

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

IN THE MATTER OF THE APPLICATION) Docket No. TC11-087
OF NATIVE AMERICAN TELECOM, LLC)
FOR A CERTIFICATE OF AUTHORITY TO)
PROVIDE LOCAL EXCHANGE SERVICE)
WITHIN THE STUDY AREA OF)
MIDSTATE COMMUNICATIONS, INC.)

Sprint Communications Company L.P.

Direct Testimony of Randy G. Farrar

Filed March 26, 2012

PUBLIC VERSION

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1 **DIRECT TESTIMONY**

2

3 **I. Introduction**

4

5 **Q. Please state your name, occupation, and business address.**

6 A. My name is Randy G. Farrar. My title is Senior Manager – Policy Support. I
7 am employed by Sprint United Management Company, the management
8 subsidiary of Sprint Nextel Corporation. My business address is 6450 Sprint
9 Parkway, Overland Park, Kansas 66251.

10

11 **Q. What is your educational background?**

12 A. I received a Bachelor of Arts degree from The Ohio State University,
13 Columbus, Ohio, with a major in history. Simultaneously, I completed a
14 program for a major in economics. Subsequently, I received a Master of
15 Business Administration degree, with an emphasis on market research, also
16 from The Ohio State University.

17

18 **Q. Please summarize your work experience.**

19 A. I have worked for a subsidiary of Sprint Nextel Corporation (or a
20 predecessor) since 1983 in the following capacities:

21

- 2011 to present: Regulatory Policy Manager. I provide financial,

22

economic, and policy analysis concerning interconnection, switched

1 and special access, reciprocal compensation and other
2 telecommunications issues at both the state and federal level.

3 - 2005 to 2011: Senior Manager – Interconnection Support. I provided
4 interconnection support, and financial, economic, and policy analysis
5 concerning interconnection and reciprocal compensation issues.

6 - 1997 to 2005: Senior Manager – Network Costs. I was an instructor
7 for numerous training sessions designed to support corporate policy on
8 pricing and costing theory, and to educate and support the use of
9 various costing models. I was responsible for the development and
10 support of switching, transport, and financial cost models concerning
11 reciprocal compensation, unbundled network elements, and wholesale
12 discounts.

13 - 1992 to 1997: Manager - Network Costing and Pricing. I performed
14 financial analyses for various business cases, analyzing the profitability
15 of entering new markets and expanding existing markets, including
16 Custom Calling, Centrex, CLASS and Advanced Intelligent Network
17 features, CPE products, Public Telephone and COCOT, and intra-
18 Local Access and Transport Area (“LATA”) toll. Within this time frame,
19 I was a member of the USTA’s Economic Analysis Training Work
20 Group (1994 to 1995).

21 - 1987 to 1992: Manager - Local Exchange Costing. Within this time
22 frame I was a member of the United States Telephone Association’s

1 (USTA) New Services and Technologies Issues Subcommittee (1989
2 to 1992).

3 - 1986 to 1987: Manager - Local Exchange Pricing. I investigated
4 alternate forms of pricing and rate design, including usage sensitive
5 rates, extended area service alternatives, intraLATA toll pricing, and
6 lifeline rates.

7 - 1983 to 1986: Manager - Rate of Return, which included presentation
8 of written and/or oral testimony before state public utilities
9 commissions in Iowa, Nebraska, South Carolina, and Oregon.

10

11 I was employed by the Public Utilities Commission of Ohio from 1978 to
12 1983. My positions were Financial Analyst (1978 - 1980) and Senior
13 Financial Analyst (1980-1983). My duties included the preparation of Staff
14 Reports of Investigation concerning rate of return and cost of capital. I also
15 designed rate structures, evaluated construction works in progress,
16 measured productivity, evaluated treatment of canceled plant, and
17 performed financial analyses for electric, gas, telephone, and water utilities.
18 I presented written and oral testimony on behalf of the Commission Staff in
19 over twenty rate cases.

20

21 **Q. What are your responsibilities in your current position?**

22 A. I provide financial, economic, and analysis concerning policy,
23 interconnection, switched and special access, reciprocal compensation, and

1 other telecommunications issues at both the state and federal level. I
2 maintain a working understanding of the interconnection and intercarrier
3 compensation provisions of the Communications Act of 1934 as amended
4 most recently by the Telecommunications Act of 1996 (“the Act” or “the
5 1996 Act”) and the resulting rules and regulations of the Federal
6 Communications Commission (“FCC”).

7
8 **Q. Have you provided testimony before other regulatory agencies?**

9 A. Yes. In addition to my previously referenced testifying experience, since
10 1995 I have presented written or oral testimonies or affidavits before twenty-
11 seven state regulatory agencies (Illinois, Pennsylvania, New Jersey, Florida,
12 North Carolina, Nevada, Texas, Georgia, Arizona, New York, Oklahoma,
13 Missouri, Virginia, Iowa, Kentucky, Ohio, South Dakota, Tennessee,
14 Minnesota, Arkansas, Oregon, Colorado, Alabama, Louisiana, California,
15 Wisconsin, and Connecticut) and the FCC, concerning interconnection
16 issues, reciprocal compensation, access reform, universal service, the
17 avoided costs of resold services, local competition issues such as the cost
18 of unbundled network elements, and economic burden analyses in the
19 context of Incumbent Local Exchange Carrier (“ILEC”)-claimed rural
20 exemptions.

1 **II. Purpose and Scope of Testimony**

2

3 **Q. On whose behalf are you testifying?**

4 A. I am testifying on behalf of Sprint Communications Company L.P. (“Sprint”),
5 a subsidiary of Sprint Nextel Corporation.

6

7 **Q. What is the purpose of this proceeding?**

8 A. On October 11, 2011, Native American Telecom, LLC (“NAT-CC”)¹ applied
9 to the South Dakota Public Utilities Commission (“Commission”) for a state
10 Certificate of Authority to provide competitive local exchange service on the
11 Crow Creek Reservation. This is the second time that NAT-CC has applied
12 for such a Certificate, the first time being on September 8, 2008; but, that
13 application was voluntarily withdrawn after Sprint and other parties
14 intervened to oppose that application.

