Sprint Communications Co. of Virginia, Inc., et al.* Civ. 09-720, Eastern District of Virginia (Richmond Division) (filed March 2, 2011).

2. Exhibit 2 to my Declaration is the "Civil Docket Report" in *Central Telephone Co. of Virginia, et al. v. Sprint Communications*

Co. of Virginia, Inc., et al. Civ. 09-720, Eastern District of Virginia (Richmond Division), showing that Sprint Communications Company LP ("Sprint") was represented in this Virginia District Court case by Mark Ayotte, Matthew Slaven, Max Heerman, and Philip Schenkenberg of Briggs and Morgan PA, 80 South Eighth Street, Minneapolis, Minnesota 55402. Briggs and Morgan PA is the same law firm that represents Sprint in the matter currently before the Commission.

3. Exhibit 3 to my Declaration is a copy of several *Denver Post* articles regarding the criminal conduct of former Qwest CEO Joe Nacchio.

4. Exhibit 4 to my Declaration is a March 19, 2012, news report from *DowJones NewsPlus* regarding Sprint's current financial status.

I DECLARE UNDER PENALTY OF PERJURY that the foregoing statements are true and correct.

Dated this 13th day of April, 2012.

SWIER LAW FIRM, PROF. LLC

/s/ Scott R. Swier

Scott R. Swier
202 N. Main Street
P.O. Box 256
Avon, South Dakota 57315
Telephone: (605) 286-3218
Facsimile: (605) 286-3219
scott@swierlaw.com
Attorneys for NAT

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of *DECLARATION OF SCOTT R. SWIER IN OPPOSITION TO CENTURYLINK'S AND SPRINT'S MOTIONS TO COMPEL DISCOVERY* was delivered *via electronic mail* on this 13th day of April, 2012, to the following parties:

Service List (SDPUC TC 11-087)

/s/ Scott R. Swier
Scott R. Swier

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

CENTRAL TELEPHONE CO.
OF VIRGINIA, et al.,

Plaintiffs,

v. Civil No. 3:09cv720

SPRINT COMMUNICATIONS CO.
OF VIRGINIA, INC., et al.,

Defendants.

MEMORANDUM OPINION

This matter is before the Court after a bench trial addressed to whether Sprint Communications Company LP ("Sprint") breached nineteen contracts it has with the Plaintiff telephone companies.[1] The Plaintiffs are Central Telephone Company of Virginia; United Telephone Southeast, LLC; Embarq Florida, Inc.; United Telephone Company of Indiana, Inc.; United Telephone Company of Kansas; United Telephone Company of Eastern Kansas; United Telephone Company of Southcentral Kansas; Embarq Missouri, Inc.; Embarq Minnesota, Inc.; United Telephone Company of the West; Central Telephone Company; United Telephone Company of New Jersey, Inc.; Carolina Telephone and Telegraph Company,

[1] Sprint Communications Company of Virginia, Inc. is also a named defendant in this action. However, given that this company is a smaller offshoot of Sprint Communications Company LP, and the fact that Sprint Communications Company LP received near exclusive attention at trial, the Defendants will be referred to collectively as simply "Sprint."

LLC; United Telephone of Ohio; United Telephone Company of the Northwest; United Telephone Company of Pennsylvania, LLC; United Telephone Company of the Carolinas LLC; United Telephone Company of Texas, Inc.; and Central Telephone Company of Texas (collectively "CenturyLink" or "the Plaintiffs"). Sprint and each of the Plaintiffs entered into Interconnection Agreements ("ICAs") from 2004 to 2005 pursuant to the Telecommunications Act of 1996 ("the Act"). The ICAs required Sprint to pay certain charges for so-called Voice-over Internet Protocol ("VoIP") telephone calls. Those charges were due under a contract provision that was in each ICA:

> Voice calls that are transmitted, in whole or in part, via the public Internet or a private IP network (VoIP) shall be compensated in the same manner as voice traffic (e.g., reciprocal compensation, interstate access and interstate access).[2]

Pl. Ex. 25 § 38.4. From the time the ICAs were executed until June 2009, Sprint paid those charges in response to monthly bills sent by the Plaintiffs. Then, in the summer of 2009, Sprint, like many companies at the time, was in considerable need of cutting costs. As part of that endeavor, Sprint, in June 2009, for the first time, disputed the Plaintiffs' charges for VoIP traffic, contending, also for the first time, that the

[2] Pl. Ex. 25 is the Virginia ICA which the parties agree is identical to the other eighteen ICAs at issue.

ICAs did not authorize the VoIP traffic charges which, for years, it had paid pursuant to the above-quoted provision.

Quite frankly, Sprint's justifications for refusing to pay access on VoIP-originated traffic, and its underlying interpretation of the ICAs, defy credulity. The record is unmistakable: Sprint entered into contracts with the Plaintiffs wherein it agreed to pay access charges on VoIP-originated traffic. Sprint's defense is founded on post hoc rationalizations developed by its in-house counsel and billing division as part of Sprint's cost-cutting efforts, and the witnesses who testified in support of the defense were not at all credible.

For the reasons set forth below, the Court finds that in refusing to pay the access charges as billed, Sprint breached its duties under the ICAs, which clearly included paying access charges for VoIP-originated traffic according to the jurisdictional endpoints of calls. Hence, judgment will be entered for the Plaintiffs.

BACKGROUND FACTS

1. Origins of the Dispute

The parties' contract dispute traces in large portion to their rather peculiar relationship. When the ICAs at issue in this action were executed, the Plaintiffs and Sprint were

effectively the same company, with the former falling under the common ownership and control of the latter. Joint Stipulation of Uncontroverted Facts ("Joint Stipulation") ¶ 6; see also Trial Transcript ("Trial Tr.") 18:17-20:3 (Cheek). The Plaintiffs were part of Sprint's so-called "local telephone division." Trial Tr. 16:16-17:20 (Cheek). Sprint also had long distance, wireless, and corporate services divisions, with the last of these providing common corporate services to Sprint's various divisions. Id. at 17:15-20, 19:14-17 (Cheek), 320:1-4 (Sichter).

The multi-divisional structure of Sprint generated a number of internal complexities. Chief among them was managing the disparate, and oftentimes conflicting, business and regulatory objectives of Sprint's separate divisions. Id. at 19:14-20 (Cheek). To solve this difficulty, Sprint developed a guiding framework for its business operations called the "One Sprint Policy," the aim of which was to advance the overall interests of Sprint and its shareholders. Id. at 20:7-8. In practice, the Policy had Sprint's divisions take consistent public positions on telecommunications matters. Inevitably, the policy to opt for company-wide uniformity worked to the detriment of one division over another in certain industry matters. Nonetheless, the One Sprint Policy was thought to benefit the parent corporation on the whole by avoiding inter-divisional

strife that might cripple the company or damage its public image, thereby permitting Sprint's divisions to complement one another to the maximum extent possible. Id. at 19:14-20:12.

In 1996, after the development of the One Sprint Policy, but before the ICAs were executed, Congress enacted the Telecommunications Act. Among its myriad features, the Act requires that, upon request, all incumbent local exchange carriers ("ILECs"), such as the Plaintiffs, must interconnect their networks with those of competing local exchange carriers ("CLECs"), such as Sprint. See 47 U.S.C. § 251(c)(2). Interconnection allows a customer of one carrier to call a customer of another carrier. When this happens, the carrier whose customer initiated the call must compensate the receiving carrier for transporting and terminating the call through its network. The Act also requires ILECs and CLECs to negotiate ICAs to establish the terms by which they will compensate one another for use of the other's network. Id. § 251(b), (c)(1). All ICAs must be approved by a state regulatory commission before they become effective. Id. § 252(e).

In April 2004, Sprint requested negotiation of new ICAs with the Plaintiffs in accordance with the Act. Sprint's request led to the execution, between 2004 and 2005, of the ICAs at issue here. These ICAs supplanted the older ICAs to which Sprint and the Plaintiffs formerly were parties. Trial Tr.

32:2-23 (Cheek). Sprint was prompted to seek renegotiation of its ICAs in 2004 because, around that time, Sprint executed wholesale agreements with various cable companies obligating Sprint to provide for termination of cable customers' VoIP-originated traffic. Id. at 32:2-23; see also Pl. Ex. 14 (email speaking to urgency of renegotiating ICAs). Sprint's status as a "telecommunications carrier" under the Act was a boon to the cable companies because the latter could rely on Sprint's standing as both a long distance carrier and CLEC to obtain local interconnection under the Act. Without Sprint, the cable companies likely would not have been able to terminate their customers' traffic efficiently. See Trial Tr. 34:25-35:15 (Cheek). Notably, in partnering with Sprint, the cable companies did not seek means by which to terminate their customers' local calls only; rather, the cable companies sought means by which to terminate their customers' local and long distance calls. Not surprisingly, and as will be explored further, the ICAs reflect the cable companies' objectives of providing for termination of both local and long distance traffic. Id. at 35:21-36:4.

