STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	: SS	
COUNTY OF BUFFALO	)	FIRST JUDICIAL CIRCUIT

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.	CIV. 12-06 MEMORANDUM DECISION AND ORDER

Appellant Native American Telecom, LLC [NAT] appeals various decisions of the South Dakota Public Utilities Commission [PUC], including the PUC's "Order Granting Intervention," "Order Denying Motion for Summary Judgment; Order Granting Motions to Compel; Order Granting in Part and Denying in Part Motion to Compel," and "Order Quashing Subpoena." Qwest Communications LLC, dba CenturyLink [CenturyLink], subsequently filed a Motion to Dismiss Appeal. That Motion to Dismiss was joined by the PUC, Sprint Communications Company, LP [Sprint], AT&T Communications of the Midwest, Inc. [AT&T], Midstate Communications, Inc. [Midstate], and South Dakota Telecommunications Associate [SDTA].[1] NAT, CenturyLink, Sprint, and the PUC have all submitted briefs on CenturyLink's Motion to Dismiss. A hearing was held on the Motion to Dismiss on August 14, 2012 at the Buffalo County Courthouse in Chamberlain, South Dakota. NAT appeared and was represented by its attorney Mr. Scott Swier. AT&T

[1] CenturyLink, Sprint, AT&T, Midstate, SDTA, and PUC when referenced collectively will be referred to as [Interveners].

appeared and was represented by its attorney Rob Konrad. Rolayne Wiest appeared on behalf of the PUC. Scott Knudson appeared on behalf of Sprint. Tom Welk appeared on behalf of CenturyLink. The court has considered the information presented in this matter and the parties' briefs and has reached the following decision.

BACKGROUND

On October 11, 2011, the PUC received an application from NAT for a certificate of authority to provide interexchange long distance service and local exchange services within the Crow Creek Sioux Tribe Reservation. This area falls within the study area of Midstate. Petitions to intervene were filed by Midstate, CenturyLink, AT&T, Sprint, and the SDTA. On November 20, 2011, the PUC unanimously voted to grant intervention to all of those parties. On November 30, 2011, the PUC issued its "Order Granting Intervention" and served a series of Data Requests on NAT. On January 12, 2012, NAT filed a Motion Requesting a Protective Order Requiring the Parties and Intervenors to Comply with a Confidentiality Agreement. The PUC granted this motion on January 31, 2012.

On January 27, 2012, NAT filed its Revised Application for Certificate of Authority. Over the next several months NAT, Sprint, and AT&T filed their direct testimony. On March 26, 2012, NAT filed a Motion for Summary Judgment. On March 27, 2012, NAT, Midstate, and SDTA filed a stipulation between those parties.

On April 2 and 3, Sprint, CentryLink, and NAT each filed Motions to Compel Discovery. After receiving responses and replies on the Motions to Compel and the Motion for Summary Judgment, the PUC issued on May 4 an Order Denying Motion for Summary Judgment; Order Granting Motions to Compel; Order Granting in Part and Denying in Part Motion to Compel. On May 7, NAT served a Subpoena to Produce Documents, Information or Objects or to Permit Inspection of Premises in Civil Action on the Commission. The PUC responded on May 16 by issuing an Order Quashing Subpoena.

On May 14, 2012, NAT served its "Notice of Appeal" on the parties. On May 29, the PUC cancelled a hearing that was scheduled for June 7, 2012.

ANALYSIS

The South Dakota Supreme Court has held that "[n]o right to appeal an administrative decision to circuit court exists unless the South Dakota Legislature enacts a statute creating that right." *Daily v. City of Sioux Falls*, 2011 S.D. 48, ¶ 24, 802 N.W.2d 905, 915. "Failure to follow the plain language of the statute deprives the circuit court of subject matter jurisdiction over the appeal and requires its dismissal." *Siama v. Landmann Jungman Hosp.*, 2002 S.D. 151, ¶ 4, 654 N.W.2d 826 (*citing Schreifels v. Kottke Trucking*, 2001 S.D. 90, ¶ 12, 531 N.W.2d 186, 189). The South Dakota Supreme Court has held that "[w]hen the legislature provides for appeal to circuit court from an administrative agency, the circuit court's appellate jurisdiction depends on compliance with conditions precedent set by the legislature." *Clagget v. Dept. of Revenue*, 464 N.W.2d 212, 214 (S.D. 1990).

