

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

**IN THE MATTER OF THE)
APPLICATION OF NATIVE)
AMERICAN TELECOM, LLC FOR A) TC11-087
CERTIFICATE OF AUTHORITY TO)
PROVIDE LOCAL EXCHANGE)
SERVICE WITHIN THE STUDY AREA)
OF MIDSTATE COMMUNICATIONS,)
INC.)**

**NATIVE AMERICAN TELECOM, LLC’S REPLY AND OPPOSITION
TO THE PETITIONS FOR INTERVENTION FILED BY
AT&T COMMUNICATIONS OF THE MIDWEST, INC.,
SPRINT COMMUNICATIONS COMPANY L.P., AND
QWEST COMMUNICATIONS COMPANY LLC dba CENTURYLINK**

COMES NOW Native American Telecom, LLC (“NAT”) and hereby submits its reply and opposition to the petitions for intervention filed by AT&T Communications of the Midwest, Inc. (“AT&T”), Sprint Communications Company L.P. (“Sprint”), and Qwest Communications Company LLC dba CenturyLink (“Qwest/CenturyLink”) (collectively the “Interexchange Carriers” or “IXCs”) as follows:

FACTS

1. NAT is a tribally-owned telecommunications carrier and operates as a limited liability company in accordance with South Dakota law. (*See* NAT’s Application for Certificate of Authority, page 1) (“Application”).
2. Under its recently-filed Application, NAT seeks to expand its authority to include areas within Midstate Communications, Inc.’s (“Midstate”) study area by providing facilities-based basic telephone service to compliment its advanced broadband services. (*See* Application, page 1).
3. AT&T, Sprint, and Qwest/CenturyLink are all IXCs.

4. AT&T objects to NAT's Application because AT&T is required to pay intrastate access fees to Competitive Local Exchange Carriers ("CLECs") and is concerned with NAT's "revenues." (AT&T's petition, ¶¶ 2-4).

5. Sprint objects to NAT's Application because Sprint is concerned with the parties' pending litigation before the South Dakota Public Utilities Commission ("Commission") (*see* SDPUC TC 10-026) and NAT's "financial status." (Sprint's petition, ¶¶ 3-6).

6. Qwest/CenturyLink objects to NAT's Application because Qwest/CenturyLink is concerned with NAT's alleged participation in "access stimulation." (Qwest's/CenturyLink's petition, ¶¶ 2-5).

ARGUMENT

I. THIS DOCKET IS LIMITED TO NAT'S APPLICATION FOR A CERTIFICATE OF AUTHORITY

7. The only issue before the Commission in this docket is whether NAT should be granted a Certificate of Authority to provide interexchange telecommunications services and local exchange services in South Dakota.

8. The issue of whether a CLEC (like NAT) should be allowed to provide competitive telecommunications services in competition with Incumbent Local Exchange Carriers ("ILECs") has been long-settled by Congress, the Federal Communications Commission, the South Dakota Legislature, and the Commission.

9. The IXCs' intervention petitions do not allege that NAT's Application should be denied. In fact, there is no legal nexus between the various issues raised by the IXCs and the narrow issue of certification that is before the Commission in this docket. Therefore, the IXCs' "interests" do not warrant intervention.

II. THE IXC'S DO NOT SATISFY THE COMMISSION'S INTERVENTION RULES

10. NAT objects to the IXCs' intervention in this docket for a very fundamental reason - the IXCs do not meet the threshold requirements of the Commission's rules to intervene and pursue party status in this docket. ARSD 20:10:01:15.05 provides in relevant part:

A petition to intervene shall be granted by the commission if the petitioner shows that the petitioner is [1] specifically deemed by statute to be interested in the matter involved, [2] that the petitioner is specifically declared by statute to be an interested party to the proceeding, or [3] that by the outcome of the proceeding the petitioner will be bound and affected either favorably or adversely with respect to an interest peculiar to the petitioner as distinguished from an interest common to the public or to the taxpayers in general.

11. The IXCs' petitions fail to meet this requirement as they are not (1) deemed by statute to be interested in the matter involved; (2) specifically declared by statute to be an interested party to the proceeding; and (3) will not be bound or affected either favorably or adversely with respect to its peculiar interest as distinguished from an interest common to the public or to the taxpayers in general.

12. The incumbent carrier in this matter, Midstate, is the party that will be potentially affected in this docket. NAT does not object to Midstate's petition for intervention.