2. Contract Language at Issue

The parties agreed that the Master Interconnection Agreement for the State of Virginia, executed December 1, 2004 ("Virginia ICA"), Pl. Ex. 25, is a representative example of all

ICAs in dispute. Joint Stipulation ¶ 34. The Virginia ICA is identical in all material respects to the other ICAs. Hereafter, the contract will be referred to as the ICA.

A. Section 38.4 of the ICA (VoIP Compensation Provision)

Section 38.4 of the ICA speaks directly to payment of access charges for termination of VoIP-originated traffic. Section 38.4 is part of Section 38 which is entitled "INTERCARRIER COMPENSATION." Section 38.4 reads: "Voice calls that are transmitted, in whole or in part, via the public Internet or a private IP network (VoIP) shall be compensated in the same manner as voice traffic (e.g., reciprocal compensation, interstate access and intrastate access)." Pl. Ex. 25 § 38.4.

The language of Section 38.4 is clear on its face. It provides in no uncertain terms that calls originating in VoIP format "shall be compensated in the same manner as voice traffic." The testimony of Mr. Hunsucker, a former Sprint employee once responsible for Sprint regulatory policy, confirms that, at time of the ICAs' execution, the parties understood the language to mean exactly what it says: access charges apply to VoIP-originated traffic in the same manner as any other voice call. Trial Tr. 228:14-16, 21 (Hunsucker). Indeed, this reflected Sprint's official position on VoIP traffic at the time the ICAs were executed. Under the One Sprint Policy then in place, VoIP-originated calls, like voice traffic, were subject

to the appropriate intercarrier compensation rates. Id. at 227:12-228:3; see also Pl. Ex. 16. Jim Burt, Sprint's current Directory of Policy, articulated this position shortly before the ICAs were signed when he submitted sworn, prepared testimony to the Florida Public Service Commission in a regulatory proceeding. Respecting a VoIP compensation provision identical to the one in issue here, Mr. Burt testified,

> [i]t is Sprint's position that a VoIP call that originates or terminates on Sprint's network should be subject to the jurisdictionally appropriate inter-carrier compensation rates. In other words, if the end points of the call define the call as an interstate call, interstate access charges apply. If the end points define the call as intrastate, intrastate access charges apply. If the end points of the call define the call as local traffic, reciprocal compensation charges apply.

Pl. Ex. 16 at 7:13-18. That, of course, is what Section 38.4 explicitly provides.

Though the One Sprint Policy cut against the interest of Sprint's long distance division, which, as a result of this policy, had to pay more for intercarrier connection than it otherwise would have, it protected the access revenue of carriers in Sprint's local telephone division. See Trial Tr. 225:7-19 (Hunsucker). Sprint considered that its local carriers' access revenues were more important to the overall profitability of the company than the added expense the company

incurred on the long distance end. In line with this calculus, Sprint treated VoIP-originated traffic no differently than voice calls, and it memorialized this in Section 38.4 of the ICA.

B. Section 38.4's Compensation Framework

The requirement of Section 38.4 (that VoIP-originated traffic shall be compensated in the same manner as voice traffic) is supported by other provisions in Section 38. For instance, Section 38.1 provides:

> The Parties agree to "Bill and Keep" for mutual reciprocal compensation for the termination of Local Traffic on the network of one Party which originates on the network of another Party. Under Bill and Keep, each Party retains the revenues it receives from end user customers, and neither Party pays the other Party for terminating Local Traffic which is subject to the Bill and Keep compensation mechanism. . . .

Pl. Ex. 25 § 38.1. This section establishes the method of compensation for local voice calls. Under it the parties would not exchange access payments, but would interconnect the other party's local traffic without charge on the condition that the other party would do the same when roles were reversed. See Trial Tr. 228:17-18, 243: 2-4 (Hunsucker).

The mechanism of compensation for interconnection of long distance traffic is provided for in Section 38.2 of the Virginia ICA:

> Compensation for the termination of toll traffic and the origination of 800 traffic between the interconnecting parties shall be based on the applicable access charges in accordance with FCC and Commission Rules and Regulations and consistent with the provisions of Part F of this Agreement [relating to "Interconnection"].

Pl. Ex. § 38.2.

The compensation provisions in Section 38 do not set forth the specific rate at which compensation for termination of long distance traffic is due. Trial Tr. 228:22-229:1 (Hunsucker). Instead, the ICA incorporates by reference the applicable tariffs which, in turn, provide the applicable rates. That makes sense because the tariffs are voluminous and, because the tariffs are controlled by regulatory entities, they change from time to time. For those reasons, it is common practice in the industry to incorporate applicable tariffs by reference.

Long distance calls can take at least two forms: intrastate long distance calls and interstate long distance calls. Id. at 227:12-228:3, 228:16-18, 236:16-24, 279:10-12. The former category is subject to intrastate tariff rates, and the latter category is subject to interstate tariff rates. Id. at 280:22-25.

Section 38.4's directive is readily discernible when coupled with Sections 38.1 and 38.2. Section 38.4's mandate that VoIP traffic "shall be compensated in the same manner as

voice traffic (e.g., reciprocal compensation, interstate access and intrastate access)" simply applies the same compensation mechanisms outlined in Sections 38.1 and 38.2 for voice traffic—that is, reciprocal, "bill and keep" compensation for local traffic and either intrastate or interstate compensation based on the applicable tariff rates for long distance traffic—to traffic originating in VoIP format.

C. The Parties' Understanding of Section 38.4

Like the Plaintiffs, Sprint understood this to be Section 38.4's effect when the ICAs were executed. Sprint, after all, paid the Plaintiffs for termination of VoIP-originated traffic in accordance with the compensation framework laid out in Section 38.4. In fact, Sprint did this without protest for the better part of five years. It was not until 2009, years after the execution of the ICAs, that Sprint first began disputing the Plaintiffs' access charges for VoIP-originated traffic. Id. at 83:23-84:20 (Cheek), 242:23-243:14, 244:11-15 (Hunsucker), 379:14-380:8 (Glover), 614:9-615:5 (Roach), 729:10-20 (Morris); see also Joint Stipulation ¶ 37.

Sprint even paid access under the terms of the ICAs after its corporate relationship with the Plaintiffs changed in 2006. Trial Tr. 729:16-20 (Morris). During and approaching 2006, Sprint perceived that the local telephone business was in a state of decline. Having recently acquired Nextel Corporation,

Sprint decided that it was in the company's best interest to jettison its local telephone division, which housed the Plaintiffs, and to spin that division off into a separate company, Embarq Corporation. Id. at 85:10-23 (Cheek); see also Joint Stipulation ¶ 7. The spin off occurred in May 2006. Joint Stipulation ¶ 8. In July 2009, CenturyTel, Inc., a Louisiana corporation, acquired Embarg and its subsidiaries, thereafter operating under the moniker "CenturyLink." Id. ¶ 9. The Plaintiffs presently fall under CenturyLink's corporate umbrella.

At trial, Sprint attempted to explain its willing payment of the Plaintiffs' access charges for VoIP-originated traffic in the years both before and after the Plaintiffs exited the company via the 2006 spinoff. Before the spinoff, but after the execution of the ICAs in 2004 and 2005, Sprint attributed its payment of the Plaintiffs' access bills to the parties' status as corporate affiliates. According to Sprint, it was not company practice to dispute bills from affiliated entities. As Mr. Morris, Sprint's senior counsel, characterized the situation, Sprint's payment of access to the Plaintiffs was like "taking money out of [Sprint's] left pocket and putting it in [Sprint's] right pocket. It all went to Momma, 'Big Sprint.'" Trial Tr. 728:9-15 (Morris). As to why Sprint continued to pay access in accordance with the Plaintiffs' bills after the

Plaintiffs were spun off into Embarq in 2006, and thus no longer part of Sprint, the Sprint witnesses based its three year acquiescence largely on Sprint's dependence on the Plaintiffs' billing systems and certain "transitional services," as well as significant financial commitments still pending among the parties. Id. at 729:16-731:10. In other words, Sprint considered its best interests to be served by paying the charges that it now says it did not owe.

According to the head of Sprint's billing division, the effect on Sprint of the global economic downturn that temporally aligned with Sprint's 2009 decision to dispute the Plaintiffs' access charges played no role in the company's abrupt change in posture in June 2009. Id. at 587:8-13 (Roach). The evidence, however, reveals that adverse economic conditions did drive Sprint to dispute the access charges that, for years, it had paid without protest. In the summer of 2009, Sprint, like many companies at the time, embarked on company-wide cost-cutting efforts. Notably, during this time period, Sprint launched a coordinated effort to contest access charges on VoIP-originated traffic with other carriers across the telecommunications industry. See id. 618:19-24; Pl. Exs. 61-62, 67.[3] In addition to disputing VoIP charges under Section 38.4 for the first time

[3] Sprint also sought to cut costs in a wide range of other areas beyond VoIP compensation. Trial Tr. 648:19-24 (Roach); see also Pl. Ex. 61.

in the history of the ICAs with CenturyLink, Sprint sent notices to AT&T, Verizon, Qwest, ComPartners, and One Communications, among others. Trial Tr. 618:19-24 (Roach); Pl. Exs. 61-62, 67.