15

16 This hearing is to determine whether NAT-CC’s second request should be
17 granted.

18

19 **Q. What is the purpose of your Direct Testimony?**

¹ The acronym “NAT-CC,” i.e., NAT-Crow Creek, is used in the April 1, 2009 *Joint Venture Agreement* to reference Native American Telecom, LLC. This testimony will use that acronym to better distinguish NAT-CC from NATE (Native American Telecom Enterprise, LLC), a non-tribal entity.

1 A. The purpose of my Direct Testimony is to demonstrate to the Commission
2 that NAT-CC is a sham entity, established for the sole purpose of “traffic
3 pumping.” It is not in the public interest to grant this Certificate.

4
5 First, as pointed out by the FCC in its recent *Connect America Order*,²
6 “traffic pumping” is not in the public interest. As discussed in Section V.D,
7 the FCC has taken deliberate steps to end the practice.

8
9 Second, the *Joint Venture Agreement*³ between (1) the Crow Creek Sioux
10 Tribe (“CCST”), (2) Native American Telecom Enterprise, LLC (“NATE”),
11 and (3) WideVoice Communications, Inc. (“WideVoice” or “WVC”), is
12 deliberately and intentionally designed for only one purpose – to promote
13 NAT-CC’s “traffic pumping” business and to enrich NATE and WideVoice.

14
15 Third, the *Service Agreement* between NAT-CC and Free Conference is
16 deliberately and intentionally designed for only one purpose – to promote
17 NAT-CC’s “traffic pumping” business and to enrich Free Conference.⁴

18

² *In the Matter of Connect America Fund, et al*; WC Docket No. 10-90, et al; FCC 11-161; Report and Order and Further Notice of Proposed Rulemaking; Adopted October 27, 2011, Released November 18, 2011 (*Connect America Order*).

³ Joint Venture Agreement, April 1, 2009, By And Between Crow Creek Sioux Tribe And Native American Telecom Enterprise, LLC And WideVoice Communications, Inc. (*Joint Venture Agreement*). See Exhibit RGF-1.

⁴ *Service Agreement By and Between: Native American Telecom – Crow Creek and Free Conferencing Corporation*, effective July 1, 2009 – June 30, 2012 (*Service Agreement*). See Exhibit RGF-2.

1 Fourth, NAT-CC's "traffic pumping" business harms Sprint and Sprint's
2 customers (many of whom live in South Dakota) by increasing its costs of
3 doing business; e.g., forcing Sprint to augment its transport facilities, by
4 increasing its legal and regulatory expenses, and by billing Sprint grossly
5 inflated amounts of switched access traffic.

6
7 Finally, and most importantly, NAT-CC provides virtually no financial benefit
8 to CCST. NAT-CC exists to benefit only three entities: NATE, WideVoice,
9 and Free Conference. Due to actions taken by the FCC in the *Connect*
10 *America Order*, the NAT-CC business model will be made unsustainable in
11 four or five years. At that time, NAT-CC will be forced to exit the South
12 Dakota market, leaving CCST with negligible benefits and potentially
13 significant liabilities.

14
15 **III. NAT-CC is Providing Service Without a Certificate**

16
17 **Q. Does NAT-CC have a Certificate of Authority to provide competitive**
18 **local exchange service to non-tribal members on the Crow Creek**
19 **Reservation?**

20 A. No, NAT-CC does not have a Certificate of Authority to provide competitive
21 local exchange service to non-tribal members on the Crow Creek
22 Reservation.

23

1 **Q. Has NAT-CC requested such a Certificate?**

2 A. Yes, NAT-CC has request such a Certificate on two occasions. First, on
3 September 8, 2008, NAT-CC applied to the Commission for a Certificate.
4 However, on October 28, 2008, after NAT-CC obtained authorization from
5 the Tribal Utility Authority, NAT-CC withdrew its application from the
6 Commission.

7
8 Second, on October 11, 2011, NAT-CC reapplied to the Commission for a
9 Certificate. This hearing is a result of that second application.

10

11 **Q. Is NAT-CC providing service to a non-tribal member without a**
12 **Certificate?**

13 A. Yes, NAT-CC has been providing service to Free Conference, a non-tribal
14 member, without a Certificate since approximately December 2009.⁵ Note
15 that NAT-CC affirmed that Free Conference is not a tribal member.⁶ Also,
16 NAT-CC contends that it does not have to determine whether its services
17 are being provided to non-tribal members or to customers of CCST.⁷

18

19 In NAT-CC's current application, it is essentially asking the Commission for
20 permission to continue doing what it has been doing, without permission, for
21 more than two years.

⁵ It is Sprint's position that Free Conference is not an end-user.

⁶ See NAT-CC's response to Sprint Request For Admission No. 2, Exhibit RGF-3.

⁷ NAT-CC's Response to Sprint's Discovery Requests Nos. 1 and 3, and Request for Admission No. 1, Exhibit RGF-3.

1

2 **Q. Does NAT-CC require a Certificate in order to provide service to a**
3 **non-tribal member?**

4 A. Sprint has taken the position that NAT-CC needs a Certificate to provide
5 service to non-tribal members. Ultimately, that is a legal question that
6 Sprint's attorneys will brief. However, apparently NAT-CC now believes it
7 needs such a Certificate – why else would NAT-CC make the application?

8

9 **Q. Do you believe it is in the public interest to give a Certificate to a**
10 **company that has been willfully operating, perhaps illegally, without a**
11 **certificate for over two years?**

12 A. No, I do not believe it is in the public interest to give a Certificate to a
13 company that has been willfully operating, perhaps illegally, without a
14 certificate for over two years.

15

16 **IV. NAT-CC Is a Sham Entity**

17

18 **Q. Please describe the creation of NAT-CC and the *Joint Venture***
19 ***Agreement.***

20 A. On August 26, 2008, NAT-CC was organized under the laws of South
21 Dakota by the Los Angeles office of Legalzoom.com Inc. Per the NAT-CC
22 Articles of Incorporation, its two founders were Gene DeJordy and Tom

1 Reiman, who are non-tribal members. Thus, NAT-CC was initially created
2 without any involvement by the CCST.⁸

3
4 On September 8, 2008, NAT-CC applied to the Commission for a state
5 Certificate of Authority to provide competitive local exchange service on the
6 Crow Creek Reservation. That application described NAT-CC as “a joint
7 venture with the Crow Creek Sioux Tribe ... to provide service only within
8 the exterior boundaries of the Crow Creek Indian Reservation.”

