

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

IN THE MATTER OF THE APPLICATION OF)	ORDER GRANTING
NATIVE AMERICAN TELECOM, LLC FOR A)	MOTION TO TAKE
CERTIFICATE OF AUTHORITY TO PROVIDE)	DEPOSITION; ORDER
INTEREXCHANGE TELECOMMUNICATIONS)	DENYING MOTION TO
SERVICES AND LOCAL EXCHANGE SERVICES)	GRANT TEMPORARY
IN SOUTH DAKOTA)	AUTHORITY
)	
)	
)	TC11-087

On October 11, 2011, the Public Utilities Commission (Commission) received an application from Native American Telecom, LLC (NAT) for a certificate of authority to provide interexchange long distance service and local exchange services in South Dakota. On October 13, 2011, the Commission electronically transmitted notice of the filing and the intervention deadline of October 28, 2011, to interested individuals and entities.

On October 13, 2011, the Commission received a Petition to Intervene by Midstate Communications, Inc. (Midstate). On October 26, 2011, the Commission received a Petition to Intervene by AT&T Communications of the Midwest, Inc. (AT&T). On October 28, 2011, the Commission received a Petition to Intervene from Sprint Communications Company, L.P. (Sprint), Qwest Communications Company LLC dba CenturyLink (CenturyLink), and South Dakota Telecommunications Association (SDTA). On November 1, 2011, CenturyLink re-filed its Petition to Intervene. On November 14, 2011, NAT filed its responses to the petitions for intervention. On November 18, 2011, CenturyLink filed a reply. On November 21, 2011, NAT filed a Notice of Supplemental Authority. On November 22, 2011, the Commission voted unanimously to grant intervention to Midstate, AT&T, Sprint, CenturyLink, and SDTA. On January 12, 2012, NAT filed a Motion Requesting a Protective Order Requiring the Parties and Intervenors to Comply with a Confidentiality Agreement.

On January 27, 2012, NAT filed a revised Application for Certificate of Authority. In its revised application, NAT stated that it seeks to provide local exchange and interexchange service within the Crow Creek Sioux Tribe Reservation which is within the study area of Midstate. On January 31, 2012, the Commission granted the Motion Requesting a Protective Order Requiring the Parties and Intervenors to Comply with a Confidentiality Agreement. On February 17, 2012, NAT filed its direct testimony. On February 22, 2012, the Commission issued an Order for and Notice of Procedural Schedule and Hearing. On March 26, 2012, Sprint and CenturyLink filed their direct testimony and NAT filed a Motion for Summary Judgment. On March 27, 2012, a Stipulation By and Between NAT, Midstate, and SDTA was filed. On April 2, 2012, Sprint filed a Motion to Compel and CenturyLink filed a Motion to Compel Discovery Responses. On April 3, 2012, NAT filed a Motion to Compel Discovery. Responses and replies were filed to the Motions to Compel and the Motion for Summary Judgment. By order dated April 5, 2012, the Commission issued an Amended Order for and Notice of Procedural Schedule and Hearing. On April 20, 2012, NAT filed its reply testimony. On May 4, 2012, the Commission issued an Order Denying Motion for Summary Judgment; Order Granting Motions to Compel; Order Granting in Part and Denying in Part Motion to Compel.

On May 7, 2012, NAT served a Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises in Civil Action on the Commission. On May 16, 2012, the Commission issued an Order Quashing Subpoena.

By order dated April 5, 2012, the hearing in this matter was scheduled for June 7, 2012. On May 18, 2012, CenturyLink filed a letter stating that the parties had reached an agreement for a continuance of the hearing set for June 7, 2012.¹

By order dated January 2, 2013, the Commission set the following procedural schedule that was agreed to by the parties:

January 18, 2013	Documents and other discovery as required by the Commission in its May 4, 2012 order shall be produced
April 1, 2013	All discovery to be completed (fact and expert)
April 8, 2013	NAT's supplemental written testimony is due
May 8, 2013	Intervenors' supplemental written testimony is due
May 29, 2013	All parties' pre-hearing motions are due
June 14, 2013	All parties' responses to pre-hearing motions are due