It is undisputed that all of NAT's appeals are based upon intermediate agency actions or rulings by the PUC. SDCL 1-26-30 governs appeals from administrative agencies. SDCL 1-26-30 provides:

> A person who has exhausted all administrative remedies available within any agency or a party who is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter. If a rehearing is authorized by law or administrative rule, failure to request a rehearing will not be considered a failure to exhaust all administrative remedies and will not prevent an otherwise final decision from becoming final for purposes of such judicial review. This section does not limit utilization of or the scope of judicial review available under other means of review, redress, or relief, when provided by law. A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy.

As there has been no final action taken by the PUC, the guiding language is the last line of SDCL 1-26-30 "A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy." SDCL 1-26-30 sets forth a condition precedent of requiring the party seeking the intermediate appeal, NAT, to prove that review of the PUC's final agency decision would not provide an adequate remedy for this court to hear the review.

In this case NAT argues that adequate remedy does not exist because the PUC's actions have denied NAT the ability to conduct full discovery, resulting in NAT being denied due process. NAT claims that this has left it in a position where appeal of the final agency decision would not provide NAT with an adequate remedy. Interveners argue that the court lacks subject matter jurisdiction as the PUC has not yet rendered its final decision. They claim that NAT still has an

adequate remedy available in that it can appeal all of these issues after the PUC has rendered its final decision.

While the South Dakota Supreme Court has not directly addressed the last sentence of SDCL 1-26-30 that is at issue in this case, it has provided guidance in addressing similar issues regarding agency action, including the doctrines of exhaustion and primary jurisdiction. The Court in *South Dakota Educ. Association/NEA By and Through Roberts v. Barnet* made clear that both exhaustion of administrative remedies and primary jurisdiction require deference to administrative proceedings when it stated:

> ""Exhaustion' applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course. 'Primary jurisdiction,' on the other hand, applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.'"

South Dakota Educ. Association/NEA By and Through Roberts v. Barnet, 1998 S.D. 84, ¶ 9, 582 N.W.2d 386, 390 (*quoting Gottschalk v. Hegg*, 228 N.W.2d 640, 642 (S.D. 1975); *United States v. Western P. R. Co.*, 352 U.S. 59, 63-64, 77 S.Ct. 161, 165, 1 L.E.2d 126, 132 (1956)). In *SDEA/NEA By and Through Roberts*, the Court, while not citing to SDCL 1-26-30, held "that neither principles of exhaustion nor primary jurisdiction require this Court's deference to an administrative proceeding and that COHE has no other plain, speedy or adequate remedy in the ordinary course of law." *Id.* ¶ 10. The situation in that case and this current case are

distinguishable because in *SDEA/NEA By and Through Roberts*, the Court found that there were no claims that required resort to an administrative process because all of the claims related to the implementation of a purportedly unconstitutional legislative act, compared to this case, where it is undisputed that the claims at issue require initial resort to the PUC's administrative process. Unlike *SDEA/NEA By and Through Roberts*, there are no overarching constitutional claims regarding the constitutionality of a legislative act in this present case. Instead, all of NAT's issues on appeal arise out of actions taken by the PUC regarding NAT's application.

Additionally, the South Dakota Supreme Court has addressed in other context what "adequate remedy" means. In *South Dakota Bd. of Regents v. Heege*, the Court held that "[f]ailure to exhaust administrative remedies where required is a jurisdictional defect." *South Dakota Bd. of Regents v. Heege*, 428 N.W.2d 535, 539 (S.D. 1988). Such an "error requires dismissal, because at that point primary jurisdiction rests with the administrative agency and not with the courts." *Id.* (*citing Matter of a Notice & Demand to Quash*, 339 N.W.2d 785 (S.D. 1983)). The Court went on to clarify that "[e]xhaustion is not required in extraordinary circumstances where a party faces impending irreparable harm of a protected right and the agency cannot grant adequate or timely relief." *Id.*. In considering the issues, the Court in *Heege* found that the petitioning party had "suffered no immediate and irreparable harm" and as such, it remanded the matter back to the South Dakota Department of Labor for further fact finding. *Id.* At 541-42. Further, in the context of extraordinary writs and agency action, cases like *Sorenson v.*

Rickman show that the Court has held that where "the statues already provide an adequate remedy at law" an extraordinary writ should not be issued. *Sorenson v. Rickman*, 486 N.W.2d 259, 261 (S.D. 1992).