9
10 On October 28, 2008, NAT-CC obtained authorization from the Tribal Utility
11 Authority to provide LEC services within the Crow Creek Indian Reservation.
12 NAT-CC then withdrew its application for a certificate from the Commission.

13
14 On April 1, 2009, the NAT-CC *Joint Venture Agreement* was signed by
15 CCST, NATE, and WideVoice.

16
17 In April/May 2009, NAT-CC and Free Conference signed a *Service*
18 *Agreement* making Free Conference the sole provider of conferencing
19 service for NAT-CC.⁹

⁸ Preliminary Injunction Transcript, Sprint Communications Company L.P. v. Native American Telecom, U.S. Court Dist. Of S.D., Case 10-4110, (Oct. 14, 2010) (“Oct. 24, 2010 Tr.”), Exhibit RGF-4. See also NAT Articles of Organization, Exhibit RGF-5.

⁹ *Service Agreement*, paragraph 6.

1 On October 11, 2011, for the second time NAT-CC applied to the
2 Commission for a state Certificate of Authority to provide competitive local
3 exchange service on the Crow Creek Reservation.

4

5 **Q. The Direct Testimonies of Jeff Holoubek and Carey Roesel on behalf of**
6 **NAT-CC both describe the benefits to the CCST provided by NAT-CC.**
7 **Do you agree with the conclusion of their testimonies?**

8 A. No. I believe that NAT-CC has brought very little benefit to the CCST, at too
9 high of a cost. NAT-CC has, however, provided significant financial benefit
10 to NATE, WideVoice, Free Conference. In fact, it would appear from the
11 terms of the *Joint Venture Agreement*, that the sole purpose of NAT-CC is
12 to enrich NATE, WideVoice, and Free Conference.

13

14 **Q. Please describe the ownership interest in Native American Telecom**
15 **(“NAT-CC”).**

16 A. Per the *Joint Venture Agreement* dated April 1, 2009. NAT-CC has the
17 following legal ownership:

- 18 • CCST owns 51% of NAT-CC,
- 19 • NATE, which is owned by non-tribal members Tom Reiman and
20 Gene DeJordy, owns 25% of NAT-CC, and
- 21 • WideVoice , which is a Nevada corporation that operates an end
22 office switch in California, owns 24% of NAT-CC. It is owned by

1 non-tribal members including Dave Erickson (who also owns Free
2 Conference, the sole provider of conferencing services for NAT-CC).

3
4 However, as discussed below, CCST's 51% ownership results in little
5 meaningful control over NAT-CC, and has resulted in no financial benefit.

6
7 **Q. Does CCST receive any meaningful financial benefit from NAT-CC
8 under the terms of the *Joint Venture Agreement*?**

9 A. No. While the terms of the *Joint Venture Agreement* assigns 51%
10 ownership to CCST, in reality CCST receives no financial benefit.

11
12 First, NATE & WideVoice get to skim-off 15% of "Gross Revenues" before
13 CCST sees a dime. Specifically, the *Joint Venture Agreement* states:

14 ***Section 6.06 WVC and NATE Cost Passthrough Escrow for***
15 ***On-Going Operation and Maintenance Costs.***
16 NATE and WVC will incur expenses related to the operation and
17 maintenance of the Crow Creek telecommunications network that may
18 not be readily segregated from the other operation and maintenance
19 expenses incurred by NATE and WVC. To cover such expenses, **15%**
20 **of gross revenues of NAT-CC shall be set aside and placed in an**
21 **escrow account for the benefit of NATE and WVC.** (Bold emphasis
22 added – except title.)
23

24 Second, NAT-CC has agreed to pay up to 95% of the switched access
25 revenue it receives directly to Free Conference, which is owned and
26 controlled by the same parties as WideVoice. Specifically, the *Service*
27 *Agreement* states:

1 **9. Marketing Fee and Payment Terms.** NAT-CC shall pay FCC a
2 marketing fee at a rate per minute of IXC traffic terminating on FCC's
3 equipment in accordance with the schedule set forth on Exhibit B.
4

5 **Exhibit B – Marketing Fee Schedule**

<u>Minutes Per Month</u>	<u>Rate per Minute</u>
6 0 – 15,000,000	(75% of Gross Tariff)
7 15,000,001-25,000,000	(85% of Gross Tariff)
8 25,000,001 and above	(95% of Gross Tariff)

10
11 Third, it is not clear if CCST receives any of the switched access revenues
12 not paid directly to Free Conference. CCST is only allowed its share of
13 predefined “Net Profits,” which are narrowly defined by the *Joint Venture*
14 *Agreement*. Specifically, the *Joint Venture Agreement* states:

15 **Section 6.01 Net Profits.**

16 Net Profits is defined as: (1) revenue generated from the provision of
17 service to end user customers, including payments and universal
18 service support, but **does not include other sources of revenue,**
19 **such as access charges,** related to services provided by third-party
20 businesses to locate on the reservation unless separately identified as
21 NAT-CC revenue in an arrangement with third-party businesses; minus
22 (2) costs associated with the build-out, operation, and maintenance of
23 the telecommunications network on the Crow Creek reservation,
24 including repayment of debt, interest, taxes, and maintenance and
25 operations expenses. (Bold emphasis added – except title.)
26

27 In addition, CCST may be denied any “end user” revenue which Free
28 Conference, a “third-party business, may pay to NAT-CC.
29

1 It also appears that CCST may not be able to realize any ongoing financial
2 benefit from end-user revenues generated from tribal members living on the
3 reservations because tribal members receive service at no charge.¹⁰

4
5 These financial restrictions on CCST are particularly important in light of the
6 ongoing disputes between NAT-CC and the IXCs. In its 2011 FCC Form
7 499-A (which contains 2010 revenue information), NAT-CC reports
8 “Uncollectible revenue” of \$3,930,146 in 2010.¹¹ This is undoubtedly billed,
9 but uncollected charges to the IXCs in 2010. In the unlikely scenario that
10 NAT-CC collects any of these charges,¹² it is not clear whether CCST would
11 receive any of this revenue per the terms of the *Joint Venture Agreement*.