On April 4, 2013, Sprint filed a Second Motion to Compel/Enforce Prior Commission Order. NAT did not file any supplemental written testimony by April 8, 2013. On April 22, 2013, Sprint filed a Motion to Suspend May 8, 2013 Due Date for Intervenor Testimony. On April 29, 2013, Sprint filed a letter stating that it agreed to have its Second Motion to Compel/Enforce Prior Commission Order and Motion to Suspend May 8, 2013 Due Date for Intervenor Testimony heard on May 21, 2013, rather than on May 7, 2013. On April 30, 2013, Midstate and SDTA filed a Joint Motion for Suspension of May 8, 2013 Deadline for Filing of Intervenor Testimony. On April 30, 2013, CenturyLink filed its Response to Sprint's Motion to Suspend May 8, 2013 Due Date for Intervenor Testimony. On May 2, 2013, AT&T filed its response to Sprint's Motion to Suspend May 8, 2013 Due Date for Intervenor Testimony. At its May 21, 2013, meeting, the Commission granted the suspension motions, granted Sprint's Second Motion to Compel/Enforce Prior Commission Order in part, and denied Sprint's request for fees.

On June 3, 2013, NAT filed an Amended Application for Certificate of Authority. In its amended application, NAT requested a certificate of authority "to provide intrastate interexchange access service for traffic that originates or terminates off of the Crow Creek reservation within the state of South Dakota, pursuant to ARSD 20:10:32:03, 20:10:32:15, and 20:10:24:02." NAT's Amended Application for Certificate of Authority at 1.

By order dated July 3, 2013, the Commission set the following revised procedural schedule that was agreed to by the parties:

¹ On May 14, 2012, NAT filed a Notice of Appeal in circuit court regarding the Commission's Order Granting Intervention and the Order Denying Motion for Summary Judgment; Order Granting Motions to Compel; Order Granting in Part and Denying in Part Motion to Compel. On May 31, 2012, NAT filed a Second Notice of Appeal regarding the Commission's Order Quashing Subpoena. By order dated October 17, 2012, the circuit court dismissed the appeal.

July 26, 2013	NAT's supplemental written testimony is due
August 30, 2013	Intervenors' supplemental written testimony is due
September 20, 2013	All parties' pre-hearing motions are due
October 4, 2013	All parties' responses to pre-hearing motions are due
October 22-24, 2013	Hearing dates (beginning at 1:00 p.m. on October 22)

All parties were required to serve responses to discovery in two weeks.

On July 26, 2013, Sprint filed its Third Motion to Compel. On July 26, 2013, NAT filed Direct Testimony of Jeff Holoubek and Direct Testimony of Brandon Sazue. On August 9, 2013, NAT filed a Notice of Taking Deposition of Randy Farrar and a Notice of Taking Deposition of Sprint. On August 20, 2013, Sprint filed a Motion to Quash Deposition Notices. On August 21, 2013, Sprint filed its Amended Third Motion to Compel. On August 23, 2013, NAT filed a Notice of Change in Corporate Structure.² On August 30, 2013, Sprint filed Direct Testimony of Randy G. Farrar. On August 30, 2013, CenturyLink filed Supplemental Testimony of William R. Easton. On August 30, 2013, Midstate and SDTA filed a letter in lieu of pre-filed testimony. On September 6, 2013, NAT filed its Brief in Opposition to Sprint's Motion to Quash Deposition Notices. By order dated September 27, 2013, the Commission granted in part and denied in part Sprint's Motion to Quash Deposition Notices.

On September 20, 2013, CCT³ filed a Motion for Leave to Take Deposition of Sprint's Expert Randy G. Farrar. CCT also filed a Motion for Grant of Temporary Authority, or in the Alternative, Expedited Decision. On October 3, 2013, Sprint filed a Memorandum in Opposition to CCT's Motion for Leave to Take a Deposition of Randy Farrar and a Memorandum in Opposition to CCT's Motion for Grant of Temporary Authority, or in the Alternative, Expedited Decision. On October 3, 2013, AT&T filed its opposition to CCT's Motion for Grant of Temporary Authority, or in the Alternative, Expedited Decision. On October 3, 2013, CenturyLink filed comments in opposition to CCT's Motion for Grant of Temporary Authority, or in the Alternative, Expedited Decision.

The Commission finds that it has jurisdiction in this matter pursuant to SDCL Chapters 1-26 and 49-31. The Commission may rely upon any or all of these or other laws of this state in making its determination. Transcript citations refer to the October 9, 2013, transcript.