While the South Dakota Supreme Court has not yet addressed the language of the last sentence of SDCL 1-26-30, other states, most notably Iowa, have addressed similar statutes. Iowa Code § 17A.19 provides in part that:

> A preliminary, procedural or intermediate agency action is immediately reviewable if all adequate administrative remedies have been exhausted and review of the final agency action would not provide an adequate remedy.

To satisfy the requirement of "and review of the final agency action would not provide an adequate remedy," the Iowa Supreme Court has held that "a party must show the existence of other reasons, peculiar to the party's own case, which make final review an inadequate remedy." *Richards v. Iowa State Commerce Commission*, 270 N.W.2d 616, 620 (Iowa 1978). "The adequacy of a remedy at law is measured by 'whether the statutory remedy provides an avenue for review of the administrative determination by which the party was aggrieved.'" *Id.* (*quoting Ragano v. Rigot*, 360 A.2d 779, 781 (Pa. Commw. Ct. 1976)). The party seeking review must demonstrate that delaying review until after the agency's proceedings are completed is inadequate. *Salsbury Labs. v. Iowa Dept. of Environmental Quality*, 276 N.W.2d 830, 836 (Iowa 1979). Specifically, the party must provide "an adequate showing of irreparable injury resulting from following the administrative process." *Id.* at 837.

The Iowa Supreme Court has also provided guidance as to what factors or situations it has found to be insufficient grounds for making final review an inadequate remedy. The Iowa Supreme Court has held that "an assertion that a judge might not stay final agency action" is inadequate because "every party seeking intermediate review could satisfy the requirement." *Richards*, 270 N.W.2d at 620. Additionally, arguments based on "expenses incident to completion of the administrative proceeding do not justify intermediate judicial review," as all parties who expend funds in the administrative proceeding could satisfy that requirement. *Id.* (*citing* 2 Am.Jur.2d Administrative Law § 586 at 417; *Petroleum Exploration, Inc. v. Public Service Comm'n*, 304 U.S. 209, 221-22, 58 S.Ct. 834, 840-41, 82 L.Ed.2d 1294, 1302-03 (1938)). This also includes damage to reputation, as both damage to reputation and monetary loss are "not ordinarily severe enough to be considered irreparable." *Salsbury Labs.*, 276 N.W.2d at 837. In *Richards*, the Court pointed out that for an intermediate appeal to be properly taken, irreparable harm should appear to justify the court's intervention. *Richards*, 270 N.W.2d at 624.

In both *Richards* and *Salsbury Labs*, the Iowa Supreme Court held that the appellants had an adequate remedy upon final review, and thus dismissed the intermediate appeal. In both cases, the Iowa Supreme Court held that "judicial review of the final action would provide appellees with an adequate remedy" since "[a]ll of the issues raised in the lower court were preserved before the agency and could be heard on review of the final agency action." *Id.* at 621. The Iowa Supreme Court found this fact to be particularly important as it was "telling proof that final

review is an adequate remedy." *Id.* (*citing General Motors Corp. v. Volpe*, 321 F.Supp. 1112, 1125-26 (D. Del. 1972)). In particular, the Court in *Richards* stated:

> Several factors bolster the conclusion that appellees' issues can be heard on final review. First, the same standing requirements apply in both review situations; if these parties are aggrieved or adversely affected by the final agency action, they would have a right to seek final judicial review. s 17A.19(1). Second, the same relief is available in both review situations. s 17A.19(8). Third, the same standard of review is applicable. s 17A.19(8). Appellees have not shown that these three principles do not apply to their particular situation. Furthermore, final review in this case would appear to provide a more complete remedy than intermediate review since all issues regarding the franchise proceedings could then be determined.

Id.

