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.	))))))))	**TC11-087**

NATIVE AMERICAN TELECOM, LLC'S
NOTICE OF SUPPLEMENTAL AUTHORITY
IN RESPONSE 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 notice of supplemental authority in response 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:

SUPPLEMENTAL AUTHORITY

I. THE FEDERAL COMMUNICATIONS COMMISSION HAS NOW RECOGNIZED THE LEGITIMACY AND LEGALITY OF "ACCESS STIMULATION" AND "REVENUE SHARING AGREEMENTS" AND HAS ADOPTED RULES GOVERNING ITS PRACTICE

On Friday, November 18, 2011, the Federal Communications Commission ("FCC") released its long-awaited Report and Order ("Order") to reform the Universal Service Fund ("USF") and Inter-Carrier Compensation ("ICC") rules.[1]

[1] The FCC's nearly-800 page Order can be found at www.fcc.gov.

In its Order, the FCC specifically recognizes the legitimacy and legality of "access stimulation" and "revenue sharing agreements." In fact, the FCC's Order adopts a "bright line definition" to identify when an access stimulating LEC must re-file its interstate access tariffs at rates that are presumptively consistent with the Act. The first condition is met where the LEC has entered into an access *revenue sharing agreement*.[2] The second condition is met where the LEC either has had (a) a three-to-one interstate terminating to-originating traffic ratio in a calendar month; or (b) has had a greater than 100 percent increase in interstate originating and/or terminating switched access MOU in a month compared to the same month in the preceding year.[3] (Order, ¶¶ 658, 667, 675-678).

If a CLEC meets both conditions of this definition, it must file a revised tariff and benchmark its tariffed access rates to the rates of the price cap LEC with the lowest interstate switched access rates in the state. (Order, ¶ 679). Specifically, the Order requires a CLEC to file its revised interstate switched access tariff within 45 days of meeting the definition, or within 45

---

[2] This "revenue sharing" condition of the definition is met when a rate-of-return LEC or a competitive LEC:

> [H]as an access revenue sharing agreement, whether express, implied, written or oral, that, over the course of the agreement, would directly or indirectly result in a net payment to the other party (including affiliates) to the agreement, in which payment by the rate-of-return LEC or competitive LEC is based on the billing or collection of access charges from interexchange carriers or wireless carriers. When determining whether there is a net payment under this rule, all payments, discounts, credits, services, features, functions, and other items of value, regardless of form, provided by the rate-of-return LEC or competitive LEC to the other party to the agreement shall be taken into account.

(Order, ¶ 669).

[3] In turn, IXCs will be permitted to file complaints based on evidence from their traffic records that a LEC has exceeded either of the traffic measurements of the second condition (*i.e.*, that the second condition has been met). (Order, ¶ 659).

days of the effective date of the rule if on that date it meets the definition. A CLEC whose rates are already at or below the rate to which they would have to benchmark in the re-filed tariff will not be required to make a tariff filing. (Order, ¶ 691).

Finally, the FCC's Order also *eviscerates* the IXCs' long-standing claims that "revenue sharing agreements" violate section 201(b) of the Act. In fact, the FCC declares just the opposite:

> [W]e do not declare revenue sharing to be a *per se* violation of section 201(b) of the Act. A ban on all revenue sharing arrangements could be overly broad, and no party has suggested a way to overcome this shortcoming. *Nor do we find that parties have demonstrated that traffic directed to access stimulators should not be subject to tariffed access charges in all cases*.

