

**BEFORE 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 Local Exchange Service	)	Docket No. TC11-087
within the Study Area of Midstate	)	
Communications, Inc.	)	

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**CENTURYLINK’S RESPONSE TO NAT’S MOTION TO COMPEL DISCOVERY**

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Qwest Communications Company, LLC, a Delaware Limited Liability Company, doing business as “CenturyLink QCC” (“CenturyLink”), through counsel, hereby submits its Response to the Motion to Compel Discovery filed by Native American Telecom, LLC (“NAT”).

**INTRODUCTION AND FACTUAL BACKGROUND**

NAT’s Motion to Compel presents a highly unusual scenario in which NAT is moving for an order compelling CenturyLink to provide discovery, but there is, and has been, no indication either in the Motion itself or through communications among counsel which, if any, data requests CenturyLink has failed to answer and how or why CenturyLink has failed to respond adequately to NAT’s requests. Indeed, as of the writing of this Response, CenturyLink does not know which of NAT’s discovery requests are the subject of NAT’s Motion to Compel. It appears that NAT’s primary contention is that, if it is asked a question, or is obligated to answer a question from another party, then it is entitled to demand CenturyLink to answer the same question, without regard to whether the question posed to CenturyLink has any relationship to the issues in this case or satisfies the applicable legal standards for discovery requests.

If there is a dispute, from CenturyLink's understanding it could only arise from CenturyLink's objections to requests that it believes are far beyond any reasonable scope of discovery. On February 24, 2012, NAT served 36 interrogatories and 7 requests for production of documents. On their face, NAT's requests were very broad, far afield from the issues raised by CenturyLink or NAT in the case, and called for some form of reasonable refinement. Accordingly, in an effort to resolve any discovery disputes between the parties, counsel for CenturyLink that same day sent a message to NAT's counsel regarding several requests, and followed up with another message the next business day.<sup>1</sup> Because CenturyLink's claims in the docket related to the delivery of calls by NAT to free service calling companies, CenturyLink requested NAT to justify several interrogatories and requests for documents that appeared to be far beyond any reasonable scope of discovery in a case in which CenturyLink is contesting NAT's use of a certificate to engage in traffic pumping and invoice access charges.

As CenturyLink noted in its correspondence to NAT's counsel, CenturyLink challenged the relevance of the following data requests and requests for documents:

- 1.27.** Identify all of CenturyLink bank accounts.
- 1.28.** Identify by name the employees and work locations of all of CenturyLink's employees.
- 1.30.** As of year-end 2010 and 2011, please provide the number of CenturyLink's:
  - (a) Retail residential customers in South Dakota;
  - (b) Retail traditional business customers in South Dakota; and
  - (c) Any other customers.

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<sup>1</sup> See Emails from Todd Lundy to Scott Swier, dated Friday, February 24, 2012, and Monday, February 27, 2012, attached as Exhibits 1 and 2, respectively.

**1.31.1** As of year-end 2010 and 2011, please provide the number of CenturyLink's:

- (a) Retail residential access lines in South Dakota;
- (b) Retail traditional business access lines in South Dakota;
- (c) Conferencing calling company access lines in South Dakota; and
- (d) Any other access lines in South Dakota.

**1.32.** Please provide the number of CenturyLink's employees as of yearend 2010 and 2011.

**1.33.** Please provide an organization chart showing all CenturyLink employees as of year-end 2011.

**DOCUMENT REQUEST NO. 1:** Provide any documents that evidence commitments for future financing of CenturyLink's operations.

**DOCUMENT REQUEST NO. 2:** Provide 2011 bank statements, general ledger and journal entries and any other financial records that identify the detail for CenturyLink's income and expenses.

**DOCUMENT REQUEST NO. 3:** Produce all documents that reflect CenturyLink's Board of Directors' meetings, minutes, and resolutions, and CenturyLink's bylaws.

**DOCUMENT REQUEST NO. 4:** Provide all general ledger journal entries or other accounting records of CenturyLink that supports CenturyLink's balance sheets and profit and loss statements for 2009, 2010, and 2011.

**DOCUMENT REQUEST NO. 5:** Provide all documents reflecting any loan CenturyLink has received from any lender.

**DOCUMENT REQUEST NO. 7:** Provide any documents that evidence commitments for future financing of CenturyLink's operations.

