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

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

Reported By Cheri McComsey Wittler, RPR, CRR

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.

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

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

And with that, Mr. Swier, welcome.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

So I think from a Summary Judgment standpoint,

that's very clear.

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

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

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

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

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

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

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

And in this case NAT is asking for something

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

stimulation.

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

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

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

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

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

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

Thank you.

CHAIRMAN NELSON: Thank you. Questions from the Commission.

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

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

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

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

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

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

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

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

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

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

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

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

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

before.

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

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

Thank you. Mr. Coit.

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

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

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

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

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

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

just wanted to indicate that.

Thank you.

CHAIRMAN NELSON: Questions for Mr. Coit?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

their certificate.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

If not, thank you.

Mr. Schenkenberg.

(Discussion off the record)

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

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

In the bigger picture there is an impact in the

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

be there. The application is not complete.

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

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

CHAIRMAN NELSON: Questions from the Commission?

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

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

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

particular position on those issues.

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

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

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

submitted an opposition or objection at this point in time.

Thank you.

CHAIRMAN NELSON: Questions for Ms. Moore?

Seeing none, Staff.

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

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

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

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

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

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

Thank you.

CHAIRMAN NELSON: Questions for Ms. Cremer.

I have just one. Mr. Schenkenberg as he was

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

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

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

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

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

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

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

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

MR. SWIER: Very brief.

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

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

for not granting a Motion for Summary Judgment.

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

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

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

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

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

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

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

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

In Iowa, which is where mileage pumping is

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

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

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

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

Voice Communications, Inc. All with various ownership percentages.

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

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

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

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

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

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

Is there a Motion?

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

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

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

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

CHAIRMAN NELSON: Is there a Motion? Commissioner Hanson.

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

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

Discussion on the Motion.

COMMISSIONER HANSON: Thank you, Mr. Chairman.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Thank you, Mr. Chairman.

CHAIRMAN NELSON: Additional comments?

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

Additional comments on the Motion?

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

Commissioner Hanson.

COMMISSIONER HANSON: Aye.

CHAIRMAN NELSON: Fiegen.

COMMISSIONER FIEGEN: Fiegen votes aye.

CHAIRMAN NELSON: Nelson votes aye.

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

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

(A short recess is taken)

CHAIRMAN NELSON: We've been doing just a little

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

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

MR. SCHENKENBERG: I am, thank you.

CHAIRMAN NELSON: Are you prepared to proceed?

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

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

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

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

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

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

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

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

Would that be acceptable, Mr. Chairman?

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

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

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

Earlier this morning you had a Docket item

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

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

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

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

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

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

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

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

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

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

CHAIRMAN NELSON: Questions from the Commission.

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

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

CHAIRMAN NELSON: Go for it.

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

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

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

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

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

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

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

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

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

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

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

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

You have rules for administrative hearings and

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

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

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

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

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

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

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

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

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

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

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

MS. CREMER: That's correct.

CHAIRMAN NELSON: Thank you. Questions from the Commission?

Is there a Motion?

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

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

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

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

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

COMMISSIONER FIEGEN: Correct.

CHAIRMAN NELSON: Okay. Discussion on that Motion?

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

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

CHAIRMAN NELSON: Further discussion?

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

Commissioner Hanson.

COMMISSIONER HANSON: Aye.

CHAIRMAN NELSON: Commissioner Fiegen.

COMMISSIONER FIEGEN: Fiegen votes aye.

CHAIRMAN NELSON: Commissioner Nelson votes aye. Motion carries.

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

(A short recess is taken)

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

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

Mr. Lundy.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Seeing none, Mr. Swier.

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

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

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

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

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

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

Commissioner Hanson.

COMMISSIONER HANSON: Aye.

CHAIRMAN NELSON: Commissioner Fiegen.

COMMISSIONER FIEGEN: Fiegen votes aye.

CHAIRMAN NELSON: Nelson votes aye. Motion carries.

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

Mr. Swier.

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

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

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

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

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

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

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

CHAIRMAN NELSON: Thank you. Questions from the Commission?

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

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

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

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

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

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

CHAIRMAN NELSON: Thank you. Additional questions?

MS. AILTS WIEST: I do.

CHAIRMAN NELSON: Rolayne.

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

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

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

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

MS. AILTS WIEST: Sure.

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

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

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

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

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

answer that as best you can in your presentation.

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

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

MS. AILTS WIEST: No.

CHAIRMAN NELSON: Okay. Yeah. Mr. Schenkenberg, go ahead.

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

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

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

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

because we've been preparing for the hearing.

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

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

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

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

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

CHAIRMAN NELSON: Thank you.

Okay. With that Mr. Schenkenberg, go ahead.

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

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

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

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

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

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

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

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

Thank you. I have nothing further.

CHAIRMAN NELSON: Thank you.

Mr. Lundy.

MR. LUNDY: Thank you, Mr. Chairman.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CHAIRMAN NELSON: Thank you.

Staff, anything?

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

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

Seeing none, is there a Motion?

MS. AILTS WIEST: I have one.

CHAIRMAN NELSON: Rolayne.

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

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

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

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

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

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

CHAIRMAN NELSON: Thank you.

Anything else, Rolayne.

MS. AILTS WIEST: No.

CHAIRMAN NELSON: Karen.

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

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

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

CHAIRMAN NELSON: Thank you. Commissioner Hanson.

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

MS. CREMER: From who?

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

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

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

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

COMMISSIONER HANSON: Yes.

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

COMMISSIONER HANSON: Correct.

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

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

COMMISSIONER HANSON: Thank you.

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

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

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

CHAIRMAN NELSON: I'm sorry.

COMMISSIONER HANSON: No. Mr. Chairman, this is Commissioner Hanson. I was looking at this from a standpoint that there's data requests by NAT on 1.19 and 1 .21 and in any regard, Mr. Chairman, just a comment. I believe that we should provide those data requests -- be

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

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

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

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

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

MR. SCHENKENBERG: Yes. We -- yes.

COMMISSIONER HANSON: All right. Thank you.

Thank you, Mr. Chair.

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

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

CHAIRMAN NELSON: Discussion on the Motion?

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

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

MS. AILTS WIEST: Thank you.

CHAIRMAN NELSON: Further discussion of the Motion?

I would simply say that I understand what

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

Additional discussion?

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

Commissioner Hanson.

COMMISSIONER HANSON: Aye.

CHAIRMAN NELSON: Commissioner Fiegen.

COMMISSIONER FIEGEN: Fiegen votes aye.

CHAIRMAN NELSON: Nelson votes aye. Motion carries.

Is there a motion to adjourn.

COMMISSIONER HANSON: Motion to adjourn.

CHAIRMAN NELSON: All those in favor vote aye. Those opposed vote nay.

Commissioner Hanson.

COMMISSIONER HANSON: Aye.

CHAIRMAN NELSON: Commissioner Fiegen.

COMMISSIONER FIEGEN: Fiegen votes aye.

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

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

STATE OF SOUTH DAKOTA)

:SS 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

S