(Order, ¶ 672) (emphasis added).[4]

II. THE COMMISSION SHOULD DENY THE IXCs' INTERVENTION MOTIONS BASED UPON THE LIMITED SCOPE OF THIS DOCKET AND THE FCC'S NEWLY-RELEASED ORDER

In their respective intervention petitions, the IXCs object to NAT's Application because of their "concerns" that NAT may engage in "access stimulation" and enter into "revenue sharing agreements" with other companies. (*see* AT&T's petition, ¶¶ 2-4; Sprint's petition, ¶¶ 3-6; Qwest's/CenturyLink's petition, ¶¶ 2-5). Based upon the limited scope of this docket and the

[4] The FCC also rejected several of the IXCs' other spurious suggestions, including (1) adopting a benchmark rate of $0.0007 ("We will not adopt a benchmarking rate of $0.0007 in instances when the definition is met, as is suggested by a few parties. The $0.0007 rate originated as a negotiated rate in reciprocal compensation arrangements for ISP-bound traffic, and there is insufficient evidence to justify abandoning competitive LEC benchmarking entirely"); (2) adopting an immediate bill-and-keep system ("Nor will we immediately apply bill-and-keep, as some parties have urged. We adopt a bill-and-keep methodology for intercarrier compensation below, but decline to mandate a flash cut to bill-and-keep here"); and (3) detariffing certain CLEC access charges ("Additionally, we reject the suggestion that we detariff [CLEC] access charges if they meet the access stimulation definition. Our benchmarking approach addresses access stimulation within the parameters of the existing access charge regulatory structure"). (Order, ¶ 692).

FCC's recent Order, these "concerns" are no longer legitimate and the IXCs' petitions to intervene should be denied.

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. The Commission's decision in granting a Certificate of Authority for interexchange service and local exchange service is limited to the criteria set forth in statute/administrative rules and primarily encompasses an applicant's *financial, technical, and managerial ability* to provide the contemplated services.[5] The IXCs have failed to provide *any nexus* between their intervention motions and the narrowly-tailored criteria that will guide the Commission's decision in this docket.

---

[5] ARSD 20:10:24:03 provides:

> If an application filed pursuant to SDCL 49-31-3 for *interexchange telecommunications* is incomplete, inaccurate, false, or misleading, the commission shall reject the application. If the commission finds that the applicant is not *financially, technically, or managerially able to provide the contemplated service*, the commission shall deny the application for certification.

(emphasis added).

ARSD 20:10:32:06 provides in part:

> 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. . . .

(emphasis added).

Furthermore, the FCC's Order now confirms NAT's long-standing legal position that "access stimulation" and "revenue sharing agreements" are entirely legitimate and legal:

> [W]e do not declare revenue sharing to be a *per se* violation of section 201(b) of the Act. A ban on all revenue sharing arrangements could be overly broad, and no party has suggested a way to overcome this shortcoming. *Nor do we find that parties have demonstrated that traffic directed to access stimulators should not be subject to tariffed access charges in all cases*.

(Order, ¶ 672) (emphasis added). NAT has always been transparent about the fact that at least one of its customers is a free conferencing service. And in fact, since August 2011, NAT has benchmarked its tariffed *interstate* rate to the rate of the price cap LEC with the lowest interstate switched access rate in South Dakota. (*see* Order, ¶ 679). Furthermore, NAT has used the same rate for its *intrastate* rate (even though the rate NAT could charge under the Order is much higher). In other words, for the past several months, NAT's interstate tariff has *mirrored the FCC's Order* that was just released on Friday afternoon.[6]

In sum, the IXCs' petitions to intervene fail to meet the Commission's requirements as the IXCs 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. (*see* ARSD 20:10:01:15.05).

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.

[6] Unfortunately, even when faced with the FCC's impending Order, the IXCs have refused to compensate NAT for the services it provides to the IXCs' customers.

Dated this 21st 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 21st, 2011, NATIVE AMERICAN TELECOM, LLC'S NOTICE OF SUPPLEMENTAL AUTHORITY IN RESPONSE 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* was served *via electronic mail (and filed with the SDPUC's electronic docket system)* 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

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

Company, LP

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@sdtaonline.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

Scott Knudson
Philip Schenkenberg
80 South Eighth Street
2200 IDS Center
Minneapolis, Minnesota 55402
skundson@briggs.com
pschenkenberg@briggs.com
Attorneys for Sprint Communications Company, LP

/s/ Scott R. Swier
Scott R. Swier