

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

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**IN THE MATTER OF THE PETITION  
OF NORTH AMERICAN LOCAL, LLC  
FOR DESIGNATION AS AN ELIGIBLE  
TELECOMMUNICATIONS CARRIER  
IN THE STATE OF SOUTH DAKOTA**

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**STAFF’S RESPONSE TO NORTH  
AMERICAN LOCAL, LLC’S REQUEST  
TO AMEND THE OCTOBER 5, 2021,  
ORDER**

**TC19-009**

COMES NOW the South Dakota Public Utilities Commission Staff (“Staff”) and hereby files this Response to North American Local, LLC’s Request to Amend the October 5, 2021, Order.

**Background**

On April 24, 2019, North American Local, LLC (NAL or North American) filed a petition for designation as an eligible telecommunications carrier in the State of South Dakota for purposes of providing lifeline only service (Petition). South Dakota Telecommunications Association (SDTA), Cheyenne River Sioux Tribe Telephone Authority and Boomerang Wireless, LLC dba enTouch Wireless each applied for, and were granted intervention by the Commission.

NAL’s initial Petition requested ETC designation in specific study areas identified in Attachment A of the Petition. The Petition asserted “North American is a facilities-based Commercial Mobile Radio Service (“CMRS”) provider that also uses the facilities of other wireless provider to make available to consumers the best coverage and services to meet their needs.” The Petition, specified, “Consistent with the entry of wireless resellers in the Lifeline market, North American has been granted forbearance from the facilities requirement for purposes of federal Lifeline support” and “North American owns and maintains many network

facilities to provide Lifeline service. These network facilities may result in North American being classified as a facilities-based provider.” (Petition page 6 and 7).

On August 23, 2021, NAL and SDTA filed a Settlement Stipulation to Amend ETC Application and Condition ETC Designation (Stipulation). The Stipulation specified in Recitals, “2) The Applicant resells Commercial Mobile Radio Services (“CMRS”) and does not have current plans to establish facilities in South Dakota.” (Stipulation page 2). Additionally, the Agreement portion of the Stipulation specifies “1.b. Applicant will provide Lifeline service as a wireless reseller, subject to all applicable federal and state requirements.” (Stipulation page 4). Further, in the Stipulation, NAL withdrew its request for statewide designation and agreed the service area shall be limited to South Dakota CenturyLink wire centers and federally recognized Tribal lands in South Dakota, excluding Cheyenne River, and as further specified in section 1.a. of the Agreement section of the Stipulation. (Stipulation page 4).

On October 5, 2021, the Commission issued an Order Approving Settlement Stipulation; Order Granting Lifeline-Only Eligible Telecommunications Carrier Designation in Non-Rural and Certain Tribal Lands’ Service Area.

On March 21, 2022, NAL filed a Letter regarding Clarification of the October 5, 2022, Commission Order (Letter). Specifically, the Letter “requests the Commission clarify NAL’s designation as an ETC is as a facilities-based Lifeline provider eligible for federal Lifeline Support.” (Letter page 1). The letter indicates NAL has been unable to obtain universal service support under this Order. NAL asserts the issue in obtaining the universal services funding is because “USAC is interpreting [the Order’s] language to mean that NAL is a pure wireless reseller in the state of South Dakota” and as such, is ineligible for universal service support. In

the Letter, NAL further indicates it is “not requesting any other changes in its ETC designation.” (Letter page 1).

Based on responses to data requests and conversations with NAL, it is Staff’s understanding that NAL has not been able to access universal service funds. Staff’s understanding is this is because the Order specifies NAL is a reseller and has no facilities in South Dakota, and that the Order does not specifically recognize NAL as a facilities-based carrier in South Dakota. Staff further understands that a carrier must have an approved compliance plan to access universal service support as a reseller. Though NAL indicated in section 15, pages 6-7, of its Petition that NAL had been granted forbearance from the facilities requirement, it is Staff’s understanding that NAL does not have an approved compliance plan required under the forbearance, and NAL is therefore not eligible to receive universal service support as a reseller.

On May 2, 2022, SDTA filed an Objection to North American Local’s Request to Amend the October 5, 2021, Order (Objection). The Objection specified SDTA objected to a modification of the Order because (i) NAL has not demonstrated that it owns facilities in South Dakota for use in the transmission or routing of services designated for support” and “(ii) the FCC has not approved NAL’s compliance plan for forbearance from the facilities requirement.”

### **Analysis**

There is no statute or administrative rule that explicitly provides the Commission may amend or clarify its own orders. However, the Commission, under SDCL 49-1-12 must record every vote and official action, and such a record should accurately reflect the Commission’s action. The Commission has on occasion issued revised orders upon agreement by all parties in a

docket and when there is a clerical or other error in the order so that the language of the order does not reflect the action or intent of the Commission. Based on SDTA's Objection, all parties are not in agreement with changing the language of the Order. However, if the Commission's believes there to be an error, or if the language of the Order does not adequately reflect the Commission's intent, Staff has no issue with the Commission clarifying or modifying the Order to capture the Commission's original intent.

In this case, Staff cannot be one hundred percent sure whether the Commission, in its motion and Order to grant ETC designation to NAL, intended to recognize NAL as a facilities-based carrier in South Dakota, or to approve NAL only as a reseller, however the Order appears consistent with the information available in the docket. In attempting to determine the Commission's intent Staff reviewed the language of the Order, comments made by the Commission when rendering a decision, and the information filed in the docket, including the Stipulation. The language of the Order specifies NAL will provide services in South Dakota via reseller only and that NAL would not have facilities in South Dakota. This language is clear and appears to align with the language of the Stipulation, specifically Recitals 2) and Agreement 1)b) as referenced above. While NAL's initial Petition did assert NAL was a facilities-based provider and has facilities that "may result in North American being classified as a facilities-based provider," (Petition Page 7) it appears the language of the Stipulation specifically amended the Petition and specifies NAL will only resell and not have facilities in South Dakota. Staff is not aware of any comments made at the September 28, 2021, Commission meeting, when the decision was rendered that suggest the Commission considered, or intended, that NAL's ETC certification was based on NAL being a facilities-based carrier. Based on this information, it does not appear to Staff that the Commission intended to designate NAL as a facilities-based

carrier, and it appears the language of the Order is not in error. If this is accurate, the issue seems to be more than a mere language correction and a determination of whether NAL qualifies as a facilities-based carrier must be made.

Staff has reviewed the filings in the docket, and NAL has not sufficiently shown evidence, nor authority, that NAL actually qualifies for a “facilities-based carrier.” Under 47 C.F.R 214(e), to qualify as a facilities-based carrier, the carrier must use its own, or a combination of its own facilities and resale to provide service. In this case, NAL asserted it does have facilities in another state, however, NAL has not shown how those facilities will actually be used to provide services in South Dakota. At this point, Staff has lingering questions regarding how NAL qualifies as a facilities-based provider. Staff concurs with the issues SDTA has raised in the Objection and those concerns should be addressed before NAL could be designated a facilities-based carrier in South Dakota.

Dated this 9<sup>th</sup> Day of May 2022.



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