The broad stroke of Sprint's refusal to pay access charges undermines its argument that it continued to pay access to the Plaintiffs after the spinoff on account of continuing dependencies and obligations peculiar to the Plaintiffs. For, if this contention is to be believed, the Court would also have to accept that Sprint's willing payment of access with these other telephone companies up until 2009 was the result of similar enduring dependencies and obligations. That scenario is neither probable, nor is it supported by the record which showed no dependencies on any of those other carriers. Also instructive is that Sprint's disputes with these other companies did not all implicate ICAs. Trial Tr. 627:16-21 (Roach). As will be discussed in detail later, a substantial part of Sprint's argument for refusing to pay the Plaintiffs' access charges is that Sprint drafted the ICAs to permit it flexibility on VoIP compensation. However, the fact that Sprint has disputed access charges with other carriers, whether or not it had executed ICAs with them, warrants the inference that, in reality, Sprint's decision to dispute access charges emanated, not from any understanding the company may have had of the ICAs' text, but from the company's decision to reduce costs.

Why Sprint would want to reduce costs—even apart from the general malaise that beset the economy in and around 2009—is apparent from internal email correspondence. That correspondence reveals that Sprint's wholesale ventures with cable companies were floundering—"tanking" in the words of one Sprint employee. Pl. Ex. 67 (email from Lisa A. Jarvis to Diane M. Heidenreich, Sept. 11, 2009). Sprint determined that disputing access charges on VoIP-originated traffic would be a step in the direction of making its relations with cable companies profitable. Id.

Further evidencing Sprint's motivation in contesting the Plaintiffs' access charges is the fact that Sprint challenged the Plaintiffs' bills in stages, progressively lowering the rate at which it was willing to compensate the Plaintiffs. In June 2009, early on in Sprint's efforts to dispute VoIP access charges, Sprint conveyed to the Plaintiffs that "the most that [it] can be charged for VoIP traffic is interstate access," because, in Sprint's estimation, the FCC had determined that VoIP traffic is interstate in nature. Pl. Ex. 54. In this way, Sprint attempted to re-rate the traffic that the Plaintiffs had billed at intrastate rates to comparably lower interstate rates. Trial Tr. 636:1-10 (Roach). Shortly thereafter, however, Sprint reached the conclusion that even re-rating traffic billed at intrastate rates to interstate rates did not produce the cost

savings that it sought to realize. In consequence, Sprint decided that it would only pay the Plaintiffs $.0007 per minute for termination of VoIP-originated traffic, a rate even lower than the Plaintiffs' interstate rates. Id. at 639:11-640:19; 642:7-17; see also Def. Ex. 133-34.

Sprint says that it settled on that rate because the FCC had established the $.0007 per-minute rate for another type of VoIP traffic. Trial Tr. 642:7-17 (Roach). But, as the record leaves no doubt, the motivating force in selecting that rate was not that Sprint honestly perceived the $.0007 rate more appropriate than the rates at which it had been billed by the Plaintiffs. What mattered for Sprint, to the exclusion of all other considerations, was that the $.0007 rate permitted the greatest savings for the company. Sprint therefore had no qualms overlooking the inconvenient detail that the $.0007 rate it chose did not apply to the type of VoIP traffic for which Sprint had received the Plaintiffs' termination services.

The fact that Sprint so cavalierly has shifted its position on the rates it is now willing to pay for VoIP-originated traffic further illustrates that its disputes were based on efforts to cut costs, rather than on a legitimately held belief that Section 38.4 did not require Sprint to pay at the levels which, for years, it had paid without protest.

Sprint did more than protest the Plaintiffs' current bills; it also demanded that the $.0007 rate be applied retroactively for the preceding twenty-four months. Id. at 643:18-25. In line with this stance, Sprint sought return of the portion of access charges that it had paid the Plaintiffs during that period in excess of the $.0007 rate. Id. at 644:23-25. But, rather than following the ICAs' "DISPUTE RESOLUTION" provisions, which specify procedures for resolving "bona fide disputes" between the parties, see Pl. Ex. 25 § 23, Sprint unilaterally took credits against its other bills with the Plaintiffs. Id. at 645:1-648:6.

On the whole, Sprint's conduct from mid-2009 onward reveals a company less concerned with meeting its contractual obligations than meeting its bottom line. For years before mid-2009, Sprint paid the Plaintiffs' VoIP-originated traffic charges under the ICAs. Thereafter Sprint found the same duties distasteful. The company sought to cut costs, and it expected to save at least $80 million by contesting carriers' access charges on VoIP-originated traffic. So essential to its cost-cutting initiatives were such savings that Sprint designated a group to monitor the realized savings and keep the company on track to meet its savings target. Id. at 649:5-651:21.

D. Summary

The factual background of this action could occupy many more pages. However, rather than presenting the facts entirely as a preface to the legal principles raised by this dispute, the more sensible approach is to address additional facts as they become relevant to the legal discussion of the post-hoc rationalizations which Sprint has offered in an effort to escape its contractual obligations. The next section will thus make findings of fact as appropriate in deciding the proper application of the controlling law.

LEGAL DISCUSSION

Under Virginia law,[4] a plaintiff must prove three elements by a preponderance of the evidence to prevail on a breach of contract claim: (1) a legally enforceable obligation existed between the defendant and plaintiff; (2) the defendant breached its obligation; and (3) the plaintiff incurred injury or damage stemming from the breach of the obligation. Sunrise Continuing Care, LLC v. Wright, 671 S.E.2d 132, 135 (Va. 2009) (citing Filak v. George, 594 S.E.2d 610, 614 (Va. 2004)). Because the Plaintiffs have satisfied their burden as to all three elements,

[4] The parties agree that Virginia law and federal Fourth Circuit common law are representative of other states' law and other circuits' law on contract interpretation. Thus, they have argued and briefed this case on the basis that Virginia law controls the outcome.

they are entitled to judgment on their breach of contract claims.

This opinion will not separately address the issue of damages. By stipulation of the parties, the Plaintiffs established compensatory damages in the amount of $18,249,647.47 ($2,031,524.01 for CLEC local and $16,218,123.46 for Feature Group D Trunks) through the date of July 12, 2010. Joint Stipulation ¶ 44, "Attachment 1 of Damages Stipulation"; see also Pl. Ex. 84. The Plaintiffs also stipulated, in accordance with Sections 7.2 and 7.4 of the ICA and the terms and conditions of the Plaintiffs' tariffs, late charges in the amount of $2,416,254.74 through the date of July 12, 2010. Trial Tr. 247:17-248:3, 251:9-252:4, 260:7-14, 261:3-17, 293:7-14 (Hunsucker), 402:19-24, 403:13-20, 403:24-404:5 (Glover); Pl. Ex. 84. The Plaintiffs are entitled to both amounts.[5]

Of the three breach-of-contract elements, this dispute most implicates the first—whether a legally enforceable obligation existed between the parties. The bulk of this opinion will address why this question must be answered in the affirmative.

1. The ICAs Establish a Legally Enforceable Obligation between Sprint and the Plaintiffs

Whether a legally enforceable agreement exists hinges on the "objectively manifested intentions of the parties." Moore

[5] The parties will be required to provide current numbers for use in the final judgment.

v. Beaufort County N.C., 936 F.2d 159, 162 (4th Cir. 1991) (citing Piver v. Pender County Bd. Of Educ., 835 F.2d 1076 (4th Cir. 1987)). Where an agreement has been memorialized in writing, as in this action, "[t]he clearest manifestation of [the parties'] intent is the contract's plain language." Silicon Images, Inc. v. Genesis Microchip, Inc., 271 F. Supp.2d 840, 850 (E.D. Va. 2003) (citing Providence Square Assoc., L.L.C. v. G.D.F., Inc., 211 F.3d 846, 850 (4th Cir. 2000)). Furthermore, where such written language is "clear and unambiguous, the proper interpretation is that which assigns the plain and ordinary meaning to the contract terms." Silicon Images, 271 F. Supp.2d at 850 (citing Providence Square, 211 F.3d at 850). In fact, courts may not look beyond the four corners of the written instrument when the contractual language is unambiguous on its face. Trex Co., Inc. v. ExxonMobil Oil Corp., 234 F. Supp.2d 572, 575 (E.D. Va. 2002) ("Virginia law specifically requires that, if the contract is plain and unambiguous in its terms, the court is not at liberty to search for its meaning beyond the instrument itself" (internal quotation marks omitted)); see also Ross v. Craw, 343 S.E.2d 312, 316 (Va. 1986) ("[The court] adhere[s] to the view that contracts must be construed as written"); Langley v. Johnson, 499 S.E.2d 15, 16 (Va. Ct. App. 1998).

