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

SPRINT'S POST-HEARING BRIEF

PUBLIC VERSION

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Sprint Communications Corp. L.P. ("Sprint") respectfully submits this post-hearing brief on the May 31, 2013 Amended Application ("Amended Application") of Native American Telecom, LLC ("NAT") to obtain a certificate of authority from the Commission. The Commission should deny the Amended Application because NAT does not qualify for a certificate, NAT's business plan is contrary to the public interest, NAT lacks sound management capabilities, and NAT is not financially viable.

I. INTRODUCTION AND BACKGROUND[1]

A. Procedural Posture

1. 2008-2009

On September 8, 2008, NAT applied to the Commission for a certificate of authority to provide competitive local exchange service on the Crow Creek Reservation (the "Reservation"). That matter was assigned Docket No. TC08-110. After intervenors questioned NAT's business plans, NAT moved to dismiss its application. Its dismissal was based on an order NAT obtained from the Crow Creek Tribal Utility Authority ("CCTUA") that purported to allow NAT to provide services on the Reservation (NAT 2). The Commission granted NAT's motion to dismiss on February 5, 2009. As discussed below, NAT then began providing voice service to Free Conferencing Corporation ("Free Conferencing"), a user of high-volume calling services, in the fall of 2009.

[1] NAT's hearing exhibits are cited herein at "NAT __." Sprint's hearing exhibits are cited as "SPRINT __." The hearing transcript is cited as "Tr. __."

2. 2010-2011

In 2010, NAT continued to operate, providing various services to Free Conferencing, as well as WiMAX services to other residential and business users (referred to as "WiMAX Customers"). Sprint disputed NAT's access charge invoices, and, in May 2010, Sprint filed a complaint against NAT with the Commission. *In the Matter of the Complaint Filed by Sprint Commc'ns Co., L.P. against Native American Telecom, LLC Regarding Telecomms. Serv's*, Docket No. TC10-026, Amended Complaint (May 5, 2010).

NAT subsequently sued Sprint in Crow Creek Sioux Tribal Court for payment of interstate and intrastate access charges. In response, Sprint brought an action in federal district court in South Dakota seeking an injunction prohibiting the Tribal Court from proceeding on those claims. After a full-day evidentiary hearing, the federal court granted Sprint's motion for a preliminary injunction:

> The court finds that Sprint is entitled to a preliminary injunction…. The tribal exhaustion rule is inapplicable because CCSTC does not have jurisdiction over this matter. Because Congress has preempted tribal court jurisdiction for interstate tariff claims brought under § 207, and after weighing the Dataphase factors, this court grants the preliminary injunction and denies [NAT's] motion for a stay.

Sprint Commc'ns Co. v. Native American Telecom, LLC, No. Civ. 10-4110-KES, 2010 WL 4973319, at *7-8 (D.S.D. Dec. 1, 2010).

Before the Commission, NAT moved to stay or dismiss Sprint's complaint case, arguing that the Commission should defer to the Tribal Court's jurisdiction. The Commission denied the motion to stay, holding that it had "clear jurisdiction" over

intrastate communications, and that it would be neither necessary nor appropriate for the Commission to stay the case in deference to Tribal Court jurisdiction. Docket TC10-026, Order Denying Motion to Stay, pp. 2-3 (May 4, 2011).

After NAT appealed, the Buffalo County Circuit Court confirmed that the Commission has broad jurisdiction over intrastate calls like those between Sprint and NAT. *In the Matter of the Complaint filed by Sprint Commc'ns Co. against Native American Telecom, LLC Regarding Telecomms. Services*, CIV 08-11-8, Mem. Decision & Order, p. 4 (Aug. 31, 2011) ("It is quite clear that the tribe does not have jurisdiction over calls that would originate off the reservation and terminate on the reservation….").

Both the federal district court order and the Buffalo County Circuit Court order remain good law.

3. 2011-2012

NAT filed a second application for a certificate of authority on October 11, 2011, initiating this Docket No. TC11-087. NAT did so, at least in part, because of the ruling in Docket No. TC10-026 that the Commission has jurisdiction over the intrastate calls at issue. *See* Docket No. TC10-026, NAT's Motion To Dismiss Based on Mootness, pp. 4-5 (Apr. 23, 2012). As it had in 2008, NAT sought a certificate to provide "local exchange service and interexchange service within the study area of MidState Communications, Inc." Sprint, MidState Communications, Inc., AT&T Communications of the Midwest, Inc. ("AT&T"), Qwest Communications Company LLC ("CenturyLink"), and the South Dakota Telecommunications Association ("SDTA")

were awarded intervenor status. Docket No. TC11-087, Order Granting Intervention (Nov. 30, 2011).

NAT revised its application on January 27, 2012, limiting the geographic scope of its request to the area "within the Crow Creek Sioux Tribe Reservation which is within the study area of MidState Communications, Inc." Docket No. TC11-087, NAT's Application for Certificate of Authority, p. 1 (Jan. 27, 2012).

The Commission set the matter for hearing in June 2012, and the parties prefiled testimony. NAT then moved for summary judgment, and refused to answer discovery requests, claiming that there were no material disputes of fact, and no reason for the Commission to do anything other than approve the application. Docket No. TC11-087, Mem. in Support of Native American Telecom, LLC's Motion for Summary Judgment, pp. 15-24 (Mar. 6, 2012). The Commission denied NAT's motion for summary judgment and granted Intervenors' motions to compel. Docket No. TC11-087, Order Denying Motion for Summary Judgment; Order Granting Motions to Compel; Order Granting in Part Motion to Compel (May 4, 2012). NAT appealed those orders, and the June hearing was canceled. NAT's appeals were dismissed by the Buffalo County Circuit Court on October 17, 2012.

4. 2013

The case became active again at the start of 2013. The parties continued to litigate discovery disputes, and NAT was (again) ordered to respond to Sprint's discovery requests. Docket No. TC11-087, Order Granting Motions to Suspend Testimony Deadline; Order Granting in Part Motion to Compel/Enforce; Order Denying Request for

Fees (May 4, 2013). Then, on May 31, 2013, NAT filed its Amended Application. In its Amended Application, NAT changed the scope of its request. NAT no longer asked for authority to provide local exchange service, but, instead, asked for authority to provide "intrastate interexchange access service" to interexchange carriers. NAT 1, p. 1. The parties conducted additional discovery and, for a third time, the Commission ordered NAT to provide additional responses to Sprint's discovery requests. Docket No. TC11-087, Order Granting Motion to Compel in Part (Oct. 4, 2013). The hearing dates were reset and moved twice before being set for February 2014.

5. 2014

In 2014, the parties submitted additional prefiled testimony, and the hearing was held on February 24-25, 2014. Prior to the hearing, CenturyLink and NAT entered into a stipulation by which CenturyLink withdrew its intervention. At the hearing, NAT called five witnesses: Brandon Sazue, Gene DeJordy, Jeff Holoubek, Carey Roesel, and David Erickson. Sprint called one witness, Randy Farrar. All witnesses were subject to cross examination and were questioned by Commissioners. The parties stipulated to the admissibility of most exhibits, and the Hearing Examiner issued rulings when agreement was not reached. Following the hearing, the parties agreed to file post-hearing briefs, and replies, after which the case will be ready for disposition.

B. Standard to Be Applied

NAT filed its Amended Application pursuant to ARSD 20:10:32:03, ARSD 20:10:32:15 (for local service authority), and ARSD 20:10.24:02 (for interexchange service authority). NAT 1, p. 1. These Commission Rules contain specific decision

criteria, which are discussed in detail below. In addition, NAT bears the burden of proof on all aspects of its application:

> [T]he telecommunications company filing the application shall have the burden of proving that it has sufficient technical, financial, and managerial capabilities to provide the local exchange services applied for consistent with the requirements of this chapter and other applicable laws, rules, and commission orders. ARSD 20:10:32:05 (emphasis added).
>
> 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. ARSD 20:10:24:03 (emphasis added).

While the bar to certification has historically been low, it is important that the Commission perform this gatekeeper function effectively, as directed by the Legislature, for the benefit of consumers and the public.

C. NAT as a Corporate Entity

NAT is Mr. DeJordy's brainchild. He and Mr. Reiman, two non-tribal members, created NAT in 2008. SPRINT 2, 8/30/13 Farrar Test., p. 13; Tr. 122 (DeJordy); Tr. 191 (DeJordy, "When we started [NAT], it was funded primarily by myself"); Tr. 211 (Holoubek testifying that "Gene and Tom came to us and asked us if we could send some traffic that way"). NAT was formed under South Dakota law and was registered with the Secretary of State. SPRINT 8. Then – well before the execution of the Joint Venture Agreement discussed below – Mr. DeJordy submitted NAT's first application for a certificate, representing that NAT was a "joint venture with the Crow Creek Sioux Tribe." SPRINT 1, pp. 13-14; Docket No. TC08-110, Application for Certificate of

Authority, p. 1. There is no evidence in the record that NAT was actually a joint venture with the Tribe when Mr. DeJordy made that representation to the Commission.

Instead, NAT became a Joint Venture on April 1, 2009 when Native American Telecom Enterprise, LLC ("NATE"), WideVoice Communications, Inc. ("WideVoice"), and the Crow Creek Sioux Tribe executed the Joint Venture Agreement. SPRINT 3. Under that agreement, the Tribe was a 51% owner of the entity, NATE was a 25% owner of the entity, and WideVoice was a 24% owner of the entity. SPRINT 3, pp. 6-7.

NAT retained its initial corporate form until the summer of 2013, following the filing of its Amended Application. What happened next is far from clear, in part because there was no testimony explaining all of these transactions.[2] It appears that a new entity by the name of Crow Creek Telecom, LLC ("CCT") was formed under tribal law. NAT 14, Bates 00577. Articles of Merger were filed with the Secretary of State on September 26, 2013 advising that (1) NAT had merged with CCT and (2) CCT was the surviving entity. SPRINT 23. NAT became inactive, and the surviving entity, CCT, was not registered with the Secretary of State. SPRINT 22; SPRINT 24. Although Mr. Holoubek testified in his deposition that he understood CCT changed its name to Native American Telecom, LLC, there is no documentary evidence in the record to show that this was done formally.

