

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

IN THE MATTER OF THE APPLICATION
OF NATIVE AMERICAN TELECOM, LLC
FOR A CERTIFICATE OF AUTHORITY TO
PROVIDE LOCAL EXCHANGE SERVICE
WITHIN THE STUDY AREA OF
MIDSTATE COMMUNICATIONS, INC.

Docket No. TC11-087

**NATIVE AMERICAN TELECOM, LLC'S
MOTION FOR SUMMARY JUDGMENT**

Pursuant to SDCL 15-6-56 and ARSD 20:10:01:01.02, Native American Telecom, LLC ("NAT") hereby moves the South Dakota Public Utilities Commission for summary judgment on NAT's "Application for Certificate of Authority to Provide Local Exchange Service Within the Study Area of Midstate Communications, Inc." ("Application").

There are no disputed issues of material fact relating to NAT's technical, managerial, and financial ability to provide the telecommunications services as proposed in NAT's Application.

Dated this 26th day of March, 2012.

SWIER LAW FIRM, PROF. LLC

/s/ Scott R. Swier

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of *NATIVE AMERICAN TELECOM, LLC'S MOTION FOR SUMMARY JUDGMENT* was delivered *via electronic mail* on this 26th day of March, 2012, to the following parties:

Service List (SDPUC TC 11-087)

/s/ Scott R. Swier
Scott R. Swier

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**MEMORANDUM IN SUPPORT
OF NATIVE AMERICAN TELECOM, LLC'S
MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

Native American Telecom, LLC ("NAT"), through its counsel and pursuant to SDCL 15-6-56 and ARSD 20:10:01:01.02, submits this memorandum in support of its motion for summary judgment.

FACTS

NAT'S APPLICATION FOR CERTIFICATE OF AUTHORITY

1. On October 11, 2011, NAT filed its Application for Certificate of Authority ("Application") with the South Dakota Public Utilities Commission ("Commission"). (Statement of Undisputed Material Facts, ¶ 1) (hereinafter "SUMF, ¶ --").

2. Exhibit A to this Application contains NAT's "Certificate of Organization - Limited Liability Company" from the South Dakota Secretary of State's Office. (Application - Exhibit A; SUMF, ¶ 2).

3. Exhibit B to this Application contains a listing of NAT's key management personnel. (Application – Exhibit B; SUMF, ¶ 3).

4. Exhibit C to this Application contains NAT's confidential financial statements. (Application – Exhibit C; SUMF, ¶ 4).

5. On November 30, 2011, Commission Staff served a series of Data Requests on NAT. (Affidavit of Scott R. Swier in Support of NAT's Motion for Summary Judgment, ¶ 2; SUMF, ¶ 5).

6. NAT's Response Date to the Commission Staff's Data Requests was December 21, 2011. (Affidavit of Scott R. Swier in Support of NAT's Motion for Summary Judgment, ¶ 3; SUMF, ¶ 6).

7. NAT provided its Responses to the Commission Staff's Data Requests in a timely manner. (Affidavit of Scott R. Swier in Support of NAT's Motion for Summary Judgment, ¶ 4; SUMF, ¶ 7).

8. On January 27, 2012, NAT filed its Revised Application for Certificate of Authority ("Revised Application") with the Commission. (Revised Application; SUMF, ¶ 8).

9. NAT's Revised Application incorporates the original Application's Exhibits A-C. (Revised Application; SUMF, ¶ 9).

10. NAT's Revised Application seeks authority to provide local exchange and interexchange service within the Crow Creek Sioux Tribe Reservation ("Reservation") which is within the study area of Midstate

Communications, Inc. ("Midstate"). (Revised Application, page 1; SUMF, ¶ 10).

11. NAT's Revised Applications provides all information required by ARSD 20:10:32:03. (Revised Application; SUMF, ¶ 11).

12. On January 31, 2012, NAT's Revised Application was "deemed complete" by the Commission's Staff. (Affidavit of Scott R. Swier in Support of NAT's Motion for Summary Judgment, ¶ 5; SUMF, ¶ 12).

NAT, LLC

13. NAT's business address is 253 Ree Circle, Fort Thompson, South Dakota 57339, Telephone: 949-842-4478, Facsimile: 562-432-5250, Web page: NativeAmericanTelecom.com. (Revised Application, page 2; Direct Testimony of Jeff Holoubek on Behalf of NAT, page 3) (hereinafter "Holoubek Testimony, page -"; SUMF, ¶ 13).

14. NAT is a tribally-owned telecommunications company organized as a limited liability company under the laws of South Dakota. (Revised Application, pages 2-3; Holoubek Testimony, page 3; SUMF, ¶ 14).

15. NAT's principal office is located at 253 Ree Circle, Fort Thompson, South Dakota 57339. (Revised Application, page 2; Holoubek Testimony, page 4; SUMF, ¶ 15).

16. NAT's registered agent is Scott R. Swier, 133 N. Main Street, P.O. Box 256, Avon, South Dakota 57315. (Revised Application, page 2; Holoubek Testimony, page 4; SUMF, ¶ 16).

17. NAT has a certificate of authority from the South Dakota Secretary of State to transact business in South Dakota. (Revised Application, page 4 and Exhibit A; Holoubek Testimony, page 4; SUMF, ¶ 17).

18. NAT's Federal Tax Identification Number is 26-3283812. (Revised Application, page 12; Holoubek Testimony, page 12; SUMF, ¶ 18).

19. NAT's South Dakota sales tax number is 1012-1173-ST. (Revised Application, page 12; Holoubek Testimony, page 12; SUMF, ¶ 19).