A. Section 38.4 Unambiguously Provides that Access Charges Are Due for VoIP-Originated Traffic

Application of these legal principles evinces a legal duty on the part of Sprint to pay access charges on VoIP-originated calls. The ICA memorializes the parties' agreement on matters relating to interconnection generally. Section 38 of the ICA controls "Intercarrier Compensation." Section 38.4, specifically, memorializes the parties' agreement on termination of VoIP-originated traffic, the precise issue disputed in this action. That section, as already found, could not be any clearer. It directs that VoIP calls are to be compensated in the same manner as voice traffic. Pl. Ex. 25. That the compensation called for in Section 38.4 is obligatory, rather than optional or conditional on some later event, is clear from that section's unqualified use of "shall." Section 38.4's explanatory clause—"(e.g., reciprocal compensation, interstate access and intrastate access)"—only makes the section's mandate more apparent: Sprint's payment of access charges for VoIP traffic were to mirror its payment of access for voice traffic under Sections 38.1 and 38.2, which respectively establish reciprocal compensation for local calls and tariff-based compensation for non-local calls. It being the case that the parties memorialized their agreement on VoIP-related access charges in Section 38.4, and it also being the case that Section

1130

38.4 is unambiguous on its face, the contract language is dispositive of the Plaintiffs' breach of contract claim. The dispute turns on the parties' objective intent, as unambiguously expressed in Section 38.4.

Sprint argues correctly that the ICAs themselves do not contain the tariff rates at which Sprint has been billed. Instead, the ICAs incorporate tariff rates by reference.[6] Trial Tr. 539:25-546:18 (Roach). This is significant, according to Sprint, because the ICA did not incorporate the rates at which it was billed, meaning that Sprint never agreed to them when executing the ICAs with the Plaintiffs. Sprint's position can be distilled to the contention that the ICAs do not incorporate the Plaintiffs' tariffs, wherein the access rates, as actually billed, are located.

In furtherance of this proposition, Sprint contends, among other things, that the tariffs are defined in the ICAs as standalone documents. Pl. Ex. 25 § 1.63. Sprint also argues that the ICAs' integration clause, set forth in Section 29.1, bars incorporation of the Plaintiffs' tariffs in making

[6] The first-order question of whether, as a matter of law, ICAs can incorporate tariffs is not in dispute. The parties concur that it is permissible for ICAs to incorporate tariffs, a position confirmed by federal precedent. See U.S. West Commc'ns, Inc. v. Sprint Commc'ns Co., L.P., 275 F.3d 1241 (10th Cir. 2002) (holding that a CLEC's decision to purchase services under the ILEC's tariff did not constitute abandonment of an ICA, but rather amended the ICA to incorporate the tariff's terms).

references to external documents "subject only to the terms of any applicable tariff on file with the State Commission or the FCC." Id. § 29.1.

Notwithstanding Sprint's protestations, the ICAs' clearly incorporate the Plaintiffs' tariffs by reference. Sprint's arguments on the subject lack merit. The fact that "tariff" is separately defined in the ICAs is irrelevant to the ability of the ICAs to incorporate the Plaintiffs' tariffs. And Section 29.1 says nothing that bars incorporation of the Plaintiffs' tariffs. At most, that section prevents the ICAs from incorporating tariffs inconsistent with tariffs filed with state commissions and the FCC.

The law does not set a particularly high threshold for incorporation of extrinsic documents. In Hertz Corp. v. Zurich Amer. Ins. Co., 496 F. Supp.2d 668 (E.D. Va. 2007), the court explained that: "[i]t *is axiomatic* in the law of contracts that, *in order* to incorporate a secondary document into a primary document, the identity of the secondary document must be readily ascertainable." Hertz, 496 F. Supp.2d at 675 (citing Standard Bent Glass Corp. v. Glassrobots Oy, 333 F.3d 440, 447 (3d Cir. 2003)); see also Bd. Of Trs., Sheet Metal Workers' National Pension Fund v. DCI Signs & Awnings, Inc., No. 1:08cv15, 2008 WL 640252, at *3 (E.D. Va. Mar. 5, 2008) (citing Hertz for same proposition). Moreover, it must be clear that the parties to

the primary agreement had knowledge of, and assented to, the incorporated terms. Hertz, 496 F. Supp.2d at 675 (citing PaineWebber Inc. v. Bybyk, 81 F.3d 1193, 1201 (2d Cir. 1996)); see also Cary v. Holt's Exam'rs, 91 S.E. 188, 191 (Va. 1917). Notably, however, it is not necessary that the primary document provide explicitly that it "incorporates" the secondary document. Hertz, 496 F. Supp.2d at 675; Bd. Of Trs., Sheet Metal Workers' National Pension Fund, 2009 WL 640252 (stating that the exact language used is not important provided that the primary document plainly refers to another document).

From the text of the ICAs it is apparent that they incorporate the Plaintiff's tariffs, and the access rates provided therein. Section 38.4 provides that VoIP-originated traffic shall be compensated in the same manner as voice calls. Pl. Ex. 25 § 38.4. Section 38.2, in turn, establishes that compensation for long distance voice traffic "shall be based on applicable access charges." Id. § 38.2. The corollary is that, in calculating the compensation for VoIP-originated traffic, the parties would have to reference the Plaintiffs' tariffs, first, to locate the applicable access rate, and, second, to use that rate to calculate the access charges due. The ICAs' text can support no other reasonable interpretation. The ICAs, after all, do not contain a list of access rates upon which access charges can be calculated. If the ICAs' repeated references to

1133

"tariffs" and "access charges" are to have any meaning, the ICAs must incorporate the Plaintiffs' tariffs by reference.

Trial testimony confirmed this common-sense construction of the ICAs. For example, Mr. Hunsucker, who had intimate knowledge of the ICAs owing to his many years as a Sprint executive, explained that he and Sprint clearly understood that Section 38.4's reference to "interstate access and intrastate access" incorporated the Plaintiffs' tariffs. See Trial Tr. 228:12-229:8 (Hunsucker). Mr. Hunsucker noted that it was common among the Plaintiff telephone carriers to have their tariffs incorporated by reference. Id. at 229:14-24. He explained that incorporation made sense from a logistical standpoint, given that the tariffs typically run thousands of pages and contain rates that regularly vary. See id. at 231:5-15; see also id. at 375:4-12 (Glover). Additionally, he explained that parties have an incentive to incorporate tariffs by reference, rather than attaching them to, or printing them in, ICAs, because tariff rates generally have been decreasing over time, meaning that parties to be billed generally stand to pay less by agreeing to tariff rates as opposed to static rates contained in ICAs. See id. 231:11-15 (Hunsucker); see also id. at 375:12-17 (Glover).

And, while the ICAs' language, standing alone, is adequate to show that the ICAs incorporate the Plaintiffs' tariffs by

reference, Sprint's own conduct in the wake of executing the ICAs is highly probative on the issue of incorporation. Sprint paid the Plaintiffs' access charges, for years and without protest, even though those access charges had been calculated using incorporated tariff rates. Sprint was fully aware of the basis of the charges it was billed and which it paid, raising the issue of the whether the ICAs incorporated the tariffs only after years of paying those bills. Sprint continued to pay access charges pursuant to the Plaintiffs' tariffs even after the 2006 spinoff. It was not until the economy took a drastic downturn, and Sprint's cable ventures faltered, that Sprint chose to dispute the Plaintiffs' tariff-based access charges. The fact that Sprint willingly paid the Plaintiffs' access charges for so long, and only contested them when faced with financial hardship, is convincing evidence that, when Sprint executed the ICAs it understood them to incorporate the tariffs.

In sum, Section 38.4 is dispositive of this dispute in the Plaintiffs' favor. As stated, that section's language clearly provides that VoIP traffic shall be compensated in the same fashion as voice traffic, and it incorporates the Plaintiffs' tariffs to make calculation of such compensation possible. Technically, the Court's analysis need proceed no further, for once it is found that an agreement is in writing and its terms are unambiguous, the law directs that the inquiry is at an end.

The unambiguous written instrument controls. Nevertheless, there is utility in considering the rest of Sprint's arguments, notwithstanding their misplaced disposition.

B. The ICAs' Scope is Not Limited to Interconnection of Local Traffic

Perhaps the closest Sprint comes to tying any of its arguments to the language of the ICAs is in arguing that various provisions of the ICAs (excluding Section 38.4) evidence that the parties never intended the ICAs to apply to the non-local traffic for which the Plaintiffs seek access charges. Toward this point, Sprint proffers a variety of arguments rooted in the ICAs' text. Sprint, for example, notes that the ICAs do not define or refer to Sprint as a long distance carrier, or "IXC" in industry shorthand. Rather, as Sprint asserts, the ICAs refer to Sprint only as a "CLEC," a competitive local exchange carrier. Pl. Ex. 25 (Preamble). Sprint also draws attention to the fact that, when the abbreviation for interexchange carrier, "IXC," is used in the ICAs, it refers only to non-parties. Id. §§ 47.5.4, 54.1, 57.9. Here, Sprint's logic is that the ICAs do not contemplate Sprint terminating long distance traffic over the Plaintiffs' networks.

Further significant for Sprint is that the ICAs' make reference to "Local Interconnection" repeatedly. Sprint finds those references in the ICAs' Preamble, id. (defining "Local

Interconnection" as the parties' desire, under the ICAs, "to interconnect their local exchange networks for the purposes of transmission and termination of calls"), and in substantive provisions of the ICAs, such as Section 2.1, which speaks to the rights and obligations of the parties "with respect to the establishment of 'Local Interconnection,'" id. § 2.1.