At this juncture, the Commission can find the following facts:

* The entity that filed the Amended Application is no longer operational, having merged with CCT.

[2] Mr. Swier's opening statement contained numerous representations on this point (Tr. 34-35), but his statements are not evidence.

* The entity that is now before the Commission, which began as CCT and was allegedly renamed "NAT," is not authorized to do business in the state of South Dakota.

* There is no evidence in the record that other regulatory bodies (the FCC, the numbering administrator, the Universal Service Administrative Company, etc.) were ever advised that the entity that previously filed tariffs, obtained numbers and remitted payments, is now inactive and operating through a different entity.

As argued below, this is highly unusual and raises significant questions for the Commission.

D. The Scope of NAT's Amended Application

As noted above, NAT's Amended Application is quite limited – NAT requests authority to provide intrastate access service. NAT 1, p. 1. Intrastate access service is a service provided to interexchange carriers, not retail voice customers. Tr. 387 (Roesel). Therefore, NAT is not seeking authority to provide services to Free Conferencing or to WiMAX Customers. Instead, NAT takes the position that any such services are subject to the sole jurisdiction of the Tribe. Tr. 160-61 (DeJordy).

As a result, if the Commission decides that it has jurisdiction over the voice services NAT provides to Free Conferencing (or to WiMAX Customers for that matter), two conclusions follow: first, NAT will have been operating without a certificate, unlawfully, for over four years. The Legislature has made this failure a criminal violation. Second, NAT's Amended Application will be deficient, as NAT has not requested the authority it must have to continue providing those services.

E. Sprint's Interest and Involvement

Throughout this case, NAT has attempted to make this case about Sprint and Sprint's motives. As the Commission already decided, this case is not about Sprint; it is about NAT and NAT's ability to meet the requirements to be certificated. Docket No. TC11-087, Order Denying Motion for Summary Judgment; Order Granting Motions to Compel; Order Granting in Part Motion to Compel, p. 3 (May 4, 2012) ("This proceeding regards NAT's ability to meet the requirements to receive a certificate of authority, not the intervenors' current ability to meet the requirements."). The Commission should decline to focus on Sprint as it considers this matter.

That does not mean, however, that the Commission should disregard Sprint's policy position, and Mr. Farrar's opinion, that traffic pumping/access stimulation[3] is contrary to the public interest. *See* SPRINT 2, 8/30/13 Farrar Test., p. 7 ("[A]s pointed out by the FCC in its recent *CAF Order*, 'traffic pumping' is not in the public interest."); Tr. 463 (Farrar explaining that the FCC in the *CAF Order* referred to "access stimulation" as a "scheme" 28 times). Sprint's position is fully supported by the FCC's findings in the *CAF Order*,[4] and by the numerous FCC and state commission decisions showing that bad business practices tend to accompany traffic pumping operations. *See, e.g., In the Matter of AT&T Corp. v. All Am. Tel. Co.*, 28 FCC Rcd. 3477, Memorandum Opinion & Order (2013) (traffic pumping entity obtained certificate under false pretenses, never intended to be a legitimate common carrier, and assessed access charges in

[3] Sprint uses the terms "traffic pumping" and "access stimulation" interchangeably.
[4] *In the Matter of Connect America Fund*, 26 FCC Rcd. 17,663, Report & Order & Further Notice of Proposed Rulemaking (2011).

violation of its tariffs) ("*2013 All American Order*"); *Qwest Commc'ns Co. v. Sancom, Inc.*, 28 FCC Rcd. 1982, Memorandum Opinion & Order (2013) (calls through Sancom to Free Conferencing did not generate access charge liability because Free Conferencing was not Sancom's "end user," was not billed for service, and behaved in a manner inconsistent with a tariffed carrier/customer relationship); *In the Matter of Qwest Commc'ns Corp. v. Farmers & Merchants Mut. Tel. Co.*, 24 FCC Rcd. 14,801, Second Order On Reconsideration, ¶¶ 17-20 (2009) (describing bad business practices of traffic pumper, including backdating bills and signing new, backdated contract amendments as part of a litigation strategy); *In re Qwest Commc'ns Corp. v. Superior Tel. Coop.*, Docket No. FCU-01-2, Final Order, pp. 26-28 (Iowa Utils. Bd., Sept. 21, 2009) (describing bad acts, including deceptive billing efforts and contracts that did not reflect the original intent of the parties). Sprint is fully justified in asking the Commission to look critically at a venture engaged in a business plan that has spawned extensive bad behavior.

It is also no secret that Sprint and NAT have a dispute about the interstate terminating access charges that NAT has billed to Sprint since 2009. This dispute does nothing to impugn Sprint's credibility or make Sprint's motives suspect. While that dispute will not be resolved by the Commission in this case, the evidence suggests that Mr. DeJordy and Mr. Reiman planned to establish a traffic pumper on tribal lands, file a traffic-pumper friendly federal tariff, and attempt to subject disputing carriers to the perils of Tribal Court. *See* SPRINT LATE FILED 7, pp. 50, 65 (Reiman testifying the plan was to establish a tribal telephone company funded via conferencing); SPRINT 2, 8/30/13 Farrar Test., p. 27 (DeJordy acknowledged that the business model depends on

conferencing); SPRINT 12, pp. 2-3 (NAT obtained an *ex parte* order for payment from the CCTUA in March 2010, and sued Sprint in Tribal Court in July 2010). If this plan had worked, NAT would have locked IXCs into paying access charges that the FCC has decided, in comparable cases, violate the Communications Act. *Sancom*, ¶ 17 ("We find that Sancom violated sections 203(c) and 201(b) of the Act" with respect to calls delivered to Free Conferencing). Instead, because of Sprint's opposition, the Federal District Court decided that NAT's tribal suit was improper for jurisdictional reasons (SPRINT 12, p. 2), and the FCC decided that the form of tariff that NAT was using violated the Communications Act. *See* Tr. 216 (Holoubek explaining that NAT's tariff tracked Northern Valley's, and NAT had to change its tariff when the FCC decided Northern Valley's tariff "was not going to work").[5] Sprint stands by its decision to challenge NAT's invoices and its method of enforcement.

Sprint has continued to dispute under the terms of NAT's tariffs, and has never been ordered to make any payment of access charges to NAT. In fact, no court or agency has ever ordered any IXC to pay a LEC access charges for calls terminating to Free Conferencing.[6] NAT sought an injunction ordering Sprint to pay NAT on its 2010 Tariff

[5] More specifically, the FCC said, among other things, that the tariff was unlawful because it would impose access charges on calls to entities that were not end users of telecommunications service under federal law. *In the Matter of Qwest Commc'ns v. N. Valley Commc'ns, LLC*, 26 FCC Rcd. 8332, ¶ 9 (2011) ("*Qwest/Northern Valley Tariff Order*").

[6] Sprint gave Mr. Holoubek a chance to dispute this statement at the hearing. In response, he pointed to the FCC's *Farmers II* decision. Tr. 318. To be clear, the FCC said in *Farmers II* that access charges were not due because the tariff "*does not apply* to the services that Farmers provided to Qwest with respect to traffic destined for high-volume calling companies." *Farmers II*, ¶ 26 n.98 (emphasis in original). It is

in the federal court action and that motion was denied. SPRINT 12, pp. 3, 16. Then, although the federal court referred NAT's claims to the FCC in February 2012,[7] Mr. Holoubek admitted on the stand that NAT has failed to prosecute that case, and has not even responded to Sprint's proposed stipulation of facts for the FCC proceeding for nearly a year and a half. Tr. 80. Sprint is confident that calls to Free Conferencing do not meet the requirements under NAT's tariffs and applicable law to qualify as "access charge calls." Accordingly, Sprint fully expects that its decision to dispute NAT's interstate charges will be supported by the decision-making body that ultimately resolves that issue.

Finally, there is no truth to NAT's suggestion that Sprint's position is somehow anti-Tribe. (Nor would a Commission decision denying the Amended Application evidence hostility toward the Tribe.) Sprint is in a dispute with NAT because NAT established itself as a traffic pumper and sued Sprint for access charges Sprint believes are not due as a matter of federal law. As this Commission is well aware, Sprint's opposition to traffic pumping is not specific to NAT. Sprint is involved in this case because it has a good-faith belief that NAT does not qualify for a certificate, and because NAT's traffic pumping business plan is not in the public interest. If NAT were to stop traffic pumping, Sprint would have no disputes with NAT on a going-forward basis. Mr. Farrar could not have been more clear on this point: "Sprint has no objection to any

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significant that this case is the closest thing that Mr. Holoubek – who manages litigation for NAT and Free Conferencing – can find to a victory for his clients' position.

[7] *Sprint Commc'ns Co. v. Native American Telecom, LLC*, No. CIV 10-4110-KES, 2012 WL 591674 (D.S.D. Feb. 22, 2012).

NAT-CC business plan that does not involve 'traffic pumping.'" SPRINT 28, 2/14/14 Farrar Test., p. 4.

In short, this case is not, and should not be, about Sprint or its motives. The Commission should either reject NAT's attempt to make this case about Sprint, or should find that Sprint's decision to invoke its dispute rights does not impugn Sprint's credibility.

II. NAT'S AMENDED APPLICATION SHOULD BE DENIED BECAUSE NAT DOES NOT ASK FOR A CERTIFICATE THAT THE COMMISSION HAS THE AUTHORITY TO AWARD

NAT's Amended Application can and should be denied for one very simple reason: no statute or rule authorizes the Commission to award NAT a certificate to provide intrastate access service to IXCs.

The confusion about the scope of NAT's Amended Application (*see, e.g.*, SPRINT 2, 8/30/13 Farrar Test., p. 10) was addressed at the hearing, and NAT's witnesses have made clear that NAT seeks authority only to provide intrastate access service to IXCs. Tr. 387 (Roesel); Tr. 160-61 (DeJordy). NAT does not seek a certificate to provide voice services to Free Conferencing or to WiMAX Customers, and it rejects any exercise of Commission jurisdiction over such services. Tr. 161 (DeJordy); NAT 2, 2/7/14 DeJordy Test., pp. 7-8 (tribally owned telecommunications operating on reservations are not subject to state jurisdiction).

