

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

CENTURYLINK’S BRIEF IN OPPOSITION TO NAT’S MOTION FOR SUMMARY JUDGMENT

Qwest Communications Company, LLC, a Delaware Limited Liability Company, doing business as “CenturyLink QCC” (“CenturyLink”), through counsel, hereby submits its brief in opposition to the motion for summary judgment filed by Native American Telecom, LLC (“NAT”).

INTRODUCTION

This docket, and NAT’s Motion for Summary Judgment, present critical issues relating to this Commission’s authority to protect the public interest in a certification proceeding. NAT’s Motion for Summary Judgment takes the position that conduct that an applicant admits will occur post-certification may not be considered by the Commission as part of the certification process. NAT takes that position even when such conduct raises issues of public interest. Instead, according to NAT, the Commission may only consider past telecommunications experiences and skills of its employees. NAT’s position is not the law of South Dakota. As shown below, the Commission has the statutory authority to evaluate whether any carrier within its jurisdiction will be providing services consistent with the public interest. And, failing to act within the public interest raises issues of whether the applicant has satisfied the criterion

that the applicant has the managerial capability to provide services in the state. Also lacking in NAT's Motion is an acknowledgement of the authority of the Commission to impose conditions upon the granting of any certificate, and CenturyLink's testimony filed in this case details the reasons that certain conditions should be imposed upon NAT to ensure that unfair and inflated access charges are not invoiced to interexchange carriers such as CenturyLink.

The law governing motions for summary judgment is that the movant must prove that "no genuine issue of material fact" exists as to any of the legal issues relevant to the case. NAT's Motion falls far short of this standard, for several reasons. First, CenturyLink provides a Statement of Material Facts containing sixty-five factual representations that create genuine issues of material fact as to whether the granting of a certificate to NAT, when it admits that it will engage in "traffic pumping," or "access stimulation," is in the public interest, and whether NAT has sufficient managerial expertise and financial capability. And, if a certificate is granted, CenturyLink's factual presentation creates genuine issues of fact as to whether certain conditions should be placed upon the certificate. Second, NAT's incorrect theory of the narrowness of the Commission's inquiry in this docket has resulted in NAT failing to present any facts showing that their intentions to engage in traffic pumping is in the public interest, and they fail to present facts showing that no conditions relating to their access services should be imposed. For these and other reasons discussed below, NAT's motion for summary judgment should be denied, and this case should proceed to an evidentiary hearing so that the Commission may have all the pertinent facts before it as it makes its decision in this very important case about attempts by a South Dakota carrier to engage in traffic pumping and charge inflated access to IXCs for the purpose of revenue sharing.

SUMMARY JUDGMENT STANDARDS

Pursuant to SDCL 15-6-56 (c), for NAT to be granted summary judgment in this docket, it must show that, after consideration of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, “there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”

The South Dakota Supreme Court has held that a material fact is one that would impact the outcome of the case. Schwaiger v. Mitchell Radiology Associates, P.C., 652 NW2d 372 (SD 2002). “Disputed facts become material if they affect the outcome of a case under the law, ‘that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.’” Fisher v. Kahler, 641 NW2d 122, 125 (SD 2002) (quoting Anderson v. Liberty Lobby, Inc., 477 US 242, 248 (1986)). Moreover, a genuine issue of material fact precludes summary judgment. Thornton v. City of Rapid City, 692 NW2d 525 (SD 2005).

The Commission must review the evidence most favorably to the non-moving party and resolve reasonable doubts about the facts against the moving party. Koeniguer v. Echrich, 422 NW2d 600, 601 (SD 1988). The moving party bears the burden of establishing that there are no genuine issues of material fact. Zephier v. Catholic Diocese of Sioux Falls, 752 NW2d 658, 662 (SD 2008). “[S]ummary judgment is an extreme remedy and should be awarded only on a clear showing of the necessary elements.” Wulf v. Senst, 669 NW2d 135, 141 (SD 2003). “Entry of summary judgment is mandated against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” Dakota Industries, Inc. v. Cabela’s.Com, Inc., 766 N.W.2d

510, 513 (SD 2009) (quoting Zephier v. Catholic Diocese of Sioux Falls, 752 N.W.2d 658, 662 (SD 2008)).

