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THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

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IN THE MATTER OF THE APPLICATION OF
NATIVE AMERICAN TELECOM, LLC FOR A
CERTIFICATE OF AUTHORITY TO PROVIDE
INTEREXCHANGE TELECOMMUNICATIONS
SERVICES AND LOCAL EXCHANGE SERVICES
IN SOUTH DAKOTA

TC11-087

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Transcript of Proceedings
April 24, 2012

ORIGINAL

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BEFORE THE PUBLIC UTILITIES COMMISSION,
CHRIS NELSON, CHAIRMAN
KRISTIE FIEGEN, VICE CHAIRMAN
GARY HANSON, COMMISSIONER

COMMISSION STAFF

- Rolayne Ailts Wiest
- John Smith
- Karen Cremer
- Kara Semmler
- Ryan Soye
- Greg Rislov
- Chris Daugaard
- Ross Pedersen
- Jon Thurber
- Brittany Mehlhaff
- Cindy Kemnitz
- Patrick Steffensen
- Deb Gregg
- Demaris Axthelm

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MAY 09 2012

**SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION**

APPEARANCES

- Scott Swier, Native American Telecom
- Todd Lundy, CenturyLink
- Richard Coit, South Dakota Telecom Association
- Phil Schenkenberg, Sprint

Reported By Cheri McComsey Wittler, RPR, CRR

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TRANSCRIPT OF PROCEEDINGS, held in the
above-entitled matter, at the South Dakota State Capitol
Building, Room 413, 500 East Capitol Avenue, Pierre,
South Dakota, on the 24th day of April, 2012, commencing
at 10:20 a.m.

1 CHAIRMAN NELSON: In the matter of the
2 application of Native American Telecom, LLC for a
3 Certificate of Authority to provided interexchange
4 telecommunications services and local exchange services
5 in South Dakota.

6 We have a number of different issues that we're
7 going to deal with in this particular Docket. The first
8 one that we will deal with is NAT's Motion for Summary
9 Judgment. We're going to resolve that issue one way or
10 another, and then that will direct whether or not we have
11 additional items to discuss today.

12 And with that, Mr. Swier, welcome.

13 MR. SWIER: Scott Swier appearing on behalf of
14 Native American Telecom this morning.

15 What I would like to do in speaking about our
16 Motion for Summary Judgment is, as the Commission knows,
17 this file has gotten pretty thick in a hurry, and I'd
18 like to distill it down for you so we can focus on this
19 Summary Judgment Motion.

20 On October 11 of 2011 NAT filed its initial
21 application with the Commission. That application
22 included Exhibits A through C. Exhibit 3 contained
23 confidential financial information.

24 About a month later on November 30 of 2011 NAT
25 received a series of data requests from Commission Staff.

1 NAT provided timely and complete responses to your
2 Staff's data requests.

3 Then on January 27 of this year, of 2012, NAT
4 filed its revised application. The revised application
5 still comes down to the fact that NAT is seeking
6 authority to provide local exchange and interexchange
7 services within the Crow Creek Sioux Tribe Reservation,
8 which is within Midstate's study area.

9 Once that revised application was submitted, the
10 Commission Staff once again had the opportunity to submit
11 any data requests in order to clarify the application.
12 That was not done regarding the revised application. And
13 on January 31 of 2012 NAT's revised application was
14 deemed complete by the Commission Staff.

15 So we have an application. We have a revised
16 application. We have data requests from the Commission
17 Staff. Those data requests were answered timely and in
18 full, and back in January of this year NAT's application
19 was deemed complete by Staff.

20 NAT then filed this Motion for Summary Judgment
21 on March 26 of 2012. And, of course, this issue is now
22 ripe today for the Commission's decision.

23 Perhaps most telling regarding our Motion for
24 Summary Judgment is that Midstate, which is really the
25 party that has a potential impact here, Midstate and

1 the SDTA have both said they don't object whatsoever to
2 the Commission granting this Motion for Summary
3 Judgment.

4 So the one entity that has a true potential
5 impact here has come forward and said we think NAT has
6 done everything right, they have a complete application,
7 their Summary Judgment is appropriate. We believe it
8 should be granted. And I think that's telling that those
9 two entities have done that in this case.

10 From a legal standpoint, of course, the
11 Commission has to decide is there a genuine issue of
12 material fact that's present in this case? And that has
13 to be, and I think this is very important, is there a
14 genuine issue of material fact that relates to this
15 particular certification proceeding? That is the focus
16 that the Commission has to be aware of today.

17 Are there genuine issues of material fact
18 regarding the scope of this application?

19 Now as the Commission is aware, these
20 applications for local service and interexchange service
21 are kind of their own different animal, and the
22 Commission has set up very specific rules for how these
23 applications have to be reviewed.

24 It's very clear and specific on what an
25 Applicant has to do and how the Commission needs to

1 review the application. And let me give you just a brief
2 example. SDCL 49-31-3 is the enabling legislation which
3 allows this Commission to make Administrative Rules
4 regarding the certification application.

5 So 49-31-3 is the enabling legislation. That
6 then provided this Commission to make Administrative
7 Rules. And that's exactly what this Commission has
8 done.

9 Administrative Rule 20:10:32:03 is this
10 Commission's rules regarding local exchange services.
11 And under the Commission's rule an Applicant, in this
12 case NAT, shall -- the word "shall" is used, provide a
13 written application with specific information.

14 Your Administrative Rule then asks an Applicant
15 to provide information in 25 very specific areas. The
16 application can then be deemed complete by Commission
17 Staff and the Commission then under the rules has the
18 information it requires to make a decision on that
19 application.

20 NAT, as you know, has provided a complete
21 application here. We have responded to all the
22 Commission's data requests, and the application has
23 been deemed complete regarding those local exchange
24 rules.

25 So I think from a Summary Judgment standpoint,

1 that's very clear.

2 The other Administrative Rule that the
3 Commission has used is Administrative Rule 20:10:24:02.
4 And these are all set forth in our briefs in this case.
5 That Administrative Rule is in regard to interexchange
6 services. So we have a rule for local exchange which
7 we've been deemed complete. We now have a rule for
8 interexchange services.

9 That rule requires again pretty much the exact
10 same procedure. NAT has to file a written application
11 that contains specific information. And it asks for
12 specific information in 20 very clear areas. Once again,
13 NAT has provided all of the information required by that
14 rule. We have responded to all the Commission's data
15 requests and the application regarding interexchange
16 services has also been deemed complete by Commission
17 Staff.

18 Finally, the third Administrative Rule that
19 comes into play here is Administrative Rule 20:10:32:06.
20 And that simply sets forth the Commission's criteria in
21 addition to the first two rules we've talked about. That
22 is the review criteria the Commission has to follow in
23 determining whether an Applicant has sufficient
24 technical, financial, and managerial capabilities for
25 local exchange service. That's how it's written.

1 And in that rule there are 11 factors that the
2 Commission has to consider. Once again, NAT has provided
3 all the information that's required by the Commission's
4 rules. We've responded to all the data requests in a
5 timely and complete way and our application has been
6 deemed complete by the Commission.

7 So that particular statute and those three
8 particular Administrative Rules, they set the game plan
9 here. The Commission has decided that's the game plan
10 when reviewing these applications.

11 There is no basis to treat NAT any differently
12 from the other CLEC applications that this Commission's
13 reviewed since 1997. There's no reason to delay what
14 this Commission knows is a very limited and
15 straightforward proceeding. Again, since 1997, which is
16 how far the Docket website goes back, there have been
17 hundreds of these applications. Not one of these cases
18 has ever turned into the event we are seeing here. We've
19 never had an elaborate proceeding or an investigation.
20 It's not happened in hundreds -- literally hundreds of
21 applications this has never happened before.

22 Your particular rules are very straightforward.
23 They're very narrow. Here are the rules. Here are the
24 procedures. You need to follow the rules.

25 And in this case NAT is asking for something

1 very simple. We're asking the Commission to do what it's
2 done hundreds of times. Follow its own rules. Your
3 rules are designed to streamline entry into the
4 marketplace. That's the intention of your rules. That's
5 the intention of the Federal Communications Act, to
6 streamline entry and to streamline competition.

7 NAT is required to abide by the Commission's
8 rules. It's done that. It has a deemed complete
9 application. It's done everything the Commission and its
10 rules require.

11 With all due respect, the purpose of Sprint and
12 CenturyLink's battle, for lack of a better word in this
13 case, is to erect massive regulatory barriers that delays
14 competitive entry. That is exactly the opposite
15 intention of the Commission's rules. The Commission's
16 rules streamline and make entry very quick and very
17 straightforward. That's exactly the opposite of what's
18 happening here.

19 Also CenturyLink and Sprint's opposition is
20 based entirely on access stimulation. As Mr. Coit talked
21 about earlier, we're all familiar that the FCC has now
22 issued its final order regarding intercarrier
23 compensation and USF. I mean, that's done. We've been
24 waiting for it for over a decade. They made their
25 decision. It is on appeal but those are the rules of the

1 game right now. That's what the FCC decided.

2 They have issued specific rules regarding access
3 stimulation. So the fact that this intervention is based
4 exclusively on access stimulation is so far beyond the
5 scope of this streamlined certification proceeding that
6 it's almost absurd of what is trying to be done here. So
7 it's irrelevant, it's beyond the scope of this
8 proceeding, and yet it's really the only reason that
9 we've gotten to the point that we're at today.

10 The FCC in its order, of course, recognized the
11 legality of access stimulation and revenue sharing
12 agreements. The rules say that here are the bright line
13 rules if a CLEC's going to be involved in access
14 stimulation. And this is the exact quote: "A CLEC" like
15 NAT "has to file a tariff benchmarked to the rate of the
16 price cap LEC with the lowest interstate switched access
17 rate in the state. In South Dakota the lowest interstate
18 price cap rate is that of Qwest."

19 So if we have a revenue sharing agreement, which
20 NAT totally admits we do, as long as we follow that
21 guideline by the FCC, access stimulation is perfectly
22 legal. And, in fact, again as the Affidavit of the
23 Mr. Holoubek in support of Summary Judgment states, the
24 FCC's order of course became legal in December of 2011.
25 Months before that, NAT actually filed its interstate

1 switched access rate that replicated what the FCC says
2 you have to do.

3 So NAT was actually four or five months ahead
4 anticipating what the FCC may do which is like gambling
5 in Las Vegas but we hit it. They hit it. They filed a
6 tariff that completely replicates exactly what the FCC
7 says we have to do.

8 So for Sprint and CenturyLink to now say well,
9 we need this investigation because we need to make sure
10 if they're in access stimulation they need to do it
11 right. We've been doing it right months before the
12 Commission said here are the rules. So, again, this
13 access stimulation issue and why this very
14 straightforward certification proceeding now has to delve
15 into access stimulation where the undisputed record is
16 we're doing it right, again, it shows that it's totally
17 irrelevant to this particular proceeding.

18 The intervention is sought because Sprint and
19 CenturyLink and the IXCs lost the battle at the FCC.
20 They wanted a complete ban on revenue sharing and access
21 stimulation, and the fact is they lost. The FCC found
22 that as long as the guidelines are met, access
23 stimulation is legal.

24 Now ultimately through five years at this point
25 we're going to go to a bill-and-keep system. But as the

1 rules are right now, access stimulation is legal as long
2 as the guidelines are met.

3 So I think the Commission has to take that
4 access stimulation issue -- it's a red herring -- and put
5 it aside. If down the road the Interveners think that
6 NAT is not following the access stimulation rules, they
7 can do what they've done throughout the country. They
8 can file a Complaint with the FCC or with the state
9 regulatory commissions. They have that option. And, in
10 fact, the rules say that's what they have to do.

11 But to have the certification proceeding as the
12 vehicle to try to police access stimulation is well
13 beyond this Commission's rules. It's well beyond the
14 rules, and it's irrelevant, and it's policing a practice
15 that they lost. So that's the red herring that I'd like
16 the Commission to keep your eye on as CenturyLink and
17 Sprint come and talk about the vagaries of access
18 stimulation and why the Commission has to go and have
19 this elaborate investigation in a cert proceeding.