The problem for NAT is that the Commission has no authority to issue a certificate to a carrier to provide "access services." SDCL § 49-31-3 directs prospective carriers to seek Commission authority to provide "interexchange telecommunications service"

and/or "local exchange service." The Commission's rules address those same services. ARSD 20:10:24:02 sets a process for a carrier to obtain a certificate to provide interexchange service, and ARSD 20:10:32:02 sets a process for a carrier to obtain a certificate to provide local exchange service. There is no rule that authorizes the Commission to grant a certificate to provide access service.

The statute and rules make sense because access service is not a standalone service, but is, instead, one of the functionalities provided by a certificated local exchange carrier. A local exchange carrier is obligated to provide access to the public switched network, access to 911 service, access to a local directory, access to operator services, access to relay service, access to an unlisted number, and access to interexchange services. ARSD 20:10:32:10. To be compensated for providing IXCs access to their end users, a certificated local exchange carrier is allowed to file an access services tariff, subject to the rate limitations imposed by law:

> A competitive local exchange carrier shall charge intrastate switched access rates that do not exceed the intrastate switched access rate of the Regional Bell Operating Company operating in the state.

ARSD 20:10:27:02:01 (emphasis added). The term "competitive local exchange carrier" means "a telecommunications company that provides local exchange services in an area in which an incumbent local exchange carrier also provides local exchange services." ARSD 20:10:27:01(3).

NAT proposes to skip a step. It seeks authority to provide access service without having authority to provide the underlying, and necessary, local exchange service. The

Commission should not grant an application that is beyond the scope the statute and the rules.

III. THE COMMISSION MUST ADDRESS JURISDICTIONAL ISSUES

The Commission is a creature of statute. It can exercise the jurisdiction granted it by Legislature, so long as exercise of that jurisdiction does not violate federal law. Thus, the Commission can and should award a certificate to NAT only for the purpose of providing services that are within the scope of the Commission's regulatory authority, and not preempted by federal law. Stated plainly, if NAT is not providing, or does not propose to provide, services subject to Commission jurisdiction, the Amended Application should be denied as moot.

If the Commission does not deny the Amended Application as moot, however, it will have to address two significant jurisdictional issues. The first is whether the provision of Internet Protocol ("IP") voice services is within the Commission's jurisdiction. If the answer to the first question is "yes," the Commission must then answer a second question: is the provision of such services on the Reservation, to a non-tribal member like Free Conferencing, subject to the Commission's jurisdiction, the Tribe's jurisdiction, or concurrent jurisdiction? These will be taken in turn.

A. NAT Provides IP Voice Services to Free Conferencing

1. The record shows that voice calls are delivered to Free Conferencing in IP

NAT did a poor job of making a record on how calls are delivered into Free Conferencing. None of NAT's prefiled testimony addresses this issue, Mr. Holoubek did

not understand the details in his deposition,[8] and Mr. Roesel did not know the details when asked on cross examination. Tr. 388 ("I wouldn't be able to address whether it's an IP service or not.").[9] On re-cross of Mr. Roesel, NAT's lawyer represented to the Commission: "There's no evidence that the bridge at issue is a VoIP bridge ... the bridge, in fact, of [Free Conferencing] is not a VoIP bridge." Tr. 442-43 (Wald). He then led Mr. Roesel on redirect, encouraging him to change his testimony:

> Q. One, it's true, is it not, that the Free Conferencing bridge is not a VoIP bridge?
>
> A. That has been my understanding.

Tr. 445-46 (Roesel).

This confusion and obfuscation is puzzling to Sprint. Mr. DeJordy did not hesitate to agree that calls are delivered in Internet Protocol. Tr. 161-62 (DeJordy). Moreover, SPRINT 38, introduced on cross examination of Mr. Roesel, contains network diagrams that represent NAT's network configuration during various periods. The diagrams were produced by Mr. Swier on November 7, 2013, and the most clear diagram is Bates 000730, which shows "TDM Voice Connections," "Voice over IP Connections," and "Inter-Switch Component Control Links" in different colors. The connection between the NAT End Office (EO) Switch and "Colocated Voice Applications Services" (i.e.,

[8] NAT 6, Holoubek Dep. p. 104 ("You are asking the wrong guy.").

[9] It is nothing short of astonishing that Mr. Roesel, a consultant hired to advise on regulatory, regulatory reporting, and tariff obligations, would claim he did not know and never inquired about the technology used to deliver calls. Tr. 389 (testifying that is not an important question to ask). Mr. Roesel's testimony is not credible. His firm made FCC/USAC filings identifying NAT as a VoIP provider, and so must have asked that question.

Free Conferencing) is blue, representing a Voice over IP Connection. This is consistent with NAT's 2013 Form 499 filings, which identify NAT as a provider of "Interconnected VoIP." SPRINT LATE FILED 18, Bates 000413 (line 105), Bates 000745 (line 105), Bates 000867 (line 105). It is also consistent with Mr. Swier's 2013 statement to the Commission that NAT is "just like Vonage." Docket No. TC10-026, Aug. 27, 2013 Transcript, p. 35. These diagrams convinced Mr. Roesel that his prior understanding, and NAT's counsel's representation to the Commission, of how calls are delivered into Free Conferencing was wrong. Tr. 449-50. The Commission should find, based on the record, that NAT provides IP voice services to Free Conferencing.[10]

2. The Commission must decide whether it has jurisdiction to regulate IP voice services

Because Free Conferencing receives voice calls in IP, the Commission will need to decide whether it has the jurisdiction to regulate IP voice service. The Commission has jurisdiction over "telecommunications companies offering common carrier services within the state to the extent such business is not otherwise regulated by federal law or regulation." SDCL § 49-31-3. A local certificate is provided to a "telecommunications company" (ARSD 20:10:32:02), making it a "competitive local exchange carrier" for purposes of the Commission's access rules. ARSD 20:10:27:01. If a VoIP provider like NAT were held not to be a telecommunications company (either because it is providing an information service, or because the service is otherwise regulated by federal law), then there would be no basis for it to be treated as competitive local exchange carrier under the

[10] NAT's network engineer, Keith Williams, was present (Tr. 288), but NAT did not call him to rebut or explain these diagrams.

access rules. And, if it is not a competitive local exchange carrier, the Commission cannot accept and enforce NAT's intrastate access tariff, and cannot authorize it to sell intrastate interexchange access service to IXCs.[11]

To Sprint's knowledge, the Commission has not issued any orders addressing its jurisdiction to regulate VoIP service offerings.[12] The seminal case at the federal level is the *Vonage* case, in which the FCC preempted the Minnesota PUC from "applying its traditional 'telephone company' regulations to Vonage's DigitalVoice service, which provides Voice over Internet protocol (VoIP) service…" *Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minn. Pub. Utils. Comm'n*, 19 FCC Rcd. 22,404, Memorandum Opinion & Order, ¶ 1 (2004), *aff'd, MPUC v. FCC*, 483 F.3d 570 (8th Cir. 2007). This regulatory question is not settled, though, as the FCC in the *CAF Order* distinguished "traditional telephone service" as distinct from VoIP service "without reaching any conclusions regarding the classification of VoIP services." *CAF Order*, ¶ 946 n.1906; *see id.* ¶ 959 (discussing *Vonage* decision).

Because Free Conferencing receives IP voice service, the Commission must decide whether its jurisdiction extends to those services in order to fully evaluate and resolve the issues raised in the Amended Application.

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[11] These statutes and rules must be applied strictly, as NAT does not consent to the Commission's exercise of any jurisdiction that does not otherwise exist. Tr. 175 (DeJordy).

[12] There appears to be no basis to support Mr. Roesel's company's definitive public statement that certification is not required. SPRINT 37.

B. NAT's Provision of Services to Free Conferencing – a Non-Tribal Member – on the Reservation[13]

If the Commission has jurisdiction over IP services like those provided to Free Conferencing, it next must determine whether the fact that the services are provided on the Reservation prohibits the Commission from exercising its jurisdiction. It is Sprint's position that the location of those services – on the Reservation – has no impact on the Commission's jurisdiction and authority to regulate NAT's provision of telecommunications service to a non-tribal member like Free Conferencing.

1. It is undisputed that NAT provides services to Free Conferencing without Commission approval

NAT has been providing services to Free Conferencing, which is not a tribally owned entity, since 2009. SPRINT 36, Bates 00726. The Commission has never authorized NAT to provide these services.

NAT has represented that the services provided to Free Conferencing are communications services. In January of 2013, NAT told Sprint that it had provided Free Conferencing with services identified in § 5.1 of NAT's South Dakota Tribal Tariff No. 1 and § 4.1 of NAT's FCC Tariff No. 3.[14] SPRINT 36, p. 1. The Tribal Tariff is NAT 16, and § 5.1 of that tariff (in conjunction with § 2.2.1) describes "communications service" as regulated by the Commission. Thus, NAT has admitted to having provided intrastate

[13] Sprint takes no position as to the Commission's jurisdiction over WiMAX services provided to tribal members on the Reservation.

[14] In deposition, Mr. Holoubek admitted that the services also include space, power, telephone numbers, Internet access, and IP addresses. NAT 6, Dep. Tr. pp. 103, 105.

telecommunications services to a non-tribal member, without the Commission's authorization, for over four years.

2. The Commission has jurisdiction and authority to regulate services provided to non-tribal members on the Reservation

The Commission should find that it has jurisdiction and authority to regulate the provision of intrastate communications services provided to non-tribal members on the Reservation. In enacting the Communications Act of 1934, Congress created a system of dual regulation of telecommunications providers. Subject to certain exceptions, states have jurisdiction over intrastate services. 47 U.S.C. § 152(b). The United States Supreme Court has held that the "sweeping" language of Section 152(b) "fences off from FCC reach or regulation intrastate matters – indeed, including matters 'in connection with' intrastate service." *Louisiana Pub. Serv. Comm'n v. Fed. Commc'ns Comm'n*, 476 U.S. 355, 370 (1986) (quoting statute) (upholding state authority to regulate depreciation rates for dual use property when regulating intrastate rates). In creating this dual-regulatory system, Congress did not carve out any role for Indian tribes to regulate telecommunications services.