In an attempt to bolster its contention that the parties never envisioned the ICAs reaching non-local traffic, Sprint suggests that Section 37 describes the intended scope of the ICAs as "Local Interconnection Trunk Arrangements." Id. § 37. According to Sprint, that terminology removes from the ICAs' ambit Feature Group D Trunks ("FGD Trunks"), or traffic delivered over FGD Trunks, since FGD Trunks connect long distance networks to local networks, and not local networks to other local networks. Citing the pricing tables referred to in Section 7.1, Sprint also makes the related argument that the pricing tables in the ICAs nowhere reference FGD Trunks by name. For Sprint, this means that the parties never intended Section 7.1's payment obligations to extend to long distance traffic delivered over FGD Trunks.

Sprint's narrow interpretation of the ICAs' scope suffers from numerous infirmities. First and foremost, only so much can be gained from Sprint referencing other provisions in the ICAs, but ignoring the one provision, Section 38.4, that speaks

directly to the issue in dispute—compensation for termination of VoIP-originated traffic. That Sprint relies on textual subtleties and nuances to support its position while failing to address the clear text of Section 38.4 in any meaningful way discloses the frailty of Sprint's position.

Second, the narrow meaning to which Sprint ascribes the ICAs' use of "Local Interconnection" is implausible in the extreme. As that term is used in the ICAs, it refers to all types of calls—both local and non-local—terminated over a local exchange network. Trial Tr. 223:24-224:7 (Hunsucker). A local exchange network, after all, is capable of receiving both local and non-local calls. Id. 235:25-236:6. Sprint, in essence, argues that the "Local" in "Local Interconnection" confines the origination of calls covered by the ICAs to local calling areas only. Were this true, though, the ICAs would have little practical significance for the parties. This is because Sprint does not even have local networks that serve VoIP customers in the calling areas covered by the Plaintiffs. Id. 523:25-524:4 (English). The VoIP-originated calls from Sprint that the Plaintiffs terminate over their local exchange networks all travel through switches in states and calling areas different from those of the Plaintiffs. Consequently, the VoIP traffic at issue in this action could not possibly travel directly from a Sprint local exchange network to one of the Plaintiffs' local

exchange networks. Sprint's interpretation of ICAs' scope thus does not comport with the actual alignment of the parties' grids insofar as VoIP traffic is concerned. Notice, too, based on the foregoing, that Sprint's reading would make all provisions speaking to VoIP in the ICAs, such as Section 38.4, invalid as beyond the ICAs' scope, since the termination of VoIP-originated traffic would never follow a direct local-exchange-to-local-exchange network path for the parties.

Third, other portions of the ICAs disclose the incredulity of Sprint's novel interpretation of the ICAs' scope. The ICAs, for example, define "access services" in their definitional section. See Pl. Ex. 25 § 1.3. If the ICAs were intended only to terminate local calls, there would be no need to define this phrase. Trial Tr. 236:16-24 (Hunsucker). Additionally, another section in the ICAs distinguishes between local traffic and non-local toll calls. See Pl. Ex. 25 § 37.1; Trial Tr. 237:7-19, 241:18-242:22 (Hunsucker). That same section also references "interexchange traffic" that, by common understanding in the industry, encompasses long distance traffic. Pl. Ex. 25 § 37.1.2; Trial Tr. 237:7-19. Section 38.4, as well, requires the payment of "interstate access" and "intrastate access" on calls in VoIP format. Those requirements would have no place in the ICAs were they limited in scope to local traffic. See Trial Tr. 77:16-21 (Cheek). These features of the ICAs leave no doubt that

the parties intended the ICAs to govern more than just local traffic.

Fourth and finally, Sprint's interpretation of Section 7.1 ignores other provisions in the ICAs addressing tariff-based payment for traffic delivered over FGD Trunks. Section 38.2, for example, provides that "[c]ompensation for the termination of toll traffic . . . between the interconnecting parties shall be based on the applicable access charges." Pl. Ex. 25 § 38.2 (emphasis added). Further, Section 38.3 provides that "[c]alls terminated to end users physically located outside of the local calling area . . . are not local calls for the purposes of intercarrier compensation and access charges shall apply." Id. § 38.3 (emphasis added). Lastly, Section 38.4, the VoIP Compensation Provision, requires that VoIP traffic shall be compensated "in the same manner as voice traffic (e.g., reciprocal compensation, interstate access and intrastate access)." Id. § 38.4 (emphasis added). Section 7.1 is not a basis to read FGD Trunks out of the scope of the ICAs.

In sum, Sprint's arguments do not withstand scrutiny. Not only do they conflict with other provisions of the ICAs, which clearly contemplate a scope beyond local traffic, but they also conflict with the operation of the parties' grids. A contract's scope is not determined by a handful of its terms taken in isolation; a contract's scope is determined by its overall

structure and content. The overall structure and content of the ICAs leads to the firm conclusion that the parties intended the ICAs' scope to extend to the interconnection of both local and non-local traffic.[7]

C. Section 38.4 Was Not Written to Be Intentionally Ambiguous

In an effort to justify its interpretation of Section 38.4, Sprint argues that, in its mind, Section 38.4 was deliberately drafted to be "ambiguous." Trial Tr. 817:21-818:2 (Luehring).

That argument conflates "ambiguous" with "broad." Whether a contract is ambiguous is a question of law for the court's determination. Wilson v. Holyfield, 313 S.E.2d 396, 398 (Va. 1984). Ambiguity has a particular meaning under Virginia law;

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[7] In addition to finding support in the ICAs' text for its contention that the parties understood the ICAs to apply only to local traffic, Sprint finds support for this contention in an agreement it reached with the Plaintiffs in 2003, prior to the execution of the ICAs in dispute. Sprint attempts to offer this so-called "Access Billing Agreement" as evidence that the parties never intended the subsequently executed ICAs to govern traffic delivered over FGD Trunks. See Def. Ex. 110.

Once again, Sprint's argument does not survive examination. First, the parties to this agreement were not limited to the Plaintiffs and Sprint. This agreement involved entities comprising Sprint's wireless division. Second, this agreement was not intended to serve as a comprehensive billing agreement. It merely set terms for the escalation of billing disputes. Trial Tr. 175:14-17 (Cheek), 566:12-20 (Roach). Third, this agreement did not apply exclusively to FGD Trunk accounts. Def. Ex. 110 (obligating Sprint to pay "all local service minute of use . . . bills"); see also Trial Tr. 180:4-6 (Cheek). This agreement is not even of marginal relevance to the parties understanding of the ICAs' scope.

the mere fact that parties disagree over a contract's terms does not equate to ambiguity. Id. ("Contracts are not rendered ambiguous merely because the parties disagree as to the meaning of the language employed by [the parties] in expressing their agreement."). In order for contract language to be ambiguous, it must be capable of two reasonable interpretations. Silicon Images, 271 F. Supp.2d at 850 (citing Metric Constructors, Inc. v. NASA, 169 F.3d 747, 751 (Fed. Cir. 1999); Aetna Cas. & Sur. Co. v. Fireguard Corp., 455 S.E.2d 229, 232 (Va. 1995)). In assessing whether an interpretation is reasonable, a court is to consider the context and intent of the contracting parties. Silicon Images, 271 F. Supp.2d at 851 (citing Metric Constructors, 169 F.3d at 752; Hunt Constr. Group v. United States, 281 F.3d 1369, 1372 (Fed. Cir. 2002)).

As a matter of law, Section 38.4 is not ambiguous. It is immaterial that Sprint now objects to the plain meaning of that provision. And, it is immaterial that Sprint believes Section 38.4 lends itself to multiple interpretations. See Trial Tr. 817:19-20 (Luehring). The issue is whether Section 38.4's language is capable of two reasonable interpretations. And, simply put, it is not. At the risk of being redundant, that section's message is patently clear: VoIP calls must be compensated in the same manner as voice traffic, meaning reciprocal compensation or compensation based on interstate or

intrastate access rates. No other reasonable interpretation has been presented.

Also instructive is that none of Sprint's in-house lawyers ever told the business people involved in the preparation of the ICA template for Section 38.4 that the provision was ambiguous. Id. at 785:13-18 (Morris), 867:1-871:2 (Luehring), 985:18-878:7 (Cowin). To the extent that these lawyers—Messrs. Morris and Cowin and Ms. Luehring—now claim that Section 38.4 was drafted to be ambiguous, the Court rejects their testimony as not believable.[8]

But even assuming for argument's sake that Section 38.4 was ambiguous, the result would still not augur a Sprint victory. Sprint seems to be of the opinion that, to the extent Section 38.4 is subject to multiple interpretations, the company is free to choose the one that most suits its fancy. Lost on Sprint is the fundamental tenet of contract law that ambiguity is construed against the drafter. Williston on Contracts § 32:12 (4th ed.) ("Since the language is presumptively within the control of the party drafting the agreement, it is a generally accepted principle that any ambiguity in that language will be interpreted against the drafter."); see also Martin & Martin, Inc. v. Bradley Enters., Inc., 504 S.E.2d 849 (Va. 1998);

[8] In so doing, the Court followed the guide of the standard credibility jury instruction. 1A O'Malley, Grenig & Lee, Federal Jury Practice and Instructions, § 15.01 (5th ed. 2000).