Counsel for the parties set a call for February 29, 2012, to confer on these issues, and counsel for NAT addressed the six data requests and the six document requests quoted above. He stated two reasons for those requests: first, Sprint had asked those questions of NAT, and so, if NAT had to answer them, then so must the other parties, even CenturyLink, though CenturyLink

had not asked such questions to NAT. Second, NAT stated that the requests were relevant to the issue of “competition.”<sup>2</sup>

In CenturyLink’s judgment, NAT’s purported reasons did not satisfy the standards governing the proper scope of discovery requests, and thus CenturyLink did not respond to those quoted above. Further, as shown by CenturyLink’s responses to NAT’s discovery requests appended to NAT’s motion to compel, CenturyLink answered all of the other questions fully.

After CenturyLink filed its responses to NAT’s data requests, NAT made absolutely no contact with CenturyLink about its responses. Despite the certification under SDCL 15-6-37 by NAT’s counsel in the Motion to Compel that he had conferred with opposing counsel in an effort to obtain the requested discovery without the need for Commission action, there has been no communication in which NAT has identified any response to NAT’s discovery that was not compliant with the rules of discovery.<sup>3</sup>

On April 2, 2012, NAT filed its Motion to Compel without listing any request that CenturyLink did not properly answer. The only reason stated in support of its Motion was: “if the Commission allows discovery to proceed, NAT should be entitled to the same discovery information that CenturyLink and Sprint are seeking from NAT.”<sup>4</sup>

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<sup>2</sup> See Affidavit of Todd L. Lundy, ¶ 5, attached to this Response as Exhibit 3

<sup>3</sup> *Id.*, at ¶ 6.

<sup>4</sup> See NAT’s Motion to Compel Discovery, dated April 2, 2012, at 1.

## NAT'S MOTION TO COMPEL FAILS TO SATISFY THE REQUISITES OF RULES 26 AND 37

As a threshold matter, a party can move to compel answers to interrogatories or production of documents if “a party **fails to answer** an interrogatory submitted under § 15-6-33,” or “if a party, in response to a request for inspection submitted under § 15-6-34, **fails to respond** that inspection will be permitted as requested or **fails to permit inspection** as requested.” SDCL 15-6-37 (a) (Emphasis added). Indeed, NAT’s Motion to Compel raises the question of whether it satisfies the requisites of a “motion” under SDCL 15-6-7 (b):

Application for order

(1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, **shall state with particularity the grounds therefor, and shall set forth the relief or order sought.**<sup>5</sup>

NAT’s Motion to Compel fails to satisfy even these elementary standards, because it neglects to identify any data request or interrogatory to which CenturyLink has filed to respond, and thus does not state with particularity the grounds for its motion or the relief it is seeking.

Even assuming that NAT’s motion were to identify the interrogatories and requests for production listed above, those requests do not meet the standards for proper discovery. SDCL 15-6-26 (b) defines the scope of discovery as follows:

(1) In general. Parties may obtain discovery regarding any matter, not privileged, **which is relevant to the subject matter involved in the pending action**, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at

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<sup>5</sup> SDCL 15-6-7 (b) (Emphasis added).

the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. (Emphasis added)

A review of the pleadings and claims filed by NAT and CenturyLink shows that the issues relevant to this docket include:

- whether NAT has complied with the requisites for certification as a local exchange carrier;
- whether the Commission should allow a carrier to use a certificate for the purpose of “traffic pumping” or “access stimulation”; and,
- whether, if a certificate is granted, the Commission should impose conditions upon NAT’s certification, specifically, conditions requiring NAT to offer Direct Trunked Transport at reasonable rates, terms and conditions to prevent NAT from charging inflated tandem switching and transport rates.

An analysis of the 12 interrogatories and documents requests listed above demonstrates that they are not relevant to the issues in this case, and they are not reasonably calculated to lead to the discovery of admissible evidence. The following lists a distilled version of the types of information NAT is seek in these 12 requests:

- CenturyLink bank accounts. (1.27)
- Number, names, and work locations of all of CenturyLink’s employees. 1.28, 1.32)
- The numbers of CenturyLink residential and business customers and access lines. (1.30, 1.31)
- An organizational chart showing all CenturyLink employees as of year-end 2011. (1.33)
- Documentation of future financing of CenturyLink’s operations. (Doc. Req. 1, and 7)

