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 WITHIN THE STUDY AREA OF MIDSTATE COMMUNICATIONS, INC.

Docket No. TC11-087

REPLY MEMORANDUM IN SUPPORT OF NATIVE AMERICAN TELECOM, LLC'S MOTION TO COMPEL DISCOVERY

INTRODUCTION

Native American Telecom, LLC ("NAT"), through its counsel, submits this reply memorandum in support of its motions to compel discovery.

FACTS

A. Procedural History Relevant To NAT's Motion To Compel Discovery

On October 11, 2011, NAT filed its Application for Certificate of Authority ("Initial Application") with the South Dakota Public Utilities Commission ("Commission"). NAT's Initial Application sought authority to provide local exchange and interexchange service within the Crow Creek Sioux Tribe Reservation ("Reservation"), which is within the existing study area of Midstate Communications, Inc. ("Midstate").

On November 30, 2011, Commission Staff served a series of Data Requests on NAT. NAT provided complete and timely Responses to these Data Requests.[1]

On January 27, 2012, NAT filed its Revised Application for Certificate of Authority ("Revised Application") with the Commission. NAT's Revised Application also seeks authority to provide local exchange and interexchange service within the boundaries of the Reservation and within Midstate's existing study area. On January 31, 2012, NAT's Revised Application was "deemed complete" by the Commission's Staff.

On April 2, 2012, CenturyLink and Sprint filed their respective "Motions to Compel Discovery." On April 3, 2012, NAT filed its "Motion to Compel Discovery." These respective motions to compel discovery are now ripe to be heard by the Commission.[2]

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[1] On November 30, 2011, the Commission also granted CenturyLink's and Sprint's intervention petitions.

[2] NAT must emphasize, however, that the parties' discovery dispute should be rendered moot by NAT's pending Motion for Summary Judgment. It is clear that NAT has complied with the requirements of ARSD 20:10:24:02 (Interexchange Services), ARSD 20:10:32:03 (Local Exchange Services), and ARSD 20:10:32:06 (Decision Criteria for Granting a Certificate of Authority).

Also, as the Commission is aware, Midstate Communications, Inc. ("Midstate") and the South Dakota Telecommunications Association ("SDTA") *do not object* to the Commission granting NAT's motion for summary judgment in this certification proceeding. The position taken by Midstate and SDTA further supports NAT's belief that (1) summary

LAW & ANALYSIS

A. The Commission's Rules Do Not Allow The Parties To Conduct Discovery In This Matter

From the very beginning of this certification proceeding, NAT has submitted that CenturyLink's and Sprint's discovery efforts are *wholly inappropriate* under the Commission's rules. SDCL 49-1-11 states that the Commission "may promulgate rules pursuant to chapter 1-26 concerning: . . . (4) Regulation of proceedings before the commission, including forms, notices, *applications*, pleadings, orders to show cause and the service thereof. . . ." (emphasis added).

Pursuant to this authority, the Commission promulgated ARSD 20:10:01:01.02, which provides:

> **Use of rules of civil procedure.** Except to the extent a provision is not appropriately applied to an agency proceeding or *is in conflict* with SDCL chapter 1-26, another statute governing the proceeding, *or the commission's rules,* the rules of civil procedure as used in the circuit courts of this state shall apply.

(emphasis added).

Therefore, it is clear that the Commission has adopted *its own precise and specific rules* with respect to an applicant's request to provide

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judgment is proper, (2) NAT has provided all required information to the Commission, (3) further discovery is improper and unnecessary, and (4) NAT should not be forced to further expend substantial time and financial resources in gaining *entry* to Midstate's service area.

interexchange telecommunications services and local exchange services in South Dakota. *See* ARSD 20:10:24:02 (Interexchange Services) and ARSD 20:10:32:03 (Local Exchange Services).