20. NAT's ownership structure consists of the Crow Creek Sioux Tribe (51%) ("Tribe"), P.O. Box 50, Fort Thompson, SD 57339-0050, Native American Telecom Enterprise, LLC (25%) ("NAT Enterprise"), 747 S. 4th Ave., Sioux Falls, SD 57104, and WideVoice Communications, Inc. (24%) ("WideVoice"), 410 South Rampart, Suite 390, Las Vegas, NV 89145. (Revised Application, pages 3, 6; Holoubek Testimony, pages 4-5; SUMF, ¶ 20).

21. The Tribe is a federally-recognized Indian tribe with its tribal headquarters located on the Reservation in Fort Thompson, South Dakota. (Revised Application, page 3; SUMF, ¶ 21).

22. NAT Enterprise is a telecommunications development company. (Revised Application, page 3; SUMF, ¶ 22).

23. WideVoice is a telecommunications engineering company. (SUMF, ¶ 23).

NAT'S TECHNICAL CAPABILITIES

24. NAT seeks to provide facilities-based telephone service to compliment its advanced broadband services. (Revised Application, page 1; SUMF, ¶ 24).

25. NAT proposes to offer local exchange and interexchange service within the Reservation, which is within the study area of Midstate. (Revised Application, page 6; Holoubek Testimony, page 13; SUMF, ¶ 25).

26. NAT will provide service through its own facilities. (Revised Application, page 6; Holoubek Testimony, pages 8, 10; SUMF, ¶ 26).

27. NAT is currently interconnected with Midstate and other carriers for the exchange of telecommunications traffic. (Revised Application, page 6; Holoubek Testimony, page 8; SUMF, ¶ 27).

28. NAT is using WiMAX (Worldwide Interoperability for

Microwave Access) technology operating in the 3.65 GHZ licensed spectrum providing service to residential, small business, hospitality and public safety. (Revised Application, pages 6-7; Holoubek Testimony, page 8; SUMF, ¶ 28).

29. The network supports high-speed broadband services, voice service, data and Internet access, and multimedia. (Revised Application, page 7; Holoubek Testimony, page 8; SUMF, ¶ 29).

30. Through the use of advanced antenna and radio technology with OFDM1 OFDMA (Orthogonal Frequency Division Multiplexing), NAT is able to deliver wireless IP (Internet Protocol) voice and data communications. (Revised Application, page 7; Holoubek Testimony, page 9; SUMF, ¶ 30).

31. This 4G technology offers flexible, scalable and economically viable solutions that are key components to deploying in vast rural environments, such as the Reservation. (Revised Application, page 7; Holoubek Testimony, page 9; SUMF, ¶ 31).

32. NAT has established a toll-free number and email address for all customer inquiries and complaints, and has a physical location on the Reservation to handle customer complaints and inquiries within twenty-four (24) hours. (Revised Application, page 8; Holoubek Testimony, pages 9-10; SUMF, ¶ 32).

33. NAT has established connectivity with telecommunications carriers to provide its customers with access to 911, operator services, interexchange services, director assistance, and telecommunications relay services. (Revised Application, page 8; SUMF, ¶ 33).

34. NAT will target its direct marketing efforts to only those individuals and organizations within the Reservation. (Revised Application, page 9; Holoubek Testimony, page 10; SUMF, ¶ 34).

35. As a newly-formed limited liability company, NAT is not registered or certificated to provide telecommunications services in other states, nor has NAT applied for or ever been denied authority to provide telecommunications services in other states. (Revised Application, page 10; Holoubek Testimony, page 11; SUMF, ¶ 35).

36. NAT will utilize advertising designed to market its services. (Revised Application, page 10; Holoubek Testimony, page 11; SUMF, ¶ 36).

37. NAT will not solicit customers via telemarketing. (Revised Application, page 10; Holoubek Testimony, page 11; SUMF, ¶ 37).

38. NAT will require all personnel to be trained in NAT's policies and procedures to ensure affirmative customer selection of services from NAT. (Revised Application, pages 10-11; Holoubek Testimony, page 11; SUMF, ¶ 38).

39. NAT will require customers to complete an order form and/or a Letter of Authorization ("LOA") selecting NAT as the customer's carrier, if a consumer is switching local service providers. (Revised Application, page 11; Holoubek Testimony, page 11; SUMF, ¶ 39).

40. NAT will comply with all state and federal rules prohibiting the slamming of customers. (Revised Application, page 11; Holoubek Testimony, page 11; SUMF, ¶ 40).

41. NAT has never had a complaint filed against it with any state or federal commission regarding the unauthorized switching of a customer's telecommunications provider and the act of charging customers for services that have not been ordered. (Revised Application, page 11; Holoubek Testimony, page 11; SUMF, ¶ 41).

42. NAT will post the current rates, terms and conditions for its local and interexchange services offered in South Dakota on its website located at www.NativeAmericanTelecom.com. (Revised Application, page 11; Holoubek Testimony, page 12; SUMF, ¶ 42).

43. NAT will notify customers by mail, email or telephone, depending upon the customer's expressed preference, as to how notification should be made, to apprise them of any changes in rates, terms and conditions of service. (Revised Application, page 11; Holoubek Testimony, page 12; SUMF, ¶ 43).

44. NAT is a tribally-owned telecommunications carrier currently providing service on the Reservation. (Revised Application, page 3; Holoubek Testimony, page 4; SUMF, ¶ 44).

45. In 1997, the Crow Creek Sioux Tribal Council established the Crow Creek Sioux Tribe Utility Authority ("Tribal Utility Authority") for the purpose of planning and overseeing utility services on the Reservation and to promote the use of these services "to improve the health and welfare of the residents." (Revised Application, page 4; Holoubek Testimony, page 5; SUMF, ¶ 45).