1143

Mahoney v. NationsBank of Virginia, N.A., 455 S.E.2d 5, 9 (Va. 1995). The record shows that Sprint drafted the standard template language that became Section 38.4 of the ICA. Trial Tr. 808:25-809:5 (Luehring). Moreover, the in-house counsel who advised the parties regarding the ICAs were, and remain today, Sprint employees. See id. at 690:25-691:1 (Morris), 805:16-17 (Luehring), 960:3-4 (Cowin). For sure, the parties' status at the time the ICAs were executed as entities of the same parent corporation complicates the application of the ambiguity rule. After all, the Plaintiffs might be considered "drafters" of the ICAs as well, since they fell under Sprint's umbrella when the parties entered into the ICAs. However, the dominant influence that Sprint employees outside the company's local telephone division wielded respecting the ICAs' terms, for all practical purposes, made Sprint the singular drafter of Section 38.4. Thus, the Plaintiffs' construction of Section 38.4 would prevail even in the event that provision were ambiguous (which it is not).

D. Section 38.4 Was Not Written to Be Intentionally Broad

Perhaps, Sprint meant to argue that Section 38.4 was intended to be "broad," not "ambiguous." One of Sprint's witnesses used the two words interchangeably in describing Section 38.4. See id. 816:22-817:1 (Luehring). Obviously, broad and ambiguous have two different meanings in everyday

1144

usage; and this distinction is only amplified in the legal setting, where, as explained, the term "ambiguous" has a particular meaning borne out by caselaw. It follows that, if Section 38.4 was intended to be broad, a separate legal issue is presented.

Sprint offers several reasons as to why the parties understood Section 38.4 to stop short of requiring payment of access charges on VoIP-originated traffic. Perhaps most conspicuous of these reasons was Sprint's insistence that VoIP's tenuous status under the Telecommunications Act of 1996 at the time of the ICAs' execution bore substantially on the parties' understanding of Section 38.4. See id. at 344:13-19 (Sichter), 909:23-910:19 (Burt); Pl. Ex. 8 at 7. Sprint even went so far as to claim that, had Section 38.4 definitively required access charges for VoIP traffic, that section—and, by extension, the ICAs—would have violated federal law. See Trial Tr. 818:7-819:22 (Luehring).

The latter contention carries no weight at all. Sprint itself admits that the FCC has yet to rule on the propriety of access charges for the type of VoIP traffic at issue in this action. Id. at 818:11-14. It goes without saying that a party cannot violate federal law in an area when no federal law exists. Absent an FCC ruling on the VoIP traffic in dispute, Sprint and the Plaintiffs were free to craft an agreement

dealing with such traffic as they saw fit. See id. at 150:2-10 (Cheek).

And, Sprint's other contention, that the precarious nature of VoIP traffic under the Act somehow determined the meaning of Section 38.4 for the parties, is also unpersuasive. First, and most fundamentally, the uncertain status of the FCC's classification of VoIP traffic does not foreclose parties from agreeing, such as they did in the ICAs, to a method of payment for the termination of VoIP-originated traffic. The only scenario in which federal regulations would bear on a contract dispute such as this one were if FCC rules expressly prohibited payment of access charges on the VoIP traffic at issue, which, by Sprint's own admission, is not the case here.

Second, Section 38.4's language does not support Sprint's assertion that the provision was intended to be broad. One need look no further than Sprint's own arguments to appreciate this point. Recognizing that Section 38.4 contains no terms that, either on their face or inferentially, support the notion that Sprint had the option of paying access charges on VoIP traffic, Sprint directs the Court to divine such an option from other provisions of the ICAs. Sprint, for example, cites a paragraph in the ICAs' Preamble which reads:

> WHEREAS, the Parties intend the rates, terms and conditions of this Agreement, and their performance of obligations thereunder, to

> comply with the Communications Act of 1934, . . . the Rules and Regulations of the Federal Communications Commission . . . , and the orders, rules, and regulations of the Commission.

Pl. Ex. 25 (Preamble). Sprint further cites Section 4.2, stating, "The Parties acknowledge that the respective rights and obligations of each Party as set forth in this Agreement are based on the texts of the Act and the orders, rules, and regulations promulgated thereunder by the FCC and the Commission . . . ." Id. § 4.2. Finally, Sprint offers Section 38.2, which relates to access charges generally: "Compensation for the termination of toll traffic and its origination of 800 traffic between the interconnecting parties shall be based on the applicable access charges in accordance with FCC and Commission Rules and Regulations . . . ." Id. § 38.2. As to Section 38.2, Sprint argues that it was meant to work in conjunction with Section 38.4 such that Section 38.4 only imposed an obligation to pay access charges as was required by law for VoIP traffic. And, it appears that Sprint also intends to say that the quoted portions of the ICAs' Preamble and Section 4.2 worked to similar effect, creating an obligation only insofar as the law required.

Those arguments do little to advance Sprint's position, however. Recall that, absent ambiguity, the ICAs' language is the Court's first and only inquiry. And nothing in the text of

Section 38.2—or, for that matter, the Preamble or Section 4.2—directs that Section 38.4 be modified in the manner advocated by Sprint. Sprint, in effect, asks the Court to read the word "shall," which conveys a clear command, out of Section 38.4 on account of language in other provisions of the ICAs, two of which do not even pertain to access charges. The Court declines that invitation, for it would be a bizarre path to modify the provision most on point with general language in peripheral, if not irrelevant, provisions. It also merits noting that, even if the above sections worked in conjunction with Section 38.4, they would not modify it in the way contemplated by Sprint. At most, the Preamble and Section 4.2's references to federal rules and regulations state the obvious, that the ICAs, and the parties' resulting obligations, are to comply in every respect with federal law. The same is true of Section 38.2. The most plausible interpretation of that section's reference to "FCC and Commission Rules and Regulations" is that, whatever access charges were to be billed, they were to comport with federal law on the subject. These references to federal rules and regulations on which Sprint relies, in other words, do not operate to relieve Sprint from all duties not imposed by federal law.

To appreciaqte the frailty of Sprint's argument one need only take it to its illogical conclusion. Sprint's contention,

in short, is that the ICAs' repeated statements that the agreements were to operate within the boundaries of federal law meant that Sprint's obligations under the ICAs' extended only to the requirements of federal law. This outcome should be resisted for the singular reason that it obviates the parties' need for the ICAs. What purpose would the ICAs, and Section 38.4, in particular, serve in the realm of VoIP traffic if Sprint's argument were to prevail? The answer is none. The Court refuses to embrace an interpretation of a contract that would render irrelevant its material terms.

Viewed as part of the whole, the language in the ICAs referencing federal law, in which Sprint vests so much significance, constitutes nothing more than boilerplate language with little, if any, substantive import. It is axiomatic that contracts are void to the extent that they impose duties inconsistent with the law. See, e.g., Shuttleworth, Ruloff and Giordano, P.C. v. Nutter, 493 S.E.2d 364, 366 (Va. 1997); Cohen v. Mayflower Corp., 86 S.E.2d 860, 864 (Va. 1955); Wallihan v. Hughes, 82 S.E.2d 553, 558 (Va. 1954). This argument made by Sprint would transform the ICA's innocuous references to federal law into text that renders Section 38.4, and, indeed the ICAs as a whole, meaningless. The ICAs' requirements that the parties comply with federal law in one area or another certainly do not

eviscerate clearly stated obligations established in other provisions of the ICAs.

The topic of the asserted breadth of Section 38.4 cannot be left without remarking on the testimony of the witnesses on which that notion (and the related notion of deliberate ambiguity) depends.[9] Central to Sprint's contention that Section 38.4 was drafted broadly or ambiguously so as to permit Sprint flexibility in paying access charges for VoIP traffic was the testimony of Janette Luehring, a Sprint in-house attorney. At trial, she testified that she had authored Section 38.4, the ICAs' VoIP Compensation Provision, and that she intended it to be "written broadly" or "ambiguously." Trial Tr. 816:22-818:22 (Luehring). On cross-examination, however, it came out that less than two months earlier at her deposition Ms. Luehring could not even remember who had authored Section 38.4. Id. at 848:2-849:5. Supposedly, two emails with which she was later presented helped to refresh her memory on the subject such that, by trial, she could clearly remember not only writing Section 38.4, the key provision in this contract dispute, but also writing it to be deliberately broad or ambiguous so that Sprint

[9] The Court considers such testimony aware that parole evidence regarding the parties' intent is superfluous given the Court's determination that Section 38.4 is unambiguous on its face. The witnesses' testimony is nevertheless worth examining because it further illustrates the baseless nature of Sprint's assault on the plain meaning of Section 38.4.

1150

could avoid paying the charge governed by the section if it so desired. See id. at 848:14-22. That revision is not supported by the emails which Luehring says prompted her recollection. The emails, from Ms. Luehring to Jim Burt, dated September 19, 2003, merely state the language that became Section 38.4. See generally Pl. Exs. 5-6. They do not contain language suggesting that Ms. Luerhing, or anyone else in Sprint, intended Section 38.4 to be broad or ambiguous.