Most importantly for purposes of this discovery dispute, the Commission's own rules *clearly prohibit the parties* from engaging in discovery. ARSD 20:10:24:02(20) states that an applicant for interexchange services *shall* only be required to produce "[o]ther information *requested by the commission* needed to demonstrate that the applicant has sufficient technical, financial, and managerial capabilities to provide the interexchange services it intends to offer. . . ." (emphasis added). Similarly, ARSD 20:10:32:03(25) states that an applicant for local exchange services *shall* only be required to produce "[o]ther information *requested by the commission* needed to demonstrate that the applicant has sufficient technical, financial, and managerial capabilities to provide the local exchange services it intends to offer. . . ." (emphasis added).

As such, the Commission's own rules prohibit discovery in this certification proceeding. Only the *Commission* can request further information from an applicant. And as noted earlier, shortly after NAT filed its Initial Application, the *Commission* served its own set of data requests upon NAT. NAT provided complete and timely responses to

these data requests. After NAT filed its Revised Application, the Commission did not serve any additional data requests, undoubtedly because the Commission believed it unnecessary to request any further information from NAT. Soon after, NAT's Revised Application was "deemed complete" by the Commission's Staff.

The Commission's rules for reviewing a certificate of authority application preclude "discovery gamesmanship" and are based on sound practical principles. Consistent with the Federal Communications Act's purpose,[3] the Commission has consistently viewed competition in the telecommunications industry as a benefit to the residents of South Dakota and has approved innumerable applications since 1997.

The Commission has established precise rules for applicants because the Commission recognizes the benefits of competition for South Dakota residents. South Dakota law does not envision the kind of elaborate (and unnecessarily drawn-out) proceedings that CenturyLink and Sprint propose. The Commission must review NAT's application in a manner consistent with the Commission's own rules. And while the Commission affords an opportunity to request a hearing on an

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[3] The Telecommunications Act was enacted to "promote competition and reduce regulation in order to secure lower prices and higher quality services for . . . consumers and encourage the rapid deployment of new telecommunications technologies."

application before granting a certificate of authority, it appears that a hearing has never been requested or held for decades (if ever) in South Dakota. *See, e.g.*, http://puc.sd.gov/Dockets/Telecom/default.aspx (providing a complete listing of the Commission's telecommunications dockets – including certificate of authority applications - from 1997-2012).

By enacting these specific and straight-forward rules, the Commission has streamlined *entry regulation* and opted to expedite competition in South Dakota. CenturyLink and Sprint propose an unprecedented level of *entry regulation* that is inconsistent with public policy and the Commission's own rules. CenturyLink and Sprint seek an extensive and unwarranted evidentiary investigation into NAT's entire business operation. However, CenturyLink's and Sprint's imaginative array of "potential issues" overreaches any *entry* regulations under South Dakota law and the Commission's rules.

Like any other applicant in the same position, NAT is only required to abide by the Commission's rules of entry. NAT has complied with each and every one of these rules. CenturyLink's and Sprint's conduct greatly exceeds the scope and purpose of the Commission's own rules in this certification matter.

CenturyLink's and Sprint's intervention has only one purpose: to erect massive regulatory and procedural barriers that delay competitive entry into the telecommunications market. Such delay undoubtedly serves CenturyLink's and Sprint's interests, but it does not serve the public good and is entirely inconsistent with the Commission's own rules. That CenturyLink and Sprint have so vigorously advocated for this extensive form of entry regulation suggests that these companies will derive a considerable strategic and competitive advantage. CenturyLink's and Sprint's actions frustrate the Commission's efforts in carrying out its role to open the interexchange and local exchange markets to competition. The Commission should not tolerate or condone these actions.[4]

In sum, NAT has met all of the certification requirements in South Dakota. NAT has followed the Commission's rules. NAT's Revised Application has been "deemed complete" by the Commission's Staff. The Commission's rules prohibit further discovery by the parties. Therefore, NAT once again asks the Commission to follow its rules, deny the parties'

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[4] CenturyLink's and Sprint's conduct has resulted in NAT's certification process being delayed far beyond any similar proceeding in the Commission's recent history. *See, e.g.*, http://puc.sd.gov/Dockets/Telecom/default.aspx (providing a complete listing of the Commission's telecommunications dockets – including certification applications - from 1997-2012).

respective motions to compel discovery, act expeditiously in resolving this narrow certification issue, and grant NAT's Revised Application.