12
13 **Q. Does CCST have any meaningful decision making or operational**
14 **control over NAT-CC, or ability to influence financial decisions?**

15 A. No. CCST has virtually no meaningful control over NAT-CC, despite its
16 51% legal ownership.

17

¹⁰ Preliminary Injunction Transcript, *Sprint Communications Company L.P. v. Native American Telecom*; U.S. District Court, District of South Dakota, Case 10-4110, March 3, 2011 (“*Mar. 3, 2011 Tr.*”) Tr. P. 150, Exhibit RGF-6.

¹¹ NAT-CC’s 2011 FCC Form 499-A, Line 421: Uncollectible revenue/bad debt expense associated with gross billed revenues amounts shown on Line 419 [See Instructions], Exhibit RGF-7.

¹² The FCC’s *Connect America Order* does not address retroactive payments.

1 First, despite 51% ownership, the terms of the *Joint Venture Agreement*
2 give CCST only three of the nine seats on the Board of Directors.

3 Specifically, the *Joint Venture Agreement* states:

4 **Section 8.01 Board of Directors.**

5 The Board of Directors shall consist of Nine (9) members. Three (3)
6 members of NAT-CC's Board of Directors shall be designated by
7 CCST
8

9 Second, CCST has no control over the day-to-day operations of the
10 NAT-CC network, even when it directly affects the Crow Creek Indian
11 Reservation and its Citizens. This control is reserved solely in the hands of
12 NATE. If a dispute arises on this issue, CCST has only three of nine votes.

13 Specifically, the *Joint Venture Agreement* states:

14 **Section 6.07 Voting Rights.**

15 (b) Regarding decisions affecting the regular and ordinary operations
16 of the CLEC and the CLEC network, **NATE shall have the authority**
17 **to make decisions concerning the regular and ordinary**
18 **operations of the CLEC and CLEC Network as it affects the Crow**
19 **Creek Indian Reservation, its Citizens and Customers**. Where
20 disagreements, disputes or conflicts arise regarding the operations of
21 the CLEC and CLEC Network, resolution will be accomplished through
22 a Majority Rule vote of the designated Board of Directors, each director
23 having one equally weighted vote. (Bold emphasis added – except
24 title)
25

26 Third, CCST has no control over the technical aspects of the NAT-CC
27 network, including “traffic pumping.” This control is reserved solely in the
28 hands of WideVoice. If a dispute arises on this issue, CCST has only three
29 of nine votes. Specifically, the *Joint Venture Agreement* states:

30 **Section 6.07 Voting Rights.**

31 (c) WVC shall have authority over the normal operations of NAT-CC as
32 it affects the technical aspects of NAT-CC including but not limited to

1 **traffic flow over the Network.** Where disagreements, disputes or
2 conflicts arise regarding the operations of the CLEC and CLEC
3 Network, resolution will be accomplished through a Majority Rule vote
4 of the designated Board of Directors, each director having one equally
5 weighted vote. (Bold emphasis added – except title.)
6

7 Note that the reference to “traffic flow over the Network” includes NAT-CC’s
8 “traffic pumping” business, in which NATE and WideVoice maintain total
9 operational and financial control under the terms of the *Joint Venture*
10 *Agreement*.

11
12 Finally, CCST only has 51% voting rights in matters that deal directly with
13 tribal matters. Specifically, the *Joint Venture Agreement* states:

14 ***Section 6.07 Voting Rights.***

15 (a) Regarding decisions affecting the physical health and financial
16 success and wellbeing of the Crow Creek Indians Reservation and
17 its Citizens, CCST shall have 51%
18

19 However, given the previous limitations of CCST’s involvement in NAT-CC’s
20 operations, this “right” is essentially meaningless.

21
22 **Q. What is your conclusion concerning the terms of the *Joint Venture***
23 ***Agreement* and the testimonies of Jeff Holoubek and Carey Roesel on**
24 **behalf of NAT-CC?**

25 A. Despite NAT-CC being described as a joint, tribally-owned venture,
26 designed to bring financial benefits to CCST, the *Joint Venture Agreement*
27 is, in fact, deliberately and intentionally designed to leave all meaningful
28 control in the hands of NATE and WideVoice.

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More importantly, the *Joint Venture Agreement* is deliberately and intentionally designed to leave all financial benefit in the hands of NATE, WideVoice, and Free Conference.

Q. Please discuss the role of Free Conference in NAT-CC.

A. The role of Free Conference cannot be understated and is key to understanding how and why NAT-CC was created.

- Per the *Service Agreement*, Free Conference is the sole provider of conferencing services for NAT-CC.¹³
- Free Conference, which provides the “free” conferencing services essential to “traffic pumping,” is owned and controlled by Dave Erickson.¹⁴
- Dave Erickson owns and controls WideVoice, which in turn means that Dave Erikson owns and controls a significant portion of NAT-CC.¹⁵
- In July 2010, Mr. Carlos Cestero, an employee of Free Conferencing, took over as controller for NAT-CC. He acts as controller for NAT-CC, Free Conferencing, WideVoice, and three other entities owned by Dave Erickson.¹⁶ He is not being paid by NAT-CC.¹⁷ Mr. Cestero

¹³ *Service Agreement*, paragraph 6.
¹⁴ Mar. 3, 2011 Tr. p. 67.
¹⁵ Mar. 3, 2011 Tr. p. 67.
¹⁶ Mar. 3, 2011 Tr. p. 13-16, 20-21.
¹⁷ Mar. 3, 2011 Tr. p. 20.

1 opened two new NAT-CC bank accounts, for which only WideVoice
2 employees have access (and NATE employees do not).¹⁸

3 • In 2010, Mr. Jeff Holoubek, the Director of Legal and Finance for Free
4 Conferencing, became President of NAT-CC without even a vote taken
5 by the NAT-CC Board of Directors.¹⁹

6 • In 2010 and 2011, WideVoice made loans to NAT-CC in order to pay
7 for day-to-day operations.²⁰ When AT&T made a large payment to
8 NAT-CC in January 2011, Mr. Holoubek simply directed Mr. Cestero to
9 use most of that payment to payback some of the WideVoice loans.²¹

10 This is not in accordance with the *Service Agreement* that requires that
11 75% - 95% of this amount be paid to Free Conference, and the
12 balance retained by NAT-CC.