20 As a procedural matter, we have asked that
21 pretty much the entire Affidavits filed by Sprint and by
22 CenturyLink opposing this Summary Judgment have to be
23 stricken because they're inadmissible. What we have done
24 is, first of all, CenturyLink filed the testimony of
25 William Heaston. What we have done is we have actually

1 gone through that entire testimony and we have blacked
2 out every allegation that is totally admissible to oppose
3 Summary Judgment.

4 To oppose Summary Judgment you have to have
5 facts. And what the entire testimony of Mr. Heaston is
6 is it's a legal brief. It was like it was written by
7 their lawyers. It alleges no facts other than his
8 qualifications and his job description. Everything else
9 is CenturyLink's view on access stimulation. And it
10 provides analysis of other states who have addressed
11 access stimulation. Those legal analyses, speculation
12 and conclusions by rule are inadmissible in opposing
13 Summary Judgment.

14 So if you look at what we did with Mr. Heaston's
15 testimony you'll see that the only thing left is his job
16 description and his qualifications. The Commission has
17 to follow the Summary Judgment rules when ruling on this
18 Motion, and it's very clear that CenturyLink did not
19 provide any disputed facts. They've provided a legal
20 brief on the access stim issue.

21 Similarly Sprint in this case to combat the
22 Motion for Summary Judgment filed the Affidavit of
23 Randy Farrar. We have done the same thing with
24 Mr. Farrar's testimony. That, again, is 95 percent a
25 legal brief as to Sprint's view of the vagaries of access

1 stimulation.

2 All of that material that we propose be stricken
3 has to be because it does not comply with the rules to
4 combat Summary Judgment.

5 So when the Commission actually views the
6 evidence that you can consider, it's clear that the
7 remaining record leaves no genuine issues of material
8 fact. NAT has filed a complete application. The
9 application's been deemed complete by the Commission.
10 NAT has answered all of the Commission's data
11 requests.

12 In other words, NAT has complied with each and
13 every of the Commission's rules. It's complied with the
14 Summary Judgment standard. If Sprint and CenturyLink
15 don't think the Commission's rules are adequate or
16 detailed enough then they can do exactly what everybody
17 else does. You go through the Administrative Rules
18 process and get the rules changed.

19 But the rules set forth the game plan for CLEC
20 applications. Those rules have been specifically
21 followed. And if the Commission allows this
22 straightforward CLEC application to become a huge
23 investigation of access stimulation, which isn't even
24 relevant to this case, then it is opening the door to
25 have entry into South Dakota almost stopped.

1 Because you know these companies that want to
2 enter the market have limited assets for the most part.
3 And it would be very easy to prohibit entry by erecting
4 these huge entry barriers. And that's exactly what's
5 going on here.

6 So based on the record we would ask the
7 Commission to review the Summary Judgment Motion, to use
8 the rules and the proper standards and to grant NAT's
9 Motion for Summary Judgment in this very limited
10 certification proceeding.

11 Thank you.

12 CHAIRMAN NELSON: Thank you. Questions from the
13 Commission.

14 Seeing none, I've got just a couple, at least at
15 this point.

16 Your argument about streamlining entry into the
17 marketplace, I mean, I buy that and I certainly agree
18 with that and support that. But I also understand under
19 the Administrative Rules we have a job to do in reviewing
20 the application.

21 You talked about ARSD 20:10:32:06 and the fact
22 that your application was deemed complete. But also in
23 that rule it talks about and says if the application is
24 inaccurate, false, or misleading, the Commission shall
25 reject the application. And what I'm dealing with is

1 your opponents here have raised significant issues
2 questioning the accuracy, the truthfulness of the
3 application and items in the application.

4 And so we've got a job to try to resolve those
5 questions. So help me understand how you would advocate
6 that we not finish our job and as I believe this rule
7 requires to make sure that the things that are in the
8 application are, in fact, true and not misleading.

9 MR. SWIER: If I may, Mr. Commissioner. You're
10 exactly right. The Commission does have these rules
11 including the one that you referenced.

12 When you look, though, at how the rules come
13 together, the Commission is to take the information
14 that's required and, if the Commission -- the Commission
15 has further questions regarding technical, managerial, or
16 financial status, so to speak, the rules give the
17 Commission the ability to request any other information
18 that you want.

19 So if the Commission deems that more information
20 is necessary to determine the efficacy of NAT's
21 representations, absolutely, the Commission has the
22 ability to do that. And this goes to a little bit of the
23 discovery issue that we're going to talk about.

24 But your particular rules are very specific.
25 Only the Commission can request further information from

1 an Applicant. And those rules are very specific to this
2 particular proceeding. And you did that so that this
3 nonsense that's happening right now doesn't happen. If
4 the Commission believes that additional information is
5 necessarily, it can do that. It did it previously with
6 your data requests, which were answered completely and
7 timely.

8 If the Commission wants to pursue the efficacy
9 of what's in the application, we've said from the
10 beginning we think you have the ability to do that and we
11 would have no problem with that. But when you get into
12 the discovery that's being requested of NAT, and, again,
13 we're getting into the second issue now, that's where
14 this straightforward process takes a turn.

15 CHAIRMAN NELSON: Could we not pursue the
16 efficacy of what's in your application by denying the
17 Summary Judgment Motion and allowing this proceeding to
18 continue and flesh it out with information provided by
19 the other parties?

20 MR. SWIER: But I think when you look at how
21 the rules are written, the Commission's determination,
22 of course, is made according to what the Applicant has
23 sworn to under oath in its application. And the
24 Commission then is going to be treating this particular
25 Applicant different than it has ever treated anyone

1 before.

2 Now if the Commission wants to disregard its own
3 rules and do that, you know, you can do that. But the
4 information that's been provided is everything that needs
5 to be provided. And if the Commission wants to look at
6 other things, it can. But we simply feel when you look
7 at the admissions that have been made by CenturyLink and
8 Sprint in the statement of material facts, all the
9 information is there for the Commission to make a
10 decision. And by disregarding your own rules it's a
11 potential huge leap as to what future certification
12 proceedings are going to look like.

13 CHAIRMAN NELSON: Thank you. Other questions
14 from the Commission?

15 Thank you. Mr. Coit.

16 MR. COIT: Again, Richard Coit with the
17 South Dakota Telecom Association. I would just like to
18 provide the Commission and Staff with a little bit of
19 background.

20 First, we as SDTA -- and I am not directly
21 representing Midstate today. I think Meredith Moore may
22 be on the phone. She's their counsel in this proceeding.
23 But as SDTA we're an intervening party. Our concerns in
24 this Docket from the get-go had to do with the claim
25 service area. And at this point we have entered into an

1 agreement with Native American Telecom in regards to the
2 service area. And it's my understanding that they have
3 agreed to limit their request for certification to the
4 Fort Thompson exchange.

5 In exchange we have agreed that we would not
6 object to a waiver request under the rules with regard to
7 the various rural -- language service obligations in
8 rural areas that are set forth in the rules that
9 generally require that competitive carriers come in and
10 serve the entirety of the rural service area absent the
11 Commission granting the waiver.

12 So it's our understanding that they intend to
13 limit their service to the Fort Thompson exchange. In
14 exchange for that, we will not object to any granting
15 that this Commission -- or any waiver that this
16 Commission may want to grant with regard to the service
17 obligations.

18 With respect to both the discovery and the
19 Motion for Summary Judgment, we have indicated that we
20 will not object. We have indicated that we don't take
21 issue with it. I would just like the Commission to
22 understand that we certainly feel that it's, you know,
23 your decision reviewing everything that's before you as
24 to whether you want to grant it or not. There's a
25 difference between not objecting and supporting, and I

1 just wanted to indicate that.

2 Thank you.

3 CHAIRMAN NELSON: Questions for Mr. Coit?

4 Seeing none, who's up next? Mr. Lundy.

5 MR. LUNDY: Thank you, Mr. Chairman,
6 Commissioners. Todd Lundy on behalf of Qwest
7 Communications Company, LLC, that does business as
8 CenturyLink QCC.

9 First of all, I'm here on several Motions but I
10 understand that the pending Motion is -- for discussion
11 is on the Motion for Summary Judgment.

12 First I'd like to address the issue of impact as
13 counsel for NAT phrased it. Or our interest in the case.
14 And that's as a customer. And a customer should have as
15 much of an interest in a potential provider as any person
16 or entity that would come before this Commission.

17 And it's not just a customer of access services.
18 We're an involuntary customer. And as a long distance
19 carrier we are obligated to deliver long distance calls
20 to an exchange when our end user customer determines to
21 dial a number that's being served by that local exchange
22 carrier.

23 We then deliver that call, and then we are
24 charged the access rates pursuant to the local exchange
25 carrier's tariff. We do not have the ability to block

1 those calls. We have to deliver them. We have to have a
2 business relationship with that LEC. We are not a
3 typical retail end user customer that can decide whether
4 or not we want to purchase that carrier's services at
5 their rates, terms, and conditions. We're an involuntary
6 customer of their access services, and, therefore, we
7 have a very strong interest and a very strong impact on
8 the future practices of NAT in this situation.

9 Secondly, it's well known that for the past
10 five years there's been a practice of traffic pumping or
11 access stimulation that's been practiced by several
12 local exchange carriers, including NAT. And
13 CenturyLink, Sprint, AT&T, and Verizon were all targeted
14 victims of that scheme to take switched access fees,
15 terminating switched access fees and charge those to
16 the local exchange carriers. We've been victimized by
17 tens of millions of dollars. Other carriers have as
18 well.

19 We anticipate that the local exchange carriers
20 are going to continue to try to have some kind of access
21 scheme in order to keep charging us access for calls to
22 free calling companies and we have an enormous interest
23 in the future activities of a carrier such as NAT that
24 has admitted that they're going to be engaging in access
25 stimulation in the future.

1 We are not here as a competitor. Again, it's
2 QCC, that's the entity that's intervened in this case.
3 They're the long distance provider. QC, the local
4 exchange carrier, has not intervened. We are not
5 certified in that area. We are not going to be competing
6 with NAT for local exchange services. We are here solely
7 as a consumer, as a customer, again an involuntary one of
8 their access services.

9 Second main point that I'd like to address is
10 what are the relevant issues in this case. And NAT has
11 made -- has grounded their Motion for Summary Judgment on
12 the theory that the rules and the subissues contained in
13 each of your rules are the only things that this
14 Commission can look at in judging whether or not it's in
15 the public interest for NAT to get a certificate.

16 That is, if they provide certain data on tax ID
17 and experience of their executives and those sorts of
18 items, then what NAT is saying, that this Commission does
19 not have the authority to go further to see whether or
20 not it's reasonable in terms of what kinds of terms and
21 conditions they're going to be charging customers. NAT
22 is saying you don't have the authority to see whether or
23 not it's in the public interest. They're saying that you
24 don't have the authority to determine whether or not you
25 should impose certain conditions upon their certificate

1 to make sure there aren't any abuses in the future. And
2 that is totally contrary to the law of this state.

3 The law of this state authorizes this Commission
4 to regulate certificated entities to make sure their
5 practices are within the public interest. The rules and
6 the statutes authorize this Commission to impose
7 conditions upon certificates if in fact it deems certain
8 potential practices to be abusive and that there are
9 conditions that should be imposed to make sure that those
10 practices do not occur.

11 I would also suggest that the very rules that
12 NAT is relying upon authorize the very inquiries that
13 CenturyLink is making in this case. The rules regarding
14 the services that are going to be provided to customers,
15 the rules that say that the Applicant has to show how any
16 person -- and the rule says "any person," how any person
17 can obtain information as to the types of services that
18 they're going to be providing.

19 Well, that in essence is what CenturyLink,
20 Sprint, and others are doing here today. We are trying
21 to determine that access charges that they are going to
22 be charging us as customers, we are trying to get that
23 information to see that -- whether or not those rates,
24 terms, and conditions are reasonable and whether there
25 should be certain conditions that should be imposed upon

1 their certificate.

2 I do find it interesting that NAT suggests that
3 the rules of the game are clear. And yet when we asked
4 the question and it's 1.15 in our discovery request of
5 how do they intend to obtain revenues from interexchange
6 carriers for calls delivered to free calling companies
7 and they declined to answer that question. If the rules
8 are so clear, if everything is so legal today, if they
9 have no qualms or this Commission should have no qualms
10 about the legality of what they're doing, then why is it
11 that they're not answering the question about what
12 charges they're going to be imposing upon interexchange
13 carriers for calls delivered to free calling companies.