Pursuant to this dual system, the South Dakota Legislature has authorized the Commission to have "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." SDCL § 49-31-3 (emphasis added). The Legislature directed the Commission to require a certificate of authority from every such telecommunications company. *Id.* ("Each telecommunications

company that plans to offer or provide interexchange telecommunications service shall file an application for a certificate of authority with the commission pursuant to this section."). The terms "telecommunications company" and "telecommunications service" are defined as follows:

> (28) "Telecommunications company," any person or municipal corporation owning, operating, reselling, managing, or controlling in whole or in part, any telecommunications line, system, or exchange in this state, directly or indirectly, for public use. For purposes of this definition the term, for public use, means for the use of the public in general or for a specific segment of the public, or which connects to the public in general or for a specific segment of the public, or which connects to the public switched network for access to any telecommunications service;
>
> (29) "Telecommunications service," the transmission of signs, signals, writings, images, sounds, messages, data, or other information of any nature by wire, radio, lightwaves, electromagnetic means, or other similar means. It does not include the provision of terminal equipment used to originate or terminate such service, broadcast transmissions by radio, television, and satellite stations regulated by the Federal Communications Commission and one-way cable television service.

SDCL § 49-31-1. These definitions are quite broad, as are the "Powers and Duties of Commission" which allow the Commission to:

> [i]nquire into the management of the business of all telecommunications companies subject to the provisions of this chapter, and the commission shall keep informed as to the manner and method in which the same is conducted, and may obtain from such telecommunications companies full and complete information necessary to enable it to perform the duties and carry out the objects for which it was created.

SDCL § 49-31-7.1(3).

Through its regulation of telecommunications, the Commission protects public welfare. *In re Establishment of Switched Access Rates for US West Commc'ns, Inc.*, 618 N.W.2d 847, 852 (S.D. 2000) ("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.") (quoting *Nw. Bell Tel. Co. v. Chicago & N.W. Transp. Co.*, 245 N.W.2d 639, 642 (S.D. 1976)).

NAT seems to argue that the Commission's authority either does not extend to the Reservation or is usurped by the Tribe's interests. Yet, in holding that the Commission has authority over the sale of a telephone exchange located on a reservation, the South Dakota Supreme Court affirmed the Commission's primacy, even on a reservation:

> The primary purposes and objectives of Congress in regulating telecommunications are to protect telecommunications' consumers. Consumers are ensured, through this regulation, of adequate facilities and reasonable rates. This protection applies to all consumers, whether they reside on or off an Indian reservation. Such regulation is an important government function, and PUC's regulatory authority furthers its objectives and purposes; it does not interfere with them.

Cheyenne River Sioux Tribe Tel. Auth. v. Public Utils. Comm'n of South Dakota, 595 N.W.2d 604, 611 (S.D. 1999).

The Court also held as follows:

> The regulatory scheme of telecommunications services specifically grants [the Commission] authority and jurisdiction over intrastate facilities. *See* 47 U.S.C. § 152(b). The authority of [the Commission] is extensive and crucial to the overall regulatory scheme. *See* SDCL ch. 49-31. Among other things it 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." SDCL § 49-31-3.

Id. at 609. No state law precedent suggests that the state lacks jurisdiction over telecommunications companies operating on a reservation.[15]

Nor does federal judicial precedent support a conclusion that inherent tribal regulatory authority over telecommunications services trumps a state's ability to regulate within reservation boundaries. The federal courts, from the Supreme Court on down, have articulated a general rule that a tribe cannot regulate non-members without their consent. *See Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 659 (2001) (tax on non-member presumptively invalid); *see Progressive Specialty Ins. Co. v. Burnette*, 489 F. Supp. 2d 955, 958 (D.S.D. 2007) ("tribal jurisdiction over non-members is 'presumptively invalid'") (quoting *Atkinson*, 532 U.S. at 659).

Despite Mr. DeJordy's assurance (Tr. 161),[16] it is not clear that Free Conferencing has consented to the jurisdiction of the Tribe. **[BEGIN CONFIDENTIAL]** [redacted]

[15] After the South Dakota Supreme Court had affirmed the Commission's authority, the tribal utility authority and US West jointly petitioned the FCC to hold that SDCL § 49-31-59 is preempted as applied to tribes in South Dakota. The FCC declined, finding the PUC's "reasons for denying the sale of the exchanges fall within core regulatory functions of rate regulation and other consumer protection mechanisms that are traditionally exercised by states." *In re Cheyenne River Sioux Tribe Tel. Auth. & US West Commc'ns, Inc.*, 17 FCC Rcd. 16919, 16930 (2002).

[16] Mr. DeJordy neither owns nor manages Free Conferencing.

[redacted]

[END CONFIDENTIAL]

More importantly, even if Free Conferencing has consented to regulation of CCST, that does not mean the Tribe's jurisdiction is exclusive, or that the Tribe's jurisdiction renders the Commission's jurisdiction void. To the contrary, the state's jurisdiction is, and remains, primary. In *Cheyenne River*, the Supreme Court rejected the argument that a consensual agreement between a tribe and U.S. West took away the Commission's regulatory jurisdiction. *Cheyenne River*, 595 N.W.2d at 609 (rejecting argument made by a tribe and U.S. West and holding "extensive congressional and legislative authority authorizes PUC to regulate the activities of U.S. WEST and its sale of telephone exchanges, whether on or off the reservation"). Similarly, the FCC decided that it would regulate Western Wireless's eligible telecommunications carrier designation as to tribal members on the reservation, but leave regulation as to non-tribal members to the Commission:

> We are not persuaded that, in the circumstances of this case, tribal regulation of the relationship between non-members and Western Wireless is so crucial to Indian sovereignty interests that it meets the Supreme Court's exacting standard. Insofar as the State asserts authority to regulate Western Wireless' provision of service to non-tribal members, therefore, we believe it may do so.

In re Western Wireless Corp. Pet. for Designation as an Eligible Telecomms. Carrier for the Pine Ridge Reservation in South Dakota, 16 FCC Rcd. 18,145, Mem. Opinion & Order, ¶ 23 (2001).[17]

Even more, this issue has already been decided as it relates to NAT's provision of services to Free Conferencing. In NAT's appeal to the Buffalo County Circuit Court in Docket No. TC10-026, the issue presented was whether "the PUC or the Tribal Utility Authority has jurisdiction over this matter with respect to intrastate telecommunications." *In the Matter of the Complaint filed by Sprint Commc'ns Co., LP against Native American Telecom, LLC Regarding Telecomms. Services*, CIV 08-11-8, Mem. Decision & Order, p. 4 (Aug. 31, 2011). The Buffalo County Circuit Court looked to *Cheyenne River* and found nothing that would grant the Tribe exclusive jurisdiction. *Id.* at 5-8. Thus, the court confirmed that the Commission did not act beyond its jurisdiction in Docket No. TC10-026 when it decided to investigate NAT's delivery of services to Free Conferencing, and that same conclusion applies here.

In sum, consistent with federal and state court precedent, including the precedent in Docket No. TC10-026, the Commission has jurisdiction and authority over telecommunications services provided on the Reservation. While the Commission may find that the CCTUA has concurrent jurisdiction, doing so does not abrogate its own.

[17] Mr. DeJordy suggested on the stand that this decision was superseded by the FCC's more recent order relating to the Standing Rock Reservation. Tr. 170. However, that order is not on point. The entity at issue was a commercial mobile radio service provider not subject to certification obligations, and the Commission did not object to Standing Rock's request that the FCC oversee its ETC designation. *Standing Rock Telecomms., Inc. Petition for Designation as an Eligible Telecomms. Carrier*, WC Docket 09-197, DA 10-1601, ¶¶ 10, 14 (2010).

3. The CCST is forcing the Commission's hand

The Crow Creek Sioux Tribe elevated the importance of the Commission's decision on these issues when it drew deep lines in the sand in the weeks leading up to the hearing. On February 3, 2013, the Tribe approved a motion adopting the Crow Creek Sioux Tribe Utilities Code. NAT 30. The Utilities Code contains a finding purporting to give the Tribe exclusive jurisdiction over matters like this one:

> The State of South Dakota lacks jurisdiction to regulate utilities within the boundaries of the Crow Creek reservation. State regulation of such utilities providing service on the Crow Creek reservation interferes with the right of the Crow Creek Sioux Tribe to govern economic and business affairs on the Crow Creek reservation. Utility regulation is preempted by the Tribe and the federal government with respect to all HUD homes of tribal members, other homes and businesses of tribal members financed in whole or in part by the Tribe or the federal government, all tribal buildings and businesses of the Tribe financed in whole or in part by the Tribe or the federal government, all Bureau of Indian Affairs or other federally owned or operated buildings, and all private parties and non-Indians that have voluntarily consented to tribal jurisdiction by locating on the Crow Creek reservation and/or contracting with the Crow Creek Sioux Tribe for services.

NAT 29, p. 1. The Tribe also approved a motion decreeing that:

> THE ASSESSMENT AND COLLECTION OF TAXES AND FEES ON THE CROW CREEK RESERVATION SHOULD BE LIMITED TO THOSE SPECIFICALLY REQUIRED BY APPLICABLE LAWS AND THAT TRIBALLY OWNED ENTITIES SHOULD NOT BE SUBJECT TO ANY STATE TAXES AND FEES.

SPRINT 32.