13 • Free Conference is the only conference calling company with which
14 NAT-CC is in business. In fact, the *Service Agreement* prohibits
15 NAT-CC from doing business with any other conference calling
16 company.²² In 2010 and 2011, NAT-CC paid Free Conference **[Begin**
17 **Confidential]** \$ ██████████ in "Marketing Fees,"²³ which is actually a
18 sharing of switched access revenues **[End Confidential]**.

19

¹⁸ Mar. 3, 2011 Tr. p. 79.

¹⁹ Mar. 3, 2011 Tr. p. 68.

²⁰ March 3, 2011 Tr. Exh. 26.

²¹ March 3, 2011 Tr. p. 98.

²² *Service Agreement*, paragraph 6.

²³ NAT-CC's 2010 and 2011 Financial Statements, Exhibit RGF-8.

1 **Q. What other evidence is there that NAT-CC was established as a sham**
2 **entity for the purpose of bilking Sprint and other IXCs as part of its**
3 **traffic pumping scheme?**

4 A. As referenced above, NAT-CC does not charge traditional end-users for
5 service. Also, according to the *Service Agreement*, NAT-CC is not charging
6 anything for services and connectivity it provides to Free Conference.²⁴
7 NAT-CC's business plan is to rely on the billing of access charges to IXCs.
8 Mr. Reiman testified on this point. Specifically, he stated:

9 [w]e bill [the IXCs], and that's how this whole big picture works. That's
10 how [sic] the business model is based on.²⁵
11

12 Mr. DeJordy also has commented on the point that the business was
13 established for the purpose of billing access charges. Specifically, he
14 stated:

15 [the] business model is largely dependent on the use of
16 FreeConferenceCall and other services that use its networks to
17 terminate calls.²⁶
18

19 **V. Financial Analysis**

20

21 **A. CCST Profitability**

22

23 **Q. Have you reviewed the financial statements for NAT-CC?**

²⁴ *Service Agreement*, at paragraph 22.

²⁵ Oct. 14, 2010 Tr. p. 66.

²⁶ <http://blog.freeconferencecall.com/?paged=7>.

1 A. Yes. I have reviewed the Balance Sheet and Income Statement (Profit &
2 Loss) for NAT-CC for 2010 and 2011. I have concluded that, consistent
3 with the terms of the *Joint Venture Agreement*, CCST has not financially
4 benefitted from its ownership in NAT-CC, while NATE, WideVoice, and Free
5 Conference are reaping significant windfalls from NAT-CC.

6

7 **Q. What percent ownership does the CCST have in NAT?**

8 A. As discussed above, the CCST owns 51% of NAT-CC. I will use this 51%
9 ownership in the following analysis.

10

11 **1. Balance Sheet**

12

13 **Q. Analyzing NAT-CC's Balance Sheet as of December 31, 2011, has the**
14 **CCST financially benefitted from its ownership position in NAT-CC?**

15 A. No. Through December 31, 2011, the CCST has not financially benefitted
16 from its ownership in NAT-CC. In fact, the CCST has lost substantial value
17 from this business. As of December 31, 2011:

18 **[Begin Confidential]**

- 19 • CCST's share of equity investment is [REDACTED] \$ [REDACTED] due
20 primarily to [REDACTED] in 2010 and 2011,
- 21 • CCST's share of an outstanding long term debt to WideVoice
22 Communications is \$ [REDACTED], and
- 23 • CCST's share of "Total Assets" is only \$ [REDACTED].

1 [End Confidential]

2

3 Thus, as summarized in Table 1, in just two years CCST has experienced a
4 total loss in value of [Begin Confidential] \$ [REDACTED] [End Confidential].

5

[Begin Confidential]

6

Table 1

7

CCST 2010 and 2011 Change in Value

8

A	B	C
Row	Description	Amount
1	Equity Investment	[REDACTED]
2	Loan from WVC	[REDACTED]
3	Total Assets	[REDACTED]
4	Total Value	[REDACTED]

9

10

[End Confidential]

11

12 Q. How did you arrive at these figures?

13 A. As of December 31, 2011, NAT-CC reports cumulative "Retained Earnings"
14 of [Begin Confidential] [REDACTED] \$ [REDACTED], "Net Income" in 2011 of
15 [REDACTED] \$ [REDACTED], and "Shareholder Distributions" of [REDACTED] \$ [REDACTED],
16 which adds to "Total Equity" of [REDACTED] \$ [REDACTED]. Thus, CCST's 51%
17 ownership means that CCST's cumulative "Total Equity" investment in
18 NAT-CC is worth [REDACTED] \$ [REDACTED] ([REDACTED] \$ [REDACTED] * 51%) [End
19 Confidential].

20

21 As of December 31, 2011, NAT-CC also reports an outstanding loan from
22 WideVoice [Begin Confidential] \$ [REDACTED]. Thus, CCST's share of this
23 long term liability is \$ [REDACTED] ([REDACTED] \$ [REDACTED] * 51%) [End Confidential].

24

1 Finally, NAT-CC reports “Total Assets” of **[Begin Confidential]** \$ [REDACTED].

2 Thus, CCST’s share of “Total Assets” is only \$ [REDACTED] [\$ [REDACTED] * 51%]

3 **[End Confidential]**.

4

5 **2. Income Statement (Profit & Loss)**

6

7 **Q. Analyzing NAT-CC’s Income Statements (Profit & Loss) for 2010 and**
8 **2011, has the CCST financially benefitted from its ownership position**
9 **in NAT-CC?**

10 A. No, CCST has not financially benefitted from its ownership in NAT-CC. In
11 fact, the CCST **[Begin Confidential]** [REDACTED] in
12 both 2010 and 2011 **[End Confidential]**.

13

14 Even if NAT-CC was to report an operating profit, it is doubtful that CCST
15 would realize any significant financial benefit. As already discussed in
16 Section IV, under the terms of the *Service Agreement*, NAT-CC pays 75% -
17 95% of its access revenues directly to Free Conference.

18

19 In addition, per the unreasonable terms of its *Joint Venture Agreement*,
20 CCST is entitled to share only a small part of NAT-CC’s total revenue
21 sources.