B. *If The Commission Disregards Its Own Rules And Permits CenturyLink And Sprint To Conduct Nearly-Unlimited Discovery, Then NAT's Motion To Compel Should Be Granted So That The Parties Are On "Equal Footing"*

If the Commission disregards its own rules and permits CenturyLink and Sprint to conduct nearly unlimited discovery, then NAT must be entitled to the *same discovery opportunities*.[5] CenturyLink and Sprint voluntarily commenced this intervention, became parties, and have demanded (for all practical purposes) nearly unlimited discovery in this certification proceeding. NAT has simply requested similar discovery information from CenturyLink and Sprint that these two companies are demanding from NAT. As such, neither CenturyLink nor Sprint can complain that NAT's discovery requests are somehow improper.

CenturyLink and Sprint are attempting to make this very straight-forward certification proceeding a "referendum" on "access stimulation." The issue of "access stimulation" has no bearing whatsoever on whether

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[5] The Commission should note that although NAT believes CenturyLink's and Sprint's discovery demands are entirely improper in this certification proceeding, NAT acknowledges that it did serve its own discovery requests upon CenturyLink and Sprint. By doing so, however, NAT does not concede that discovery is proper. Rather, because of the expedited procedural schedule in this matter, if NAT would not have served any discovery requests on CenturyLink and Sprint, these companies would have undoubtedly later claimed that NAT somehow "waived" its right to do so.

NAT should be entitled to operate as a CLEC in Midstate's study area. However, if the Commission allows CenturyLink and Sprint to pursue discovery, the Commission cannot deny NAT the ability to proceed in a similar manner.

Again, if the Commission disregards its discovery rules, then NAT's discovery requests become essential in this matter. Under ARSD 20:10:32:06, NAT must establish "sufficient *technical, financial, and managerial ability* to provide the local exchange services described in its application. . . ." If the Commission finds that the scope of this certification proceeding should exceed anything allowed in the Commission's recent history, then NAT must be allowed to provide the Commission with a comparative analysis of the technical, financial, and managerial abilities of NAT and other companies (including CenturyLink and Sprint) that provide telecommunications services in South Dakota. Without this comparative information, NAT will be forced to "shoot at an unknown target." In other words, how can NAT know the "technical, financial, and managerial" standards it must meet for certification if it cannot prepare a comparative analysis between itself and other companies that the Commission has already certificated to provide telecommunications services in South Dakota? As a matter of fundamental fairness, the potentially unprecedented nature of this

proceeding requires that NAT be provided with this information so that it may present this comparative analysis and meet its burden under the Commission's rules.

C. Sprint's Discovery Reponses Are Incomplete

Sprint alleges that NAT's discovery requests are "not properly supported," "irrelevant," "overbroad," and "unduly burdensome." ("Sprint's Memorandum in Opposition to NAT's Motion to Compel," pages 1-4 – dated April 14, 2012) ("Sprint's Opposition, page -- "). Sprint is incorrect.[6]

First, Sprint claims that NAT's request for Sprint's "internal business and financial information" is irrelevant in this proceeding. (Sprint's Opposition, pages 2-3). However, in its earlier submission, Sprint claims that its discovery requests 11, 12, 13, 14, 15, 16, 17, 28,

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[6] Consistent with its "standard" discovery practices, Sprint refuses to produce *any meaningful discovery* responses to the vast majority of NAT's discovery requests:

- Data Requests - 1.7, 1.8, 1.9, 1.10, 1.15, 1.17, 1.18, 1.22, 1.23, 1.24, 1.25, 1.27, 1.28, 1.29, 1.30, 1.31, 1.32, and 1.33
- Document Requests – 1, 2, 3, 4, 5, 6, and 7

Sprint has also provided *incomplete responses* to several other of NAT's discovery requests:

- Data Requests – 1.26, 1.34, 1.35, and 1.36

(*See* Exhibit 1 to NAT's Motion to Compel Discovery).