13. Midstate is represented by competent counsel and no reason exists for the IXCs to take a "second bite of the apple" and unduly lengthen the process in this proceeding.

14. AT&T's objections that it may be required to pay intrastate access fees to NAT and that it is concerned with NAT's "revenues" do not meet the Commission's intervention rules.

15. Sprint's objections that it is concerned with the parties' pending litigation in SDPUC TC 10-026 and NAT's "financial status" do not meet the Commission's intervention rules. Sprint is represented by counsel in SDPUC TC10-026 and its counsel can competently articulate Sprint's legal positions in that case. Also, Sprint's "expertise" in reviewing NAT's financial

status is unnecessary as this issue will be thoroughly reviewed by the Commission in this docket.

16. Qwest's/CenturyLink's objection that it is concerned with NAT's alleged participation in "access stimulation" does not meet the Commission's intervention rules.¹ If

¹ In addition to the substantive reasons for denying Qwest's/CenturyLink's intervention petition, the Commission should also deny its petition on procedural grounds. Qwest's/CenturyLink's petition was filed in direct violation of South Dakota's "unauthorized practice of law" rules. SDCL 16-18-1 provides:

License and bar membership required to practice law-Injunction to restrain violations. Excepting as provided by § 16-18-2, *no person shall engage in any manner in the practice of law in the State of South Dakota unless such person be duly licensed as an attorney at law, and be an active member of the State Bar in good standing.* Any person engaging in any manner in the practice of law in violation of this section may be restrained by permanent injunction in any court of competent jurisdiction, at the suit of the attorney general or any citizen of the state. (emphasis added).

SDCL 16-18-2 provides in relevant part:

Attorney licensing-Non-resident attorneys-"Pro hac vice" admission on motion-Requirements. A nonresident attorney, although not licensed to practice law in the State of South Dakota, but licensed in another jurisdiction within the United States, may, after first complying with the requirements hereinafter set forth, participate in the trial or hearing of any particular cause in this state, provided a resident practicing attorney of this state, a member of the State Bar of South Dakota, is actually employed and associated and personally participates with such nonresident attorney in such a trial or hearing.

Mr. Jason D. Topp and Mr. Todd Lundy (in their respective capacities as corporate counsel) filed Qwest/CenturyLink's "Petition to Intervene" on October 28, 2011, the Commission's deadline for intervention in this matter. Neither Mr. Topp nor Mr. Lundy are listed as members of the State Bar Association of South Dakota. Additionally, at the time they filed Qwest's/CenturyLink's Petition, neither Mr. Topp nor Mr. Lundy had applied for *pro hac vice* status from the Hughes County Circuit Court. Qwest/CenturyLink is well-aware of the impropriety of making a "last minute filing" in direct contravention of South Dakota's *pro hac vice* rules. NAT's counsel has the utmost professional respect for Mr. Welk and Mr. Madsen. However, their retention as local counsel (and subsequent "Re-Filed Petition") was accomplished *days after* the Commission's intervention deadline. Qwest/CenturyLink should not be allowed to simply "flaunt" South Dakota law at their convenience. The Commission should take Mr.

Qwest/CenturyLink believes that NAT is engaged in improper activities, it is able to bring legal actions in the appropriate courts and administrative agencies. In fact, Qwest/CenturyLink has brought suits against numerous ILECs and CLECs throughout the nation for alleged improper “access stimulation.” However, any potential “access stimulation” dispute between Qwest/CenturyLink and NAT is clearly not relevant to the Commission’s decision in this docket.²

17. While the IXCs are naturally “inquisitive” regarding NAT’s Application, the IXCs do not meet the threshold requirements of the Commission’s rules to intervene and pursue party status in this docket

18. If the Commission grants the IXCs’ intervention requests in this docket, it would establish the unprecedented step of allowing an IXC to intervene in every CLEC’s application to provide interexchange telecommunications services and local exchange services in our State.