22

1 Specifically, the *Joint Venture Agreement* states that CCST is allowed only
2 a share of narrowly defined “Net Profits.”

3 **Section 6.01 Net Profits.**

4 Net Profits is defined as: (1) revenue generated from the provision of
5 service to end user customers, including payments and universal
6 service support, but does not include other sources of revenue, such
7 as access charges, related to services provided by third-party
8 businesses to locate on the reservation unless separately identified as
9 NAT-CC revenue in an arrangement with third-party businesses; minus
10 (2) costs associated with the build-out, operation, and maintenance of
11 the telecommunications network on the Crow Creek reservation,
12 including repayment of debt, interest, taxes, and maintenance and
13 operations expenses.
14

15 **Q. Looking at NAT-CC’s 2010 and 2011 Income Statements, is there any**
16 **“Net Profits” attributable to CCST?**

17 A. NAT-CC financials indicate “End User Fee Income” of **[Begin Confidential]**
18 **\$** in 2010 and **\$** in 2011 **[End Confidential]**. Setting aside the
19 limitations on sharing “Net Profits” under the *Joint Venture Agreement*,
20 business expenses would have to be paid before CCST would receive its
21 51% share of its “Net Profits.” Potential CCST “Net Profits” are further
22 limited because less than 10% of tribal members receive telephone service
23 from CCST,²⁷ and they receive that telephone service for free.²⁸ This is
24 supported by the fact that in March 2011, Peter Lengkeek, the Treasurer of
25 CCST, testified that CCST had received no money from NAT-CC.²⁹

²⁷ See Mar. 2, 2011 Tr. pp. 151 and 154, where Mr. Lengkeek testified that there were approximately 115 installations of service. Compare that to the 2000 Census Data, included as Exhibit RGF-10, that shows a total Native American population on the CCST reservation of 1,936.

²⁸ Mar. 3, 2011 Tr. p. 150.

²⁹ Mar. 3, 2011 Tr. p. 171. “Q. My question to you was, isn’t it true the Tribe has received no money from NAT. Isn’t that correct? A: Yes.”

1

2 **B. NATE, WideVoice, and Free Conference Profitability**

3

4 **Q. Have NATE, WideVoice, and Free Conference financially benefitted**
5 **from its ownership position in NAT-CC?**

6 A. Yes, NATE, WideVoice, and Free Conference have profited from their
7 investment in NAT-CC. The terms of the *Joint Venture Agreement* and
8 *Service Agreement* virtually guarantees that NATE, WideVoice, and Free
9 Conference will profit from NAT-CC. Using reasonable assumptions, I
10 estimate that in 2010 and 2011 alone, NATE, WideVoice, and Free
11 Conference collectively have realized a positive cash flow of approximately
12 **[Begin Confidential] \$ [REDACTED] [End Confidential].**

13

14 **Q. How did you arrive at these figures?**

15 A. There are at least four sources of income for NATE, WideVoice, and Free
16 Conference. First, per the terms of the unreasonable *Joint Venture*
17 *Agreement*, NATE and WideVoice get to skim-off 15% of “Gross Revenues”
18 before CCST sees a dime. Specifically, the *Joint Venture Agreement*
19 states:

1 **Section 6.06 WVC and NATE Cost Passthrough Escrow for**
2 **On-Going Operation and Maintenance Costs.**

3 NATE and WVC will incur expenses related to the operation and
4 maintenance of the Crow Creek telecommunications network that may
5 not be readily segregated from the other operation and maintenance
6 expenses incurred by NATE and WVC. To cover such expenses, 15%
7 of gross revenues of NAT-CC shall be set aside and placed in an
8 escrow account for the benefit of NATE and WVC.
9

10 NAT-CC reported “Total Income” of **[Begin Confidential]** \$ ██████████ in
11 2010 and \$ ██████████ in 2011, or a two-year total of \$ ██████████. Note that (1)
12 NAT-CC reports “Total Income” rather than the typical “Total Revenue,” and
13 (2) no “escrow amount” appears on the “Income Statement.” Thus, it
14 appears that the NAT-CC reported “Total Income” is likely calculated after
15 the 15% escrow has been deducted from “Gross Revenue.” The NATE and
16 WideVoice escrow amount for 2010 and 2011 is approximately \$ ██████████
17 [{\$ ██████████ / (1 – 15%)} – ██████████] **[End Confidential]**.

18
19 Second, the majority of NAT-CC’s operational expenses are, in fact, the
20 result of services provided by WideVoice, and Free Conference. Thus,
21 these expenses are, as a result, direct revenue sources to WideVoice, and
22 Free Conference. NAT-CC’s two-year “Marketing Expense” of **[Begin**
23 **Confidential]** \$ ██████████ is, in fact, a revenue sharing arrangement paid
24 directly to the Free Conference, which is owned by Dave Erickson, who also
25 is an owner of WideVoice. In fact, ██████████% of all NAT’s access revenues in
26 2010 and 2011 were paid directly to Free Conference Call **[End**
27 **Confidential]**.

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Third, NAT-CC’s two-year “Repair and Maintenance” of **[Begin Confidential]** \$ [REDACTED] is most likely paid directly to NATE and WideVoice per terms of the *Joint Venture Agreement*³⁰ **[End Confidential]**. In its responses to Sprint’s Discovery Requests, NAT-CC refused to provide information on this expense item. I will assume 100% of this expense item was paid directly to NATE and WideVoice.

Fourth, according to the 2011 NAT-CC’s “Balance Sheet,” NAT-CC has paid a total of **[Begin Confidential]** \$ [REDACTED] of “Shareholder Distributions,” i.e., dividends paid to the owners. At least \$ [REDACTED] of this “Shareholder Distribution” was paid directly to Mr. Reiman and Mr. DeJordy, the owners of WideVoice.³¹ **[End Confidential]**.

In addition, I suspect that some portion of NAT-CC’s two-year “Professional Fees” of **[Begin Confidential]** \$ [REDACTED] and “Consulting Fees” of \$ [REDACTED] is most likely paid directly to NATE and WideVoice per terms of the *Joint Venture Agreement*³² **[End Confidential]**. However, in its responses to Sprint’s Discovery Requests, NAT-CC refused to provide information on these expense items. Without further information, I have not included any of these amounts in this analysis, which makes my estimate conservative.