14 The other point -- the other sort of threshold
15 issue before I get into the standard for Summary Judgment
16 is the impact of the FCC's Connect America order. Any
17 word search of that document will show that the FCC
18 characterized access stimulation as arbitrage many, many
19 times and that the goal of the order was to reduce access
20 stimulation by removing the financial incentives. It
21 also authorized or contemplated future proceedings if, in
22 fact, they saw that there are future abuses through
23 access stimulation.

24 So rather than legitimizing it, I suggest that
25 the goal of the FCC was to eliminate it. And they

1 certainly did not preclude this Commission from
2 determining whether access stimulation should be done in
3 this state. The FCC also did not preclude this
4 Commission's analysis of intrastate access issues when it
5 comes to access stimulation.

6 Secondly, the FCC in paragraph 820 of that order
7 talks about another potential abuse and also put that up
8 for comment for future rule making and that is mileage
9 pumping, and that is one of our major concerns here, it's
10 the basis of our testimony, it's the major basis of our
11 case.

12 And mileage pumping is very much at issue. The
13 rules of that are not clear at all. And mileage pumping
14 is where the LEC may determine distant points of
15 interconnection and then charge relatively high either
16 tandem switching or transport rates to deliver the call
17 to their exchange. And so what we perceive the trend of
18 moving from charging the end office rate, which now has
19 to be charged at the price cap carrier rate, and moving
20 to a revenue stream that's based on tandem switching and
21 transport, and that's what the FCC was concerned about in
22 paragraph 820. That's what we're concerned about here.
23 That's what the concern that Mr. Heaston talked about in
24 his testimony and that's the basis of our recommendation
25 for a condition in this case.

1 I would repeat that if the FCC rules of the game
2 are so clear now in terms of what the charges are going
3 to be that there would have been an answer to our
4 question on 1.15 as to what revenues they intend to gain
5 from us by charging us access for calls delivered to free
6 calling companies.

7 So now we come to the Motion for Summary
8 Judgment. The issue is whether or not there's a genuine
9 issue of material fact.

10 CenturyLink submitted a very detailed statement
11 of fact, 65 separate paragraphs from Mr. William Heaston.
12 Contrary to NAT's characterization, any review of those
13 statements will show that they are statements of fact.
14 We describe where traffic pumping is, where the equipment
15 is put, why it's put there, the kickbacks that result
16 between the local exchange carrier and the free calling
17 company, the abuse of these -- the switched access rate
18 structure, and why it's contrary to the public interest.

19 We also set forth facts as to what mileage
20 pumping is and the basis for our recommendation in this
21 case that certain conditions be placed upon that. Those
22 are factual statements. There are some references to
23 opinions and decisions of other regulatory agencies. I
24 would suggest that that is typical in terms of putting a
25 subject matter expert's analysis into regulatory context.

1 It's something that is done with regularity before
2 administrative agencies. It's not considered to be
3 testimony. It's considered to be supportive regulatory
4 authority for the subject matter expert's opinions in the
5 case. And it's typically done. It's not that often in
6 Mr. Heaston's testimony. And the Commission can decide
7 whether or not to subscribe it as a fact or not.

8 And, so, therefore, Mr. Chairman and
9 Commissioners, we have shown the genuine issue of
10 material fact as to a relevant issue in this case, which
11 is is it in the public interest for access stimulation to
12 happen in this state? And secondly, there's an issue of
13 genuine fact as to whether conditions should be placed
14 upon this certificate that relates to the issue of
15 mileage pumping. And I'll stand for any questions.

16 CHAIRMAN NELSON: Questions from the Commission?
17 I just have one.

18 As I listen to you I perceive that what you're
19 telling us is we have the authority to really change the
20 level of the bar to entry on the fly, as we see fit as it
21 relates to the public interest. Is that accurate?

22 MR. LUNDY: Mr. Chairman, I'm not sure if I
23 completely understand your question. I know that the
24 Commission has the authority to determine whether the
25 practices of a carrier is going to be in the public

1 interest. The fact that there is future conduct I
2 believe is also within the Commissioner's prerogative to
3 determine whether that's in the public interest.

4 We made an example in our briefing, which is
5 let's say that a -- an Applicant makes all the right
6 statements according to the rules but its express purpose
7 is to engage in slamming or to engage in cramming.
8 Should the Commission say, well, we will await a
9 Complaint of cramming or slamming and then address it or
10 does the Commission have the authority to say, no, that
11 kind of conduct is not consistent with the public
12 interest of the state. It's not consistent with other
13 rules that we have in this state. And, therefore, we
14 will say that your certificate is either not granted or
15 it's granted on the condition that you show us that you
16 will not engage in cramming or slamming.

17 And that's pretty much what we're doing here
18 today is to say that there's admitted statements from NAT
19 they're going to engage in access stimulation. Is that
20 within the public interest of the state that they do so?
21 And if they are going to do so, are there conditions that
22 this Commission should place upon that certificate to
23 make sure there aren't abuses regarding that?

24 I would also try to respond to your question
25 that the rules that are cited by NAT regarding providing

1 information on the services that are going to be provided
2 to customers and information that will be available to
3 anyone as to what those services are going to be, those
4 are clearly within the rules of the application.

5 And so I believe you also have the prerogative
6 to say, NAT, what services are you going to be providing
7 to your access service customers and are those rates,
8 terms, and conditions that are going to be reasonable.

9 CHAIRMAN NELSON: Thank you. Any other
10 questions at this point?

11 If not, thank you.

12 Mr. Schenkenberg.

13 (Discussion off the record)

14 MR. SCHENKENBERG: This is Phil Schenkenberg on
15 behalf of Sprint. I'm not going to repeat anything that
16 Mr. Lundy said. I do want to point out that Sprint and
17 Qwest have taken different approaches in this case and on
18 this Motion.

19 We are not asking for the Commission to make
20 this a referendum on access pumping and traffic
21 stimulation. We are focused very much on the strict
22 requirements of the rules that this Commission is
23 required to follow in order to determine that an
24 application for authority should be granted

25 In the bigger picture there is an impact in the

1 traffic pumping arena because every access stimulation or
2 traffic pumping arrangement on a going-forward basis
3 under the new FCC rules is going to be dependent on the
4 existence of a lawful relationship under state law,
5 regulated under state law, between the LEC and the
6 conference call company.

7 And so it is this Commission's authority, not
8 withstanding what the FCC has done, to regulate entry, to
9 regulate the local service offerings, and to make sure
10 that the companies that come before you to provide local
11 service are meeting the rules. And that's why we're
12 here.

13 We have identified numerous facts that are
14 before you in the record that would support a decision by
15 this Commission that NAT does not meet the requirements
16 contained in the Commission's rules for obtaining a
17 certificate.

18 NAT, of course, as it concedes has the burden of
19 proof on all aspects. Mr. Chairman, you pointed out that
20 the investigation needs to be completed, not just
21 started. And the way to complete it is to make sure that
22 you have a complete comfort level that the application is
23 complete, isn't misleading, that the Applicant has the
24 appropriate financial and managerial resources. And as
25 Interveners we have every right to put facts before you

1 that we believe will allow you to make the decision that
2 the application does not meet the criteria

3 And there are four areas where we've done that.
4 And the first is we have put facts before you in the
5 record that show that this is a company that has for the
6 last two-plus years and then certainly for the last six
7 months knowingly provided what it believes to be an
8 intrastate regulated service without a certificate.

9 It's decided, as Mr. Swier said last November,
10 that it needed a certificate to provide service to Free
11 Conferencing. It didn't stop providing service to Free
12 Conferencing. It continued to provide that service, not
13 withstanding the fact that it doesn't have a certificate
14 as of today.

15 Now the facts that are before you are not
16 opinions of Mr. Farrar. They're documents attached to
17 Mr. Farrar's testimony. They're discovery responses.
18 They're hearing transcripts. They are exactly the kind
19 of facts that a Commission or a court can use to
20 determine whether there is an issue of fact to preclude
21 entry of Summary Judgment.

22 We believe very strongly that if this Commission
23 determines after hearing that NAT has violated South
24 Dakota Law by continuing to provide service without a
25 certificate when it was required to do so, that that

1 justifies a Commission decision that this company doesn't
2 have the necessary managerial qualifications, that the
3 application is misleading, and that this Commission
4 should deny that requested entrance.

5 As Mr. Lundy indicated, NAT's decision to
6 respond to our disputed facts simply by crossing them out
7 is not in compliance with the rules. And even if you
8 were to look at our witness, Mr. Farrar, as an opinion
9 witness, the facts, the transcripts, the discovery
10 responses that are attached can't be struck and support
11 the fact that he is reporting to the Commission. To the
12 extent he identifies facts within those documents, those
13 are before you.

14 The second category that we have raised is our
15 belief that NAT is a sham entity that doesn't intend to
16 provide local service but intends to pursue one business
17 activity and that is this provision of inbound service to
18 the conference call company that it has overlapping
19 ownership interests with.

20 We have done that, again, by identifying facts
21 contained within transcripts, discovery responses, items
22 that are before you and can be considered.

23 If this is a sham entity that's designed to
24 support access stimulation or traffic pumping so that
25 those revenues can be funneled through to Free

1 Conferencing, the individual Mr. Erickson, who has an
2 ownership interest in Free Conferencing and is affiliated
3 in some way with Wide Voice, then we think the
4 Applicant -- the requirement that this Applicant have the
5 intention to provide local service should not be
6 believed. And if that's not believed, if that's not the
7 reason for NAT to be providing -- obtaining a
8 certificate, then under the rules it shouldn't obtain a
9 certificate.

10 And, frankly, to the extent that the public
11 policy argument being made by NAT is that this is pro
12 tribe, if this is a sham entity, it's not designed to
13 help the tribe, it's designed to help Mr. Erickson and
14 his entity, then that application is misleading and you
15 certainly ought to investigate that through discovery at
16 hearing.

17 And I note that at this point with all
18 testimony, and we're going to hear from Mr. Erickson
19 about why this is such a great thing but we're not going
20 to hear from anybody from the tribe. I think that's very
21 telling.

22 Number three, we believe there are facts before
23 you that would allow you to make a decision that NAT is
24 not a viable financial entity, business entity. And
25 under the rules you must decide that NAT has sufficient

1 financial resources to support the provisioning of local
2 exchange service in a manner that ensures continued
3 quality of telecom services and safeguards consumer and
4 public interest.

5 The facts before you show NAT is underwater on
6 this venture. Revenues are going through to Wide Voice
7 and Free Conferencing. NAT has lost money since they've
8 been involved in this. I'm sorry. Yeah. NAT has lost
9 money. The tribe has lost its equity position. And if
10 this is going to be a venture that is going to rely
11 solely on access charge revenue to support itself, which
12 is what NAT says, they're not charging customers for
13 local service. They're going to charge long distance
14 carriers and use that for 100 percent of the operation.
15 If that's not a viable business venture and you're going
16 to have customers potentially stranded and harmed by this
17 when this venture falls apart, that's something you ought
18 to investigate and make sure you're comfortable with
19 before granting a certificate.

20 Finally, I'll just touch very briefly on this.
21 We've pointed out there are ways in which NAT's
22 application is not complete. There is no explanation or
23 description of intraexchange -- I'm sorry, interexchange
24 intrastate service. You can't find it in the
25 application. It's not in the tariff. It's required to

1 be there. The application is not complete.

2 They have told us and Staff in the discovery
3 response they don't have TRS capabilities. The
4 application is not complete. As Mr. Lundy talked about,
5 there's items in discovery that we need and as -- we've
6 identified in the brief failure to provide discovery by a
7 party precludes that party from obtaining Summary
8 Judgment.

9 Thank you very much. I'm happy to answer any
10 questions.

11 CHAIRMAN NELSON: Questions from the
12 Commission?

13 Seeing none at this time, Ms. Moore, did you
14 have anything you wanted to add?

15 MS. MOORE: Thank you, Mr. Chairman. This is
16 Meredith Moore appearing on behalf of Midstate
17 Communications today.