46. On October 28, 2008, the Tribal Utility Authority entered its *Order Granting Approval to Provide Telecommunications Service* ("Approval Order"). (Revised Application, page 4; Holoubek Testimony, page 5; SUMF, ¶ 46).

47. Under this Approval Order, NAT was "granted authority to provide telecommunications service on the . . . Reservation subject to the jurisdiction of the laws of the Crow Creek Sioux Tribe." (Revised Application, page 4; Holoubek Testimony, pages 5-6; SUMF, ¶ 47).

48. NAT currently provides service on the Reservation pursuant to this Approval Order. (Revised Application, page 3; Holoubek Testimony, page 4; SUMF, ¶ 48).

49. NAT currently provides high-speed Internet access, basic telephone, and long-distance services on and within the Reservation. (Revised Application, page 3; Holoubek Testimony, page 5; SUMF, ¶ 49).

50. NAT has physical offices, telecommunications equipment, and telecommunications towers on the Reservation. (Revised Application, page 5; Holoubek Testimony, page 6; SUMF, ¶ 50).

51. NAT provides a computer training facility with free Internet and telephone service to tribal members. (Revised Application, page 5; Holoubek Testimony, page 6; SUMF, ¶ 51).

52. NAT provides 110 high-speed broadband and telephone installations at residential and business locations on the Reservation. (Revised Application, page 5; Holoubek Testimony, page 7; SUMF, ¶ 52).

53. NAT has established an Internet Library with six (6) work stations that provide computer/Internet opportunities for residents that do not otherwise have access to computers. (Revised Application, page 5; Holoubek Testimony, page 7; SUMF, ¶ 53).

NAT'S MANAGERIAL CAPABILITIES

54. NAT has years of managerial and technical experience in providing the telecommunications services proposed in its Revised Application. (Holoubek Testimony, page 13; SUMF, ¶ 54).

Patrick Chicas

55. Patrick Chicas ("Chicas") is the Chief Technical Officer for NAT. (Application – Exhibit B; SUMF, ¶ 55).

56. Chicas' business address is 410 South Rampart, Suite 390, Las Vegas, Nevada 89145. (SUMF, ¶ 56).

57. Chicas has overall responsibility for NAT's strategic guidance, network operations, and network planning and engineering. (Application – Exhibit B; SUMF, ¶ 57).

58. Chicas also serves as President and a Managing Director for Wide Voice, LLC. (Application – Exhibit B; SUMF, ¶ 58).

59. From September 2003 to April 2009, Chicas was a co-founder and Chief Technology Officer of Commpartners, Inc. a nationwide CLEC. (Application – Exhibit B; SUMF, ¶ 59).

60. From August 2000 to November 2003, Chicas was the president, co-chairman, and a member of the board at Rubicon Media Group, a sector-pioneering Internet publishing concern recently sold to Advanstar Communications, Inc. (Application – Exhibit B; SUMF, ¶ 60).

61. From March 1999 to August 2000, Chicas was the vice president for Data Services at Mpower Communications. (Application – Exhibit B; SUMF, ¶ 61).

62. While at Mpower, Chicas designed the company's entire IP infrastructure and the first production VoIP (Voice Over Internet Protocol) network for small business services. (Application – Exhibit B; SUMF, ¶ 62).

63. From January 1997 to September 1998, Chicas was the first executive hire and vice president of operations at Digital Island, Inc. (Application – Exhibit B; SUMF, ¶ 63).

64. Chicas also has prior telecommunications experience with Pacific Bell (now AT&T), PacTel Cellular (now Verizon), and GTE Mobilnet (now Verizon). (Application – Exhibit B; SUMF, ¶ 64).

Jeff Holoubek

65. Jeff Holoubek (“Holoubek”) is NAT's acting president. (Application – Exhibit B; Holoubek Testimony, page 2; SUMF, ¶ 65).

66. Holoubek received his law degree from the Boston University School of Law. (Application – Exhibit B; Holoubek Testimony, page 3; SUMF, ¶ 66).

67. Holoubek received his Masters of Business Administration (M.B.A.) from California State University – Fullerton. (Application – Exhibit B; Holoubek Testimony, page 3; SUMF, ¶ 67).

68. Holoubek holds Bachelor of Arts degrees in Accounting, Finance, and Philosophy. (Holoubek Testimony, page 3; SUMF, ¶ 68).

NAT'S FINANCIAL CAPABILITIES

69. NAT is not a publicly-held entity. (Holoubek Testimony, page 14; SUMF, ¶ 69).

70. NAT has provided its "confidential financial documents" for the Commission's analysis and review. (Holoubek Testimony, page 14; SUMF, ¶ 70).

71. The "confidential financial documents" provided by NAT to the Commission include (1) NAT's Balance Statements and (2) NAT's Profit & Loss Statements (through December 31, 2011). (Affidavit of Scott R. Swier in Support of NAT's Motion for Summary Judgment, ¶ 6; SUMF, ¶ 71).

72. NAT is committed and prepared to allocate the necessary resources to provide high-quality telecommunications services to its customers. (Holoubek Testimony, page 14; SUMF, ¶ 72).

LAW & ANALYSIS

I. THE COMMISSION SHOULD GRANT NAT'S MOTION FOR SUMMARY JUDGMENT AND AWARD NAT A CERTIFICATE OF AUTHORITY

A.) Standard for Summary Judgment

In South Dakota, the standard for summary judgment is well established:

Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories,

and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” . . . All reasonable inferences drawn from the facts must be viewed in favor of the nonmoving party. The burden is on the moving party to clearly show an absence of any genuine issue of material fact and an entitlement to judgment as a matter of law. On the other hand, “[t]he party opposing a motion for summary judgment must be diligent in resisting the motion, and mere general allegations and denials which do not set forth specific facts will not prevent issuance of a judgment.”