³⁰ *Joint Venture Agreement*, Articles III and IV.
³¹ Mar. 3, 2011 Tr. p. 76-77.
³² *Joint Venture Agreement*, Articles III and IV.

1

2

The following Table 2 summarizes the estimated total positive cash flow of

3

[Begin Confidential] \$ ██████████ that has been realized by NATE,

4

WideVoice, and Free Conference **[End Confidential]**.

5

[Begin Confidential]

6

Table 2

7

NATE, WideVoice, and Free Conference

8

2010 and 2011 Cash Flows

9

A	B	C
Row	Description	Amount
1	Escrow	██████████
2	Marketing Fee	
3	Repair & Maintenance	
4	Shareholder Distribution	
5	Total	

10

11

[End Confidential]

12

13

C. CCST Vs. NATE, WideVoice, and Free Conference

14

15

Q. What do you conclude about the financial relationship between CCST

16

and NATE & WideVoice?

17

A. As discussed in Section IV, the *Joint Venture Agreement* and *Service*

18

Agreement are intentionally designed to enrich NATE, WideVoice, and Free

19

Conference, while leaving CCST with little financial benefit. Even worse,

20

these contracts will likely leave CCST with a significant liability. Specifically,

21

I have estimated that in 2010 and 2011 NATE, WideVoice, and Free

22

Conference have realized a positive cash flow of approximately **[Begin**

23

Confidential] \$ ██████████, as summarized in Table 2 **[End Confidential]**.

24

This cash has gone directly to entities such as Free Conference and Wide

1 Voice located or operating in California and Nevada. None of this cash will
2 ever benefit the CCST.

3

4 In contrast, CCST has accumulated value of **[Begin Confidential]** [REDACTED]
5 **[\$** [REDACTED], as summarized in Table 1 **[End Confidential]**.

6

7 **D. Future Financial Viability of NAT-CC**

8

9 **Q. Do you believe that NAT-CC is a financially viable entity in the future?**

10 A. No, I do not believe that NAT-CC is a financially viable entity in the future.

11 As already discussed, NAT-CC was established for one reason only, “traffic
12 pumping.” In recent FCC decisions, the FCC has specifically targeted
13 “access stimulation,” its term for “traffic pumping.”

14

15 **Q. How has the FCC targeted “traffic pumping?”**

16 A. In the FCC’s recent *Connect America Order*, the FCC has an entire section
17 titled “Rules To Reduce Access Stimulation.” In this Order, the FCC
18 recognizes the harmful effects of traffic pumping. For example, the FCC
19 explicitly states:

20 The record confirms the need for prompt Commission action to
21 address the adverse effects of access stimulation (¶ 662)

22

23 Access stimulation imposes undue costs on consumers, inefficiently
24 diverting capital away from more productive uses such as broadband
25 deployment. (¶ 663)

26

1 The record indicates that a significant amount of access traffic is going
2 to LECs engaging in access stimulation. ... When carriers pay more
3 access charges as a result of access stimulation schemes, the amount
4 of capital available to invest in broadband deployment and other
5 network investments that would benefit consumers is substantially
6 reduced. (¶ 664)

7
8 Access stimulation also harms competition by giving companies that
9 offer a “free” calling service a competitive advantage over companies
10 that charge their customers for the service. (¶ 665)

11
12 ... excess revenues that are shared in access stimulation schemes
13 provide additional proof that the LEC’s rates are above cost. (¶ 666)
14

15 **Q. Has the FCC explicitly rejected NAT-CC’s premise that assisting Tribal**
16 **lands somehow justifies “traffic pumping?”**

17 A. Yes. NAT-CC’s premise is essentially a “Robin Hood” defense – it’s alright
18 to “rob the bank” as long as the stolen funds are put to good use. However,
19 the FCC has explicitly rejected NAT-CC’s premise that assisting Tribal lands
20 somehow justifies “traffic pumping.” Explicitly, the FCC stated:

21 Several parties claim that access stimulation offers economic
22 development benefits, including the expansion of broadband services
23 to rural communities and tribal lands. Although expanding broadband
24 services in rural and Tribal lands is important, we agree with other
25 commenters that how access revenues are used is not relevant in
26 determining whether switched access rates are just and reasonable in
27 accordance with section 201(b). ... Moreover, Congress created an
28 explicit universal service fund to spur investment and deployment in
29 rural, high cost, and insular areas, and the Commission is taking
30 action here and in other proceedings to facilitate such deployment.
31 (¶ 666)
32

33 For example, the *Connect America Order* has set aside \$50 million of the
34 Phase I Mobility Fund in 2012 specifically for tribal areas, and \$100 million

1 of the Phase II Mobility Fund annual budget in future years specifically for
2 tribal areas.

3

4 **Q. How has the FCC addressed the problem of “traffic pumping?”**

5 A. The FCC established a process where traffic pumping CLECs such as
6 NAT-CC will have to reduce their rates on all intrastate and interstate traffic.
7 In just over four years from now, by July 1, 2016, NAT-CC will have to
8 reduce its rates for all interstate traffic, including “traffic pumping,” to
9 \$0.0007. By July 1, 2017, all traffic will be exchanged on a Bill-and-Keep
10 basis, essentially a \$0.0000 rate.³³

11

12 **Q. What effect will a rate of \$0.0007 have on NAT-CC’s financials?**

13 A. At a rate of \$0.0007, NAT-CC’s business model will almost certainly fail.
14 Table 3, below, restates NAT-CC’s 2011 Income Statement assuming all
15 IXC’s pay the 2016 rate of \$0.0007.

³³ Under a Bill-and-Keep arrangement, carriers do not bill each other for terminating the other carrier’s traffic. In other words, two carriers exchange each other’s traffic without compensation from the other carrier. Instead, all compensation is received from each carrier’s own end-users.