33 and document requests 1, 2, 3, 7, 8, and 9 are essential to demonstrate that NAT does not have sufficient "financial capabilities" to provide its proposed services. (Sprint's Memorandum in Support of Motion to Compel, pages 11-17).

If the Commission allows discovery to proceed, NAT must also be allowed to compare its financial information with that of Sprint.[7] As such, Sprint must comply with NAT's discovery requests 1.22 and 1.23 (business plans, strategies, goals, or methods of obtaining revenues in South Dakota or any other state), 1.24 (wholesale pricing rates), 1.27 (bank accounts), 1.29 (business plans for the South Dakota market) and document requests #1 (documents evidencing future financing commitments), #2 (bank statements, general ledgers, journal entries, and other financial records that identify income and expenses), #3 (documents reflecting board of directors' meetings, minutes, resolutions, and by-laws), #4 (general ledger journal entries or other accounting records that support Sprint's balance sheets and profit and loss statements for 2009, 2010, and 2011), #5 (documents reflecting any loan received from any lender), and #7 (documents reflecting commitments for

[7] This is especially true in light of recent *DowJones* reports highlighting Sprint's rapidly declining financial condition. (*See* "Declaration of Scott R. Swier in Opposition to CenturyLink's and Sprint's Motions to Compel Discovery" – Exhibit 4) (filed with the Commission on April 13, 2012).

future financing). Sprint has refused to comply with these discovery requests.

Directly related to "financial capabilities" is information related to the parties' "internal workings." Sprint submits to the Commission that its discovery requests 22, 27, 30, 31, 36, and 38 are absolutely essential to demonstrate the disingenuousness of NAT's "internal workings." (Sprint's Memorandum in Support of Motion to Compel, pages 7-11). NAT must be allowed to compare its "internal working" information with that of Sprint. As such, Sprint must comply with NAT's discovery requests 1.28 (names of Sprint's employee's and work locations), 1.32 (number of Sprint's employees as of year-end 2010 and 2011), 1.33 (organizational chart showing all Sprint employees as of year-end 2011) and document request 3 (relating to Sprint's directors' meetings, minutes, resolutions, and bylaws).

NAT also has the burden of proving its "technical and managerial capabilities" to provide the proposed services. NAT must be allowed to compare its "technical and managerial capabilities" with that of Sprint. Sprint submits that its discovery requests 5, 6, 7, 18, 23, 24, 29, 41, 42, 43, and 44 are essential to "test the validity of NAT's [technical and

managerial] statements."[8] (Sprint's Memorandum in Support of Motion to Compel, pages 17-23). NAT must also be allowed to review similar information. As such, Sprint must comply with NAT's discovery requests 1.30 (retail residential customers, business customers, and other customers in South Dakota as of year-end 2010 and 2011) and 1.31 (residential access lines, business access lines, conference calling access lines, and other access lines in South Dakota as of year-end 2010 and 2011) .

Second, Sprint submits that NAT's discovery requests are "overly broad and unduly burdensome." (Sprint's Opposition, pages 3-4). This allegation is ironic in that NAT's discovery requests to Sprint are nearly *identical* to Sprint's discovery requests to NAT. *In other words, even Sprint concedes that its own discovery requests are overly broad, unduly burdensome, and not capable of being accurately comprehended.*[9]

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[8] In reality, Sprint is demanding this discovery so that it can serve as a "Super Commission" in this proceeding.