Schultz v. Dew, 1997 SD 72, ¶ 11, 564 N.W.2d 320, 322 (quoting *Ward v. Lange*, 1996 SD 113, ¶ 10, 553 N.W.2d 246, 249).

B.) The Telecommunications Act of 1996

The Telecommunications Act of 1996 (“Act”) significantly changed the delivery of telephone service in this country. See, e.g., STUART MINOR BENJAMIN, ET AL., TELECOMMUNICATIONS LAW AND POLICY 717 (2001); Salvatore Massa, et al., *Pricing Network Elements Under the Telecommunications Act of 1996: Back to the Future*, 23 *Hastings Comm. & Ent. L.J.* 751, 752 (2001) (noting that the Act is a “revolutionary piece of legislation”). At the heart of the Act is the overarching objective to transition the entire industry from a regulated monopoly to unregulated competition. BENJAMIN, ET AL., TELECOMMUNICATIONS LAW AND POLICY, at 716; HUBER, ET AL., FEDERAL TELECOMMUNICATIONS LAW, Volume 1, § 109 (Second Edition). These provisions eliminate state-imposed barriers to

competition and force incumbent local exchange carriers to cooperate with their potential competitors. *Id.*

C.) *The Legal Framework For Reviewing NAT's Revised Application Is Clear And Specific*

i.) SDCL 49-31-3

SDCL 49-31-3 provides that “[e]ach telecommunications company that plans to offer or provide interexchange telecommunications service shall file an application for a certificate of authority with the commission pursuant to this section.” This statutory provision also requires that “[t]elecommunications companies seeking to provide any local exchange service shall submit an application for certification by the commission pursuant to §§ 49-31-1 through 49-31-89 . . . [and] submit a two hundred fifty dollar application fee with its application. . . .” *Id.*

Furthermore, “[a] telecommunications company has the burden to prove in its application that it has *sufficient technical, financial and managerial capabilities* to offer the telecommunications services described in its application. . . .”¹ *Id.* (emphasis added). Finally, “[t]he

¹ SDCL 49-31-3 also clarifies that “[t]he commission may rule upon a telecommunications company’s application for a certificate of authority with or without hearing.”

commission shall, by rules promulgated pursuant to chapter 1-26, *prescribe the necessary procedures to implement this section.*" *Id.* (emphasis added).

ii.) ARSD 20:10:32:03

As a result of this enabling legislation, the Commission has prescribed the "necessary procedures" to implement this statute. Specifically, ARSD 20:10:32:03 provides that "[a] telecommunications company required to apply for a certificate of authority for local exchange services from the commission *shall submit a written application and provide . . . [specific] information. . . .*" (emphasis added). The Commission's rules then require that a telecommunications company provide information in twenty-five (25) very specific areas.² ARSD

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

and time-frame by which applicant will provide service through the use of its own facilities, the purchase of unbundled network elements, or resale; (c) A description of all facilities that the applicant will utilize to furnish the proposed local exchange services, including any facilities of underlying carriers; and (d) Information identifying the types of services it seeks authority to provide by reference to the general nature of the service; (9) A service area map or narrative description indicating with particularity the geographic area proposed to be served by the applicant; (10) Information regarding the technical competence of the applicant to provide its proposed local exchange services including: (a) A description of the education and experience of the applicant's management personnel who will oversee the proposed local exchange services; and (b) Information regarding policies, personnel, or arrangements made by the applicant which demonstrates the applicant's ability to respond to customer complaints and inquiries promptly and to perform facility and equipment maintenance necessary to ensure compliance with any commission quality of service requirements; (11) Information explaining how the applicant will provide customers with access to emergency services such as 911 or enhanced 911, operator services, interexchange services, directory assistance, and telecommunications relay services; (12) For the most recent 12 month period, financial statements of the applicant consisting of balance sheets, income statements, and cash flow statements. The applicant shall provide audited financial statements, if available; (13) Information detailing the following matters associated with interconnection to provide proposed local exchange services: (a) The identity of all local exchange carriers with which the applicant plans to interconnect; (b) The likely timing of initiation of interconnection service and a statement as to when negotiations for interconnection started or when negotiations are likely to start; and (c) A copy of any request for interconnection made by the applicant to any local exchange carrier; (14) A description of how the applicant intends to market its local exchange services, its target market, whether the applicant engages in multilevel marketing, and copies of any company brochures that will be used to assist in sale of the services; (15) If the applicant is seeking authority to provide local exchange service in the service area of a rural telephone company, the date by which the applicant expects to meet the service obligations imposed pursuant to § 20:10:32:15 and applicant's plans for meeting the service obligations; (16) A list of the states in which the applicant is registered or certified to provide telecommunications services, whether the applicant has ever been denied registration or certification in any state and the reasons for any such