18 I would echo Mr. Coit's earlier comments.
19 Midstate has not submitted a pleading in opposition to
20 NAT's Motion for Summary Judgment in this matter and it
21 has not weighed in on the Motions to Compel that are also
22 being presented today because none of the discovery
23 requests were served upon Midstate and they don't seek
24 information relevant to Midstate so we don't believe that
25 we have standing to obviously advance or take any

1 particular position on those issues.

2 As Mr. Coit indicated, the primary concern that
3 Midstate had when NAT filed its application for
4 Certificate of Authority in this matter was the extent of
5 Midstate's study area for which NAT sought a Certificate
6 of Authority. NAT subsequently submitted an amended
7 application seeking a waiver to provide services only in
8 that portion of Midstate's study area that is within the
9 Crow Creek Sioux Reservation.

10 And it was because of that and NAT's
11 representations regarding the scope of its Certificate
12 of Authority that Midstate and SDTA entered into that
13 Stipulation which Mr. Coit previously referenced at the
14 end of March indicating that Midstate would not object
15 to the waiver should the Commission choose to grant
16 one.

17 I would like to make clear that Midstate does
18 not in any way, shape, or form seek to usurp this
19 Commission's authority in determining whether NAT's
20 application in this particular case meets the standards
21 set forth in SDCL 49-31-3 and ARSD 20:10:32:3 and the
22 subsequent rules that relate to the granting of a
23 Certificate of Authority and whether all of the relevant
24 information has been submitted and properly done. So we
25 would simply indicate that we obviously have not

1 submitted an opposition or objection at this point in
2 time.

3 Thank you.

4 CHAIRMAN NELSON: Questions for Ms. Moore?

5 Seeing none, Staff.

6 MS. CREMER: Thank you. This is Karen Cremer of
7 Staff. We've all read a lot and we've heard a lot. And
8 Staff, to be clear, does not necessarily agree with all
9 that has been said. However, the hearing is the time and
10 place to sort out all of these various allegations.

11 I do, however -- I am compelled to address two
12 matters. And one is this deeming of a complete
13 application by Staff. Truly all that does is start the
14 clock under 49-31-3. There's nothing more magical about
15 it than that. It doesn't mean all the information has
16 been explored and vetted. That's done at a hearing. All
17 it does is it gives the Applicant the ability to know the
18 clock has started and their Docket is being worked on.

19 As to the application process here somehow being
20 different, that is also incorrect. And, you know, a
21 couple of Dockets that come to mind are -- for the
22 granting of a COA is TC06-178 and TC06 -188. And those
23 were huge Dockets that I believe went on a year and a
24 half, almost two years, involved Sprint and MCC Telephony
25 getting a COA in the Brookings area. Western Wireless.

1 We've had a number of Dockets over the years that have
2 involved a process very similar to this. So I would just
3 like to clarify that.

4 As to the Motion for Summary Judgment itself,
5 the parties have summarized the law pertaining to the
6 granting of a Motion for Summary Judgment so I'm not
7 going to reiterate that, other than to say that any team
8 must demonstrate the absence of any disputed issue of
9 material fact and show entitlement to judgment on the
10 merits as a matter of law. The evidence must be viewed
11 most favorably to Sprint and CenturyLink and reasonable
12 doubts should be resolved against NAT. However, Sprint
13 and CenturyLink must show a genuine material issue
14 exists.

15 Staff believes that NAT has failed to adequately
16 show that there are no material facts in dispute,
17 especially as to matters regarding the financial and
18 managerial capabilities of NAT. Based on its filings,
19 there are genuine issues of material fact raised by
20 Sprint and CenturyLink which would require this matter to
21 go to an evidentiary hearing. Therefore, Staff
22 recommends denial of NAT's Motion for Summary Judgment.

23 Thank you.

24 CHAIRMAN NELSON: Questions for Ms. Cremer.

25 I have just one. Mr. Schenkenberg as he was

1 going through his four points, his fourth point was that
2 he believes the application itself was not complete as it
3 relates to interexchange service. Can you tell us
4 whether you believe the application was complete?

5 MS. CREMER: No, we did not. And granted we did
6 not ask a second round of questions. And the reason for
7 that was -- and our concerns go to -- in particular the
8 one that Mr. Daugaard and I have talked about in great
9 detail is 20:10:32:06 sub 7. But there are others too.
10 So I don't want, you know, to think that's the only one.

11 But we did not ask a second round of questions
12 because there were interveners at that point and we knew
13 that they would be asking the very questions that we also
14 had questions about and they did. And there is an e-mail
15 out there where I tell all the parties, you know, share
16 all your data requests and responses so we're not all
17 asking NAT the same thing three or four times. Which is
18 only fair to NAT. They shouldn't have to respond
19 repeatedly. And the parties, the intervenors did raise
20 the exact questions that Staff had.

21 So it's complete in the sense that we have
22 enough now to start. Years past we would get
23 applications in that were two or three pages long. And
24 back then too the statute read differently, 49-31-3, and
25 it said if after 60 days the Commission hasn't acted on

1 your application you can start providing service. Well,
2 that became very difficult for Staff on a two- or
3 three-page application to get all the questions asked and
4 answered and everything returned before the 60 days.

5 The statute was ultimately changed. It no
6 longer reads like that. But in fairness to the
7 Applicant, you need -- you need to be able to tell them
8 at some time we've got enough to start the clock so that
9 you're not hanging out there for two years, you know, oh,
10 we need this, oh, we need that before we -- we don't want
11 to be so bureaucratic that, you know, each and every
12 piece of information to the very last nth degree is in
13 before we deem it complete.

14 CHAIRMAN NELSON: Thank you. Other questions
15 for Ms. Cremer?

16 Seeing none, Mr. Swier, would you like a brief
17 rebuttal?

18 MR. SWIER: Very brief.

19 CHAIRMAN NELSON: Thank you. And then I will
20 open it up for questions again.

21 MR. SWIER: There are a couple issues regarding
22 CenturyLink's response in this case. First of all, it is
23 true that CenturyLink is a customer. However, all they
24 are alleging is they think that NAT may do something in
25 the future that's wrong. That does not meet the standard

1 for not granting a Motion for Summary Judgment.

2 Also, you'll see that once again Sprint and
3 CenturyLink rely on the pejorative term "traffic pumping"
4 and how bad it is and how they're a victim and how it's a
5 scheme. The FCC has said specifically, and it's very
6 easy, that access stimulation is perfectly legitimate as
7 long as the guidelines are followed.

8 And NAT, in fact, has a tariff on hand with the
9 FCC that follows their guidelines. So to make the
10 speculative assertion that, well, we're afraid NAT's not
11 going to comply with the new guidelines, NAT's already
12 complied with the new guidelines. There's no speculation
13 regarding that.

14 We also -- CenturyLink talked about imposing
15 conditions on NAT's certificate. We have always said
16 that if the Commission deems it appropriate to impose
17 conditions on NAT, as long as those conditions are fair
18 and don't single out NAT as opposed to any other company,
19 we have no problem with various conditions.

20 But do we need to go to this extent to have
21 those conditions?

22 Another comment was made, well, all of
23 CenturyLink's testimony by I believe it was
24 Mr. Heaston -- well, it's a mix of legal analysis and
25 it's a mix of opinion and it's a mix of fact. This

1 Commission under the Summary Judgment standard has to go
2 through what has been filed in opposition and if you go
3 and look at that submission, there is no way that any
4 court would find that what they've submitted is
5 admissible evidence for a Summary Judgment Motion.
6 Absolutely no way.

7 So I'd ask the Commission, go through that
8 material. It's long. It's tedious. But they can't just
9 give you a 20- or 30-page document, throw it up in the
10 air and say, well, there's enough mud here that it will
11 stick on the wall to get by Summary Judgment. You have
12 to look at what's admissible and what's not. And I think
13 it's very clear when you look at the record what they're
14 relying on here does not create a genuine issue of
15 material fact.

16 Mileage pumping. There was also a red herring
17 regarding mileage pumping. Here's the deal with mileage
18 pumping in South Dakota. First of all, mileage pumping
19 is an issue in Iowa. It's not an issue in South Dakota.
20 Here's why mileage pumping doesn't apply. In
21 South Dakota there is only one place for NAT to connect.
22 That mileage is based on NAT's connection with
23 South Dakota network. That's where we can go. That's
24 where it will be connected.

25 In Iowa, which is where mileage pumping is

1 really being fought right now, there are multiple
2 connection spots in Iowa that a CLEC could go to to
3 increase the way that that call is routed. Issue in
4 Iowa? Absolutely. It's not an issue in South Dakota.
5 NAT according to their engineers, NAT can only go to SDN.
6 It's not like we could go to Aberdeen or Rapid City or
7 Pierre or Pukwana. Sioux Falls is where you go, where
8 SDN is. So the mileage pumping issue, again, according
9 to our technicians in South Dakota that is a red herring.
10 That is not an issue in our state.

11 So those are just some issues. And, again, we
12 asked the Commission to focus on what we're here for
13 today. It's a Summary Judgment Motion. There has to be
14 admissible evidence in the record to combat Summary
15 Judgment. And as a procedural matter, they have -- both
16 CenturyLink and Sprint have failed to combat that
17 standard.

18 Sprint, again, brought up four different areas.
19 Again, we go back to traffic pumping again. I don't know
20 how else that we can say that the rules are the rules and
21 NAT has complied with the rules and will do so.

22 Regarding a sham entity, NAT is duly authorized
23 under South Dakota Law as a limited liability company.
24 It's made up of three partners: The Crow Creek Sioux
25 Tribe, Native American Telecom Enterprises, and Wide

1 Voice Communications, Inc. All with various ownership
2 percentages.

3 It's somewhat ironic that Sprint now is going to
4 come in with the white hat to protect the Native
5 Americans. The Native Americans are majority owners of
6 this entity. There are contracts that are signed between
7 the entities. What goes on internally with the company
8 is really none of this Commission's -- it's certainly
9 your prerogative but how is that relevant to a
10 certification? Yet another red herring that does not
11 combat what we're here for, and that's Summary Judgment.

12 Perhaps the biggest issue here are the finances.
13 Your rules require that certain financial information be
14 provided. That information has been provided by every
15 other CLEC applicant since 1997. That information has
16 been provided to the Commission for your review to
17 determine whether the finances are, indeed, appropriate.

18 For Sprint and CenturyLink now to want all this
19 other financial information, it would be like any of you
20 who run a business. People who don't want to see you do
21 well or get into business would love to have your
22 playbook. They'd love to have it. Commissioner Nelson,
23 for your property your neighbors I'm sure who you compete
24 with would love to have your playbook for how you were
25 going to run your business.

1 That is really what Sprint and CenturyLink are
2 after here. The financial information has been provided
3 in complete detail for your review. So the argument that
4 more financial information is needed is absolutely,
5 again, another red herring.

6 So, again, for this Motion we're simply asking
7 you to follow the Summary Judgment rules, to not take
8 those red herring issues that have nothing to do with
9 this proceeding and to grant the Motion for Summary
10 Judgment.

11 CHAIRMAN NELSON: Thank you. Questions from the
12 Commission for any of the attorneys that have appeared
13 before us?

14 Is there a Motion?

15 COMMISSIONER FIEGEN: I just first of all have
16 a comment. How we started today was on a timeline and
17 the first five minutes of the 10 minutes of the testimony
18 was the timeline of how this all started. On October 11
19 and November 30 and January 27. But what we forgot in
20 the timeline is that we had interveners. And we can't
21 forget that in South Dakota we allow that and they come
22 to the Commission and ask us if they can intervene.

23 So we need to add to the timeline October 13 and
24 October 26 and October 28 that we had Interveners that
25 came. And so that changes the dynamics of this because

1 all of a sudden the Staff doesn't have to ask for a lot
2 of discovery to follow up on financial matters or
3 management matters that would concern Commissioners.
4 Because the Commission here is to protect all consumers,
5 not just the service area but all consumers that will be
6 affected.