The CCST's actions are, presumably, based on the untenable position that tribal lands are a "sovereign nation." This is simply incorrect – the CCST has the rights granted to it by Congress. *See Plains Commerce Bank v. Long Family Land & Cattle*

Co., 554 U.S. 316, 327 (2008) ("tribes retain authority to govern 'both their members and their territory,' subject ultimately to Congress") (quoting *United States v. Mazurie*, 419 U.S. 544, 557 (1975)); *Rice v. Rehner*, 463 U.S. 713, 719 (1983) (tribal sovereignty "'exists only at the sufferance of Congress and is subject to complete defeasance'") (*quoting United States v. Wheeler*, 435 U.S. 313, 323 (1978) (emphasis by Justice O'Connor)). As explained above, Congress has given tribes no role in regulating communications. It certainly has not authorized tribes to preempt states' utility regulation. Nor can the Tribe simply decree, contrary to longstanding practice, that no state taxes or assessments can be levied for services provided on the Reservation. In upholding its jurisdiction to regulate NAT's services to non-Tribal members, the Commission will not be infringing on the ability of members of the Tribe "'to make their own laws and be ruled by them.'" *White Mountain Apache v. Bracker*, 448 U.S. 136, 142 (1980) (quoting *Williams v. Lee*, 358 U.S. 217, 220 (1959)). The CCST's extraordinary power play should not go unnoticed by the Commission as it considers the Amended Application.

4. The Commission must disregard Mr. DeJordy's testimony on legal issues

As it considers this Amended Application, the Commission must disregard Mr. DeJordy's opinion testimony that the Commission lacks jurisdiction over communications activities on the Reservation. *See* NAT 2, 2/7/14 DeJordy Test., pp. 7-8. Like other company witnesses offering testimony on matters of law, Mr. DeJordy's

testimony can be accepted as the company's position, but is not entitled to any additional weight as the Commission resolves legal issues.[18]

Mr. DeJordy is not, as he claims, a "recognized expert ... in tribal matters." NAT 2, 2/7/14 DeJordy Test., p. 3. Instead, he is a lawyer who, like many others, has practiced in an area of law for more than ten years. Lawyers, even experienced lawyers, are not allowed to provide expert opinion on legal issues. *See, e.g., Marx & Co. v. Diners' Club, Inc.*, 550 F.2d 505, 509-10 (2d Cir. 1977) (expert witness was an experienced lawyer, but legal opinion testimony should not have been received: it is up to the judge to decide the law). What is more, Mr. DeJordy admitted to being counsel for the CCST (Tr. 169), which obligates him to advocate for his client, not provide unbiased testimony. And, while Mr. DeJordy did not admit to having served as counsel for NAT (Tr. 121), he did serve as counsel to NAT when he filed NAT's First Application,[19] authored FCC comments,[20] and negotiated a spectrum sale on NAT's behalf.[21]

The Commission should make clear that Mr. DeJordy's opinions are not being accepted as expert opinions and are not being given deference as the Commission resolves the jurisdictional issues presented.

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[18] In fact, Mr. DeJordy's opinion is completely contrary to NAT's concession in Docket No. TC10-026 that the Commission's jurisdiction over intrastate traffic on the Reservation was settled by the Circuit Court's order. Docket No. TC10-026, NAT's Mem. in Opp. To Sprint's "Motion to Compel NAT to Honor Its Agreement," pp. 3, 6-7 (May 9, 2012).

[19] See Docket No. TC08-110, Application for Certificate of Authority, p. 8 (Sept. 8, 2010) (signed by Gene DeJordy, Esq.).

[20] http://apps.fcc.gov/ecfs/document/view?id=6520210174.

[21] Mr. DeJordy's claim that a practicing lawyer can negotiate a contract as a consultant, and not a lawyer, is not credible. Tr. 120-21.

IV. APPLICATION REQUIREMENTS IN THE COMMISSION'S RULES

For NAT to be awarded a certificate it must prove that it meets the mandatory standards in the Commission's rules. Measured against those standards, NAT's Amended Application comes up short.

A. NAT Does Not Meet the Standards to Provide Local Service

ARSD 20:10:32:15 contains 25 discrete items that must be addressed, to the Commission's satisfaction, before a local service certificate will issue. Even though NAT did not ask for a local certificate, it did cite the rule in its Amended Application and thus Sprint addresses these requirements. The Commission should find that NAT fails to meet several of the requirements, as discussed below.

ARSD 20:10:32:15(2) A description of the legal and organizational structure of the applicant's company;

NAT has not provided a clear explanation of its organizational structure. NAT's Amended Application describes an entity that no longer exists. As noted *supra*, there is no testimony in the record explaining the corporate reorganization or detailing how the assets and liabilities of the old organization were transferred to the new entity. Nor is there documentary evidence supporting Mr. Holoubek's assertion that CCT's name was formally changed to NAT.[22] In fact, even Mr. DeJordy, in his 2014 testimony, refers to NAT as if it is the same NAT that existed in 2009. NAT 3, 2/7/14 DeJordy Test., p. 5 ("I originally established NAT ….''). The Commission should find this requirement has not been met.

[22] If it was not, then there is no entity even named "Native American Telecom, LLC."

ARSD 20:10:32:15(4) The location of the applicant's principal office, if any, in this state and the name and address of its current registered agent, if applicable;

Because NAT is not authorized to transact business in South Dakota (see below), NAT does not appear to have a registered agent in the state.

ARSD 20:10:32:15(5) A copy of its certificate of authority to transact business in South Dakota from the secretary of state;

NAT does not meet this requirement. As reflected in SPRINT 22 and SPRINT 23, NAT is no longer active with the Secretary of State, and CCT is not registered. One can only assume that NAT has intentionally failed to comply with this simple requirement to further its attempt to evade the jurisdiction of the state. NAT's failure to meet this requirement compels the Commission to deny the Amended Application.

ARSD 20:10:32:15(8) A list and specific description of the types of services the applicant seeks to offer and how the services will be provided including:

- ***(a) Information indicating the classes of customers the applicant intends to serve;***
- ***(b) Information indicating the extent to and time-frame by which applicant will provide service through the use of its own facilities, the purchase of unbundled network elements, or resale;***
- ***(c) A description of all facilities that the applicant will utilize to furnish the proposed local exchange services, including any facilities of underlying carriers; and***
- ***(d) Information identifying the types of services it seeks authority to provide by reference to the general nature of the service;***

To meet this requirement, an applicant must identify the types of local services provided, the recipient(s) of the services, and how the applicant will extend services throughout its service area. NAT seeks no authorization to provide local service, and has

identified no local voice services that it would provide in accordance with a certificate of authority. Therefore, it does not meet this requirement.

In addition, the Commission should take note that, in NAT's initial application, when it sought the authority to provide local services, NAT made it appear that its WiMAX technology allowed it to immediately provide service throughout its requested service area. *See, e.g.*, NAT 8, 2/16/12 Holoubek Test., pp. 8-7 (failing to identify any need for further build out). Then, on the stand, Mr. DeJordy admitted that the WiMAX technology in place today reaches only a small portion of the Reservation, and there would need to be dozens of additional towers to serve the area. Tr. 115 (DeJordy testifying that NAT might need 20-30 cell sites to cover the Reservation using WiMAX). This is further evidence that NAT's initial application was pretextual – NAT had no intention of serving the entire Reservation using WiMAX. Instead, NAT intended to provide voice service to a small group of individuals and businesses, and to use that as a cover for the traffic pumping operations that predominated.

ARSD 20:10:32:15(24) Federal tax identification number and South Dakota sales tax number; and

There is insufficient evidence in the record on this requirement. It is not clear that the tax ID numbers listed in the Amended Application are still valid as to the new entity. Additionally, there is now a significant question as to whether NAT intends to pay any state taxes as it provides services on the Reservation. *See* SPRINT 32.

ARSD 20:10:32:15(25) Other 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 consistent with the requirements of this chapter and other applicable rules and laws.

This key, catch-all requirement merits separate discussion below.

B. NAT Does Not Meet the Standards to Provide Interexchange Service

Likewise, NAT does not meet the standards to provide interexchange service. ARSD 20:10:24:02 governs interexchange service and, in large part, parallels ARSD 20:10:32:03 discussed just above.

Accordingly, for the reasons argued in the above section (and not repeated here), NAT does not meet the following application requirements to receive a certificate to provide interexchange service:

ARSD 20:10:24:02(2) A description of the legal and organizational structure of the applicant's company;

ARSD 20:10:24:02(4) A copy of the applicant's certificate of authority to transact business in South Dakota from the Secretary of State;

ARSD 20:10:24:02(6) A list and specific description of the telecommunications services the applicant intends to offer;

ARSD 20:10:24:02(7) A detailed statement of how the applicant will provide its services;

ARSD 20:10:24:02(17) Federal tax identification number and South Dakota sales tax number;

ARSD 20:10:24:02(20) Other 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 consistent with the requirements of this chapter and other applicable rules and laws.

As to ARSD 20:10:24:02(7), Sprint also notes that there is no testimony explaining how NAT would, from a technical standpoint, deliver outbound intrastate, interexchange calls to locations off of the Reservation.

V. NAT'S BUSINESS PLAN IS NOT IN THE PUBLIC INTEREST

The Commission should deny NAT's request to obtain a certificate that will be used to accomplish a business plan that is contrary to the public interest. NAT is unquestionably engaged in access stimulation, which the FCC found hurts consumers. After four years of operations, it is clear that NAT is in the business of pumping traffic and sending money to California. As Mr. Erickson stated succinctly: "We are in the terminating access business." Tr. 369. The Commission should not facilitate NAT's business plan, and should deny NAT's Amended Application as contrary to the public interest.

A. NAT is Engaged in Access Stimulation, a Practice That the FCC Has Found Disserves the Public Interest

1. NAT's activities meet the FCC's definition of "access stimulation"

There was a significant amount of discussion at the hearing on whether NAT is engaged in access stimulation under the FCC's rules. *See, e.g.*, Tr. 203 (DeJordy, "I would say it's not access stimulation."). While discussed at length, there can be no realistic dispute on this point. The FCC adopted a formal, two-pronged test for defining "access stimulation" in the *CAF Order*. The test is met if a LEC:

> (a) Is sharing switched access revenues with a third party, and
> (b) Has traffic volumes that meet either of the following:
> (i) A three-to-one interstate terminating-to-originating traffic ratio in a calendar month; or

> (ii) More than a 100 percent growth in interstate originating and/or terminating switched access MOU in a month compared to the same month in the preceding year.

CAF Order, ¶ 658. Before the *CAF Order*, the FCC defined "access stimulation" as an:

> "arbitrage scheme" by which a telecommunications carrier "enters into an arrangement with a provider of high volume operations such as chat lines, adult entertainment calls, and 'free' conference calls" in order to generate elevated traffic volumes and maximize access charge revenues.