20:10:32:03(1-25). *The Commission* may then “request additional information to demonstrate that the applicant has sufficient technical, financial, and managerial capabilities to provide the local exchange services it intends to offer. . . .” ARSD 20:10:32:03(25). Once a telecommunications company provides this information to the

denial, a statement as to whether or not the applicant is in good standing with the appropriate regulatory agency in the states where it is registered or certified, and a detailed explanation of why the applicant is not in good standing in a given state, if applicable; (17) The names, addresses, telephone numbers, E-mail addresses, and facsimile numbers of the applicant's representatives to whom all inquiries must be made regarding customer complaints and other regulatory matters; (18) Information concerning how the applicant plans to bill and collect charges from customers who subscribe to its proposed local exchange services; (19) Information concerning the applicant's policies relating to solicitation of new customers and a description of the efforts the applicant shall use to prevent the unauthorized switching of local service customers by the applicant, its employees, or agents; (20) The number and nature of complaints filed against the applicant with any state or federal commission regarding the unauthorized switching of a customer's telecommunications provider and the act of charging customers for services that have not been ordered; (21) Information concerning how the applicant will make available to any person information concerning the applicant's current rates, terms, and conditions for all of its telecommunications services; (22) Information concerning how the applicant will notify a customer of any materially adverse change to any rate, term, or condition of any telecommunications service being provided to the customer. The notification must be made at least thirty days in advance of the change; (23) A written request for waiver of those rules believed to be inapplicable; (24) Federal tax identification number and South Dakota sales tax number; and (25) *Other information requested by the commission* needed to demonstrate that the applicant has sufficient technical, financial, and managerial capabilities to provide the local exchange services it intends to offer consistent with the requirements of this chapter and other applicable rules and laws.
ARSD 20:10:32:03 (emphasis added).

Commission, the application is deemed "complete" and the Commission may rule on the application.

In this case, NAT has provided the Commission with a complete application and thoroughly responded to the Commission Staff's Data Requests. The intervenors have failed to show that any information contained in either NAT's Revised Application or Data Request Responses creates any "genuine issue of material fact."

iii.) ARSD 20:10:32:06

Under ARSD 20:10:32:06, the Commission's criteria for granting a certificate of authority is limited and specific:

In determining if an applicant has sufficient technical, financial, and managerial capabilities and whether to grant a certificate of authority for local exchange services the commission shall consider:

- (1) If the applicant has an actual intent to provide local exchange services in South Dakota;
- (2) Prior experience of the applicant or the applicant's principals or employees in providing telecommunications services or related services in South Dakota or other jurisdictions, including the extent to which that experience relates to and is comparable to service plans outlined in the filed application;
- (3) The applicant's personnel, staffing, equipment, and procedures, including the extent to which these are adequate to ensure compliance with the commission's rules and orders relating to service

obligations, service quality, customer service, and other relevant areas;

(4) The nature and location of any proposed or existing facilities which the applicant intends to use in providing local exchange services;

(5) If the applicant intends to resell local exchange services or enter into facility arrangements with other telecommunications carriers, when the necessary arrangements will be in place;

(6) The applicant's marketing plans and its plan and resources for receiving and responding to customer inquiries and complaints;

(7) If the applicant has sufficient financial resources to support the provisioning of local exchange service in a manner that ensures the continued quality of telecommunications services and safeguards consumer and public interests;

(8) If the applicant, in providing its local exchange services, will be able to provide all customers with access to interexchange services, operator services, directory assistance, directory listings, and emergency services such as 911 and enhanced 911;

(9) If the applicant is seeking authority to provide local exchange services in the service area of a rural telephone company, if the applicant's plans for meeting the additional service obligations imposed in rural telephone company service areas pursuant to § 20:10:32:15 are adequate and demonstrate that the applicant will in fact meet such obligations;

(10) The extent to which the applicant, applicant's affiliates, or applicant's principals have been subject to any civil, criminal, or administrative action in connection with the provisioning of telecommunications services; and

(11) Any other factors relevant to determining the applicant's technical, financial, and managerial capability to provide the services described in the application consistent with the requirements of this chapter and other applicable laws, rules, and commission orders.

ARSD 20:10:32:06.

The undisputed facts presented by NAT in its Revised Application and responses to the Commission Staff's Data Requests, satisfy these legal requirements. The intervenors have failed to show that any information NAT provided to the Commission creates any "genuine issue of material fact." As such, the Commission must consider the undisputed facts as presented, grant NAT's motion for summary judgment, and award NAT a certificate of authority.

D.) There Is No Basis To Treat NAT Differently From Any Other CLEC And Further Delay Competition

The Commission has consistently viewed competition in telecommunications services as a benefit to the residents of South Dakota and has approved the applications of numerous CLECs. Since competitive telephone services were first introduced in South Dakota, our state's residents have benefited through lower prices, greater choice, and availability of a broader range of often innovative services. Granting NAT's Revised Application will help bring these benefits of competition to

a significant number of Tribal members who until now may not have had the opportunity to enjoy such benefits.

The Commission has established a simple regulatory procedure for CLECs because the Commission recognizes the benefits of competition to South Dakota residents. South Dakota law does not envision the kind of elaborate proceeding or investigation of a CLEC's offerings that the intervenors propose. The Commission must review a CLEC's application in a manner consistent with the applicable statutory and administrative laws. And while the Commission affords an opportunity to request a hearing on a CLEC application before a certificate of authority is granted, a hearing has never been requested or held in South Dakota. *See, e.g.,* <http://puc.sd.gov/Dockets/Telecom/default.aspx> (providing a complete listing of the Commission's telecommunications dockets – including CLEC applications - from 1997 thru 2012).

By enacting the straightforward CLEC application framework, the Commission has streamlined entry regulation and opted to expedite competition in South Dakota by regulating *conduct rather than entry*. The intervenors propose an unprecedented level of *entry regulation* that is inconsistent with the Commission's framework. The intervenors seek an extensive and unwarranted evidentiary investigation into the nature of NAT's services. However, the intervenors' imaginative array of

“potential issues” overreaches any entry regulation under South Dakota law.

There is no basis to delay NAT’s entry in order to address the intervenors’ “abstract claims.” Like any other CLEC in the same position, NAT is only required to abide by the Commission’s rules of entry. NAT has complied with each and every one of these rules. Consistent with South Dakota’s market-based approach to CLEC regulation, the Commission should not waste time and resources entertaining the intervenors’ “abstract claims” prior to entry.