7 So today I'm going to -- I'm not going to make
8 the Motion because I have talked before the Motion but
9 I'm going to vote to deny because in a hearing that's
10 where we're going to get the facts. And even today I'm a
11 new Commissioner and I was hearing that there is never
12 ever a case like this before so all the sudden I'm like
13 oh, man I have to do more research. And then the facts
14 were wrong. So I am excited to study it more and
15 understand the facts and that's what we do at a hearing.

16 CHAIRMAN NELSON: Is there a Motion?
17 Commissioner Hanson.

18 COMMISSIONER HANSON: Mr. Chairman, I too have a
19 lot of comments to make and I'm wondering if you want a
20 Motion and then comments or --

21 CHAIRMAN NELSON: You know, why don't I move
22 that in TC-11-087 that the Commission deny NAT's Motion
23 for Summary Judgment.

24 Discussion on the Motion.

25 COMMISSIONER HANSON: Thank you, Mr. Chairman.

1 First of all, a lot has been said. And forgive
2 me for being prepared to say a lot. First I'd like to
3 say that this Commission knows Mr. Heaston. He has
4 appeared before us on numerous occasions and we have
5 considered him an expert witness and I wouldn't simply
6 take a black marker and eliminate whatever he has to say.
7 I wouldn't discount or ignore his testimony based on just
8 because he wasn't standing before us.

9 And CenturyLink certainly was not just alleging
10 that NAT might do something wrong in the future. They
11 were, in case you weren't listening, they were quite
12 clear that they were concerned that NAT has been doing
13 something in the past and they're doing something wrong
14 today.

15 And I find it unreasonable and unconscionable
16 that the Commission would not have the authority to
17 pursue these matters. From a perspective of a
18 Commission, there would be no purpose of having a
19 Commission if we didn't have the authority to pursue
20 matters of this nature and to protect the consumers.

21 The purpose, yes, of the PUC on our rules, we
22 went through a protracted duration of time in order to
23 streamline our rules to make everything more efficient
24 and it would be, I guess, a friendlier PUC from that
25 perspective and help businesses.

1 There's an assertion that this process is
2 inconsistent and it's unwarranted and yet -- and that --
3 also that we rarely -- excuse me, that there is no reason
4 to treat NAT differently and that we've never had this
5 extensive of a process on a COA.

6 However, as Ms. Cremer has pointed out, clearly
7 there have been situations and clearly from the
8 discussion that has taken place here, we have never had a
9 situation where there have been so many questions
10 proposed. You know, a standard operating procedure is a
11 COA is presented and we -- no one objects to it. But
12 there's been concentration of materials presented to us
13 on objections here. So it's reasonable for us to pursue
14 those matters.

15 We're asked to follow the rules and that we're
16 not following the rules if we don't allow Summary
17 Judgment at this juncture. However, the rules clearly
18 state that all reasonable inferences drawn from the facts
19 must be viewed in favor of the nonmoving party. The
20 burden is on the moving party, NAT, to clearly show an
21 absence of any genuine issue of material fact and an
22 entitlement to judgment as a matter of law.

23 But the facts of this matter show the
24 Interveners have brought up issues directly related to
25 financial and managerial capabilities. They have

1 contested the number of material facts which NAT left
2 uncontested, and as Sprint pointed out, a party cannot
3 simply refuse to answer discovery and then expect that a
4 Motion for Summary Judgment would be granted.

5 If we were to grant Summary Judgment under these
6 circumstances in this fashion, we would simply set up a
7 process of a Catch-22 where anyone, any entity who would
8 wish to contest would simply be snowballed by the other
9 company and by refusing to provide information they
10 wouldn't have the proof in order to present to this
11 Commission and we'd simply have to provide the -- there
12 would be absolutely no purpose then to the COA process.

13 Mr. Chairman, I'm cutting out some of the things
14 I wanted to say, but in following our rules, which has
15 been brought up on numerous occasions, 15-6-56F states
16 that "The court may refuse the application for Summary
17 Judgment or may order a continuance to permit Affidavits
18 to be obtained or depositions to be taken or discovery to
19 be had or may make such other order as is just."

20 And clearly the law and our rules provide that
21 we can pursue this.

22 Lastly, if I owned a company that was faced with
23 being called a sham company as many times as NAT has been
24 called a sham company here today, I would want to stand
25 up in an open forum and I would want to prove that it's

1 not a sham company. And it surprises me that you haven't
2 taken that tact at all.

3 Thank you, Mr. Chairman.

4 CHAIRMAN NELSON: Additional comments?

5 I would simply say going back to my earlier
6 question, ARSD 20:10:32:06 requires us to make sure that
7 the application is not inaccurate, false, or misleading
8 in any way, and I think the process that is being laid
9 out in going to a full hearing on this will allow us to
10 assure ourselves of that fact. And, therefore, I'll
11 support the Motion.

12 Additional comments on the Motion?

13 Seeing none, all those in favor will vote aye.
14 Those opposed nay.

15 Commissioner Hanson.

16 COMMISSIONER HANSON: Aye.

17 CHAIRMAN NELSON: Fiegen.

18 COMMISSIONER FIEGEN: Fiegen votes aye.

19 CHAIRMAN NELSON: Nelson votes aye.

20 The Motion carries. And the Motion for Summary
21 Judgment is denied.

22 We are going to take a five-minute break, and we
23 will come back at 11:40.

24 (A short recess is taken)

25 CHAIRMAN NELSON: We've been doing just a little

1 bit of shuffling here to try to figure out how we're
2 going to play out our time. This is the way we're going
3 to play out. The Commissioners had a noon hour event
4 scheduled with our Staff today. And we are going to
5 recess at noon for one hour and then we will come back at
6 1 o'clock and finish whatever we have not gotten done in
7 the next 15 minutes.

8 With that, we will move on to Sprint's Motion to
9 Compel. And let me just check and make sure
10 Mr. Schenkenberg, are you still with us?

11 MR. SCHENKENBERG: I am, thank you.

12 CHAIRMAN NELSON: Are you prepared to proceed?

13 MR. SCHENKENBERG: I am. Thank you,
14 Mr. Chairman, members of the Commission. Sprint has
15 filed a Motion to Compel. We are asking the Commission
16 to order NAT to respond to various discovery responses.
17 And these Motions are always a bit cumbersome. There are
18 a number of requests. Let me just make a couple of
19 high-level comments and then I may ask for some advice on
20 what you think the best way to proceed on various topic
21 matters in order to make this as efficient as possible.

22 At that high-level I think based on the
23 discussion we've already had this morning I think the
24 Commission has recognized that Interveners in these cases
25 before the Commission are entitled to obtain discovery

1 that assists the Staff and that suggestion by NAT that
2 discovery is off limits is something that the Commission
3 doesn't agree with. We obviously support that decision
4 if that's the Commission's decision on this.

5 We had also pointed out that we've got two
6 orders in this case that have been issued for scheduling
7 purposes that clearly contemplates that there will be
8 discovery. So this has been part of what this case will
9 be about since intervention was granted.

10 Certainly discovery in a case, any case before
11 the Commission needs to focus on facts, obtaining facts
12 that can make a difference. And that's what we've tried
13 to do. We have, again, focused on four different areas
14 in which we believe there are facts to be uncovered that
15 would allow us to present a full record to the Commission
16 and allow the Commission to determine whether the
17 standards are met.

18 I do want to point out that there isn't anything
19 that we have asked for that NAT has argued would be
20 burdensome to provide. That isn't a part of this case.
21 And frankly a number of these questions if you look at
22 them are very easy to answer. They've just made the
23 decision that they don't think -- NAT doesn't think it
24 should have to.

25 And I have -- and in our brief we tried to do

1 this in our brief in a way that would organize it. And
2 I have identified the four categories and they track
3 what I discussed earlier this morning. I guess there's
4 five categories. But -- and I have grouped the requests
5 that correlate to each category. And I don't want to
6 spend a lot of time going through everything unless the
7 Commission thinks it's helpful. Maybe if it's
8 acceptable to you I'll just at a very high level
9 talk about each of these five and then answer
10 questions.

11 Would that be acceptable, Mr. Chairman?

12 CHAIRMAN NELSON: That would be very
13 appropriate. Thank you.

14 MR. SCHENKENBERG: At a high level, again,
15 category 1 is the extent to which NAT is providing
16 service in violation of law and how that impacts
17 managerial capabilities.

18 And as an example, one of the questions we asked
19 about, what surcharges and taxes and remittances apply to
20 the services that have been provided. And what's been
21 collected, what's been remitted, what have they been
22 doing. And that's an example of something that goes to
23 the extent of which we think NAT has been violating state
24 law.

25 Earlier this morning you had a Docket item

1 related to setting a gross receipts tax levy which
2 applies on intrastate services. That's the kind of thing
3 we're asking about. And that's important to the
4 Commission and it's part of the Commission's
5 responsibility to oversee it. And we want to know what
6 intrastate revenues they've had, have they been
7 collecting this, have they been remitting it? Because we
8 think the answer is no. And it would be fairly easy for
9 them to tell us the answer is no. That's an example
10 within category 1. I'm not going to go further into
11 category 1. The three requests that relate to that
12 category 1 are identified in our brief.

13 Category 2 relates to this question of whether
14 NAT is really the entity that it claims it is. And we
15 identify those on 7 through 11 of our brief. The
16 questions that we've asked go to how it's managed, what
17 the management structure is, who makes decisions, who are
18 the employees, where are the records kept. NAT really
19 doesn't have a response to our argument, other than it
20 says this information is not something we're required to
21 file with an application under the rules. And I think
22 that's an argument that's already been dismissed by the
23 Commission. We think it bears on managerial
24 qualifications and intent to provide local exchange
25 service and it ought to be provided.

1 Category 3 is financial. We've asked for
2 essentially detail behind the two-page balance sheets
3 that has been provided by NAT in their application. So
4 NAT has identified certain revenues and expenses and
5 we've asked for the detail behind it.

6 I will say as I looked over those questions
7 again there are several questions in that category where
8 we asked for all documents relating to a certain topic.
9 Really what we would ask for is documents sufficient to
10 identify the detail behind those numbers. We hadn't
11 intended and certainly wouldn't want to ask for all
12 documents in a way that would be overbroad.

13 And as an example, document request 3 which asks
14 for the detail behind income and expenses, we don't want
15 all documents. We just want documents sufficient to
16 identify the detail behind those expense and revenue
17 items and we would certainly accept that modification to
18 the requests in that category.

19 Category 4 is have they told us the truth in the
20 application and the testimony? There were
21 representations, for example, about how many employees
22 NAT has, how many full-time jobs have been created. We
23 asked for detail and they haven't provided it. I think
24 in our brief we've outlined how each one of the items we
25 asked for ties to something that NAT believes is

1 important because it put it in its application and put it
2 in its testimony. And it ought to be provided for us to
3 have a full and complete record at hearing.

4 And then the final is category 5 which is
5 expert's discovery. It didn't come up earlier. It
6 wasn't relevant earlier. They had expert witnesses,
7 provided expert opinions. We have drafted expert
8 discovery to be very cognizant of the limitations on
9 expert discovery in the rules. We haven't asked for
10 privileged materials. We've asked for the facts that
11 have been provided on which the expert has relied. We've
12 asked for identification of what testimony has been given
13 by this expert in some prior cases over the last several
14 years so we can understand and properly examine him.

15 And it's certainly discovery that's appropriate
16 and allowable under the rules and it ought to be
17 provided.

18 I have nothing further unless you have questions
19 about specific requests.

20 CHAIRMAN NELSON: Questions from the Commission.

21 Okay. Seeing none, Mr. Swier, will it take you
22 more than 10 minutes? If so, I'm thinking we'll break at
23 this point. If not, we'll let you go ahead.

24 MR. SWIER: I think 10 minutes will do it.

25 CHAIRMAN NELSON: Go for it.

1 MR. SWIER: All right. First of all, I would
2 like to say to the Commission that regarding the first
3 Motion for Summary Judgment, with all due respect I
4 thought I was here today to talk about that Motion for
5 Summary Judgment and to not get into the myriad of other
6 issues brought up by Sprint and CenturyLink.

7 So with all due respect, I'm not trying to
8 mislead the Commission in any way. I asked you to take a
9 look at that Motion as a legal argument. And, again, we
10 were not trying to misrepresent at all. But when you
11 look at the legal argument there, that's what we were
12 here and prepared to talk about today, and not some of
13 the other information.