At its October 9, 2013, meeting, the Commission considered CCT's Motion for Leave to Take Deposition of Sprint's Expert Randy G. Farrar. CCT's motion was made pursuant to SDCL 15-6-26(b)(4)(A)(ii) which states that "[u]pon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (4)(C) of this section, concerning fees and expenses as the court may deem

² The notice stated that NAT "has recently merged into a tribally-chartered Limited Liability Corporation – Crow Creek Telecom, LLC – which is majority-owned and controlled by the Crow Creek Sioux Tribe, and is an arm of the Crow Creek Sioux Tribe. As a result of this merger, all of the rights and assets of NAT, including any rights formerly held by NAT in these proceedings, are now held by Crow Creek Telecom, LLC."

³ The parties have now begun to refer to NAT as CCT based on NAT's Notice of Change in Corporate Structure.

appropriate." Pursuant to the Commission's rules of practice, the "taking and use of discovery shall be in the same manner as in the circuit courts of this state." ARSD 20:10:01:22.01.

Sprint opposed the motion, asserting that "absent unusual circumstances, written discovery is sufficient to allow a party to prepare its cross-examination of an opposing expert, and that a judge or jury (or Commissioners) can evaluate expert opinions based on live direct and cross." Sprint's Memorandum in Opposition to CCT's Motion for Leave to Take a Deposition of Randy Farrar at 3. In the event the Commission granted the Motion, Sprint requested that the Commission: 1) find that Mr. Farrar's time should be compensated at \$100 per hour for time spent preparing for and attending the deposition; 2) that the scope of the deposition be limited so that NAT may only ask questions about Mr. Farrar's August 30, 2013, prefiled testimony; and 3) that the deposition be limited to 3.5 hours. Sprint stated that the dollar figure for the average in Mr. Farrar's pay grade is just below \$100.00 an hour and that he is above average in his pay grade. Tr. at 15.

The Commission voted unanimously to grant CCT's Motion for Leave to Take Deposition of Sprint's Expert Randy G. Farrar. In addition, the Commission voted to set the compensation at \$100 per hour, limited to the time spent attending the deposition (Commissioner Fiegen, dissenting). The Commission voted unanimously to deny Sprint's request to limit the scope of the deposition to Mr. Farrar's August 30, 2013 testimony or to limit the length of the deposition to 3.5 hours. The Commission finds these are unnecessary limitations.

In its Motion for Grant of Temporary Authority, or in the Alternative, Expedited Decision, CCT requested "temporary authority to originate and terminate intrastate telecommunications services traffic within the Crow Creek Reservation (the 'Reservation'), and which traffic crosses Reservation boundaries within South Dakota, during the pendency of this proceeding, or, in the alternative, for expedited grant of CCT's Application for Certificate of Authority ('Motion')." CCT's Motion for Grant of Temporary Authority, or in the Alternative, Expedited Decision at 1. CCT stated that "[t]he public interest would be served by permitting CCT to stop blocking calls between residents and businesses on the Reservation and those in other parts of South Dakota while this proceeding is pending." *Id.* CCT stated that "[r]esidential and business customers located on the Reservation, and the Crow Creek Sioux Tribe as a whole, should be permitted full access to the suite of services (including intrastate telephone services) offered by CCT during the remaining pendency of its Application." *Id.* at 3. CCT stated that its application regarded the provision of "intrastate interexchange service for traffic that either originates or terminates off of the reservation within the State of South Dakota." Tr. at 24. CCT further contended "[t]here is no activity that NAT is doing that involves any intrastate telecom services within the State of South Dakota." Tr. at 37. CCT stated that the 605 area code calls referenced by the intervenors are interstate calls. *Id.* CCT stated that "[i]f the Commission chooses not to grant the temporary authority CCT requests, the Commission should expedite this proceeding and reach a final decision as soon as the record contains sufficient information to support granting CCT the requested Certificate of Authority. To be clear, CCT respectfully submits that the record already contains sufficient information to support granting CCT the requested Certificate of Authority." CCT's Motion for Grant of Temporary Authority, or in the Alternative, Expedited Decision at 5-6.

