

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

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<b>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.</b>	<b>TC11-087  JOINT POST-HEARING BRIEF OF MIDSTATE COMMUNICATIONS, INC. AND SOUTH DAKOTA TELECOMMUNICATIONS, INC.</b>
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This matter came on for hearing before this Commission on February 24 and 25, 2014. Midstate Communications, Inc. (“Midstate”) and South Dakota Telecommunications Association, Inc. (“SDTA”) respectfully submit this Memorandum of Law in summary and support of the position which they advocated at the time of the hearing and which they believe should be appropriately memorialized in any Certificate of Authority issued to Native American Telecom (“NAT”).

**FACTUAL BACKGROUND**

On October 11, 2011, NAT submitted an application for a certificate of authority to provide interexchange long distance service and local exchanges services in South Dakota and, more specifically, in Midstate’s study area. See October 11, 2011 Application for Certificate of Authority. On October 13, 2011, and October 28, 2011, respectively, Midstate and SDTA filed Petitions to Intervene in the docket. See Petition to Intervene of Midstate Communications, Inc. and SDTA Petition to Intervene. Midstate and SDTA both sought intervention in order to clarify the scope of NAT’s request and to ensure that neither Midstate nor any SDTA member companies, as incumbent local exchange carriers and rural carriers, would be negatively

impacted by NAT's Application. Id. This Commission granted intervention to both Midstate and SDTA. See November 30, 2011 Order Granting Intervention.

On January 27, 2012, NAT filed a revised Application for Certificate of Authority. See January 27, 2012 Revised Application for Certificate of Authority. The revised Application stated that NAT "will provide service only within the boundaries of the Crow Creek Sioux Tribe Reservation." The revised Application also included a request for waiver pursuant to A.R.S.D. 20:10:32:18<sup>1</sup>. Specifically, NAT seeks waiver of the requirement that NAT serve the entirety of Midstate's study area. See A.R.S.D. 20:10:32:15<sup>2</sup>; see revised Application for Certificate of Authority, p. 7, § 9.

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<sup>1</sup> Administrative Rule of South Dakota 20:10:32:18 provides:

A telecommunications company seeking authority to provide local exchange services in the service area of a rural telephone company may petition the commission for a waiver from having to satisfy the eligible telecommunications service requirements as set forth in 47 U.S.C. § 214(e)(1) (September 10, 1998) and applicable federal regulations. The commission may grant the waiver if, after notice and opportunity for hearing, it is determined by the commission that granting the waiver does not adversely impact universal service, that quality of service shall continue, and that it is in the public interest. The telecommunications company requesting the waiver shall have the burden to prove by a preponderance of the evidence that granting the waiver is consistent with these standards.

<sup>2</sup> Administrative Rules of South Dakota 20:10:32:15 provides:

If a telecommunications company is seeking authority to provide local exchange service in the service area of a rural telephone company, the company shall satisfy the service requirements imposed on eligible telecommunications carriers pursuant to 47 U.S.C. § 214(e)(1) (September 10, 1998) and applicable federal regulations. After notice and opportunity for hearing, these service requirements shall be imposed on the alternative local service provider throughout a geographic area as determined by the commission, unless a waiver is granted pursuant to § 20:10:32:18. The local service provider seeking authority in the rural service

Following the filing of NAT's revised Application for Certificate of Authority, Midstate and SDTA jointly served a set of Interrogatories and Requests for Production of Documents upon NAT. The discovery requests, in part, asked NAT to identify that portion of Midstate's study area for which NAT seeks a Certificate of Authority. NAT responded to the Interrogatories and Requests for Production of Documents, stating that it intends to provide service only within Midstate's Fort Thompson exchange, all of which is located on the Crow Creek Sioux Reservation. See Midstate/SDTA Exhibit 2. While the boundaries of the Crow Creek Sioux Reservation extend beyond the Fort Thompson exchange, NAT agreed to limit its anticipated service offerings to the Fort Thompson exchange. Id. NAT further represented that there is no risk for "cherry picking" or "cream skimming" behavior on its part because of the nature of its request and the location of the Fort Thompson exchange and Crow Creek Sioux Reservation. Id.

Based upon the representations made in NAT's revised Application for Certificate of Authority and discovery responses, on March 26, 2012, Midstate, SDTA, and NAT filed a Stipulation addressing the intended scope of NAT's Application for Certificate of Authority (the "Stipulation"). See Midstate/SDTA Exhibit 1. In that Stipulation, NAT again confirmed its intention to provide service only within Midstate's Fort Thompson exchange. Id. at ¶¶5-6. Based upon the Stipulation, Midstate and SDTA stated their respective intentions not to object to

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area shall be required to meet the eligible telecommunications carrier service requirements within 24 months after the later of:

- (1) The date of the commission's order granting the provider a certificate of authority to provide local exchange services; or
- (2) The date of the commission order approving any agreements for resale, interconnection, or network elements that are necessary for the provider to provide its local exchange services. The 24 month time requirement may be extended by the commission if good cause is shown.

NAT's request for waiver of A.R.S.D. 20:20:32:15. Id. at ¶6. The Stipulation was submitted in lieu of pre-filed testimony on the issues presented by NAT's initial Application for Certificate of Authority and January 27, 2012 revised Application for Certificate of Authority. See Midstate/SDTA Exhibit 5.