14 Regarding the Motion to Compel discovery, our
15 position in this case from the beginning has been that
16 your rules do not allow outside parties to conduct
17 discovery. Your rules specifically say that discovery
18 and production requests can be done by the Commission.
19 That's what it says specifically, regarding application
20 certifications.

21 I think based on the Commission's previous
22 comments, you are going to not follow those rules however
23 they may be written and you are going to allow Intervener
24 discovery. And if you are going to allow Intervener
25 discovery, the only thing that we're asking for is to

1 allow us to have the same discovery opportunities that
2 Sprint is having.

3 We provided Sprint with identical discovery
4 materials that they provided to us. In other words,
5 they're about the exact same. If we are going to defend
6 ourselves in this case and we have to meet the burden,
7 then we need to have some type of comparative analysis.

8 In other words, we need to meet our burden and
9 we need to compare, for instance, our financial
10 condition. We have a right to defend ourselves by
11 comparing our financial condition to any other
12 telecommunication providers in the state. Because the
13 Commission really doesn't have a standard.

14 We don't know if the standard is if you have a
15 million dollars in profit and loss that that's deemed
16 sufficient for the Commission. We don't know if that
17 number is 100,000. So we're shooting here at really an
18 unknown target. So we're simply asking for fairness.
19 And if the Commission is going to give Sprint and
20 CenturyLink all the information that they request, we're
21 simply asking as a fairness standard that we be allowed
22 to have the same discovery opportunities that they have.

23 And if you look in our Motion, Sprint has given
24 no information to us. They have objected to their own
25 discovery questions because they're the exact same. So

1 we're simply asking here for fairness. If the Commission
2 is going to grant discovery, which it appears that you
3 will, let us have the same opportunity so that we can
4 defend ourselves from these allegations and to be able to
5 make a comparative analysis for the Commission to make a
6 decision. So we're simply asking for fairness here and
7 that's really all I have to say.

8 CHAIRMAN NELSON: If I could just ask one
9 question while you're still there. I'm looking at ARSD
10 20:10:32:05, and it says, "The Applicant and other
11 parties may request a hearing." And so that tells me it
12 anticipates that other parties would be a full party to a
13 proceeding and, therefore, be allowed to ask for
14 discovery. Why don't you see that there?

15 MR. SWIER: Because if you look at the
16 Commission's specific rules it does allow a hearing to be
17 held. We don't dispute that. But when you look at the
18 information that can be requested from the Applicant, the
19 two rules regarding interexchange and local exchange
20 services specifically say you have to give these 20 or 25
21 information requests. Plus an Applicant can give any
22 other information requested by the Commission. I mean,
23 it's very clear. And that's the rule for this
24 proceeding.

25 You have rules for administrative hearings and

1 contested case hearings and under normal rules the other
2 parties would be entitled to discovery. This
3 Commission's specific rules say additional information
4 can be requested by the Commission. And, again, all NAT
5 is doing here is trying to follow the Commission's rules
6 to the letter. And the Commission's rules here on this
7 very specific certification application say that
8 discovery can be asked for by the Commission. It doesn't
9 say another party. So that is our first fundamental
10 argument which we believe is simply a plain reading of
11 the law.

12 But if you are going to not follow those rules
13 and allow discovery, again, we're simply asking to let us
14 have a fair fight and to defend ourselves. And to do
15 that we should be entitled to the same information that
16 Sprint and CenturyLink gain and that is all we're asking
17 here.

18 CHAIRMAN NELSON: Thank you. Other questions
19 from the Commission? Seeing none, Ms. Cremer, how much
20 time do you anticipate?

21 MS. CREMER: Well, I had anticipated we were
22 going through them one by one, so that said I will just
23 say this. As to NAT's argument that the rules do not
24 allow outside parties, I believe the rules and statutes
25 clearly allow parties to pursue discovery. Due process

1 certainly allows for that. Cross-examination of
2 witnesses. It's all in the statutes.

3 And then as to allowing the same discovery --
4 them to pursue discovery to CenturyLink and Sprint, I
5 would just simply say that CenturyLink and Sprint are not
6 the parties seeking the Certificate of Authority but NAT
7 is. And that information would be not relevant to this
8 proceeding.

9 CHAIRMAN NELSON: If I could ask, what is your
10 conclusion on the Motion to Compel?

11 MS. CREMER: Well, I had -- again, I had gone
12 through them one by one, so, you know, on this one you
13 would grant it, on that one --

14 CHAIRMAN NELSON: Okay. That frankly I do want
15 to hear. And so maybe we'll come back and start with
16 that.

17 MS. CREMER: Well, I can summarize it in a big
18 picture. Pretty much Sprint's Motion to Compel, I would
19 grant all of those with the modifications that they asked
20 for. As to CenturyLink's Motion to Compel, again, I
21 would grant those. And as to NAT's Motion to Compel, I
22 just -- I did not find any that I would grant. You know,
23 again, has he made an argument maybe? I would change my
24 mind on one or two. I didn't see any. And I would deny
25 all of NAT's in the big picture.

1 CHAIRMAN NELSON: Okay. So specifically as it
2 applies to Sprint's Motion, there are none of those that
3 you would deny.

4 MS. CREMER: That's correct.

5 CHAIRMAN NELSON: Thank you. Questions from the
6 Commission?

7 Is there a Motion?

8 COMMISSIONER HANSON: I assume you wish to take
9 them one at a time, CenturyLink's Motion to Compel first?

10 CHAIRMAN NELSON: Yeah. Well, we have not heard
11 from CenturyLink yet. We're just on Sprint's Motion
12 right now.

13 COMMISSIONER HANSON: Excuse me. Just trying to
14 help you out.

15 COMMISSIONER FIEGEN: Mr. Chairman, I move that
16 we grant discovery asked by Sprint so Motion to Compel
17 would be granted from Sprint. Is that the correct
18 Motion?

19 CHAIRMAN NELSON: With the caveats that Sprint
20 laid out this morning?

21 COMMISSIONER FIEGEN: Correct.

22 CHAIRMAN NELSON: Okay. Discussion on that
23 Motion?

24 COMMISSIONER HANSON: Mr. Chairman, I would just
25 like to say that it is clear that the Commission's rules

1 provide that a party may obtain discovery, that -- that's
2 the entire purpose of being able to go through these
3 processes is so that they don't have to come to us every
4 time they need to go through a discovery. And if, for
5 instance, in this situation that NAT does not wish to
6 provide it, then they give cause of why they should not
7 provide it. It's not a situation of they don't have to
8 provide any information. It's they don't have to provide
9 information if the Commission should decide that they do
10 not have to.

11 CHAIRMAN NELSON: Further discussion?

12 Seeing none, all those in favor of the Motion
13 will vote aye. Those opposed nay.

14 Commissioner Hanson.

15 COMMISSIONER HANSON: Aye.

16 CHAIRMAN NELSON: Commissioner Fiegen.

17 COMMISSIONER FIEGEN: Fiegen votes aye.

18 CHAIRMAN NELSON: Commissioner Nelson votes aye.

19 Motion carries.

20 We're going to be in recess for about 20
21 seconds.

22 (A short recess is taken)

23 CHAIRMAN NELSON: Contrary to what I had said
24 about 15 minutes ago, that went much quicker than what I
25 had anticipated. So I'm thinking we may try to take

1 these other two Motions and see how quickly we can
2 dispose of those while doing it appropriately and hearing
3 from all parties fully.

4 Mr. Lundy.

5 MR. LUNDY: Mr. Chairman, Commissioners, the
6 standard for a Motion to Compel is whether CenturyLink in
7 this instance is asking questions that are reasonably
8 calculated to lead to the discovery of admissible
9 evidence. I believe the Commission has already ruled
10 that outside parties can ask for information.
11 CenturyLink has intervened as a party to this case.
12 Parties are entitled to their discovery rights and that's
13 all that we're seeking here.

14 I do have to comment on NAT making several
15 contentions, one that CenturyLink is requesting massive
16 amounts of discovery, that we're trying to seek to know
17 every aspect of NAT's business and want to know
18 everything about their finances. They're accusing us of
19 wanting to know everything there is about how they're
20 going to make their money and then they make the
21 relatively offensive comment that our discovery requests
22 are amounting to gamesmanship. And as offensive as those
23 accusations are they are certainly untrue.

24 If you look at CenturyLink's discovery requests
25 they are all patterned upon the one or two issues that

1 we're looking at in this case. CenturyLink has taken a
2 very focused view of what this certification is about.
3 And it's about access charges that are going to be
4 invoiced to CenturyLink for calls that are delivered to
5 free conferencing companies. We have not taken a more
6 expansive view of this case than that.

7 All of our questions are focused on that issue.
8 We asked 15 questions to NAT, all about those issues, and
9 then we asked three more questions relating to what their
10 expert relied upon. So we have asked a total of 18
11 questions again directed towards access charges for calls
12 delivered to free calling companies. We're not asking
13 for anything about their finances, how they're going to
14 make money, employees, bank accounts, finances, none of
15 that. We have taken a very focused approach.

16 NAT answered 12 of those questions. Three of
17 our first set remain unanswered and three relating to
18 their expert witness remain unanswered. So focusing on
19 the first three, that's 1.13, 1.14, and 1.15. 1.13
20 focuses on communications that NAT has had with the free
21 calling companies in terms of how they're going to be
22 making money. That is very relevant because the free
23 conferencing companies are obviously going to be sharing
24 a portion of the access revenues that they obtain from
25 IXCs such as CenturyLink. So that kind of information is

1 highly pertinent to their plans and their intentions in
2 terms of the ultimate charges that they're going to be
3 rendering.

4 1.14 asks for contracts or agreements between
5 NAT and any free calling company. That's relevant for
6 basically the same reason, that it determines what -- or
7 is helpful in determining what kind of access charges are
8 going to be assessed against IXCs.

9 Now as to 1.14, NAT refused to answer that. But
10 yet last week they offered the testimony of Mr. David
11 Erickson. In his testimony I believe pages 11 through 13
12 he talks about the contract between NAT and
13 FreeConferencing.com which is Mr. Erickson's company. So
14 we have a situation where our attempts to get the
15 contract has been denied, is not relevant to the case,
16 and yet NAT has proffered testimony on its own behalf
17 talking about that very contract. So I believe NAT's
18 provisioning of that testimony shows exactly the
19 relevance of the terms of contracts between NAT and
20 FreeConferencing.com.

21 Then 1.15, I've talked about it a little bit
22 before. That is a broad question that simply asks how do
23 you intend to charge IXCs such as CenturyLink for
24 switched access, for transport, for tandem switching,
25 what kind of access charges are you intending on charging

1 us for calls delivered to free calling companies. We're
2 not asking how they're going to make money on any other
3 service or to any other kind of customer, retail,
4 wholesale, or otherwise. What we're concerned is what
5 are they going to charge us for calls delivered to free
6 conferencing companies, and I believe that's well within
7 the scope of relevant issues in this case.

8 The second set of discovery questions that were
9 not answered by NAT has to do with the documents that
10 were reviewed by their expert, Mr. Roesel. The first
11 question, 2.1, simply asks what did you review and
12 analyze in preparing your testimony. NAT's response to
13 our Motion to Compel did not address that question so
14 absent further information from NAT as to why they're not
15 responding to that, it's hard for me to discuss it other
16 than to say when an expert has filed testimony before the
17 Commission it's clearly relevant as to what documents he
18 analyzed in preparation of that testimony.

19 The other two questions go to whether he did any
20 analysis regarding access stimulation and if he did any
21 analysis relating to access charges that would be billed
22 to IXCs. Again, those are highly relevant to this case.
23 NAT's response is that Mr. Roesel didn't address those
24 issues in his testimony. Fair enough. If he didn't
25 review anything regarding those issues, then the answer

1 is simply he didn't review anything. But we at least are
2 entitled to know whether he reviewed documents of that
3 nature before he prepared his testimony.

4 So I believe all of those 6 questions, again
5 narrowly tailored to the issues in this case, they're not
6 broad, they're not massive, and we request that the
7 Commission compel NAT to answer them. Thank you.