- 2011 bank statements, general ledger and journal entries, and any other financial records that identify the detail for CenturyLink's income and expenses. (Doc. Req. 2)
- CenturyLink's Board of Directors' meetings, minutes, and resolutions, and CenturyLink's bylaws. (Doc. Req. 3)
- Balance sheets and profit and loss statements for 2009, 2010, and 2011. (Doc. Req. 4)
- All documents reflecting any loan CenturyLink has received from any lender. (Doc. Req. 5)

As the Commission reviews the substance of NAT's requests, it is also important to note that the certificate at issue is for the geographic area in which Midstates is the incumbent carrier – CenturyLink is not an incumbent or competitive carrier in that area. Thus, CenturyLink's business operations, loans, employee information, and the like, have absolutely nothing to do with an application by NAT to provide services in that area. It is also telling that none of the information listed above would support, refute, or relate to any of the testimony that either NAT or CenturyLink has filed thus far. And, NAT is at the reply testimony stage, and thus should be able to only address the substance of CenturyLink's testimony filed by Mr. Easton, again none of which relates to any of the information requests listed above.

The only reason proffered by NAT in its Motion to Compel for requiring CenturyLink to produce such extraneous information is as follows:

NAT believes that discovery is wholly inappropriate in this certificate of authority matter. However, if the Commission allows discovery to proceed, NAT should be entitled to the same discovery information that CenturyLink and Sprint are seeking from NAT.<sup>6</sup>

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<sup>6</sup> NAT's Motion to Compel Discovery, dated April 2, 2012, at 1.

For several reasons, NAT's position does not support an order compelling discovery from CenturyLink. First, "retribution" or "payback" – that, if NAT has to do something, then everyone else has to – is not the standard for compelling discovery under Rules 26 and 37 as discussed above. Second, even if the Commission entertains NAT's contention, CenturyLink did not ask NAT any of the questions listed above. Third, even if Sprint asked NAT such questions to learn more about NAT's certification request, that says nothing about whether it is proper to require CenturyLink to answer those same questions.

During the call on February 29, 2012, NAT's counsel offered another justification for the requests – that they were relevant to the issue of "competition," evidently competition between NAT and CenturyLink. NAT did not raise this issue in its Motion to Compel, but in any event, it has no basis. First, CenturyLink does not provide services in the geographical area that is the subject of the application, thus there is no competition at issue. Second, competition has not been raised as an issue by any party in its pleadings or in testimony filed thus far in the case. Third, and perhaps most importantly, NAT raising "competition" as an issue reflects a fundamental disagreement as to what this case is about. From CenturyLink's perspective, it is challenging NAT's certification because CenturyLink is a potential "customer" of NAT's access services, and thus CenturyLink seeks to prevent or, through conditions, mitigate the effects of access arbitrage. Thus, this case is about a carrier (NAT) offering and providing access services to its IXC "customers," and whether its access services are just, reasonable, and consistent with the public interest. There is no issue of "competition" in this case.

CenturyLink also raised in its response the general objection that NAT's requests are unduly burdensome. Considering and balancing the absence of any relevance of the questions



quoted above to the issues in this case, it certainly is an unreasonable request to demand CenturyLink to expend its resources to pull information about its financing, loans, employees names and locations, board minutes, and organizational charts for all of its employees.

**NAT’S CERTIFICATION DOES NOT SATISFY RULE 37**

Under SDLC 15-6-37 (a), a motion to compel discovery “must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action.”

As stated above, NAT did not contact CenturyLink at all after CenturyLink submitted its discovery responses, and there has been no communication between NAT and CenturyLink in which NAT has identified which, if any, of CenturyLink’s responses are not proper, and why.<sup>7</sup>

There has been no “effort to secure the information or material without [Commission] action.”

The only communication regarding NAT’s discovery to CenturyLink was the conference call on February 29, in which CenturyLink inquired about the basis for several of NAT’s questions. But certainly, the good faith certification necessary under Rule 37 (a) contemplates something more, at least some communication after the responding party has submitted its answers such that the parties can address whether Commission action is necessary.

WHEREFORE, CenturyLink respectfully requests an order of the Commission denying NAT’s Motion to Compel.

Dated April 13, 2012.

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<sup>7</sup> See Affidavit of Todd L. Lundy, ¶ 6, attached to this Response as Exhibit 3



CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of this document was delivered via e-mail on this **13th day of April, 2012, to the following parties:**

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