19. A review of the Commission’s electronic docket reveals that since 2000, the Commission has never allowed an IXC to intervene in a CLEC’s application to provide Interexchange telecommunications services and local exchange services in South Dakota. (*See e.g.*, SDPUC TC 00-006, 00-071, 00-073, 00-075, 00-077, 00-116, 00-121, 00-125, 00-134, 00-140, 01-035, 01-055, 01-107, 02-032, 02-105, 03-032, 03-188, 03-196, 03-199, 03-202, 04-092, 04-260, 05-008, 05-052, 05-059, 05-069, 05-101, 05-155, 05-157, 05-221, 06-046, 06-098, 06-188, 06-189, 07-083, 08-041, 08-100, 09-005, 09-007, 09-012, 09-015, 09-083, 09-100, 10-001,

Topp’s and Mr. Lundy’s improper actions seriously and deny Qwest’s/CenturyLink’s “Petition” on these grounds alone.

² As the Commission is aware, “South Dakota has yet to take a position [regarding traffic stimulation].” *In the Matter of the Filing by Aventure Communication Technology, LLC dba Aventure Communications for Approval of Its Switched Access Services Tariff No. 3*, SDPUC Docket TC 11-010 - Staff Brief, page 4 (dated October 12, 2011).

10-003, 10-08, 10-091, 11-001, and 11-008).

WHEREFORE, NAT respectfully requests that the Commission deny the IXCs' respective petitions to intervene because this docket is limited to whether NAT should be granted a Certificate of Authority to provide interexchange telecommunications services and local exchange carrier services in South Dakota.

Dated this 14th day of November, 2011.

SWIER LAW FIRM, PROF. LLC

/s/ Scott R. Swier

Scott R. Swier

202 N. Main Street

P.O. Box 256

Avon, South Dakota 57315

Telephone: (605) 286-3218

Facsimile: (605) 286-3219

scott@swierlaw.com

*Attorneys for Native American
Telecom, LLC*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on *November 14th, 2011*, *NATIVE AMERICAN TELECOM, LLC'S JOINT REPLY AND OPPOSITION TO THE PETITIONS FOR INTERVENTION FILED BY AT&T COMMUNICATIONS OF THE MIDWEST, INC., SPRINT COMMUNICATIONS COMPANY L.P., and QWEST COMMUNICATIONS COMPANY LLC dba CENTURLINK* was served *via electronic mail* upon the following:

Ms. Patty Van Gerpen
Executive Director
South Dakota Public Utilities Commission
500 East Capitol
Pierre, S.D. 57501
patty.vangerpen@state.sd.us

Ms. Karen Cremer
Staff Attorney
South Dakota Public Utilities Commission
500 East Capitol
Pierre, S.D. 57501
karen.cremer@state.sd.us

Ryan J. Taylor
Meredith A. Moore
Cutler & Donahoe, LLP
100 N. Phillips Avenue, 9th Floor
Sioux Falls, South Dakota 57104-6725
ryant@cutlerlawfirm.com
meredithm@cutlerlawfirm.com
Attorneys for Midstate Communications, Inc.

Ms. Bobbi Bourk
Staff Analyst
South Dakota Public Utilities Commission
500 East Capitol
Pierre, South Dakota 57501
bobbi.bourk@state.sd.us

Mr. Jeff Holoubek
President
Native American Telecom, LLC
253 Ree Circle
Fort Thompson, South Dakota 57433
jeff@nativeamericantelecom.com

William M. Van Camp
Olinger, Lovald, McCahren & Reimers, PC
PO Box 66 – 117 E. Capitol
Pierre, South Dakota 57501
bvancamp@olingerlaw.net
Attorney for AT&T Communications of the Midwest, Inc.

Stanley W. Whiting
Whiting Law Office
142 E. 3rd Street
Winner, South Dakota 57580
swhiting@gwtc.net
Attorney for Sprint Communications Company, LP

Jason D. Topp
200 South Fifth Street, Room 2200
Minneapolis, Minnesota 55402
Jason.topp@centurlink.com
Attorneys for Qwest/CenturyLink

Todd Lundy
1801 California Street, #1000
Denver, Colorado 80202
Todd.lundy@centurylink.com
Attorneys for Qwest/CenturyLink

Richard Coit
SDTA
PO Box 57
320 East Capitol Avenue
Pierre, South Dakota 57501-0057
richcoit@sdaonline.com
Attorney for SDTA

Thomas J. Welk
Christopher W. Madsen
101 North Phillips Avenue, Ste. 600
Sioux Falls, South Dakota 57117-5015
tjwelk@bgpw.com
cwmadsen@bgpw.com
Attorneys for Qwest/CenturyLink

/s/ Scott R. Swier
Scott R. Swier