[9] Sprint has filed the "Affidavit of Sonya Thornton" ("Thornton Affidavit") in support of its claims of "overbreadth" and "undue burden." However, Thornton's affidavit *does not even reference this case. See e.g.,* Thornton Affidavit, ¶ 2 ("I make this affidavit in support of Sprint's Response to *Northern Valley's Motion to Compel*") (emphasis added); Thornton Affidavit, ¶ 12 ("I have reviewed *Northern Valley's* Document Request No. 1") (emphasis added); Thornton Affidavit, ¶ 13 ("Sprint includes this information in the event *Northern Valley* seeks to expand the custodian list beyond the individuals identified above") (emphasis added). Based upon the fact that Thornton is unaware that this case involves NAT and

Third, Sprint makes the unavailing argument that it should not be required to produce relevant discovery because of the excessive cost and Sprint's status as "simply an intervenor in this case." The fact is that Sprint chose to intervene in this case. Sprint was granted intervention status. Sprint voluntarily became a party. Sprint is demanding irrelevant and voluminous discovery from NAT. Sprint is flaunting the Commission and its certification rules. Sprint is delaying this certification matter far beyond any reasonable time period. It is disingenuous of Sprint to now tell the Commission that NAT should be required to produce massive amounts of discovery, but Sprint should be entirely immune from doing likewise.

Finally, it is undisputed that the *only reason* Sprint has intervened in this *routine and limited certification matter* is the issue of "access stimulation." (*See e.g.,* Intervention Petition of Sprint; Sprint's Opposition, pages 2-4). Despite the Federal Communications Commission's ("FCC") recent Final Rule, Sprint has mislead the Commission by depicting "access stimulation" as improper and subject to an extensive "investigation and hearing" in this limited certification matter. CenturyLink's and Sprint's actions have "opened the door" to the

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its discovery requests, the Commission should disregard her affidavit as to "overbreadth" and the "undue burden" that Sprint will allegedly encounter in responding to NAT's discovery requests.

discovery of information regarding "access stimulation" and NAT must be given the opportunity to compare its alleged "access stimulation activities" with those of Sprint. Therefore, Sprint must comply with NAT's discovery requests 1.7, 1.8, 1.9, 1.10, 1.15, 1.16, 1.17, 1.18, 1.19, 1.21, 1.25, and 1.26 as these requests are directly related to Sprint's involvement with "access stimulation" issues.

In sum, if the Commission allows discovery in this proceeding, NAT has shown that its discovery requests are supported by "good cause," "relevant to the subject matter involved" and "reasonably calculated to lead to the discovery of admissible evidence." ARSD 20:10:01:22.01; SDCL 15-6-26(b)(1).[10]

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[10] Sprint's responses to NAT's data requests 1.15 (documents evidencing Sprint's communications with any LEC, ILEC, CLEC, and/or IXC offering services in South Dakota), 1.22 (documents referencing Sprint's business plans, strategies, goals, or methods of obtaining monies or revenues in South Dakota or in any other state), 1.23 (documents referencing Sprint's business plans, strategies, goals, methods of obtaining monies or revenues from any retail, wholesale customer, including residents, businesses, local exchange carriers, and interexchange carriers, in South Dakota or any other state), 1.24 (documents relating to Sprint's wholesale pricing rates from 2009-present), and 1.25 (documents relating to Sprint's history of making payments to LECs, ILECs, and/or CLECs for terminating switched access charges from 2009-present date) assert that NAT's requests seek "*privileged materials*."

These assertions must also fail as Sprint has not produced a *privilege log* identifying the particular documents to which a *particular privilege may be asserted*. SDCL 15-6-26(b)(5) ("When a party withholds information otherwise discoverable under these rules by claiming that it is privileged . . . the party shall make the claim expressly and shall

D. CenturyLink's Discovery Reponses Are Incomplete

CenturyLink alleges that NAT's discovery requests are "irrelevant," "beyond the reasonable scope of discovery," overly "broad," outside the "issues raised by the parties," and "unreasonable." ("CenturyLink's Response to NAT's Motion to Compel Discovery," pages 1-9 – dated April 13, 2012) ("CenturyLink's Opposition, page --"). CenturyLink is incorrect.[11]

First, CenturyLink claims that NAT's request for CenturyLink's "internal business information" and "financial information" is irrelevant in this proceeding. (CenturyLink's Opposition, pages 5-9). However, as noted earlier, CenturyLink's fellow intervenor (Sprint) claims that this exact information is essential to demonstrate that NAT does not have

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describe the nature of the documents, communications, or things not produced in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection").