Qwest/Northern Valley Tariff Order, ¶ 1 n.1.

Under either of these definitions, NAT is engaged in access stimulation. NAT's revenue sharing agreement with Free Conferencing has always guaranteed that at least 75% of access revenue will be shared. SPRINT 4 and SPRINT 5. And, since NAT claims to have stopped originating intrastate interexchange traffic, the terminating-to-originating ratio is 100-to-0, far greater than three-to-one. (Aside from the *de minimis* amount of calls made to WiMAX Customers, all terminating calls are made to NAT's numbers from elsewhere in the country by people using conference calling services). Moreover, call volumes are elevated for the purpose of maximizing billing of above-cost access rates and significant mileage charges. An IXC like Sprint is a captured carrier, forced to deliver those calls through the LEC, and NAT uses billing, threats, and litigation tactics to force payment of above-cost rates that – per <u>every</u> reported decision – are not due.

The Commission should find NAT is engaged in access stimulation.

2. The FCC has found that traffic pumping disserves the public interest

While the FCC has not found traffic pumping to be *per se* illegal, it has found the practice of generating huge volumes of calls, charged at above-cost access rates, to be bad for consumers. For example, the *CAF Order* contains many such findings:

> Access stimulation imposes undue costs on consumers, inefficiently diverting capital away from more productive uses such as broadband deployment. (¶ 663)
>
> The record indicates that a significant amount of access traffic is going to LECs engaging in access stimulation. … When carriers pay more access charges as a result of access stimulation schemes, the amount of capital available to invest in broadband deployment and other network investments that would benefit consumers is substantially reduced. (¶ 664)
>
> Access stimulation also harms competition by giving companies that offer a "free" calling service a competitive advantage over companies that charge their customers for the service. (¶ 665)
>
> … excess revenues that are shared in access stimulation schemes provide additional proof that the LEC's rates are above cost. (¶ 666)

See also SPRINT 2, 8/30/13 Farrar Test., pp. 38-40. In fact, the FCC considered its new rules to put the industry on a path to transition away from access stimulation altogether. *CAF Order*, ¶ 662. When there are no above-cost access rates, and no revenue sharing, the ills of traffic pumping will be fully addressed. Until then, the Commission should not certificate a carrier that has turned traffic pumping into the centerpiece of operation (and, in NAT's case, its only revenue generating activity).

NAT's witnesses argue that once the FCC adopted the transition rules, traffic pumping became a pro-public interest activity. *See, e.g.*, NAT 7, 2/7/14 Roesel Test., p. 9 (claiming benefits of access stimulation in a post-*CAF Order* world). Not true. While the scope of the problem has been reduced as rates have gone down, any revenue sharing

evidences above-cost rates, and incents the same uneconomic and inefficient activity that prompted the FCC to take action.

Moreover, NAT continues to argue the point, rejected by the FCC, that benefits to the Tribe (i.e., free service, economic development, the possibility of cash distributions) makes this an activity that serves the public interest. *See* NAT 3, 2/14/14 DeJordy Test., pp. 6-7 (arguing that implicit subsidies provided to Tribe via access stimulation furthers national telecommunications policies). However, the FCC dealt directly with these same claims when it provided implicit subsidies to tribal lands:

> Several parties claim that access stimulation offers economic development benefits, including the expansion of broadband services to rural communities and tribal lands. Although expanding broadband services in rural and Tribal lands is important, we agree with other commenters that how access revenues are used is not relevant in determining whether switched rates are just and reasonable in accordance with section 201(b).

CAF Order, ¶ 666 (footnotes omitted). The provision of implicit subsidies via traffic pumping is directly at odds with FCC policy decisions, and the Commission should also reject NAT's attempt to argue the public policy benefits of such activities.

3. The Legislature's inaction should not be considered

The Commission should reject NAT's argument that the Legislature's failure to pass an access stimulation bill in 2010 (NAT 27) or 2011 (NAT 28) is in any way relevant here. First, these bills were introduced before the FCC's findings in late 2011 that these practices disserve the public interest, inhibit investment, and harm consumers. *See CAF Order*, ¶ 663.

Second, the Legislature has directed this Commission to evaluate the public interest in certification proceedings. And, the Legislature could not have been privy to the facts in Section IV below, including that NAT has operated for the purpose of sending money to California without being authorized to do business in the state, and is interested in bringing "billions" of minutes from all over the country to Fort Thompson (Tr. 293 (Holoubek)) without complying with state law or paying its fair share of taxes. The Commission should reject NAT's contention that Legislature would have it abrogate its charge and simply rubber-stamp this Amended Application.

B. The Facts Show that NAT's Purpose Is to Send Money to California

In his opening statement, Mr. Swier invited the Commission to draw conclusions based on NAT's prior business practices:

> So you have four or five years of history to look back to see how this company has conducted itself and how it's run its business and provided services to its customers.

Tr. 38 (Swier). Such facts do not reflect well on NAT, and justify a finding that NAT's business plan is not in the public interest.

1. NAT's purpose is to send money to California

The record reflects that NAT was formed, and has been run, to generate cash to be sent to California. The evidence on this point was described and documented by Mr. Farrar in his written testimony (SPRINT 2, 8/30/13 Farrar Test., pp. 15-27; SPRINT 21, 2/14/14 Farrar Test., pp. 7-8), and confirmed at the hearing. Benefits to the Tribe have been limited and will be gone when NAT ceases operations. This business model is not in the public interest.

Those who originally established NAT's operations ensured that the Tribe would realize little, if any, financial benefit. Under the Service Agreement, for example, Free Conferencing was automatically entitled to 75%-95% of the revenue generated from minutes it received. SPRINT 4, p. 9. Whatever was left would be available to pay expenses, but could not be used to fund distributions to the Tribe. Under § 6.02 of the Joint Venture Agreement, the Tribe could be compensated only from Net Profits, and access charges are expressly excluded from the definition of "Net Profits:"

> Net Profits is defined as: (1) revenue generated from the provision of service to end user customers, including payments and universal service support, but does not include other sources of revenue, such as access charges, related to services provided by third-party businesses to locate on the reservation unless separately identified as NAT-CC revenue in an arrangement with third-party businesses; minus (2) costs associated with the build-out, operation, and maintenance of the telecommunications network on the Crow Creek reservation, including repayment of debt, interest, taxes, and maintenance and operations expenses.

SPRINT 3, § 6.01 (emphasis added).

Moreover, at inception, 100% of NAT's projected revenues were to be access charges generated by Free Conferencing, as it had promised Free Conferencing exclusivity (SPRINT 4, p. 4 § 7), and it intended to give its WiMAX service away. Tr. 141 (DeJordy). These facts evidence a clear intent to keep financial distributions from the Tribe.

The scheme played out as planned. Between 2009 and the end of 2013, NAT sent **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** plus additional amounts to WideVoice and NATE. SPRINT 2,

[redacted]

8/30/13 Farrar Test., p. 24; SPRINT 9, Tr. p. 55 ($140,000 to WideVoice); SPRINT 33 (describing $6,248 distribution to NATE, plus $3,000 per month stipend to Reiman). During this same period, the record, while not clear, suggests the Tribe received a total distribution of approximately $12,500. SPRINT 33, p. 1 (assuming the Tribe received 51% of the noted distribution). This distribution was made only because NAT needed to make a distribution to the Tribe to offset the distribution NATE was deemed to have made when Mr. Reiman charged over $12,000 of non-business expenses to NAT. SPRINT 33.[24]

2. NAT's purpose does not benefit the Tribe

Of course, NAT justifies its failure to provide financial benefit to the Tribe by pointing to the provision of free WiMAX service to fewer than 5% of the Tribe's population in a small geographic area, and an Internet library made available to tribal members. These benefits are slight compared to the cash sent to California. SPRINT 2, 8/30/13 Farrar Test., pp. 17-24. And now, rather than expanding the free service NAT has long bragged about, NAT intends to replace that free service with an expensive, high-end voice and data service. Tr. 183 (DeJordy). Moreover, the Internet library cannot be run if NAT goes out of business as Mr. Farrar predicts.

Nor does the CCST have meaningful control over NAT, despite its 51% legal ownership. Instead, the terms of the Joint Venture Agreement assures all meaningful control is in the hands of NATE and WideVoice, who hold six of the nine seats on NAT's

[24] The mechanics of this deemed distribution are described in SPRINT 33. The disallowed charges include over $9,000 of cash withdrawals made by Mr. Reiman.

Board of Directors (SPRINT 3, § 8.01). In addition, no tribal representative has ever run the day-to-day operations, which were handled by Mr. DeJordy and Mr. Reiman before control was usurped by Mr. Holoubek and WideVoice in mid 2010. SPRINT 9, Tr. pp. 31-32.

The minimal benefits NAT may provide to the Tribe do not outweigh the fact that NAT was formed, and has always been run, to send cash to California. As such, NAT's business plan is not in the public interest.

VI. NAT LACKS MANAGERIAL CAPABILITIES

The Commission should find that NAT's managers are not fit to operate a certificated local exchange carrier, and deny the Amended Application.

A. NAT's Managers Have Operated Willfully, Without a Certificate

In the event the Commission decides that it has jurisdiction to regulate NAT's provision of service to Free Conferencing (*see supra* Section III), then it should deny the Amended Application because NAT has been operating unlawfully since 2009.

NAT affirmed in discovery that it has provided telecommunications services to Free Conferencing. There is also no dispute that Free Conferencing is a non-tribal member. When NAT began providing service in 2009, without a certificate, it did so in violation of law. *See* SDCL § 49-31-3 (establishing that it is a misdemeanor to provide telecommunication services without a certificate of authority). After the Circuit Court affirmed the Commission's jurisdiction over intrastate services, NAT knowingly violated the law by continuing to operate.

NAT has never addressed its decision to provide service before asking for permission to do so. The only logical conclusion is that NAT's managers decided it was more important to generate revenue for those in California than it was to ensure regulatory compliance. The Commission should find it is not in the public interest to award a certificate to a company that has been willfully operating illegally for more than four years, and deny the Amended Application. SPRINT 2, 8/30/13 Farrar Test., pp. 9-13.