LEGAL STANDARDS GOVERNING NAT'S APPLICATION FOR CERTIFICATION

The legal issues to be determined by the Commission law in this certification docket are far greater in scope than NAT contends. As shown below, the Commission must determine whether NAT's access stimulation practices and the charges it intends to impose upon its IXC customers demonstrate that NAT has the "managerial" and "financial" capability to provide service in this state, as well as whether NAT's service plans are consistent with the public interest. Further, South Dakota law specifically authorizes the Commission to impose conditions upon a certificate, and the Commission is thus faced with the issues of whether to impose certain conditions relating to access stimulation and terms and rates by which NAT provides Direct Trunked Transport to requesting IXCs.

First, contrary to NAT's narrow description of the Commission's authority in this or any other case, SDCL 49-31-3 says:

The commission has general supervision and control of all telecommunications companies offering common carrier services within the state to the extent such business is not otherwise regulated by federal law or regulation. The commission shall inquire into any complaints, unjust discrimination, neglect, or violation of the laws of the state governing such companies. The commission may exercise powers necessary to properly supervise and control such companies.

As stated by the South Dakota Supreme Court, "this court has determined that the underlying basis for this regulation is to protect the public interest:

Public service commissions are generally empowered to, and are created with the intention that they should regulate public utilities insofar as the powers and operations of such utilities affect the public interest and welfare.

In the Matter of the Establishment of Switched Access Rates for US WEST Communications, Inc. v. AT&T Communications of the Midwest, Inc., 618 N.W.2d 847, 852 (SD 2000), quoting Northwestern Bell Telephone Co., Chicago & NW Transportation, 245 N.W.2d 639, 642 (SD 1976).

Under South Dakota statutes and this Commission's rules, a carrier applying for a certificate to offer services in this state shoulders the burden to prove that it has "sufficient technical, financial and managerial capabilities to offer the telecommunications services described in its application before the commission may grant a certificate of authority." SDCL 49-31-3. See also ARSD 20:10:32:05, and SDCL 49-31-71. "Any certificate of authority granted by the commission may be suspended or revoked pursuant to chapter 1-26 for a willful violation of the laws of this state, a willful failure to comply with a rule or order of the commission, or other good cause." SDCL 49-31-3. CenturyLink submits that the standards of certificate revocation are instructive to, and should mirror, the standards for an initial application.

The Commission reviews an application for certification under standards set forth in ARSD 20:10:32:06. The following are the standards from that rule that are specifically pertinent to the issues raised by CenturyLink in this docket:

Rejection of incomplete application -- Decision criteria for granting a certificate of authority. A certificate of authority to provide local exchange service may not be granted unless the applicant establishes sufficient technical, financial, and managerial ability to provide the local exchange services described in its application consistent with the requirements of this chapter and other applicable

laws, rules, and commission orders. If an application is incomplete, inaccurate, false, or misleading, the commission shall reject the application. 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;

* * *

- (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;

* * *

- (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.

A review of the pleadings and orders in this docket shows that the issues surrounding NAT's intended access stimulation are well within the subject matter of this docket. On November 30, 2011, the Commission granted CenturyLink's petition to intervene. The governing standard on petitions to intervene is whether the requesting party "will be bound and affected ... adversely with respect to an interest peculiar to the petitioner as distinguished an interest common to the public or to the taxpayers in general," as provided in ARSD 20:10:01:15:05. CenturyLink's petition to intervene asserted that, as an interexchange carrier, it may be the victim of an access charge scheme perpetrated by NAT for calls delivered to free service calling companies, and therefore it had an interest in the docket.¹ And, as admitted by NAT in its discovery responses, and as stated by CenturyLink's witness Mr. Easton, NAT will be engaging in "access stimulation" as defined by the FCC.² CenturyLink has further concerns that NAT will engage in a form of "mileage pumping," in which LEC charges unreasonably high transport charges to IXCs.³ Thus, NAT's activities and intentions to use its certificate to charge access to IXCs for calls delivered to free service calling companies in the area that is the subject of the application for Certificate of Authority have already been made part of this case, through the Commission's order granting CenturyLink, and other IXCs, intervention into this docket.