8 CHAIRMAN NELSON: Thank you. Any questions from
9 the Commission?

10 Seeing none, Mr. Swier.

11 MR. SWIER: Mr. Chair, very briefly, 1.13, 1.14,
12 and 1.15 all address free conferencing service companies
13 and access stimulation. As we have said before, we think
14 that is well beyond the scope of this certification
15 proceeding and that those are not reasonably calculated
16 to lead to the discovery of admissible evidence. And
17 again, we simply go back to our view that we don't feel
18 discovery is proper.

19 Regarding 2.1 and 2.2, once again, our
20 objections were based on the fact that we did not feel
21 that discovery was proper here. However, now that the
22 Commission is going to allow discovery, we have no
23 problem whatsoever answering 2.1 and 2.2.

24 CHAIRMAN NELSON: Thank you. Staff, anything
25 further to add?

1 Thank you. Is there any questions from the
2 Commission? Is there a Motion?

3 I will move that in TC-11-087 that the
4 Commission grant CenturyLink's Motion to Compel discovery
5 responses. Discussion on the Motion?

6 Seeing none, all those in favor will vote aye.
7 Those opposed nay.

8 Commissioner Hanson.

9 COMMISSIONER HANSON: Aye.

10 CHAIRMAN NELSON: Commissioner Fiegen.

11 COMMISSIONER FIEGEN: Fiegen votes aye.

12 CHAIRMAN NELSON: Nelson votes aye. Motion
13 carries.

14 That brings us to the last Motion of the day,
15 and that is NAT's Motion to Compel discovery.

16 Mr. Swier.

17 MR. SWIER: Thank you, Mr. Commissioner. As we
18 have noted earlier, our discovery requests replicate what
19 the Commission has already said Sprint and CenturyLink
20 can have.

21 Again, we think that our discovery requests are
22 incredibly relevant in this case to defend ourselves and
23 to make a comparison between NAT and other
24 telecommunication companies. Without that information,
25 we are shooting at either an unknown or a moving target.

1 And I believe for the Commission to simply say now that
2 this has turned into a full-fledged contested case
3 hearing that one party can have all the discovery that it
4 wants but the other party who is asking for the exact
5 same materials can't have anything? That as a matter of
6 fundamental fairness takes one of the parties, ties their
7 hand behind their back and has no opportunity to get
8 relevant information that can be used in the case.

9 Again, the standard is not if the information is
10 admissible. It's if it's reasonably calculated. It's a
11 very deferential standard. And if this Commission simply
12 says that one party gets discovery and the other party
13 doesn't, I think as a matter of fundamental fairness for
14 NAT to present its case that that is improper and that
15 NAT should also be entitled to discovery.

16 I'm unaware of any case where one party gets all
17 the discovery they want and the other parties get
18 nothing. And we've set forth in our brief the requests
19 that NAT has made that we think should be answered by
20 Sprint and CenturyLink, and it's the same questions they
21 asked of us.

22 So for NAT to get absolutely no discovery in a
23 contested case hearing I think is unconscionable and I
24 think the Commission should look at our Motion and should
25 grant our information request. Otherwise, as a matter of

1 fundamental fairness how can that be fair? How can we
2 defend ourselves if Sprint and CenturyLink get all the
3 information and we get none? And, again, I think through
4 our brief it's set out pretty clearly what we're asking
5 for. Thank you.

6 CHAIRMAN NELSON: Thank you. Questions from the
7 Commission?

8 I do have one. Help me understand how our
9 granting your Motion would help us in -- and what I've
10 said repeatedly today is determining if your application
11 is complete, accurate, and not misleading? How does this
12 discovery help us answer that question?

13 MR. SWIER: Number one is there is some standard
14 out there, especially for financial information, that the
15 Commission has made hundreds of decisions on whether a
16 company has sufficient financial capability to produce
17 the services they want to. Because that information is
18 entirely confidential we can't get that information.

19 We don't know what that standard is. Again, if
20 we're going to compare finances, Sprint's finances are X.
21 CenturyLink's finances are X. We've already seen through
22 the filings that some of the most respected economic
23 analysis in the country say Sprint's on the verge of
24 bankruptcy. So we know that we have a company that's on
25 the verge of bankruptcy and yet they are -- they're

1 looking at NAT's finances and saying they're not
2 adequate. We need to be able to defend that and to make
3 a comparative analysis. We don't have any other
4 information that's available to us on how we can compare
5 our proposed services and our finances and our managerial
6 capabilities with anyone. It's an unknown, moving
7 target.

8 So we need to have that information to defend
9 ourselves, to have a fair fight. And, again, we may get
10 the information and decide not to use it at the hearing.
11 But that's not the standard. The standard is much lower
12 than that. And we should be entitled to that same
13 information that Sprint is requesting. Because otherwise
14 we're going to come in here in June with a moving target
15 that we don't know what the standard is.

16 So because of that, again, I think it's
17 indefensible that one party gets everything they want and
18 the other party gets nothing.

19 CHAIRMAN NELSON: Thank you. Additional
20 questions?

21 MS. AILTS WIEST: I do.

22 CHAIRMAN NELSON: Rolayne.

23 MS. AILTS WIEST: I have a question with respect
24 to specific items that you're requesting more discovery
25 to. And with respect to Sprint, I see in a footnote you

1 stated that Sprint did not produce meaningful discovery
2 with respect to -- or incomplete responses to 1.34, 1.35,
3 and 1.36. I believe in Sprint's response they said that
4 they updated that -- those responses. I don't believe
5 any of those were discussed in the brief.

6 And so my question is do you still believe that
7 Sprint has not responded fully to 1.34, 1.35, and 1.36
8 which relates to expert witness discovery?

9 MR. SWIER: May I look at those real quickly?

10 MS. AILTS WIEST: Sure.

11 MR. SWIER: Thanks. Rolayne, it may be just
12 easier. Can you tell me what those three are?

13 MS. AILTS WIEST: Yes. One's related to, like I
14 said, expert discovery, identify the witness, any factual
15 material, information provided, the cases, and all
16 information with respect to 15-6-26B-4 all with respect
17 to the expert witness.

18 MR. SWIER: And when is Sprint alleging that
19 they provided us with that information?

20 MS. AILTS WIEST: I believe in their response
21 they stated -- and Sprint can -- maybe Sprint is better
22 able to address this, that I thought they had updated
23 their responses. And maybe Sprint could address that.

24 CHAIRMAN NELSON: I think, yeah,
25 Mr. Schenkenberg, let's just go to you and if you can

1 answer that as best you can in your presentation.

2 MR. SCHENKENBERG: Okay. Go ahead with my
3 presentation and address that issue as well or --

4 CHAIRMAN NELSON: Rolayne, do you have any other
5 questions for Mr. Swier?

6 MS. AILTS WIEST: No.

7 CHAIRMAN NELSON: Okay. Yeah.

8 Mr. Schenkenberg, go ahead.

9 MR. SCHENKENBERG: I'm looking in my e-mail. I
10 believe it was last week, perhaps last Friday just before
11 we served at 3:00. I did serve additional supplemental
12 discovery responses with that expert discovery
13 identifying Mr. Farrar, identifying that which he relied
14 on, identifying the cases that he had provided testimony.

15 It looks like that's -- my admin served that by
16 e-mail so it's not showing up on my e-mail so I can't
17 give you an exact date. But we should have an Affidavit
18 of the Service. We certainly intended to provide expert
19 discovery which is certainly appropriate to the extent
20 we'd put on a witness.

21 CHAIRMAN NELSON: I'm going to stop you at that
22 point. Mr. Swier, did you receive that?

23 MR. SWIER: It was sent this past Friday; is
24 that correct? If it was sent on late Friday, between
25 then and now I have not had a chance to review that

1 because we've been preparing for the hearing.

2 I can certainly go back and review that
3 information and if indeed it was provided then our
4 objection would be withdrawn. But providing it at that
5 late date really doesn't provide me with an opportunity
6 to go through it. But I certainly would be happy to.

7 CHAIRMAN NELSON: I understand. Any follow-up,
8 Rolayne?

9 MS. CREMER: I show it as April 13 is when it
10 was filed.

11 MR. SCHENKENBERG: My recollection is I served
12 it earlier in the day that I had filed our brief and
13 maybe I'm getting my Fridays mixed up.

14 MR. SWIER: And again, if that indeed was done
15 I'm more than happy to look at it. If it complies I
16 won't have a problem with those then. I think that's as
17 simple as we can put it.

18 CHAIRMAN NELSON: Thank you.

19 Okay. With that Mr. Schenkenberg, go ahead.

20 MR. SCHENKENBERG: Thank you. Phil Schenkenberg
21 on behalf of Sprint.

22 I think we disagree with Mr. Swier's suggestion
23 that this is a moving target. The target isn't the rule.
24 The rules establish the standards that the Commission
25 needs to find are met. We've talked about those in

1 length today. And they don't change. They don't change
2 because there's an Intervener. They don't change based
3 on information that might be within an Intervener's
4 possession. They are the standards that apply and have
5 always been applied.

6 If there were a moving target it certainly would
7 not move based on who the Intervener was. NAT is not
8 required to judge itself against CenturyLink or Sprint or
9 any other carrier in South Dakota. And certainly the
10 moving target wouldn't be set by carriers like Sprint and
11 CenturyLink who aren't certificated to provide local
12 exchange service in Midstate's study area. So the notion
13 that somehow NAT needs information from Sprint and
14 CenturyLink in order to prove up the application is met
15 is simply we believe a poor reading of the rules.

16 I do wish to take issue with Mr. Swier's
17 statement about Sprint being on the verge of bankruptcy.
18 He certainly had submitted something that was in the
19 public domain but it didn't come out of Sprint. And if
20 you really want some financial information about Sprint,
21 and CenturyLink for that matter, these are two
22 publicly-traded companies with significant amounts of
23 financial information available publicly to all potential
24 investors and all members of the public. And so if this
25 were really an issue that's where he could go, not to

1 news reports and the discovery requests that he's asked
2 here.

3 And I'm going to end by going back to the rules.
4 There isn't an equal footing standard in the discovery
5 rules. There isn't a fairness standard. There isn't a
6 tit for tat standard. There's a relevance standard. And
7 so the argument that NAT gets discovery so it can be on
8 equal footing just isn't supported by the rules.

9 I believe in 3 NAT does concede there's a
10 relevancy standard. It needs to demonstrate the
11 information it seeks may lead to evidence that can be
12 used at trial and make a difference in the case. But it
13 doesn't go through the request to identify why Sprint's
14 financial information, Sprint's bank accounts, location
15 of Sprint's employees, Sprint's business plans goes to
16 any of the issues this Commission is required to consider
17 in deciding whether the application should be granted.

18 Thank you. I have nothing further.

19 CHAIRMAN NELSON: Thank you.

20 Mr. Lundy.

21 MR. LUNDY: Thank you, Mr. Chairman.

22 First I want to take issue with the statement
23 that NAT has to produce everything and we have to produce
24 nothing. Again, our discovery requests were focused on
25 access charges for calls delivered to free calling

1 companies and that's all that we have asked of them. In
2 terms of whether we've produced nothing, that's
3 incorrect. The responses that have been filed with the
4 Commission show that we did answer numerous questions.
5 And I'll go through the questions in more detail but we
6 did draw the line where the questions really were beyond
7 the scope of any reasonable issue in this case.

8 What happened here is that CenturyLink and
9 Sprint submitted their discovery request to NAT. Then
10 what NAT did is they basically copied, cut and pasted our
11 request and CenturyLink -- CenturyLink's request and
12 Sprint's request into one document for each party to
13 answer. And so when I received questions from NAT
14 regarding bank accounts and financing documents and
15 organizational charts and that sort of information I
16 immediately asked for a conference with Mr. Swier about
17 those questions.

18 And his response was that Sprint asked them of
19 NAT so NAT can ask them of CenturyLink and secondly,
20 they're for competitive issues. And that was during our
21 February 29 conference call among the parties.

22 Those responses really didn't satisfy my inquiry
23 regarding whether it satisfied the standard for discovery
24 so we answered all the other questions but we did not
25 answer several of the questions that had to do with --

1 that were taken from Sprint's request to NAT regarding
2 bank accounts, loan documents, employee names, employee
3 locations, and the like.