The wide-ranging investigation envisioned by the intervenors can have only one purpose: to erect a massive regulatory barrier that delays competitive entry. Such delay may serve the interests of the intervenors, but it does not serve the public good and is inconsistent with the Commission’s framework. The intervenors’ actions also frustrate the Commission’s efforts in carrying out its role to open the local exchange and exchange access markets to competition.

The intervenors’ demand for a drawn-out inquiry only serves to delay competitive entry into the market. NAT’s CLEC certification process has already been delayed far beyond what has been normal for the Commission. The intervenors have shown no reason why NAT’s Revised Application should be denied on the basis of any of the grounds

identified in the Commission's rules. NAT has met all of the requirements for CLEC certification in South Dakota. Therefore, NAT asks the Commission to act expeditiously in resolving the narrow issue before it and grant NAT's Revised Application.

CONCLUSION

There is no basis to delay NAT's entry into the proposed service area. NAT has met all of the legal requirements for receiving a Certificate of Authority from the Commission. NAT has submitted its Revised Application with all required supporting information. Competition is no less in the public interest in the area that NAT proposes to serve than in the rest of South Dakota.

Therefore, the Commission should (1) proceed with its own independent analysis of NAT's Revised Application; (2) apply the same legal standards and procedural framework that the Commission has applied to every other competitive entry application since 1997; (3) deny the intervenors' request to hold an unnecessary hearing on "abstract issues"; and (4) issue a decision granting NAT's Revised Application as a matter of law.

Dated this 26th day of March, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of *MEMORANDUM IN SUPPORT OF NATIVE AMERICAN TELECOM, LLC'S MOTION FOR SUMMARY JUDGMENT* was delivered *via electronic mail* on this 26th day of March, 2012, to the following parties:

Service List (SDPUC TC 11-087)

/s/ Scott R. Swier
Scott R. Swier

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

IN THE MATTER OF THE APPLICATION
OF NATIVE AMERICAN TELECOM, LLC
FOR A CERTIFICATE OF AUTHORITY TO
PROVIDE LOCAL EXCHANGE SERVICE
WITHIN THE STUDY AREA OF
MIDSTATE COMMUNICATIONS, INC.

Docket No. TC11-087

**DECLARATION OF SCOTT R. SWIER
IN SUPPORT OF NATIVE AMERICAN TELECOM, LLC'S
MOTION FOR SUMMARY JUDGMENT**

STATE OF SOUTH DAKOTA)
 :SS
COUNTY OF BON HOMME)

Scott R. Swier ("Affiant"), one of the attorneys for Native American Telecom, LLC ("NAT"), upon information and belief, and being first duly sworn upon his oath, declares as follows:

1. Affiant makes this Affidavit in Support of NAT's "Motion for Summary Judgment."
2. On November 30, 2011, SDPUC Staff served a series of Data Requests on NAT.
3. NAT's Response Date to the SDPUC Staff's Data Requests was December 21, 2011.
4. NAT provided its Responses to the SDPUC Staff's Data Requests in a timely manner.

5. On January 31, 2012, NAT's Revised Application was "deemed complete" by the Commission's Staff.

6. NAT's "confidential financial documents" provided to the Commission include (1) NAT's Balance Statements and (2) NAT's Profit & Loss Statements (through December 31, 2011).

I DECLARE, upon information and belief, that the foregoing statements are true and correct.

Dated this 26th day of March, 2012.

/s/ Scott R. Swier

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of *DECLARATION OF SCOTT R. SWIER IN SUPPORT OF NATIVE AMERICAN TELECOM, LLC'S MOTION FOR SUMMARY JUDGMENT* was delivered *via electronic mail* on this 26th day of March, 2012, to the following parties:

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Docket No. TC11-087

**NATIVE AMERICAN TELECOM, LLC'S
STATEMENT OF UNDISPUTED MATERIAL FACTS
IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

Pursuant to SDCL 15-6-56(c) and ARSD 20:10:01:01.02, Native American Telecom, LLC ("NAT") hereby submits the following statement of undisputed material facts in support of its motion for summary judgment.

NAT'S APPLICATION FOR CERTIFICATE OF AUTHORITY

1. On October 11, 2011, NAT filed its Application for Certificate of Authority ("Application") with the South Dakota Public Utilities Commission ("Commission").
2. Exhibit A to this Application contains NAT's "Certificate of Organization - Limited Liability Company" from the South Dakota Secretary of State's Office. (Application - Exhibit A).
3. Exhibit B to this Application contains a listing of NAT's key management personnel. (Application - Exhibit B).

4. Exhibit C to this Application contains NAT's confidential financial statements. (Application – Exhibit C).

5. On November 30, 2011, Commission Staff served a series of Data Requests on NAT. (Affidavit of Scott R. Swier in Support of NAT's Motion for Summary Judgment, ¶ 2).

6. NAT's Response Date to the Commission Staff's Data Requests was December 21, 2011. (Affidavit of Scott R. Swier in Support of NAT's Motion for Summary Judgment, ¶ 3).

7. NAT provided its Responses to the Commission Staff's Data Requests in a timely manner. (Affidavit of Scott R. Swier in Support of NAT's Motion for Summary Judgment, ¶ 4).

8. On January 27, 2012, NAT filed its Revised Application for Certificate of Authority ("Revised Application") with the Commission.