Other commissions have addressed the meaning of "managerial ability" and the "public interest" in the context of certification proceedings and a LEC's traffic pumping activities. The Iowa Board recently addressed whether it should revoke the certification of an Iowa traffic

¹ See Qwest's Re-filed Petition to Intervene, dated November 1, 2011, at ¶¶2 through 5.

² See Direct Testimony of William R. Easton, at pp. 14 through 18.

³ Id., at pp. 20 through 22.

pumping LEC known as Great Lakes.⁴ The Board found that Great Lakes had acted contrary to the “public interest” and had demonstrated a failure in “managerial ability” when it made misrepresentations in its initial certificate application of its intention to provide services to legitimate residential and business customers when in fact it intended on providing traffic pumping services, and when it continued to deliver calls to free service calling companies offering adult content without providing parental controls over such calls.⁵

The Utah Commission has also considered whether traffic pumping activities satisfy the public interest standard in the context of a certification proceeding.⁶ In Utah, a traffic pumping LEC known as All-American applied for an amendment to its certificate; after a review by the Commission and its staff, the docket was converted into an inquiry of whether All-American should be certificated at all. The Utah Commission revoked All-American’s certificate, and, granted, there was a multitude of reasons and misconduct supporting the revocation. But among them was the Commission’s consideration of All-American’s operating model, by which it was delivering calls to a free service calling company and attempted to charge switched access to IXCs – a classic traffic pumping scheme. The Utah Commission determined that “[All-American’s] services, if anything, increases the cost of telecommunications to the customers of interexchange (IXC) carriers in the state and provide no significant benefit.”⁷ With the increased traffic coming through on the free conference calling lines, the traffic results in a “higher per minute cost to Qwest and other IXC's to terminate traffic to or carry traffic out of

⁴ In re: Great Lakes Communications, LLC, Docket No. SPU-2011-0004.

⁵ In re: Great Lakes Communications, LLC, Docket No. SPU-2011-0004, Final Order, issued March 30, 2012, at 14-15, 22-23.

⁶ In the Matter of the Consideration of the Rescission, Alteration, or Amendment of the Certificate of Authority of All American to Operate as a Competitive Local Exchange Carrier within the State of Utah, Docket No. 08-2469-01, Issued April 26, 2010, affirmed on Reconsideration, issued July 6, 2010.

⁷ Id., at 46.

[the ILEC's] service territory." All-American admitted to the Commission, as all traffic pumping LECs must, that, ultimately, the "free" conference calling service it claims to provide, is not free at all, but is paid for by the IXC's, whose customers are the general ratepayers in Utah. The Utah Commission ruled that these increased costs to Utahns produce no significant benefit, if any benefit at all, and that the traffic pumping arrangement increases costs to Utah ratepayers while funneling money out of the state or into the hands of only a few, without promoting true competition or technological improvement, or serving any other public interest. The Utah Commission concluded that: "There is little or no benefit served through [All-American's] operation and nothing that furthers Utah's public policies or public interest without countervailing detriments."⁸

And, completely ignored by NAT in the present context of this case, the South Dakota statutes authorize the imposition of conditions upon a carrier seeking certification:

In granting a certificate of authority to provide local exchange service, the commission may impose terms and conditions, on a competitively neutral basis, that it finds consistent with preserving and advancing universal service, protecting the public safety and welfare, ensuring the continued quality of service, and safeguarding the rights of consumers.

The Commission's Rules also authorize the imposition of conditions in this docket. ARSD

20:10:32:07 says:

Certification subject to commission imposed terms and conditions. In addition to the requirements imposed by this chapter on providers of local exchange services, the commission, in granting a certificate of authority to provide local exchange services, may impose additional terms and conditions, on a competitively neutral basis, that it finds necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued

⁸ Id., at 47-48.

quality of service, and safeguard the rights of consumers. The preservation and advancement of universal service shall be a primary concern.

As more fully described below, a major component of CenturyLink's case is a request for the Commission to impose reasonable conditions upon NAT in order to ensure that IXCs are not the victims of any potential access scheme perpetrated as a result of the granting of a certificate to NAT.