[11] Also consistent with its "standard" discovery practices, CenturyLink refuses to produce *any meaningful discovery* responses to a significant portion of NAT's discovery requests:

- Data Requests – 1.16, 1.22, 1.23, 1.24, 1.27, 1.28, 1.30, 1.31, 1.32, 1.33, 1.34, and 1.36
- Document Requests – 1, 2, 3, 4, 5, and 7.

(*See* Exhibit 2 to NAT's Motion to Compel Discovery).

sufficient "financial capabilities" to provide its proposed services. (Sprint's Memorandum in Support of Motion to Compel, pages 11-17).

If the Commission allows the intervenors' discovery to proceed, NAT must also be allowed to compare its "internal business information" and "financial information" with that of CenturyLink. As such, CenturyLink must comply with NAT's data requests 1.22 and 1.23 (business plans, strategies, goals, or methods of obtaining revenues in South Dakota or any other state), 1.24 (wholesale pricing rates),[12] 1.27 (bank accounts), 1.28 (employee information), 1.30 (number of retail residential customers, traditional business customers, and any other customers in South Dakota), 1.31 (number of retail residential access lines, retail business access lines, conferencing calling access lines, and other access lines in South Dakota), 1.32 (number of CenturyLink employees as of year-end 2010 and 2011), 1.33 (employee organization chart as of year-end 2011) and document requests #1 (documents evidencing future financing commitments), #2 (bank statements, general ledgers, journal entries, and other financial records that identify income and expenses), #3 (documents reflecting board of directors' meetings, minutes, resolutions, and by-laws), #4 (general ledger journal entries or other accounting records that support CenturyLink's balance sheets and profit

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[12] This information is also known in the telecommunications industry as "wholesale carrier, long distance termination, rate decks."

and loss statements for 2009, 2010, and 2011), #5 (documents reflecting any loan received from any lender), and #7 (documents reflecting commitments for future financing). CenturyLink has refused to comply with these discovery requests.

Second, CenturyLink submits that NAT's discovery requests are "unreasonable." (CenturyLink's Opposition, pages 8-9) ("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").

CenturyLink's position must fail. "The party resisting production of discovery bears the burden of establishing lack of relevancy or that complying with the request would be unduly burdensome." *Lyon v. Bankers Life and Casualty Company*, Civ. 09-5070-JLV at *6 (District of South Dakota - Jan. 14, 2011). *See St. Paul Reinsurance Co. v. Commercial Financial Corp.,* 198 F.R.D. 508, 511 (N.D.Iowa 2000) ("[T]he mere statement . . . that [an] interrogatory [or request for production] [is] 'overly broad, burdensome, oppressive or irrelevant' is not adequate to voice a successful objection"). *Id.* (quoting *St. Paul Reinsurance*, 198 F.RD. 511). Rather, "the party resisting discovery *must show specifically* how . . . each interrogatory [or request for production] is not relevant or

how each question is overly broad, burdensome, or oppressive." *Id.* (quoting *St. Paul Reinsurance*, 198 F.R.D. at 512) (emphasis added).

"[T]he fact that answers to [interrogatories or request for production] will be burdensome and expensive is not in itself a reason for refusing to order discovery which is otherwise appropriate." *Id.* (quoting *In re Folding Carton Antitrust Litigation,* 83 F.R.D. 260, 265 (N.D.Ill.1979)). Also, "the fact that answering the interrogatories [or request for production] will require the objecting party to expend considerable time, effort, and expense consulting, reviewing, and analyzing huge volumes of documents and information is an insufficient basis to object." *Id.* (quoting *Burns v. Imagine Films Entertainment, Inc.,* 164 F.R.D. 589, 593 (W.D.N.Y.1996)). CenturyLink has not met its burden of showing why NAT's data requests and document requests should not be answered or documents not produced where it merely makes conclusory objections. Instead, CenturyLink filed "boiler plate objections" and simply refused to respond to several of NAT's discovery requests, thereby depriving NAT of meaningful discovery.[13]