On May 31, 2013, NAT filed an Amended Application for Certificate of Authority. See NAT's Exhibit 1. In that Amended Application, NAT again confirmed that it "will provide service only within the boundaries of the Crow Creek Reservation." Id. at p. 8, ¶9. It also renewed its request for "a waiver of any requirement to serve the entire study area of rural telephone companies to the extent one applies in ARSD 20:10:32:15." Id. at p. 10, ¶15. Midstate and SDTA again sought and received confirmation from NAT that it intended to honor the terms of the parties' Stipulation. See Midstate/SDTA Exhibit 4.

NAT presented its Application to this Commission at hearing on February 24 and 25, 2014. Midstate did not offer any witness testimony, but did offer five exhibits, all of which are included in the record.

### ARGUMENT AND ANALYSIS

#### **1. Legal Standard.**

The legal standards applicable to this hearing are set forth in 47 C.F.R. § 54.101(a) and (b), SDCL § 49-31-71, SDCL § 49-31-75, A.R.S.D. 20:10:32:03, A.R.S.D. 20:10:32:15, and A.R.S.D. 20:10:24:02.

#### **2. Any Certificate of Authority Issued by this Commission Must be Consistent with the terms of the March 26, 2012 Stipulation.**

This Commission is vested with the authority to grant or deny NAT's Application. See SDCL § 49-31-71 (providing in relevant part that "[t]he commission shall issue a certificate of authority for local exchange service . . . if . . . the applicant has demonstrated sufficient technical,

financial, and managerial capabilities to provide the local exchange services applied for.”). Midstate and SDTA defer to the Commission as to whether NAT has satisfied the requirements of the applicable rules and regulations.

Consistent with the Stipulation, Midstate and SDTA represented that they would not Object to NAT’s request for a waiver of the requirement to serve the entirety of Midstate’s study so long as NAT’s request was limited to the Ft. Thompson exchange. At the hearing in this matter, NAT affirmed the terms of the parties’ Stipulation. See Hearing Transcript, p. 154:25; p. 155:1-4; p. 198:3-13. Accordingly, Midstate and SDTA made no objection to NAT’s filings and do not make one now.

If this Commission deems that NAT has satisfied the regulatory requirements for issuance of a certificate of authority, Midstate and SDTA request that any certificate of authority issued contain certain conditions. South Dakota Codified Law 49-31-71 vests with this Commission the discretion to “impose terms and conditions” when granting a certificate of authority. Those conditions must be made “on a competitively neutral basis” and “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.” To the extent that this Commission grants NAT its requested Certificate of Authority, Midstate and SDTA request that the Certificate of Authority expressly limit the scope of the service area in which NAT may offer service to that of Midstate’s Ft. Thompson exchange.

Furthermore, Midstate and SDTA request that any certificate of authority issued specifically define or illustrate the boundaries of the service area for which NAT is authorized to provide service. The boundaries of the Ft. Thompson exchange and Crow Creek Reservation do not match one another exactly. Accordingly, at hearing, Midstate and SDTA submitted a map

showing the exact boundaries of the Ft. Thompson exchange. See Midstate/SDTA Exhibit 3. The map depicted in Exhibit 3 represents the culmination of many months of effort between SDTA, Midstate, Commission Staff and the Commission to properly identify the boundaries of each Incumbent Local Exchange Carrier (“ILEC”) in the state. The study area boundaries shown in Exhibit 3 were ultimately certified to the Federal Communications Commission by this Commission by virtue of an Order dated June 21, 2013. Id. As noted by both Commissioners Nelson and Hanson in questioning at the time of the hearing, it is critical that the boundaries of the service territory be well defined. See Transcript, p. 183:19-25; 184:1-11; p. 199:17-22. Such precision will protect Midstate, its customers, and its eligibility for federal funding. It will also ensure that Midstate may return to this Commission, if necessary, should NAT seek to amend any certificate of authority to expand the scope of its service offerings outside of the Ft. Thompson exchange.

Both of the terms and conditions requested by Midstate and SDTA are reasonable, limited, and supported by the facts of this case and the legal standards applicable to it. The terms and conditions are consistent with this Commission’s statutory goals and, if implemented, will ultimately serve to protect Midstate, its customers, and all other ILECs in South Dakota.

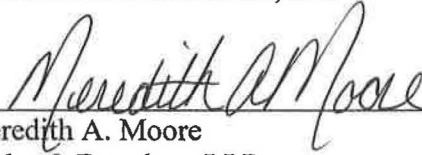
#### CONCLUSION

Midstate and SDTA respectfully request that any Certificate of Authority issued to NAT be consistent with the terms of the parties’ March 26, 2012 Stipulation and define with particularity the study area in which NAT is authorized to serve.

Dated this 4<sup>th</sup> day of April, 2014.

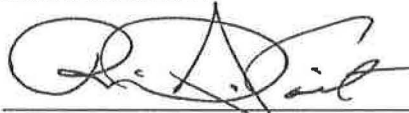
Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing was served electronically on the 4th day of April, 2014, upon the following:

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