To sum up the legal issues in this case, and thus whether there are any genuine issues of disputed fact, CenturyLink submits that NAT must prove that the granting of a certificate is in the public interest, and that it will not engage in activities that are contrary to the interests of prospective customers, which includes CenturyLink. CenturyLink also recommends that the Commission consider whether it is in the public interest to grant a certificate when the applicant expressly intends to use the certificate to engage in access stimulation. And, a carrier's capacity to act consistent with the public interest and with South Dakota law is highly relevant to whether the applicant possesses the "managerial ability" that is an undisputed requisite to obtaining a certificate. Further, the law authorizes CenturyLink to request that any grant of a certificate be subject to reasonable conditions.

CENTURYLINK'S STATEMENT OF FACTS AND RESPONSES TO NAT'S STATEMENT FACTS DEMONSTRATE THAT GENUINE ISSUES OF MATERIAL FACT EXIST, RESULTING IN THE DENIAL OF NAT'S MOTION.

CenturyLink has filed with this Brief its Statement of Material Facts, which includes sixty-five separate statements that raise an abundance of genuine issues of fact relevant to the legal matters to be decided by the Commission in this docket. Further, CenturyLink's Statement responds to and disputes several facts asserted by NAT, which also create genuine issues of material fact.

Of course, the threshold issue for the Commission is whether NAT's view of a certification docket should control, which is that the Commission can review only the purported experiences, financial statements, and skills of the applicant's employees, and not the practices in which the applicant intends to engage under the requested certificate. Under NAT's theory, if the applicant has skilled employees, then a certificate must be issued, regardless of the intentions of the applicant to use the certificate to engage in schemes that clearly are contrary to the public interest. An analogy to NAT's theory is that an applicant should be granted a certificate to engage in cramming, slamming, or consumer fraud, as long as the applicant's employees have shown a degree of telecom experience. Traffic pumping, or access stimulation, is no less abhorrent to the public interest.

The law in South Dakota as discussed above rejects NAT's theory. The Commission is authorized and empowered to ensure that every carrier certificated in this state is acting consistent with the public interest. Further, the cases cited above have demonstrated that a carrier engaging in access stimulation is not acting in the public interest, and may not have the managerial capability sufficient to be granted a certificate.

CenturyLink's Statement of Material Facts and Mr. Easton's testimony support denial of NAT's certificate. At the very least, CenturyLink's Statement creates many genuine issues of material fact with regard to the standards to be considered by the Commission. In short, CenturyLink's Statement and Mr. Easton have shown that NAT has admitted to plans to engage in access stimulation, the objective of which is to abuse the regulatory structure of access charges and to swindle millions out of their IXC customers. CenturyLink's Statement of Material Facts, ¶¶ 1-50. CenturyLink's Statement provides the same factual support that led to the

conclusions reached by the Utah Commission -- that there is little or no benefit served through a LEC's perpetration of a traffic pumping scheme and nothing that furthers a state's public policies or public interest without countervailing detriments.⁹ Accordingly, CenturyLink has raised issues of fact as to whether NAT's certificate should be granted.

Perhaps more importantly, state statutes and rules authorize the Commission to impose conditions upon any certificate issued to NAT. That is, the Commission may place conditions upon NAT in order to mitigate the harm that may result from its admitted access stimulation practices. CenturyLink has supported factually the imposition of conditions that would require NAT to offer Direct Trunked Transport at reasonable rates, terms and conditions in order to prevent the invoicing of inflated tandem switching and transport charges. See CenturyLink's Statement of Material Facts, ¶¶ 51-65. At the very least, CenturyLink has raised genuine issues of fact related to CenturyLink's proposed conditions that require the denial of NAT's Motion for Summary Judgment.

NAT'S MOTION FAILS TO SATISFY THE STANDARD THAT NO GENUINE ISSUES OF MATERIAL FACT EXIST

Because NAT takes the position that only the telecom experiences and skills of its employees are relevant to a certification application, and not whether the applicant's intended uses of a certificate once granted would be in the public interest, NAT presents no facts relating to the issues raised by CenturyLink and other IXC's in this case. That is, CenturyLink and other IXC's have raised the issues of whether NAT's traffic pumping activities and proposed access charges would be in the public interest, and whether certain conditions should be imposed in

⁹ In the Matter of the Consideration of the Rescission, Alteration, or Amendment of the Certificate of Authority of All American to Operate as a Competitive Local Exchange Carrier within the State of Utah, Docket No. 08-2469-01, Issued April 26, 2010, affirmed on Reconsideration, issued July 6, 2010, at pp. 47-48.

order to prevent access charge abuse. Having taken the position that post-certification conduct is irrelevant, NAT does not address its intended access stimulation activities or the reasonableness of its access charges. Accordingly, because the issue of whether NAT's conduct will be consistent with the public interest is relevant to the Commission's definition of its application, NAT has failed to make a showing satisfying the standard under SDLC 15-6-56 (c) that there is no genuine issues of material fact.