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[13] Any allegation by CenturyLink that NAT's discovery requests seek "privileged materials" must also fail as CenturyLink has not produced a privilege log identifying the particular documents to which a particular privilege may be asserted. SDCL 15-6-26(b)(5) ("When a party withholds information otherwise discoverable under these rules by claiming that it is privileged . . . the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not

The fact is that CenturyLink intervened in this case. CenturyLink was granted intervention status. CenturyLink voluntarily became a party. CenturyLink is demanding irrelevant and voluminous discovery from NAT. CenturyLink is flaunting the Commission and its certification rules. CenturyLink is delaying this certification matter far beyond any reasonable time period. It is disingenuous of CenturyLink to now tell the Commission that NAT should be required to produce massive amounts of discovery, but CenturyLink should be entirely immune from doing likewise.

Finally, it is undisputed that the *only reason* CenturyLink has intervened in this *routine and limited certification matter* is the issue of "access stimulation." (*See e.g.,* Intervention Petition of CenturyLink; CenturyLink's Opposition, pages 2, 6). Despite the FCC's recent Final Rule, CenturyLink has mislead the Commission by depicting "access stimulation" as improper and subject to an extensive "investigation and hearing" in this limited certification matter. CenturyLink's actions have "opened the door" to discovery of information regarding "access

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produced in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection").

stimulation" and NAT must be given the opportunity to compare its alleged "improper activities" with those of CenturyLink.[14]

E. NAT's Motion To Compel Must Be Granted Because Its Discovery Request Are Supported By "Good Cause," "Relevant To The Issues In This Proceeding," And "Reasonably Calculated To Lead To The Discovery of Admissible Evidence."

First, as stated previously, if the Commission finds that the scope of this certification proceeding should exceed anything allowed in the Commission's recent history, then NAT must be allowed to provide the Commission with a comparative analysis of the technical, financial, and managerial abilities of NAT and other companies (including CenturyLink and Sprint) that provide telecommunications services in South Dakota. Without this comparative information, NAT will be forced to "shoot at an unknown target."

In other words, how can NAT know the "technical, financial, and managerial" standards it must meet for certification if it cannot prepare a comparative analysis between itself and other companies that the Commission has already certificated to provide telecommunications services in South Dakota? As a matter of fundamental fairness, the

[14] CenturyLink's claim that NAT failed to comply with SDCL 15-6-37(a)'s "good faith certification" requirement is incorrect. (*See* CenturyLink's Opposition, page 9). As CenturyLink's filings show, the parties had multiple contacts regarding their respective discovery differences. It quickly became clear that the parties had reached an impasse and would require the Commission's intervention to resolve these differences.

potentially unprecedented nature of this proceeding requires that NAT be provided with this information so that it may present this comparative analysis and meet its burden under the Commission's rules.

Second, NAT's motion to compel must be granted so that NAT can prove it is actually pricing its telecommunications services at a lower rate than CenturyLink and Sprint. Without this discovery, NAT cannot prove this fundamental issue.

Third, it is NAT's position that CenturyLink's and Sprint's primary motivation is to simply avoid paying NAT for services. It is noteworthy that CenturyLink and Sprint still refuse to provide payment to NAT for interstate terminating access fees (despite the fact that NAT's current interstate tariff fully complies with the FCC's Final Rule). For example, Sprint offers its "Anytime Minutes Option" calling plan (among several other plans) that requires a Sprint customer to pay $69.99 for 450 minutes per month. As such, Sprint is guaranteed a payment of $0.155/minute (fifteen and one-half cents per minute).