Further undermining her testimony, Ms. Luehring conceded that she had never conveyed to any of her corporate clients (neither Sprint nor the once-affiliate Plaintiffs) that Section 38.4 was broad or ambiguous, notwithstanding her own recognition that she might have had an obligation to do so under principles of ethics and/or federal securities law. Trial Tr. 865:15-869:23. Ms. Luehring's demeanor while testifying also undercut her veracity. When pressed by opposing counsel on the crucial issues in this action, she was unresponsive and evasive. Simply put, on the record as a whole, Ms. Luehring's testimony is not credible.

Sadly, the testimony of other Sprint witnesses is no more trustworthy. Jim Burt, who, it may be recalled, is Sprint's current Director of Policy, said that the written testimony submitted to the Florida Public Service Commission in 2004 (in which he stated that a VoIP provision identical to Section 38.4

required payment of access charges according to "the jurisdictionally appropriate inter-carrier compensation rates"), Pl. Ex. 16 at 7:13-18, had no bearing on Sprint's understanding of the ICAs presently in dispute, see Trial Tr. 941:19-942:14 (Burt). That claim defies credibility. Moreover, the testimony of James Sichter, Mr. Burt's former boss, recounted a significantly different story. Mr. Sichter made clear that, pursuant to the One Sprint Policy, Sprint took the singular position that access charges were due and payable on VoIP-originated traffic in the manner set out in Section 38.4. Mr. Burt would not have been allowed to advocate a contrary position before the Florida Public Service Commission. Id. at 324:15-326:15 (Sichter). Hence, to the extent that Mr. Burt characterized his testimony in Florida as an isolated occurrence, wholly dependent on the context of that individual proceeding, he misled the Court. Had Mr. Burt been forthright, he would have conceded that the position he articulated to the Florida Public Service Commission was consistent with Sprint's company-wide position on VoIP access charges. He also would have conceded that Sprint did not understand Section 38.4 to be ambiguous when it was written. Sprint knew then, as it does now, that Section 38.4 requires payment of access charges for VoIP-originated traffic according to the jurisdictional endpoints of calls.

1152

Joseph Cowin, a senior Sprint in-house attorney, was similarly misleading. When presented with Mr. Burt's 2004 testimony before the Florida Public Service Commission, attesting that Sprint believed access charges to be due and payable on VoIP-originated traffic in the same manner required by Section 38.4, Mr. Cowin denied the accuracy of Mr. Burt's statement. Dep. Tr. 19:11-16 (Cowin). When pressed to explain his answer, Mr. Cowin expressed that he did not understand Mr. Burt's use of the word "believe." Id. at 20:10-21:4. Apparently, for him, that word has some definition that escapes basic understanding. When further pressed, Mr. Cowin pled ignorance, stating that he really knew nothing about the particulars of the proceedings before the Florida regulatory commission. Id. at 21:21-22:2.

Third, and in a parting attempt to change the meaning of Section 38.4 to something other than what that provision says, Sprint argues that, in 2004 and 2005 when the ICAs were executed, it would not have given its competitors better terms on VoIP compensation than it gave the then-affiliate, and now Plaintiff, local telephone carriers. Toward this point, Sprint notes that it signed ICAs with non-affiliate competitors of Sprint explicitly recognizing that the applicability of access charges on VoIP-originated traffic was an unsettled issue. See Pl. Ex. 10 § 37.3 (agreement between Sprint and Level 3

Communications LLP) ("The Parties further agree that this Agreement shall not be construed against either party as a 'meeting of the minds' that VoIP traffic is or is not local traffic subject to reciprocal compensation in lieu of intrastate or interstate access."); Pl. Ex. 11 § 4.4 (similar agreement between Sprint and MCI). Sprint contends that it would not have done this had the ICAs entered into with the then-affiliate Plaintiffs not also worked to the same effect, stopping short of imposing a requirement to pay access charges for VoIP traffic. In this way, Sprint invites the Court to read into Section 38.4 the notion that Sprint had an option, rather than an obligation, to pay access charges on VoIP-originated traffic.

Sprint's third argument falls flat because the record does not establish that the ICAs noted above would have given Sprint's competitors more favorable contract terms. Sprint assumes that its non-affiliate competitors stood to benefit by terms that did not lock parties into paying access charges for VoIP traffic. This may have been the case. But, it is equally plausible, in the absence of evidence to the contrary, that Sprint's competitors stood to lose by such terms. Sprint's competitors, for example, might have been in a position to collect more access charges from Sprint than they paid Sprint in return for termination of their customers' traffic. Such a scenario would have made contractual language facilitating

disputation of access charges a hindrance rather than a boon for them. This same point can be made from the perspective of the Plaintiffs. Section 38.4's language, obligating payment of access charges, might have been advantageous to the Plaintiffs if they were positioned to collect more access charges than they were to pay out. Because these possibilities are unaccounted for in the evidence, the accuracy of Sprint's claim that contractual language leaving open the issue of VoIP access charge benefited its competitors is tenuous at best. And, with this proposition in question, Sprint's entire argument—that Section 38.4 should be read to mirror its other agreements with non-affiliate competitors, lest the Court conclude that Sprint gave better terms to non-affiliates—rests on an unstable foundation.

If these other ICAs prove anything, it is that Sprint certainly knew how to draft a VoIP provision that stopped short of obligating the parties to pay access charges on VoIP-originated traffic, and the company made a conscious decision not to include such language in the ICAs entered into with the Plaintiffs. The VoIP provision in the ICA that Sprint executed with Level 3 Communications Company LLC is illustrative.[10] See Pl. Ex. 10 § 37.3. This ICA was agreed to in March 2004, before

[10] Though illustrative, this ICA is not exhaustive of instances in which Sprint agreed to disagree on VoIP compensation. See, e.g., Pl. Ex. 11 § 4.4; see also Trial Tr. 863:9-11 (Luehring).

the effective dates of any of the ICAs involved in this action. Trial Tr. 863:10-13 (Luehring). Its VoIP provision, Section 37.3, departs markedly from Section 38.4. Section 37.3, for instance, begins, "Neither Party will knowingly send voice calls that are transmitted by a Party or for a Party at that Party's request . . . via the public Internet or a private IP network over local interconnection trunks for termination as local traffic until a mutually agreed Amendment is effective." Pl. Ex. 10 § 37.3. It also states, "The Parties further agree that this Agreement shall not be construed against either Party as a 'meeting of the minds' that VOIP traffic is or is not local traffic subject to reciprocal compensation in lieu of intrastate or interstate access." Id.

That Sprint agreed to an ICA containing such verbiage, before it negotiated the ICAs in this dispute, demonstrates convincingly that Sprint well knew how to draft language "agreeing not to agree" on VoIP compensation when the ICAs with the Plaintiffs were executed. Furthermore, that such verbiage is absent from the ICAs here at issue, Trial Tr. 864:1-6 (Luehring), is strong evidence that Sprint did not intend to leave the issue of VoIP compensation unresolved with the Plaintiffs. Thus, in sum, the antecedent ICAs that Sprint signed with its competitors, such as the one executed with Level 3, rather than counseling for reading language into Section

38.4, counsel for reading Section 38.4 just as it is written, to require compensation for the termination of VoIP-originated traffic.

E. Section 38.4 Means What It Says

If there is a common thread to Sprint's arguments, it is obfuscation. Sprint attempts to steer this action away from the basic contract principles on which it is properly to be decided and toward issues that, to put it charitably, are extraneous. Sprint's conduct cannot be explained by novel interpretations of the ICAs or subtleties pertaining to the parties' purportedly unique relationship, as Sprint would have this Court believe. These explanations represent nothing more than smoke and mirrors, proffered to conceal the straightforward nature of this contract dispute. The record does not reveal a company that carefully drafted the ICAs' VoIP Compensation Provision—Section 38.4—to permit Sprint flexibility to compensate the Plaintiffs as it saw fit. The record reveals, instead, a company that, years after signing the ICAs and performing them as written, has attempted to graft onto them an interpretation that helps its cost-cutting initiatives. The bottom line is that Section 38.4 means what it says: VoIP traffic shall be compensated in the same manner as voice traffic, meaning intrastate and interstate access charges where appropriate.

2. Sprint Breached Its Obligation To The Plaintiffs

There being no doubt that Section 38.4 of the ICA—and, by extension, the VoIP compensation provisions of the other ICAs—require payment of access charges for VoIP-originated traffic according to the jurisdictional endpoints of calls, the only question remaining is whether Sprint breached its contractual mandate.[11] Clearly it did. By refusing to pay the Plaintiffs' access charges as billed, Sprint violated the terms of the ICAs. By incorporating the Plaintiffs' tariffs, the ICAs plainly establish interconnection rates higher than the $.0007 per-minute rate Sprint now offers the Plaintiffs.