4 Also importantly, on February 29 we entered into
5 a Stipulation just as we did in the Wide Voice case that
6 limited the discovery question where it was logical to
7 the question that it only pertained to delivery of calls
8 to free calling companies in South Dakota. And that was
9 a Stipulation that CenturyLink and NAT entered into. And
10 if you review our discovery responses, we insert that
11 Stipulation to condition that question wherever
12 appropriate. And we answered each of the questions
13 completely in the context of that Stipulation.

14 So going to the specific requests that are the
15 subject of NAT's Motion to Compel, we start with 1.22 and
16 1.33, business plans, strategies, goals. That's a
17 question that is the subject of the Stipulation. We both
18 agreed that neither party would have to go beyond the
19 issue of delivery of call to free calling companies.
20 That's what we've asked of them. They asked that of us.
21 And so we answered that question completely.

22 Of course the answer to the question is we don't
23 engage in that business. But that is a complete answer
24 to the question according to the Stipulation we entered
25 into.

1 The second is 1.24, wholesale pricing rates. On
2 that February 29 call I asked Mr. Swier could you please
3 provide more information as to what you mean by that.
4 Because that can mean all kinds of things. We did not
5 hear from NAT as to how they were defining that question
6 until last Wednesday, April 18.

7 So from February 29 until April 18 we did not
8 get a response to their commitment that they would
9 provide us with more information as to what they meant
10 under 1.24. And yet they're here before the Commission
11 saying that we have failed to comply with our discovery
12 obligations.

13 The others, 1.27 bank accounts, employee
14 information, 1.28, number of retail customers. Number of
15 employees, names, locations, the financing documents,
16 general ledgers, journal entries, the -- what we hear
17 today is that because Sprint asked those questions of NAT
18 then NAT can ask those questions of CenturyLink.

19 Well, that's not the standard. The standard is
20 can they point to a relevant legal issue in this case and
21 will that information be reasonably calculated to produce
22 admissible information.

23 The theory that we hear today, and this is for
24 the first time last Wednesday, is a comparison theory.
25 That's new to the case. No party has raised the issue of

1 comparison of finances or of loan documents or employee
2 numbers or bank accounts. We're not presenting a
3 comparison theory. I don't understand that Sprint is.
4 It's up to NAT as to whether they want to present a
5 comparison theory or not. But that would incredibly
6 expand the case beyond any notion that I think is
7 contemplated by the rules that they have to prove that
8 they have some comparative value in terms of all of those
9 elements to other existing companies.

10 That's a new theory. We're not proposing it.
11 Sprint isn't proposing it. I think it's just a theory in
12 order to try to get discovery from us or try to make us
13 expend the resources to conduct discovery when no party
14 in the case is suggesting a comparison theory. We
15 certainly are not.

16 And I would just close by saying that if it's --
17 if the question is should Qwest -- excuse me.
18 CenturyLink respond to the same questions that we gave to
19 NAT, we did. And it's all -- to us this case is about
20 access charges for calls delivered to free calling
21 companies. So we have complied with the Stipulation that
22 we entered into and with what we think the relevant
23 issues in the case are. The bank accounts and loan
24 documents, I mean, a loan for -- I'm just sort of making
25 this up, a loan to provide DSL in Florida? Why would

1 that be possibly relevant in this case except for the
2 amount of resources that we have to expend to accumulate
3 all of that documentation.

4 So we ask that the Motion to Compel be denied in
5 its entirety. Thank you.

6 CHAIRMAN NELSON: Thank you.

7 Staff, anything?

8 MS. CREMER: I would stand by prior comments of
9 denial of this Motion.

10 CHAIRMAN NELSON: Questions from the Commission?
11 Thank you. Questions.

12 Seeing none, is there a Motion?

13 MS. AILTS WIEST: I have one.

14 CHAIRMAN NELSON: Rolayne.

15 MS. AILTS WIEST: This is a similar question I
16 had with respect to Sprint. But I believe in one of
17 your -- in your footnote, Mr. Swier, you stated that
18 CenturyLink hadn't provided meaningful discovery to 1.34
19 and 1.36. There was no discussion in the brief.

20 So my question is are you still contending that
21 they did not respond adequately to 1.34 and 1.36, which
22 are again related to expert witnesses?

23 MR. SWIER: If I may, I think that the expert
24 materials have now been -- again, with Sprint I don't
25 know because we just got that stuff a day or two ago. I

1 think my recollection is with regard to CenturyLink I do
2 believe in the information that they ultimately did
3 provide us that we are now okay with the information
4 they've given us regarding the expert. But with Sprint,
5 again, because of the lateness of the discovery, we don't
6 know for sure.

7 And, again, this whole discovery has been a very
8 fluid process. But our intention is not to simply make
9 it painful on Sprint or CenturyLink. They decided to
10 intervene in this case. They're parties. They are
11 subject to discovery just as any other party is.

12 And I think the fact that, again, this
13 comparative analysis that we're going to need to make --
14 how we present our case is how we present our case but we
15 feel that part of our burden is we're going to have to
16 make this comparative analysis. And without this very
17 basic information that we're requesting that we're
18 already having to give the other side, we think that
19 that's simply improper.

20 CHAIRMAN NELSON: Thank you.

21 Anything else, Rolayne.

22 MS. AILTS WIEST: No.

23 CHAIRMAN NELSON: Karen.

24 MS. CREMER: Mr. Swier, if you didn't get it,
25 Staff shows that we received that on April 13, shortly

1 after noon from Sprint. So if you didn't get that, you
2 know, I guess you should let them know so that you do
3 receive that response.

4 MR. SWIER: And, again, we'll look at that right
5 away and if it complies it's not an issue anymore.

6 CHAIRMAN NELSON: Thank you. Commissioner
7 Hanson.

8 COMMISSIONER HANSON: I was trying to -- earlier
9 I missed the data request numbers. I'm wondering did
10 we -- did you -- do you know if, Ms. Cremer, if you've
11 received data requests on 1.19 and 1.21?

12 MS. CREMER: From who?

13 COMMISSIONER HANSON: Well, it was a data
14 request by NAT directed towards Sprint.

15 Mr. Chairman, does counsel know? Ms. Wiest, do
16 you know if those have been received or not?

17 MS. AILTS WIEST: Yeah. I don't get any of the
18 discovery unless they've actually been filed with respect
19 to us for purposes of contesting any such discovery.

20 With respect to data request 1.19 and 1.21 and I
21 think you're probably referring to Sprint?

22 COMMISSIONER HANSON: Yes.

23 MS. AILTS WIEST: Those -- I mean, from NAT to
24 Sprint.

25 COMMISSIONER HANSON: Correct.

1 MS. AILTS WIEST: My understanding would be that
2 the answers that -- I would assume that the answers that
3 Sprint gave in their initial are still the up-to-date
4 answers and that nothing further has been given to them
5 with respect to data request 1.19 and 1.21.

6 The only thing that I'm aware from this meeting
7 is that there have been updates to the expert witness
8 testimony.

9 COMMISSIONER HANSON: Thank you.

10 CHAIRMAN NELSON: Mr. Schenkenberg, can you add
11 anything to Commissioner Hanson's question?

12 MR. SCHENKENBERG: I understood Mr. -- I'm
13 sorry. Commissioner Hanson's question to be addressed or
14 relating to questions asked of Qwest and then Ms. Wiest
15 was referring to questions asked of Sprint.

16 I think -- I'm looking at 1.29 that was asked of
17 us and that relates to business plans. We responded to
18 the expert's discovery request. And I thought the
19 Commissioner's question was whether Qwest has as well.

20 CHAIRMAN NELSON: I'm sorry.

21 COMMISSIONER HANSON: No. Mr. Chairman, this is
22 Commissioner Hanson. I was looking at this from a
23 standpoint that there's data requests by NAT on 1.19 and
24 1.21 and in any regard, Mr. Chairman, just a comment. I
25 believe that we should provide those data requests -- be

1 permitted because they do directly relate from a
2 standpoint that if Sprint claims that access stimulation
3 is illegal these would in fact show whether they're
4 participating in it. And so in that respect when a
5 Motion is made I think that we should include both of
6 those -- permit both of those.

7 MR. SCHENKENBERG: I do apologize for my
8 confusion. I think I misheard you on the numbers which
9 is why I was confused. Those two requests we did respond
10 by objecting but also referring back to our response to
11 1.1 in which we said Sprint does not believe that it
12 delivers calls directly to any entity offering free or
13 nearly free conference services in South Dakota.

14 So I think we believe we answered those
15 questions by saying we don't do this in South Dakota,
16 consistent with the limitations that had been discussed
17 before about limiting this to South Dakota.

18 COMMISSIONER HANSON: Well, I heard you say two
19 different things just now, that you answered by objecting
20 that you answered by saying you believe you did not --
21 that you do not provide this service.

22 Did you specifically reply and are you ready to
23 testify that you do not participate in that?

24 MR. SCHENKENBERG: Yes. We -- yes.

25 COMMISSIONER HANSON: All right. Thank you.

1 Thank you, Mr. Chair.

2 CHAIRMAN NELSON: Thank you. Further
3 Commissioner questions and/or motions? Commissioner
4 Hanson.

5 COMMISSIONER HANSON: If, in fact, Sprint has
6 now stated that they do not participate in that, I'm -- I
7 still want to see that data request provided. So my
8 Motion would be that in TC-11-087 that the Commission
9 deny NAT's Motion to Compel discovery, except for data
10 requests 1.19 and 1.21, and that the Commission approve
11 those data requests.

12 CHAIRMAN NELSON: Discussion on the Motion?

13 MS. AILTS WIEST: Just for a clarification,
14 Commissioner, would 1.19 be limited to South Dakota?

15 COMMISSIONER HANSON: Yes. Yes. That's what I
16 understand their data request was, that it was -- that
17 they were limited to South Dakota. If NAT did not
18 limit their data requests in both cases to South Dakota,
19 then my Motion would provide that in 1.19 and 1.21 that
20 those data requests would be limited to just
21 South Dakota.

22 MS. AILTS WIEST: Thank you.

23 CHAIRMAN NELSON: Further discussion of the
24 Motion?

25 I would simply say that I understand what

1 Mr. Swier is saying about doing a comparative analysis,
2 but I don't think that's the standard here. And I don't
3 see how any of this requested information, other than the
4 two exceptions that we've talked about helps us to
5 determine whether, or not NAT meets the standards provided
6 in the Administrative Rules and whether they're truthful
7 and not misleading and, in fact, complete. So,
8 therefore, I'm going to support the Motion.

9 Additional discussion?

10 Seeing none, all those in favor will vote aye.

11 Those opposed nay.

12 Commissioner Hanson.

13 COMMISSIONER HANSON: Aye.

14 CHAIRMAN NELSON: Commissioner Fiegen.

15 COMMISSIONER FIEGEN: Fiegen votes aye.

16 CHAIRMAN NELSON: Nelson votes aye. Motion

17 carries.

18 Is there a motion to adjourn.

19 COMMISSIONER HANSON: Motion to adjourn.

20 CHAIRMAN NELSON: All those in favor vote aye.

21 Those opposed vote nay.

22 Commissioner Hanson.

23 COMMISSIONER HANSON: Aye.

24 CHAIRMAN NELSON: Commissioner Fiegen.

25 COMMISSIONER FIEGEN: Fiegen votes aye.

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CHAIRMAN NELSON: Nelson votes aye. We're adjourned.

(The proceeding is concluded at 12:45 p.m.)

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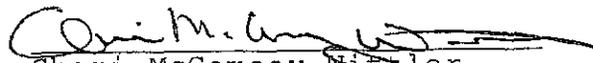
CERTIFICATE

COUNTY OF SULLY)

I, CHERI MCCOMSEY WITTLER, a Registered Professional Reporter, Certified Realtime Reporter and Notary Public in and for the State of South Dakota:

DO HEREBY CERTIFY that as the duly-appointed shorthand reporter, I took in shorthand the proceedings had in the above-entitled matter on the 24th day of April, 2012, and that the attached is a true and correct transcription of the proceedings so taken.

Dated at Onida, South Dakota this 8th day of May, 2012.



Cheri McComsey Wittler,
Notary Public and
Registered Professional Reporter
Certified Realtime Reporter

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