As Iowa Supreme Court and others have noted, there are policy reasons behind the strict requirements of statutes like SDCL 1-26-30. In *Richards*, the Iowa Supreme Court pointed out that "a contrary rule 'would inundate the courts with innumerable appeals, initiated without statutory foundation, and frequently of a petty or unmeritorious character.'" *Id.* at 620 (*quoting McAuliffe v. Carlson*, 30 Conn.Supp. 118, 121, 303 A.2d 746, 748 (Conn. Super. Ct. 1973)). By allowing disappointed parties to an administrative proceeding the right to interrupt proceedings with intermediate appeals, without complying with the statutory requirements, the orderly administrative process is frustrated. *Id.* at 624. Additionally, waiting until the agency has taken final judicial action prevents courts from ruling on issues that subsequent agency action could render moot. *Salsbury Labs*, 276 N.W.2d at 837 (*citing Aircraft & Diesel Equipment Corp. v. Hirsch*, 331 U.S. 752, 772, 67 S.Ct. 1493, 1503, 91 L.Ed.2d 1796, 1808 (1947)).

Based on the current background of this case, NAT has not met its burden, of proving the inadequacy of judicial review after the PUC's final decision, to justify an intermediate appeal at this time. NAT has presented arguments about how continuing with the PUC's process has been made more difficult and burdensome because of the PUC 's prior rulings. Specifically, NAT contends that the PUC's preliminary actions have impacted NAT's ability to conduct discovery, which constitutes a due process denial, and that CenturyLink was improperly allowed to intervene.

The problem is that even with such additional challenges, NAT has not demonstrated that these issues cannot be properly heard and resolved on appeal after the PUC's final ruling. NAT has not laid out sufficient reasons why it will suffer an irreparable harm if the PUC is allowed to finish its procedural process on these issues. All of the arguments NAT presented set forth a variety of issues and reasons why NAT may or may not have solid grounds for appeal. They do not set forth why those grounds for appeal would disappear, or otherwise be irreparably harmed, if the court declines to hear an intermediate appeal.

Specifically with regards to NAT's discovery issues, there has not been a showing that NAT will suffer an irreparable harm absent an intermediate appeal. As the United States Supreme Court has pointed out, appeals on discovery and evidentiary issues can be remedy by appellate courts "vacating an adverse judgment and remanding for a new trial." *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100, 130 S.Ct. 599, 606-07, 175 L.Ed.2d 458 (2009) (addressing the context of

disclosure of the attorney-client privilege) (*see also Corn Exchange Bank v. Tri-City Livestock Auction Co.* 368 N.W.2d 596, 600 (S.D. 1985)). The United States Court of Appeal, Second Circuit, explained the rationale behind denying review of discovery orders until final adjudication of the issues. Its stated reasons included:

> an appellant's ultimate right of review upon an appeal from a final judgment in the action; the elimination of unnecessary appeals, since the complaining party may win the case or settle it; the absence of irreparable harm from the vast majority of orders requiring production of documents; the potential for harassment of litigants by nuisance appeals, and the fact that any appeal tends to delay or deter trial or settlement of a lawsuit; the burden on the reviewing court's docket from appeals of housekeeping matters in the district courts; and the slim chance for reversal of all but the most unusual discovery orders.

American Exp. Warehousing, Ltd. v. Transamerica, Inc. Co., 380 F.2d 277, 280 (2nd 1967). SDCL 15-26A-3(6) governs intermediate appeals of discovery, and other intermediate orders, to the South Dakota Supreme Court. SDCL 15-26A-3(6) provides that such appears are not allowed as a matter of right, but rather are allowed "only when the court considers that the ends of justice will be served by determination of the questions involved without awaiting the final determination of the action or proceeding." As cases like *Dakota, Minnesota, & Eastern R.R. Corp. v. Acuity* demonstrate, the South Dakota Supreme Court has been hesitant to review discovery decisions absent a final judgment on the underlying claims. *See Dakota, Minnesota, & Eastern R.R. Corp. v. Acuity*, 2006 S.D. 72, ¶ 30, 720 N.W.2d 655, 664.