9. NAT's Revised Application incorporates the original Application's Exhibits A-C. (Revised Application).

10. NAT's Revised Application seeks authority to provide local exchange and interexchange service within the Crow Creek Sioux Tribe Reservation ("Reservation") which is within the study area of Midstate Communications, Inc. ("Midstate"). (Revised Application, page 1).

11. NAT's Revised Applications provides all information required by ARSD 20:10:32:03. (Revised Application).

12. On January 31, 2012, NAT's Revised Application was "deemed complete" by the Commission's Staff. (Affidavit of Scott R. Swier in Support of NAT's Motion for Summary Judgment, ¶ 5).

NAT, LLC

13. NAT's business address is 253 Ree Circle, Fort Thompson, South Dakota 57339, Telephone: 949-842-4478, Facsimile: 562-432-5250, Web page: NativeAmericanTelecom.com. (Revised Application, page 2; Direct Testimony of Jeff Holoubek on Behalf of NAT, page 3) (hereinafter "Holoubek Testimony, page -").

14. NAT is a tribally-owned telecommunications company organized as a limited liability company under the laws of South Dakota. (Revised Application, pages 2-3; Holoubek Testimony, page 3).

15. NAT's principal office is located at 253 Ree Circle, Fort Thompson, South Dakota 57339. (Revised Application, page 2; Holoubek Testimony, page 4).

16. NAT's registered agent is Scott R. Swier, 133 N. Main Street, P.O. Box 256, Avon, South Dakota 57315. (Revised Application, page 2; Holoubek Testimony, page 4).

17. NAT has a certificate of authority from the South Dakota Secretary of State to transact business in South Dakota. (Revised Application, page 4 and Exhibit A; Holoubek Testimony, page 4).

18. NAT's Federal Tax Identification Number is 26-3283812.
(Revised Application, page 12; Holoubek Testimony, page 12).

19. NAT's South Dakota sales tax number is 1012-1173-ST.
(Revised Application, page 12; Holoubek Testimony, page 12).

20. NAT's ownership structure consists of the Crow Creek Sioux Tribe (51%) ("Tribe"), P.O. Box 50, Fort Thompson, SD 57339-0050, Native American Telecom Enterprise, LLC (25%) ("NAT Enterprise"), 747 S. 4th Ave., Sioux Falls, SD 57104, and WideVoice Communications, Inc. (24%) ("WideVoice"), 410 South Rampart, Suite 390, Las Vegas, NV 89145. (Revised Application, pages 3, 6; Holoubek Testimony, pages 4-5).

21. The Tribe is a federally-recognized Indian tribe with its tribal headquarters located on the Crow Creek Sioux Tribe Reservation ("Reservation") in Fort Thompson, South Dakota. (Revised Application, page 3).

22. NAT Enterprise is a telecommunications development company. (Revised Application, page 3).

23. WideVoice is a telecommunications engineering company.

NAT'S TECHNICAL CAPABILITIES

24. NAT seeks to provide facilities-based telephone service to compliment its advanced broadband services. (Revised Application, page 1).

25. NAT proposes to offer local exchange and interexchange service within the Reservation, which is within the study area of Midstate. (Revised Application, page 6; Holoubek Testimony, page 13).

26. NAT will provide service through its own facilities. (Revised Application, page 6; Holoubek Testimony, pages 8, 10).

27. NAT is currently interconnected with Midstate and other carriers for the exchange of telecommunications traffic. (Revised Application, page 6; Holoubek Testimony, page 8).

28. NAT is using WiMAX (Worldwide Interoperability for Microwave Access) technology operating in the 3.65 GHZ licensed spectrum providing service to residential, small business, hospitality and public safety. (Revised Application, pages 6-7; Holoubek Testimony, page 8).

29. The network supports high-speed broadband services, voice service, data and Internet access, and multimedia. (Revised Application, page 7; Holoubek Testimony, page 8).

30. Through the use of advanced antenna and radio technology with OFDM1 OFDMA (Orthogonal Frequency Division Multiplexing), NAT is able to deliver wireless IP (Internet Protocol) voice and data communications. (Revised Application, page 7; Holoubek Testimony, page 9).

31. This 4G technology offers flexible, scalable and economically viable solutions that are key components to deploying in vast rural environments, such as the Reservation. (Revised Application, page 7; Holoubek Testimony, page 9).

32. NAT has established a toll-free number and email address for all customer inquiries and complaints, and has a physical location on the Reservation to handle customer complaints and inquiries within twenty-four (24) hours. (Revised Application, page 8; Holoubek Testimony, pages 9-10).

33. NAT has established connectivity with telecommunications carriers to provide its customers with access to 911, operator services, interexchange services, director assistance, and telecommunications relay services. (Revised Application, page 8).

34. NAT will target its direct marketing efforts to only those individuals and organizations within the Reservation. (Revised Application, page 9; Holoubek Testimony, page 10).

35. As a newly-formed limited liability company, NAT is not registered or certificated to provide telecommunications services in other states, nor has NAT applied for or ever been denied authority to provide telecommunications services in other states. (Revised Application, page 10; Holoubek Testimony, page 11).

36. NAT will utilize advertising designed to market its services. (Revised Application, page 10; Holoubek Testimony, page 11).

37. NAT will not solicit customers via telemarketing. (Revised Application, page 10; Holoubek Testimony, page 11).

38. NAT will require all personnel to be trained in NAT's policies and procedures to ensure affirmative customer selection of service from NAT. (Revised Application, pages 10-11; Holoubek Testimony, page 11).

39. NAT will require customers to complete an order form and/or a Letter of Authorization ("LOA") selecting NAT as the customer's carrier, if a consumer is switching local service providers. (Revised Application, page 11; Holoubek Testimony, page 11).