B. NAT Managers Should Not be Running a Regulated Entity

While NAT has identified numerous individuals who play a role in running its operations, its core management does not inspire confidence that the business will be run effectively. Those individuals are addressed in turn.

1. Jeff Holoubek

Mr. Holoubek, NAT's acting president, has no experience running a telephone company. Tr. 239 (Holoubek). He does not know the technical aspects of the business, nor does he know the market for competitive voice services. Tr. 241-42 (Holoubek). He described himself as the guy who "manage[s] the legal cases" (NAT 6, Dep. Tr. 48), which goes to prove that NAT's disputes with IXCs are at the organization's core, whereas the provision of voice services is on the periphery.

Mr. Holoubek is mired in a conflict. He is responsible for making decisions, as an officer and board member of NAT, that have a financial impact on his employers Free Conferencing and WideVoice. His failure to even concede that there is a potential conflict of interest (Tr. 253-55) reflects poorly on him. Both the CCST's Business

Corporation Ordinance and South Dakota law require every transaction between an entity like NAT and an organization in which a director or officer has a material financial interest (Free Conferencing, WideVoice, NATE), to be formally approved and ratified after full disclosure. *See* NAT 15 § 6.19 (standards for director conflicts of interest); SDCL § 47-1A-862.1 (director with conflicting interest must disclose and cannot play a role in the decision). There is no evidence that such requirements are regularly met by NAT. *See, e.g.*, SPRINT 9, pp. 55-56, 98-99 (no evidence of formal action when Mr. Holoubek directed Carlos Cestero to send $140,000 to WideVoice during a period of financial crisis for NAT).

Nor does the record suggest that the Tribe – NAT's majority owner – has been provided the full disclosure required by those provisions. For his part, Mr. Sazue was unaware of any of the details of the financial benefits that Free Conferencing has achieved through its relationship with NAT. Tr. 93, 95 (Sazue). As NAT's president and a board member, it is Mr. Holoubek's responsibility to ensure full disclosure and avoid conflicts of interest. Mr. Holoubek has failed to fulfill this responsibility.

Mr. Holoubek is also responsible for NAT's erroneous filings with the Universal Service Administrative Company ("USAC"), and NAT's failure to pay certain state regulatory assessments. Under Mr. Holoubek's watch, and by his signature, FCC Form 499s were filed with errors so substantial that Mr. Roesel "[couldn't] actually describe them all." Tr. 408. Mr. Roesel recalled that "[l]arge amounts of revenue were recorded on the wrong line." Tr. 408. In addition, as was explained by Mr. Farrar, the calendar year 2010 filing contains a representation, made under penalty of perjury, that NAT had

received payment for services of **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** Stated bluntly, a document signed by Mr. Holoubek misrepresented NAT's end user income to USAC, presumably for litigation purposes. In addition, as reflected in a NAT discovery response, NAT neither collected nor remitted state E911 and TRS assessments through at least May 2013. SPRINT 9, pp. 5-6.

Finally, Mr. Holoubek made numerous statements in this case, under oath, that were simply untrue. For example, Mr. Holoubek testified that NAT was receiving 25% of access charges collected with "zero risk and zero investment," and described this as a 25% operating profit. Tr. 219. This absurd statement ignores all of the costs of running a business, and cannot be squared with the numbers that prove NAT has consistently lost money. SPRINT 2, 8/30/13 Farrar Test., pp. 28-43. Mr. Holoubek gave deceiving written testimony that NAT had "towers" on the Reservation (NAT 8, 2/17/12 Holoubek Test., p. 6), when in fact NAT has only <u>one</u> tower. Tr. 113 (DeJordy). He also changed an answer from "Yes" to "No" on the stand, even though "Yes" was a complete and accurate answer:

> Q. And so, for example, when the NAT and Free Conferencing signed their original agreement NAT was promising to provide services to Free Conferencing without charge; right?
>
> A. Yes. In the original agreement --
>
> Q. You've answered my question. Is the answer yes?
>
> A. I'd change my answer to no then if you don't like the explanation.

Tr. 258.

The Commission has many reasons to find Mr. Holoubek's managerial capabilities are less than adequate.

2. David Erickson

Mr. Erickson is a NAT board member, owns Free Conferencing, and has an interest in WideVoice. He has been the largest beneficiary of NAT's operations. SPRINT 28, 2/14/14 Test., p. 13.

The FCC does not agree with Mr. Erickson's testimony that he has "always complied with and followed the rules." Tr. 330. In the *Sancom* case, the FCC found that the relationship between Free Conferencing and Sancom was in violation of the Communications Act. *Sancom*, ¶ 17. There was no genuine billing relationship, and the evidence "flatly contradict[ed]" those parties' claims that billing was accomplished through a netting process. *Sancom*, ¶¶ 19-20. Mr. Erickson's role in Communications Act violations should not be overlooked.

Further, the record demonstrates that Mr. Erickson's company took nearly **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** out of South Dakota, and has paying customers in South Dakota, and yet failed to register as a foreign corporation doing business in the state. Tr. 363-64; SPRINT 35. This does not suggest that Mr. Erickson or his company have made a commitment to following the rules, nor can this be excused by lack of sophistication given the global success and reach of Mr. Erickson's company. Tr. 335 (claiming to have served "1 percent of humanity").

Mr. Erickson's live testimony also leaves questions about his managerial capabilities. In response to a question from Commissioner Nelson, Mr. Erickson denied

that calls had ever been routed through California, saying "I'm not exactly sure where … where that testimony came from," and calling the suggestion "crazy." Tr. 369-70. This in fact was the case when NAT began operations, as is plainly reflected on SPRINT 36, Bates 000726, which states:

> From 09/2009 … NAT-CC used dedicated TDM transport from South Dakota to Los Angeles, CA for both local and access traffic ….

That routing was changed in late 2012, but was certainly in place for much of the time NAT has been operational. And on billing issues, while Mr. Erickson admits his company is being provided services valued at more than $6.45 per line, he claims Free Conferencing is paying, through an invoice or a "netting" process, a greater amount. Tr. 345. The invoices are within SPRINT 16, and show no charges beyond $6.45 per line. And, Sprint invites the Commission to review the general ledger information within SPRINT 11, which shows no evidence of netting. Mr. Erickson's testimony may have been what he wanted the Commission to hear, but it has no basis in fact.

3. Gene DeJordy

Mr. DeJordy has years of experience in the telecommunications industry, and has a history with the Commission. His credibility here, however, is suspect for two reasons.

First, Mr. DeJordy was not transparent about his role as counsel for NAT and the CCST. As to NAT, he erroneously denied ever having been its counsel. Tr. 120. In fact, Mr. DeJordy filed NAT's first application in Docket No. TC08-110 as its counsel, and has submitted comments on NAT's behalf at the FCC. *See supra* Section III(B)(4). Moreover, while Mr. DeJordy did not deny serving as counsel to the CCST when asked

(Tr. 120), he first offered what purported to be prefiled "expert" testimony on tribal jurisdiction issues without disclosing to the Commission that he was counsel to the Tribe. NAT 3, 2/1/14 DeJordy 2/7/14 Test., pp. 3, 11. In all fairness, this should have been disclosed, and Mr. DeJordy's lack of transparency should weigh against his credibility.

Second, Mr. DeJordy submitted prefiled testimony short on details but with a strong conclusion about NAT's new "business plan" to use CMRS spectrum it obtained from Sprint and equipment to be obtained from Tazca-Connects. NAT 3, 2/1/14 DeJordy 2/7/14 Test., pp. 12-13. Yet, as became clear at the hearing, this is not a complete business plan (Tr. 117), the estimate of potential business customers for the service has no basis in fact,[25] and the projections of actual customers ignore the economic concept of elasticity. Tr. 152.

These facts weigh against Mr. DeJordy's credibility, and cast doubt on his managerial fitness.

4. Tom Reiman

Mr. Reiman is a part owner of NATE, plays a significant role in NAT's operations, and is one of the company's few paid employees. Unfortunately for NAT, Mr. Reiman's behavior when he had control over NAT's accounts does not comport with standards that should apply to those running regulated companies.

The information about Mr. Reiman's actions came from NAT itself. As Mr. Holoubek described it in his deposition:

[25] Mr. DeJordy assumed **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** potential business subscribers on the reservation. Tr. 139. Mr. Sazue testified that that there would be "not even close" to 500. Tr. 87.

> ... we were actually at a hearing -- and I forgot what the hearing was all about. And it came out that Tom Reiman had used a company credit card to pay for expenses that we believe, too, might be inappropriate.
>
> And so when we dug into it a little more, we found that there was approximately – and don't hold me to this number, but it's probably really close -- around $12,000 worth of expenses that we didn't agree with.
>
> Now, whether or not it was wrong or anything else is beside the point, but we didn't agree with how he was using the company credit card. And when questioned about it, he said that, well, he's an owner of the company and he thought that he was able to use it for certain purposes
>
> And given that -- for one thing, the trust and continued support of the tribe for this venture was very important as well as the fact that we didn't know Tom and Gene that well at the time, so we just didn't take any chances at all. And we just made -- we took a vote and decided that it would be best if they relinquished that financial control.

NAT 6, Holoubek Dep. pp. 65-66; *see also* SPRINT 9, Tr. pp. 77-80 (Carlos Cestero testifying about cash withdrawals classified as NATE shareholder distributions because they were not for business expenses); SPRINT 33 (describing disallowed expenses). When NATE relinquished control over NAT, Mr. Cestero opened a new bank account to which account Mr. Reiman would not have access. SPRINT 9, Tr. p. 79.

These facts do not reflect well on Mr. Reiman, and neither NAT nor Mr. Reiman has made any attempt to rationalize these facts. Moreover, pursuant to SPRINT 33, Mr. Reiman failed to repay these amounts until 2012, two years after the improper withdrawals occurred.[26]

The Commission should find that Mr. Reiman's actions in 2010, as reported by NAT, raise significant questions about his managerial fitness.