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[Begin Confidential]

Table 3
NAT-CC 2011 Income Statement
Restated for July 2016 Rate of \$0.0007

A Row	B Description	C 2011 Income Statement		E Assumptions
		Actual	At \$0.0007	
1	Minutes			
2	Sprint			13% of IXC total
3	Total Industry			Cell D2 / 13%
4	Rate		\$ 0.0007	July 2016 rate
5				
6	Gross Revenues			Cell D3 * D4
7	15% Escrow			Cell D6 * 15%
8	Revenues			Cell D6 - D7
9				
10	Expenses			
11	Marketing			Cell D8 * 75%
12	All Other Operating Exp.			
13	Total Expenses			
14				
15	Net Income		\$ (327,032)	

6
7
8

[End Confidential]

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As can be seen, at the 2016 rate of \$0.0007, and at current demand and expense levels, NAT-CC will almost certainly lose over \$300,000 per year under the following assumptions:

- Sprint's actual interstate and intrastate minutes terminated to NAT-CC in 2011 were [Begin Confidential] [End Confidential],
- Sprint's minutes are equal to 13% of the total IXC industry,³⁴
- All IXCs pay the \$0.0007 rate on every minute,

³⁴ *Sprint Communications Company, L.P., Plaintiff, vs. Native American Telecom, LLC, and Crow Creek Sioux Tribal Court, Defendants*; United States District Court, District of South Dakota, Southern Division; Civ. 10-4110-KES; Order Denying Defendant Native American Telecom's Motion for a Preliminary Injunction; May 31, 2011, at page 14, Exhibit RGF-9.

- 1 • NAT-CC pays Free Conference a 75% “Marketing Fee” to Free
2 Conference, which is equal to lowest end of the 75% - 95% payout
3 range called for in the NAT-CC – Free Conference *Service*
4 *Agreement*, and
- 5 • All Other Operating Expenses remain unchanged.

6

7 **Q. How does this analysis conclude concerning transport rates under the**
8 **FCC’s *Connect America Order*?**

9 A. This analysis assumes that by 2016, transport will not be a significant
10 source of revenue for NAT-CC under the *Connect America Order*. While
11 the FCC did not address transport rate elements, it did ask for comments
12 and suggestions as part of the FNPRM.

13

14 In addition to “traffic pumping,” NAT-CC is also engaged in “mileage
15 pumping,” a deceptive practice of placing the conference calling company-
16 owned conference bridge equipment as far away as possible from a tandem
17 switch for the sole purpose of inflating transport billings to the IXCs. In
18 other words, rather than designing its network in the most efficient manner
19 possible, as does any rational company, “mileage pumpers” such as
20 NAT-CC intentionally and deliberately design their networks in as inefficient
21 manner as possible – just to inflate the transport billings. South Dakota’s
22 geography is ideal for “mileage pumping.”

23

1 It is clear that the FCC wants to discourage the deceptive practice of
2 “mileage pumping.” Specifically, in the *Connect America Order*, the FCC
3 states:

4
5 Ultimately, **we agree with concerns raised by commenters that the**
6 **continuation of transport charges in perpetuity would be**
7 **problematic.** For example, **the record contains allegations of**
8 **“mileage pumping,” where service providers designate distant**
9 **points of interconnection to inflate the mileage used to compute**
10 **the transport charges.** Further, Sprint alleges that current incumbent
11 LEC tariffed charges for transport are “very high and constitute a
12 sizeable proportion of the total terminating access charges ILECs
13 impose on carriers today.” ... As a result, commenters suggest that
14 perpetuating high transport rates **could undermine the**
15 **Commission’s reform effort and lead to anticompetitive behavior**
16 **or regulatory arbitrage such as access stimulation.** We therefore
17 seek comment on the appropriate treatment of, and transition for, all
18 tandem switching and transport rates in the FNPRM. (¶ 820) (Bold
19 emphasis added.)
20

21 Based on this comment, it would be unreasonable to allow “traffic pumping”
22 and “mileage pumping” LECs such as NAT-CC to continue to bill IXCs
23 outrageous amounts for transport across vast distances for the sole purpose
24 of inflating access billings.

25
26 Assuming the FCC follows through on its intentions to eliminate “mileage
27 pumping” by 2016, transport will not be a significant source of revenue for
28 “traffic pumping” and “mileage pumping” LECs such as NAT-CC.

29
30 **Q. What do you conclude?**

1 A. As already discussed, NAT-CC's sole purpose for existence is to be a
2 "traffic pumper." Even in the best of conditions, i.e., if NAT-CC is somehow
3 able to convince regulatory and legal authorities to require the IXCs to pay
4 NAT-CC's past and current billings, the business model will begin to
5 deteriorate immediately due to the forced rate reductions required by the
6 FCC's *Connect America Order*. The NAT-CC business model will almost
7 certainly fail by 2016 at a rate of \$0.0007, and will certainly fail by 2017
8 under Bill-and-Keep. However, regardless of the authoritative decisions,
9 NATE, WideVoice, and Free Conference will continue to siphon off at least
10 **[Begin Confidential]** \$ [REDACTED] per year (one-half of the two-year estimate
11 of \$ [REDACTED] from Table 2) from NAT-CC's operations **[End Confidential]**.
12 To the extent IXC's actually have to pay, and at a higher rate, NATE,
13 WideVoice, and Free Conference's windfall will be significantly greater.
14
15 However, once the NAT-CC business model inevitably fails, NATE,
16 WideVoice, and Free Conference will exit the market, taking their
17 accumulated windfall with them, leaving CCST responsible for 51% of
18 accumulated losses.

19
20 **VI. Summary and Conclusion**

21

22 **Q. Should NAT-CC be granted certification in South Dakota?**

1 A. No. First, for the reasons set forth in this testimony, the Commission should
2 deny NAT-CC's request for a Certificate, and should prohibit further
3 provision of service by NAT-CC to non-tribal members in the state.

4

5 Second, if the Commission is inclined to grant certification, it should only do
6 so after imposing conditions that address the issues raised in this testimony.

7

8 Finally, before the Commission grants a Certificate to companies that are
9 established for the purpose of operating an "access pumping" scheme, the
10 Commission should consider establishing rules applicable to such
11 operations, including ways to address "mileage pumping" and the intrastate
12 rates that apply to this traffic. It is my opinion that high mileage and high
13 rates are the primary reason that "access pumping" is occurring in rural
14 states such as South Dakota.

15

16 **Q. Does this conclude your Direct Testimony?**

17 A. Yes, it does.

18

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