40. NAT will comply with all state and federal rules prohibiting the slamming of customers. (Revised Application, page 11; Holoubek Testimony, page 11).

41. NAT has never had a complaint filed against it with any state or federal commission regarding the unauthorized switching of a customer's telecommunications provider and the act of charging customers for services that have not been ordered. (Revised Application, page 11; Holoubek Testimony, page 11).

42. NAT will post the current rates, terms and conditions for its local and interexchange services offered in South Dakota on its website located at www.NativeAmericanTelecom.com. (Revised Application, page 11; Holoubek Testimony, page 12).

43. NAT will notify customers by mail, email or telephone, depending upon the customer's expressed preference, as to how notification should be made, to apprise them of any changes in rates, terms and conditions of service. (Revised Application, page 11; Holoubek Testimony, page 12).

44. NAT is a tribally-owned telecommunications carrier currently providing service on the Reservation. (Revised Application, page 3; Holoubek Testimony, page 4).

45. In 1997, the Crow Creek Sioux Tribal Council established the Crow Creek Sioux Tribe Utility Authority ("Tribal Utility Authority") for the purpose of planning and overseeing utility services on the Reservation and to promote the use of these services "to improve the

health and welfare of the residents.” (Revised Application, page 4; Holoubek Testimony, page 5).

46. On October 28, 2008, the Tribal Utility Authority entered its *Order Granting Approval to Provide Telecommunications Service* (“Approval Order”). (Revised Application, page 4; Holoubek Testimony, page 5).

47. Under this Approval Order, NAT was “granted authority to provide telecommunications service on the . . . Reservation subject to the jurisdiction of the laws of the Crow Creek Sioux Tribe.” (Revised Application, page 4; Holoubek Testimony, pages 5-6).

48. NAT currently provides service on the Reservation pursuant to this Approval Order. (Revised Application, page 3; Holoubek Testimony, page 4).

49. NAT currently provides high-speed Internet access, basic telephone, and long-distance services on and within the Reservation. (Revised Application, page 3; Holoubek Testimony, page 5).

50. NAT has physical offices, telecommunications equipment, and telecommunications towers on the Reservation. (Revised Application, page 5; Holoubek Testimony, page 6).

51. NAT provides a computer training facility with free Internet and telephone service to tribal members. (Revised Application, page 5; Holoubek Testimony, page 6).

52. NAT provides 110 high-speed broadband and telephone installations at residential and business locations on the Reservation. (Revised Application, page 5; Holoubek Testimony, page 7).

53. NAT has established an Internet Library with six (6) work stations that provide computer/Internet opportunities for residents that do not otherwise have access to computers. (Revised Application, page 5; Holoubek Testimony, page 7).

NAT'S MANAGERIAL CAPABILITIES

54. NAT has years of managerial and technical experience in providing the telecommunications services proposed in its Revised Application. (Holoubek Testimony, page 13).

Patrick Chicas

55. Patrick Chicas ("Chicas") is the Chief Technical Officer for NAT. (Application - Exhibit B).

56. Chicas' business address is 410 South Rampart, Suite 390, Las Vegas, Nevada 89145.

57. Chicas has overall responsibility for NAT's strategic guidance, network operations, and network planning and engineering. (Application - Exhibit B).

58. Chicas also serves as President and a Managing Director for Wide Voice, LLC. (Application - Exhibit B).

59. From September 2003 to April 2009, Chicas was a co-founder and Chief Technology Officer of Commpartners, Inc. a nationwide CLEC. (Application – Exhibit B).

60. From August 2000 to November 2003, Chicas was the president, co-chairman, and a member of the board at Rubicon Media Group, a sector pioneering Internet publishing concern recently sold to Advanstar Communications, Inc. (Application – Exhibit B).

61. From March 1999 to August 2000, Chicas was the vice president for Data Services at Mpower Communications. (Application – Exhibit B).

62. While at Mpower, Chicas designed the company's entire IP infrastructure and the first production VoIP (Voice Over Internet Protocol) network for small business services. (Application – Exhibit B).

63. From January 1997 to September 1998, Chicas was the first executive hire and vice president of operations at Digital Island, Inc. (Application – Exhibit B).

64. Chicas also has prior telecommunications experience with Pacific Bell (now AT&T), PacTel Cellular (now Verizon), and GTE Mobilnet (now Verizon). (Application – Exhibit B).

Jeff Holoubek

65. Jeff Holoubek (“Holoubek”) is NAT’s acting president. (Application – Exhibit B; Holoubek Testimony, page 2).
66. Holoubek received his law degree from the Boston University School of Law. (Application – Exhibit B; Holoubek Testimony, page 3).
67. Holoubek received his Masters of Business Administration (M.B.A.) from California State University – Fullerton. (Application – Exhibit B; Holoubek Testimony, page 3).
68. Holoubek holds Bachelor of Arts degrees in Accounting, Finance, and Philosophy. (Holoubek Testimony, page 3).

NAT’S FINANCIAL CAPABILITIES

69. NAT is not a publicly-held entity. (Holoubek Testimony, page 14).
70. NAT has provided its “confidential financial documents” for the Commission’s analysis and review. (Holoubek Testimony, page 14).
71. The “confidential financial documents” provided by NAT to the Commission include (1) NAT’s Balance Statements and (2) NAT’s Profit & Loss Statements (through December 31, 2011). (Affidavit of Scott R. Swier in Support of NAT’s Motion for Summary Judgment, ¶ 6).

72. NAT is committed and prepared to allocate the necessary resources to provide high-quality telecommunications services to its customers. (Holoubek Testimony, page 14).

Dated this 26th day of March, 2012.

SWIER LAW FIRM, PROF. LLC

/s/ Scott R. Swier

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