[26] Sprint also notes that, while Mr. Sazue gave Mr. Reiman a vote of support (Tr. 100), Mr. Sazue was not aware of Mr. Reiman's improper use of NAT funds. Tr. 82.

C. NAT is a Sham Entity Involved in Sham Business Arrangements

As explained by Mr. Farrar, NAT is not a standalone business serving as a competitive provider; it is sham entity that is being run in conjunction with Mr. Erickson and companies in which he has an interest. SPRINT 2, 8/30/13 Farrar Test., pp. 13-27.

The following Table 1 is a summary of the key evidence, and citations to other traffic pumping cases, that shows the extent to which NAT's behavior tracks that of other LECs found to be engaging in sham arrangements:

TABLE 1[27]

ACTS THAT EVIDENCE SHAM ARRANGEMENTS OR UNLAWFUL OPERATIONS	EXAMPLES FROM OTHER TRAFFIC PUMPING CASES	RECORD EVIDENCE REGARDING NAT
• LEC not in business to provide competitive local service as a common carrier. • Instead, LEC is business to serve high-volume calling companies. • LEC provides promise of exclusivity to high-volume calling companies, inconsistent with common carrier obligations.	• *2013 All American Order*, ¶ 25 ("Defendants had no intention at any point in time to operate as *bona fide* CLECs or provide local exchange service to the public at large."). • *2013 All American Order*, ¶ 25 ("Defendants' entire business plan was to generate access traffic exclusively to a handful of CSPs."). • *Sancom*, ¶¶ 23, 25 (through exclusive agreement with Free Conferencing, "Sancom was not acting as a common carrier indiscriminately serving End Users as defined in the Tariff."). • Farmers II, ¶ 14 (exclusivity clause is antithetical to common carrier operations).	• Mr. Holoubek testified that NAT does not consider itself to be in competition with MidState, and he does not even know what MidState's local voice product is. Tr. 241-42. • NAT has only one paying customer, even after more than four years of operations. Tr. 251-52 (Holoubek, acknowledging that is unusual for a LEC). • Mr. Erickson explained that "we're in the terminating access business." Tr. 369. • 2009 Service Agreement promised exclusivity for Free Conferencing. SPRINT 3, p. 4 ¶ 7.

[27] The full cites to the cases referenced below are:

- *AT&T Corp. v. All American Tel. Co.*, 28 FCC Rcd. 3477, Mem. Op. & Order (2013) ("*2013 All American Order*")
- *Qwest Commc'ns Corp. v. Superior Tel. Coop.*, Final Order, No. FCU-07-2 (Iowa Utils. Bd. Sept. 21, 2009) ("*IUB Order*")
- *Qwest Commc'ns Corp. v. Farmers & Merchants Mut. Tel. Co.*, 24 FCC Rcd. 14,801, Second Order on Reconsideration (2009) ("*Farmers II*")
- *Qwest Commc'ns Co. v. Sancom, Inc.*, 28 FCC Rcd. 1982, Order (2013) ("*Sancom*")

ACTS THAT EVIDENCE SHAM ARRANGEMENTS OR UNLAWFUL OPERATIONS	EXAMPLES FROM OTHER TRAFFIC PUMPING CASES	RECORD EVIDENCE REGARDING NAT
• For LEC and its high-volume calling partners, litigation concerns predominate over commercial considerations. • LEC and its high-volume calling partners backdate bills and make payments in arrears for litigation purposes.	• *Farmers II*, ¶ 20 (high-volume calling companies and pumpers signed contract amendments as part of a litigation strategy). • *Farmers II*, ¶ 16 (LEC did not issue bills until dictated by litigation concerns). • *IUB Order*, p. 27 (practice of backdating is an attempt to hide deficiencies of prior arrangements).	• Mr. Holoubek explained how NAT's practices, including its agreement with Free Conferencing, were guided by the FCC's *Farmers II* decision, rather than normal business consultations. Tr. 257-59. • Mr. Erickson testified "we've hired a consultant" to tell the parties what should be billed" (Tr. 341), demonstrating that bills were dictated by litigation strategy rather than commercial considerations. • Mr. Farrar described and documented how bills and the 2012 Service Agreement were backdated. SPRINT 21, 12/4/13 Farrar Test. pp. 5-6. • Mr. Holoubek admitted bills and the 2012 Service Agreement were backdated. Tr. 265, 270-71, 276. • In 2011, Free Conferencing paid amounts in arrears. Tr. 269 (Holoubek).
• LEC fails to comply with tariffs and/or contracts. • LEC claims, contrary to record evidence, that payments occurred via a netting process.	• *Sancom*, ¶ 24 (arrangements appear to have been purposefully structured to avoid a traditional tariffed offering). • *Sancom*, ¶ 19 (absence of genuine billing relationship) • *2013 All American Order*, ¶ 38 (practices show calling company was not receiving services described in tariffs).	• Mr. Holoubek admitted that "things evolved" and the parties neither followed nor amended the service agreement. Tr. 269-70. • NAT's Tribal Tariff has a $35 per PRI charge for local service (Tr. 400) that has never been assessed (SPRINT 16).

ACTS THAT EVIDENCE SHAM ARRANGEMENTS OR UNLAWFUL OPERATIONS	EXAMPLES FROM OTHER TRAFFIC PUMPING CASES	RECORD EVIDENCE REGARDING NAT
	• *Sancom*, ¶ 20 (finding no support for claims that netting was taking place between Free Conferencing and Sancom). • *Farmers II*, ¶ 15 (LEC did not intend this to be a traditional local service offering).	• Free Conferencing has received services not described in tariffs – space, power, IP addresses – without being charged. Tr. 341-41 (Erickson); SPRINT 16 (bills). • Mr. Erickson claimed netting was occurring (Tr. 334), even though there is no such evidence in the General Ledger. SPRINT 11.
• LEC and high-volume calling partners are business partners, and not in an arm's length commercial arrangement.	• *Farmers II*, ¶ 10 (stark difference between true customer relationships, which, involve individuals who subscribe to local exchange service and pay a local exchange carrier for that service, compared to relationships that involve money and other benefits flowing out of the LEC to the so-called customers). • *Sancom*, ¶ 21 ("Sancom viewed the Free Calling Companies more as business partners than local exchange customers."). • *IUB Order*, pp. 32-34 (parties who share profits are business partners). • *2013 All American Order*, ¶ 25 (All American and e-Pinnacle perpetuated their scam in conjunction with jointly operated, co-owned entities)	• Most of NAT's revenues are shipped directly to Free Conferencing. • Free Conferencing plays a large role in running NAT, through the president, board members, and the involvement of WideVoice. • Mr. Erickson described the group as a "team" that provides terminating access, the location, and the calling applications. Tr. 360. • Charges to Free Conferencing are dictated by regulatory compliance, not commercial considerations. Tr. 345. • Free Conferencing has foregone a portion of its revenue sharing to maintain NAT's appearance of solvency. SPRINT 28, 2/14/14 Farrar Test., pp. 21-23.

The Commission should find, as recommended by Mr. Farrar and proven by the record, that NAT's participation in sham arrangements renders it unfit for certification.

VII. NAT LACKS THE FINANCIAL CAPABILITY TO PROVIDE A REGULATED SERVICE

The Commission should find that NAT has failed to prove that it has the financial fitness necessary to obtain a certificate. Under its current plan, NAT has lost money in the past, is losing money now, and will continue to lose money. Its proposed new business plan is speculative, poorly planned, and does not warrant putting the State's citizens at risk.

A. NAT's Current Business Plan Is Not Viable

Mr. Farrar has explained in detail his analysis and conclusions about NAT's financial status. **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** And, NAT is at the whim of Free Conferencing, which could easily leave Ft. Thompson, taking away 100% of NAT's current revenue. SPRINT 21, 12/4/13 Farrar Test., pp. 11-12.

The only way in which NAT sought to challenge Mr. Farrar's conclusions was through the third page of NAT 13, which Mr. Holoubek claimed showed that NAT would

have made money if all IXCs had paid for all minutes, at full access rates, without disputing. Tr. 225-26, 229-30. In addition to being unrealistic, the numbers do not work. As described by Mr. Farrar, **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**

The Commission, therefore, should find that NAT's past and current business plan is not financially viable.

B. NAT's New Business Plan Is Farfetched

In response to facts proving NAT's poor financial condition, NAT, at the last possible minute, disclosed a new business plan based on charging high monthly rates for an expensive, high-end, Long Term Evolution ("LTE") wireless voice and data service. If NAT is able to achieve success through a business model that does not rely on traffic pumping, Sprint will have no objection. SPRINT 29, 2/14/14 Farrar Test., p. 4. However, NAT's new plan is best viewed as a litigation tactic rather than a realistic business plan.

There is no dispute that this new plan was sprung on the Commission (and first disclosed to Sprint) on the eve of the hearing. Tr. 135 (DeJordy). While Mr. DeJordy presented it as if it were a fully vetted business plan, NAT's new plan was not "a business plan that [he could] take to the bank" (Tr. 118), NAT has no binding contract with Tazca (Tr. 145), and the financing has not been put into place. Tr. 145-46 (DeJordy). This preliminary "plan" should be disregarded as the Commission evaluates NAT's actual financial fitness.

Nor is it believable that NAT could accomplish the customer and revenue benchmarks in the plan. It is well known that the Reservation has low levels of economic development, high poverty rates, and low employment levels. *See, e.g.*, Tr. 118 (DeJordy noting the lack of economic development); Tr. 68 (Sazue describing the Reservation as a third-world country). **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**

[redacted]

For these reasons, the Commission should find that NAT's proposed new business plan does not allow NAT to meet the obligation to demonstrate financial fitness, going forward, as required to obtain a certificate.

CONCLUSION

This has been a highly unusual case. NAT is here because it wants a certificate it can point at, for litigation purposes, as it continues to try to collect on its unlawful access charge bills. NAT's business practices, its multiple changes in course, its obfuscation, and its disregard for legal and regulatory obligations, have made this a difficult case for the Commission. Now that the record has been made, however, the Commission can and should find that NAT does not qualify for the certificate it seeks for all the reasons argued above. Sprint respectfully requests, therefore, that the Commission deny NAT's Amended Application.

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