OTHER DOCKETS HAVE EXAMINED ACCESS STIMULATION IN CERTIFICATION PROCEEDINGS

NAT complains that it is being singled out and subjected to different treatment if its access stimulation conduct is examined in the context of a certification application. NAT's Memorandum, at pages 21-24. NAT is incorrect. In a recent, parallel proceeding, the Commission granted CenturyLink's and other IXCs intervention in the docket considering Wide Voice's application for certification, in which issues of access stimulation and access charges were raised by the intervenors.¹⁰ Further, as demonstrated above, other regulatory agencies have examined access stimulation in the context of certification. The Utah Commission reviewed All-American's access stimulation activities in the context of All-American's application to amend its certificate, and not only was the amendment rejected, but also All-American's certificate was revoked. In Iowa, the Board has considered access stimulation activities in dockets considering the revocation of certificates, the mirror image of a certificate application.¹¹

¹⁰ In the Matter of the Application of Wide Voice, L.L.C. for a Certificate of Authority to Provide Local Exchange Services in South Dakota, Docket No. TC11-088. Wide Voice ultimately withdrew its application.

¹¹ In re: Great Lakes Communications, LLC, Docket No. SPU-2011-0004, Final Order, issued March 30, 2012; Aventure Communication Technology, LLC, v. Qwest Communication Corp., Docket No. FCU-2011-0002; docket pending.

Regardless of past precedent, it is clear that this Commission has the authority to consider whether NAT's activities are in the public interest. And, access stimulation is a relatively recent phenomenon, having appeared in South Dakota and other states in the last five years or so. Thus, other than Wide Voice, there have been no other instances in which a known traffic pumping LEC has requested certification, and thus there is good reason that this docket is raising matters that are issues of first impression for this Commission.

NAT'S MOTION SHOULD BE DENIED FOR FAILURE TO RESPOND TO DISCOVERY.

Under SDLC 15-6-56(f), the Commission may deny a motion for summary judgment when the moving party has failed to provide discovery of facts that could be used to oppose the motion. As stated in the Affidavit of Todd L. Lundy filed with this Brief, NAT has failed to provide two categories of discovery that CenturyLink could use to oppose NAT's Motion for Summary Judgment. First, NAT failed to provide any of the documents and materials reviewed and analyzed by its consultant in his preparation of his testimony in which he describes "the managerial, financial, and technical ability of NAT to provide the telecommunications services as outlined in NAT's revised 'Application for a Certificate of Authority.'" Such information is relevant to the credibility and sufficiency of the consultant's conclusions that NAT has met the statutory criteria for certification. Second, NAT failed to provide responses to discovery seeking information relating to how NAT intends to make money from interexchange carriers such as CenturyLink through its admitted plans to engage in access stimulation. This information will be relevant to whether NAT's intended use of its certificate would be in the public interest and whether any conditions should be placed upon its certificate. Accordingly, NAT's failure to

provide discovery of information relevant to CenturyLink's opposition to NAT's Motion should result in its denial.

WHEREFORE, CenturyLink respectfully requests an order of the South Dakota Commission denying NAT's Motion for Summary Judgment.

Dated: April 11, 2012.

Respectfully submitted,

By: /s/ Todd Lundy
Todd L. Lundy (Admitted Pro Hac Vice)
CenturyLink Law Department
1801 California St., #1000
Denver, CO 80202
Telephone: 303-992-2510
todd.lundy@centurylink.com

And

Christopher W. Madsen
Boyce, Greenfield, Pashby & Welk, L.L.P.
300 S. Main Avenue
P.O. Box 5015
Sioux Falls, SD 57117-5015
Main: (605) 336-2424
Direct: (605) 731-0202
Fax: (605) 334-0618