CONCLUSION

For the reasons set forth above, judgment will be entered for the Plaintiffs for compensatory damages and late charges in stipulated amounts or pursuant to decision based on briefs to be filed as required by the Order entered on February 18, 2011; prejudgment interest in an amount to be determined by the Court upon submission of briefs or agreement as to the appropriate rate and the actual calculation of the prejudgment amount; and for post-judgment interest at the federal judgment rate or other rate, if applicable, after submission of briefs or agreements as to the applicable post judgment rate; and for reasonable

[11] The issue of damages was resolved by stipulation of the parties. See introduction to "LEGAL DISCUSSION," supra.

attorneys' fees, if any be awardable, in an amount to be determined by the Court upon submission of briefs and evidence.

It is so ORDERED.

/s/ REP
Robert E. Payne
Senior United States District Judge

Richmond, Virginia
Date: March 1, 2011

U.S. District Court
Eastern District of Virginia - (Richmond)
CIVIL DOCKET FOR CASE #: 3:09-cv-00720-REP

Central Telephone Company of Virginia et al v. Sprint Communications Company of Virginia, Inc. et al
Assigned to: District Judge Robert E. Payne
Demand: $20,400,000
Cause: 47:0332 Telecommuncations Act of 1996

Date Filed: 11/16/2009
Jury Demand: Plaintiff
Nature of Suit: 190 Contract: Other
Jurisdiction: Federal Question

Plaintiff

Central Telephone Company of Virginia
a Virginia Corporation

represented by **Michael J. Lockerby**
Foley & Lardner LLP (DC)
3000 K St NW
Suite 600
Washington, DC 20007-5143
(202) 672-5300
Fax: (202) 672-5399
Email: mlockerby@foley.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Benjamin Rodes Dryden
Foley & Lardner LLP (DC-NA)
3000 K St NW
Suite 600
Washington, DC 20007-5109
NA
202-945-6128
Fax: 202-672-5399
Email: bdryden@foley.com
PRO HAC VICE
ATTORNEY TO BE NOTICED

Donna Ann Bucella
Foley & Lardner LLP (DC)
3000 K St NW
Suite 600
Washington, DC 20007-5143
202-672-5300
Fax: 202-672-5399
Email: dbucella@foley.com
TERMINATED: 08/02/2010
ATTORNEY TO BE NOTICED

Jennifer Matilda Keas
Foley & Lardner LLP (DC-NA)
3000 K St NW
Suite 600

Washington, DC 20007-5109
NA
PRO HAC VICE
ATTORNEY TO BE NOTICED

Plaintiff

United Telephone Southeast, LLC
a Virginia Limited Liability Company

represented by **Michael J. Lockerby**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Benjamin Rodes Dryden
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Jennifer Matilda Keas
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Plaintiff

Embarq Florida, Inc.
a Florida Corporation

represented by **Michael J. Lockerby**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Benjamin Rodes Dryden
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Jennifer Matilda Keas
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Plaintiff

United Telephone Company of Indiana, Inc.
an Indiana Corporation

represented by **Michael J. Lockerby**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Benjamin Rodes Dryden
(See above for address)
PRO HAC VICE
ATTORNEY TO BE NOTICED

Jennifer Matilda Keas
(See above for address)

Court approves Nacchio's request to drop appeal

By Andy Vuong The Denver Post The Denver Post
Posted:

DenverPost.com

A federal appeals court in Denver today approved a request by Joe Nacchio to withdraw his appeal of his sentence, ending the imprisoned former Qwest chief executive's more than five-year legal battle with the Justice Department.

Nacchio, serving five years and 10 months in prison for criminal insider trading, filed to withdraw the appeal Friday.

Nacchio was charged with 42 counts of insider trading in December 2005 connected to his sale of $100 million in Qwest stock in early 2001.

A jury convicted him on 19 counts in 2007, finding that he based some of the stock sales on material information about Qwest's deteriorating finances that was not available to the public.

The U.S. Supreme Court rejected Nacchio's request for a review of the case in 2009.

Nacchio reported to a federal prison camp in Schuylkill, Pa., in April 2009. His projected release date is May 2014.

Andy Vuong: 303-954-1209, avuong@denverpost.com or

1162

SEC settlement comes at "low cost" to Nacchio

By Andy Vuong The Denver Post The Denver Post
Posted:

DenverPost.com

In March 2005, regulators filed a sweeping lawsuit against former Qwest chief executive Joe Nacchio and several other former executives, accusing them of engaging in a "massive financial fraud" and seeking as much as $300 million in ill- gotten gains.

Last week, the Securities and Exchange Commission quietly agreed to settle the suit with the imprisoned Nacchio — without garnering any substantial penalty not already imposed through his 2007 criminal insider-trading conviction. The SEC had sought as much as $216 million in forfeitures from Nacchio.

"It's some indication of the merits of their case," said Kevin Evans, an attorney for co-defendant and former Qwest accountant James Koz lowski. "If they thought this was such a great settlement for them, I would have expected them to issue the same splashing press release that they issued when they filed this case."

Donald Hoerl, director of the SEC's regional office in Denver, declined to comment Tuesday.

Nacchio doesn't admit or deny guilt under the settlement, which requires court approval.

"It comes at a very low cost to Nacchio," said former SEC attorney Peter Henning, now a law professor at Wayne State University.

Nacchio agreed to forfeit $44.6 million — an amount he had already been ordered to pay as part of his criminal conviction.

The deal states that the forfeiture from the criminal case would satisfy the SEC requirement. Nacchio also agreed not to appeal the $19 million in fines stemming from the criminal case.

The settlement bars Nacchio from acting as an officer or director of any public company.

Nacchio's attorneys have filed plans to appeal his criminal sentence, which includes a prison term of five years and 10 months.

The $44.6 million is slated to go toward a fund to compensate harmed Qwest investors. The $19 million in fines will go toward a national victims' assistance fund, said Jeff Dorschner, a spokesman for the U.S. attorney in Colorado.

The SEC lawsuit, a culmination of a three-year investigation into Qwest, initially alleged that Nacchio and others helped the company book $3 billion in false revenue from 1999 to 2001.

It has since been narrowed to focus on whether the defendants misled investors by lumping one-time sales with recurring revenue in Qwest's regulatory filings and not disclosing that they had done so. Recurring revenue better reflects a company's financial condition.

Twelve former Qwest executives and accountants were sued. Including Nacchio, eight have settled. The SEC said the Nacchio deal "will not affect the status of the case concerning the remaining defendants."

The remaining defendants are former Qwest president Afshin Mohebbi, former chief financial officer Robert Woodruff, and former accountants Frank Noyes and Kozlowski.

Henning said Nacchio's deal doesn't necessarily mean others will settle.

"As you get further down the chain, the greater the possibility that people are going to fight," Henning said.

The SEC has said settlement discussions with Kozlowski and Mohebbi broke down in February. Evans, Kozlowski's attorney, said there haven't been any settlement talks since. He said there is "zero" chance his client would admit wrongdoing.

"They never should've brought this case against him to begin with," Evans said.

Andy Vuong: 303-954-1209, avuong@denverpost.com or

1164

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TOP STORIES

Bernstein Downgrades Sprint, Notes Bankruptcy Risk; Shares Fall

By Joan E. Solsman
Of DOW JONES NEWSWIRES

NEW YORK -- Sprint Nextel Corp. (S) shares fell premarket after the research firm Sanford C. Bernstein called a bankruptcy filing "a very legitimate risk" in downgrading the wireless carrier to underperfrom.

Sprint spokesman Scott Sloat said the company had no comment. Sprint shares fell 4.5% to $2.76 premarket.

In a research note, Bernstein analyst Craig Moffett said Sprint faces two distinct outcomes. First, company upgrades it network, stabilizes Clearwire Corp.'s (CLWR) financial position and delivers compelling 4G offerings; in the other, the company suffocates under its hefty contract with Apple Inc. (AAPL), has a "hobbled" 4G offering and faces a heavy debt burden.

"At this point we simply don't believe there is any analytical framework that provides strong conviction as to whether Sprint can or cannot avoid bankruptcy over the next four years or so," Moffett said.

The analyst added that notwithstanding a rally in Sprint stock recently--the stock has risen 24% so far this year--the firm believes the risk of bankruptcy is rising. He noted that the company's five-year credit default swaps already price in a roughly 50/50 probability of bankruptcy.

"To be clear, we are not predicting a Sprint bankruptcy," Moffett said in the note. "We are merely acknowledging that it is a very legitimate risk." Sprint shares are down 43% from a year earlier.

Sprint has said its deal with Apple to offer the computer maker's immensely popular iPhone will cost it at least $15.5 billion over four years. That limits its ability to turn a profit in that time, but the company is counting on the iPhone to draw in lucrative contract customers to help keep it on pace with larger competitors. Sprint is also offering the most generous data use for the phones than rivals.

The company buys its 4G WiMax network wholesale from Clearwire but has announced plans to build and manage a 4G network of its own over the next two years, at a cost of about $10 billion.

In the note, Bernstein analyst Moffett noted Sprint's debt maturities through 2013 are covered and in 2014 are modest. "But thereafter the company faces a sustained multiyear barrage of large maturities that will need to be addressed," he said.

Among other risks, he noted a next-generation LTE iPhone likely would be disadvantaged on Sprint's network, as well as the execution and financial challenges of upgrading its network.

---By Joan E. Solsman, Dow Jones Newswires; 212-416-2291; joan.solsman@dowjones.com

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