In its opposition to the motion, Sprint stated that:

CCT cannot dodge blame for this timing. CCT's initial application was filed on October 11, 2011, but it amended its application 3.5 months later on January 27, 2012. Then, instead of providing discovery and proceeding to hearing on June 7, 2012, CCT unsuccessfully opposed intervenors' discovery, unsuccessfully demanded discovery from intervenors, and unsuccessfully appealed to district

court, all of which caused a delay of more than 8 months. When the case was jumpstarted by Sprint in late 2012, CCT failed to abide by the Commission's order compelling discovery, and then mooted the new procedural schedule by amending its application again on May 31, 2013. This caused another 6 month delay. Finally, CCT sought new discovery on Sprint very late in the process and then voluntarily moved the October 2013 hearing dates because it had done so.

Sprint's Memorandum in Opposition to CCT's Motion for Grant of Temporary Authority, or in the Alternative, Expedited Decision at 1-2 (emphasis omitted). Sprint pointed out that CCT failed to cite to any statute or rule that would allow the Commission to grant CCT a temporary certificate of authority. *Id.* at 2. Sprint also contended that CCT's claim that CCT has blocked intrastate calls since April of 2013 is not true. *Id.* at 3-4. Sprint further stated that CCT's most recent application requests authority to provide intrastate interexchange access service, which is not even a service provided to Tribal members or Free Conferencing and that "[t]here is no rule that authorizes the Commission to grant a certificate to provide access service." *Id.* at 5, 6 (emphasis in original). Sprint also claimed that Sprint has put forth compelling evidence that CCT is a sham entity and is not financially viable and that CCT's application is incomplete because there are questions regarding its corporate reorganization. *Id.* at 7-8. Regarding CCT's request for an expedited decision, Sprint stated that "[w]hen CCT amended its application in May 2013, it agreed to a hearing date in October 2013. Now, it has voluntarily agreed to push that hearing date back at least until December in order to obtain additional discovery from Sprint. By choosing to forgo an October hearing in favor of discovery, it has waived any claim for an expedited hearing." *Id.* at 9.

AT&T also opposed CCT's motion, contending that a grant of temporary authority is not allowed by rule or statute. AT&T's Opposition at 1. AT&T further stated that the parties are in the process of finalizing a hearing date. *Id.* In addition, AT&T disputed CCT's assertion that CCT has been blocking intrastate calls. *Id.* AT&T stated that "AT&T's network is recording intrastate interexchange traffic from the customers located on the Crow Creek Reservation and other parts of South Dakota." *Id.* AT&T further noted that CCT has entered into a stipulation with Midstate and SDTA that provides that CCT will only provide service within the Fort Thompson exchange, not the entire Crow Creek Reservation as requested in CCT's motion. *Id.* at 2.

CenturyLink opposed the motion, asserting there is a lack of statutory authority to grant temporary authority and that substantial issues have been raised by the intervenors regarding CCT's application. CenturyLink's Comments in Opposition to NAT's Motion at 1-2.

The Commission unanimously voted to deny CCT's Motion for Grant of Temporary Authority, or in the Alternative, Expedited Decision. The Commission finds that CCT has failed to cite to any statutory authority that would allow the Commission to issue a temporary certificate of authority to a telecommunications company. With respect to CCT's request for an expedited decision, the Commission points out that it has scheduled this docket for hearing three times. The Commission further notes that CCT has amended its application twice and, as noted above, has recently submitted a notice that it has changed its corporate structure. With respect to new hearing dates, CCT stated at the meeting that it had replied that morning to Commission Staff's September 23rd email agreeing to the new hearing dates of December 11-12, 2013. *Tr.* at 42. Therefore, this docket is once again scheduled for hearing. The Commission's decision regarding this docket will be issued following the hearing, after the Commission has considered all of the evidence.

It is therefore

ORDERED, that CCT's Motion for Leave to Take Deposition is granted as set forth above; and it is further

ORDERED, that CCT's Motion for Grant of Temporary Authority, or in the Alternative, Expedited Decision is denied.

Dated at Pierre, South Dakota, this 23rd day of October, 2013.

CERTIFICATE OF SERVICE
The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, electronically.
By: <u>[Signature]</u>
Date: <u>10.23.13</u>
(OFFICIAL SEAL)

BY ORDER OF THE COMMISSION:

[Signature]
GARY HANSON, Chairman

[Signature]
CHRIS NELSON, Commissioner

[Signature]
KRISTIE FIEGEN, Commissioner
(Dissenting in part)