After a Sprint customer exceeds his 450 monthly minutes, however, the customer is required to pay Sprint $0.45 (forty-five cents per minute) for each additional minute used. In other words, Sprint is guaranteed a per minute payment of at least $.155 and yet refuses to pay NAT the $.006327 *(i.e., 6/10ths of one penny) for the most important part of the*

call - call completion.[15] Sprint also has usage policies that purport to ban wireless consumers from calling "free" conferencing services. And although Sprint has the authority in its calling plans to eliminate this activity, Sprint chooses not to enforce these policies because it knows customer dissatisfaction (and the concomitant loss of revenue) would immediately occur. Instead, Sprint connects the call and still refuses payment to NAT.[16]

Fourth, it is necessary for NAT to demonstrate that CenturyLink and Sprint have been imposing unconscionably high transport rates at the wholesale level. These higher transport rates make call delivery more expensive to the call originator. In fact, CenturyLink and Sprint have

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[15] A copy of Sprint's "Customer Plan Options" is attached to this reply brief and marked as "Exhibit 1." This document can also be found at http://shop.sprint.com/mysprint/shop/plan/plan_wall.jsp?INTNAV=WWW:HE:Plans.

[16] Under its "Website, Use & Network Management Terms" Sprint still views "Access Stimulation" as an unlawful practice that can result in the immediate termination of a customer's service. However, based upon the substantial profits it recoups, Sprint does not enforce this policy. And yet Sprint still refuses to compensate NAT its 6/10ths of one penny for NAT's call completion. A copy of Sprint's "Website, Use & Network Management Terms" is attached to this reply brief and marked as "Exhibit 2." This document can also be found at http://www.sprint.com/legal/agreement.html?INTNAV=ATG:FT:Terms

priced wholesale traffic so high that it has resulted in "call blocking" by other carriers and service providers.

In sum, NAT has shown that its discovery requests to CenturyLink and Sprint are supported by "good cause," "relevant to the subject matter involved" and "reasonably calculated to lead to the discovery of admissible evidence." ARSD 20:10:01:22.01; SDCL 15-6-26(b)(1).

CONCLUSION

CenturyLink's and Sprint's interventions are based on irrelevant claims that NAT intends to engage in "access stimulation" – an activity that the FCC has recently approved. However, this "access stimulation" issue has no bearing on whether NAT should be allowed *entry* into Midstate's service area.

CenturyLink's and Sprint's actions have undoubtedly met its purpose – to delay a prompt and orderly resolution of NAT's Revised Application. If CenturyLink and Sprint believe there is an issue that needs to be investigated, they should be required to file a complaint for Commission action – an action that is handled *separately* from reviewing NAT's Revised Application. This certification proceeding is not the proper forum for CenturyLink and Sprint to pursue such concerns.

The issue presented in NAT's Revised Application is whether it should be authorized to operate as a CLEC in Midstate's service area.

When deciding whether NAT should be issued a certificate of authority, the Commission must review NAT's Revised Application under the requirements of ARSD 20:10:24:02 (Interexchange Services), ARSD 20:10:32:03 (Local Exchange Services), and ARSD 20:10:32:06 (Decision Criteria for Granting a Certificate of Authority). In this case, NAT has complied with these rules and the Commission's Staff has deemed NAT's Revised Application to be "complete."

CenturyLink's and Sprint's concerns over "access stimulation" have no bearing on whether NAT should be allowed to operate in Midstate's service area. Rather, CenturyLink and Sprint only want to use this proceeding as a vehicle to conduct irrelevant and voluminous discovery without having to initiate a proper complaint against NAT. Nowhere do the Commission's rules allow these companies to act as a "Super Commission" and demand "more detailed answers" before the Commission reviews NAT's Revised Application.

However, if the Commission disregards its own rules and allows CenturyLink and Sprint to engage in their continued "gamesmanship," then NAT's motion to compel discovery must be granted so that NAT may have a fair hearing in this certification proceeding.

Dated this 18th day of April, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of *REPLY MEMORANDUM IN SUPPORT OF NATIVE AMERICAN TELECOM, LLC'S MOTION TO COMPEL DISCOVERY* was delivered *via electronic mail* on this 18th day of April, 2012, to the following parties:

Service List (SDPUC TC 11-087)

/s/ Scott R. Swier
Scott R. Swier