While NAT is correct that the information it seeks in its discovery requests "is either directly related to the legal standards that apply in this certification

proceeding, or is calculated to obtain information that may be used to test the veracity of the statements Sprint and CenturyLink have made in its testimony," that alone does not reach the threshold required under SDCL 1-26-30 for an intermediate appeal to be granted. In its brief and oral argument, NAT has only laid out reasons why it is in a more difficult position because of the PUC's rulings on the discovery issues. Even granting NAT its argument that "the PUC has placed NAT in a position that precludes it from engaging in any meaningful contested case proceeding," it has not shown that such actions have made it so that "review of the final agency decision would not provide an adequate remedy." As it appears the discovery issues have all been properly preserved for appeal, NAT is still is able to appeal all of these discovery issues after the PUC has reached its final decision. If a reviewing court were to determine that the PUC made mistakes in granting or denying various discovery motions, the court can vacate the PUC's decision and remand for a new hearing with the proper discovery orders in place. Further, as *American Exp. Warehousing, Ltd.* and *Salsbury Labs* point out, NAT's discovery issues may be mooted by a favorable ruling by the PUC on its application. Such a decision will not be known though until the PUC has been allowed to reach its final determination.

With regards to NAT's Rule 45 subpoena request and the PUC's Motion to Quash, NAT has presented no showing that it will suffer an irreparable harm unless its appeal is heard at this time. While NAT makes a detailed argument in its brief as to why access to previously granted PUC certification would allow to

establish and analyze the "financial threshold" the PUC has established, NAT does not explain why or how the information sought is going to change the outcome of the PUC's final decision. From the information presented, the PUC appears to have a somewhat bright-line approach to the "financial thresholds" NAT must meet. While knowing how those thresholds were historically applied in other cases, NAT does not explain how the PUC's ruling on its Rule 45 subpoena would uniquely deny NAT due process. NAT's argument does not convince this court that an intermediate appeal is the only way to prevent irreparable harm. Moreover, it appears from the oral argument that NAT may still be able to access the records sought, just not through the Rule 45 subpoena approach it tried to take. Finally, it appears that issue has been properly preserved for appeal so that NAT would be able to appeal it after the PUC's renders its final decision.

With regards to NAT's appeal on the PUC granting CenturyLink's motion to intervene, there has been no showing that this issue cannot be properly remedied on appeal. NAT's detailed brief lays out why it believes CenturyLink's intervention was improper because of the initial filing of CenturyLink's petition to intervene by out-of-state, non-authorized attorneys. The problem is that nowhere in NAT's brief or oral argument does it explain why CenturyLink being improperly allowed to intervene constitutes an irreparable harm to NAT that cannot be properly addressed on appeal after a final decision is reached. This issue can be resolved after the PUC's final decision as it appears that it has been properly preserved for appeal by NAT. Additionally, as with the discovery issues, this issue may well be

mooted by the PUC's final decision, thus negating the need for an intermediate appeal.

Ultimately, the court is unable to find that NAT would be denied an adequate remedy if it is forced to potentially appeal all of these issues after the PUC makes it final decision on NAT's application. NAT has failed to demonstrate that it will suffer irreparable harm in waiting to appeal until after the PUC has completed its administrative procedure on NAT's application. At best, it appears that NAT would suffer harm in the form of increased monetary expenses, lost time, and potentially damage to its reputation if the PUC's procedural process is allowed to go forward. The problem is that the Iowa Supreme Court in both *Richards* and *Salsbury Labs* specifically rejected those grounds as justification to grant an intermediate appeal.

Moreover, it appears that all of the issues NAT raises today have been properly preserved so that they could be raised on an appeal from the PUC's final decision. As per the rationale of the Iowa Supreme Court, waiting until the PUC has reached such a final determination is the correct action as it would ensure the reviewing court a full and complete record, it would provide all parties with the opportunity to seek final judicial review on all issues, and it would ensure that these, and other potential issues, have not been mooted by the PUC's decision. As NAT has the same remedy and standard of review available on appeal from the PUC's final decision, NAT is not entitled to an intermediate appeal at this time. Thus the court lacks subject matter jurisdiction is required to dismiss this action.

As such, the court addresses neither the substance nor merit of NAT's appealable issues in reaching this decision.

For the reasons outline above, IT IS HEREBY ORDERED that CenturyLink's Motion to Dismiss is hereby GRANTED, and the matter is remanded to the PUC for further proceedings.

Dated this 17th day of October, 2012.

BY THE COURT:

Bruce V. Anderson, Circuit Judge
First Judicial Circuit, Charles Mix County