

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

<b>IN THE MATTER OF THE APPLICATION OF )</b>	<b>FINAL DECISION AND</b>
<b>NATIVE AMERICAN TELECOM, LLC FOR A )</b>	<b>ORDER; NOTICE OF</b>
<b>CERTIFICATE OF AUTHORITY TO PROVIDE )</b>	<b>ENTRY OF ORDER</b>
<b>INTEREXCHANGE TELECOMMUNICATIONS )</b>	
<b>SERVICES AND LOCAL EXCHANGE SERVICES )</b>	<b>TC11-087</b>
<b>IN SOUTH DAKOTA )</b>	

**PROCEDURAL HISTORY**

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.<sup>1</sup>

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:

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<sup>1</sup> 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.<sup>2</sup> 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, CCT<sup>3</sup> 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 the Motion for Grant of Temporary Authority, or in the Alternative, Expedited Decision. By order dated October 23, 2013, the Commission granted CCT's Motion for Leave to Take Deposition and denied CCT's Motion for Grant of Temporary Authority, or in the Alternative, Expedited Decision. By order dated November 8, 2013, the hearing was set for December 11-12, 2013.

On December 3, 2013, NAT<sup>4</sup> filed a Motion for Continuance of Contested Case Hearing, along with an Affidavit of Scott R. Swier in support of the motion. NAT requested that the hearing be continued because Sprint refused to make its witness, Randy Farrar, available for a deposition on December 5, 2013. NAT stated that NAT and Sprint had previously agreed to the December 5, 2013, date. On December 3, 2013, Sprint filed a Memorandum in Response to NAT's Motion for Continuance, along with an affidavit of Philip R. Schenkenberg supporting its

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<sup>2</sup> 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."

<sup>3</sup> The parties began to refer to NAT as CCT based on NAT's Notice of Change in Corporate Structure.

<sup>4</sup> In its motion, NAT reverted to referring to itself as NAT instead of CCT.

response. Sprint agreed that it and NAT had agreed on the December 5, 2013, date but stated that NAT did not file a Notice of Deposition until November 27, 2013. Sprint stated that since NAT had not filed a notice earlier, Sprint assumed NAT had decided not to conduct the deposition. Sprint stated that its witness was not available to appear as he had other work obligations on that date. Sprint stated that it did not object to NAT's request for a continuance. On December 4, 2013, NAT filed a letter stating that "all the parties to this docket have stipulated to NAT's motion that this contested case hearing be continued by the Commission to a future date." By order dated December 6, 2013, the Commission granted the motion (Commissioner Nelson, dissenting). The parties agreed to new hearing dates of February 24-26, 2014. By order dated December 31, 2013, the hearing was set for those dates. At a prehearing conference call held on January 29, 2014, the parties agreed to dates for the filing of additional testimony, witness lists, exhibits, and motions. In addition, the parties agreed to hold a conference call prior to the hearing to discuss stipulating to exhibits. Witness lists, additional testimony, and exhibits were subsequently filed.

On February 10, 2014, NAT filed a Motion to Strike Expert Testimony of Randy J. Farrar and a Motion to Strike Expert Testimony of William R. Easton. On February 18, 2014, CenturyLink filed a Stipulation as to CenturyLink's Withdrawal from Docket (NAT/CenturyLink Stipulation).

The hearing was held as scheduled on February 24 and 25, 2014. At the beginning of the hearing, the Commission unanimously voted to approve the Stipulation entered into between NAT and CenturyLink. NAT's Motion to Strike Expert Testimony of Randy J. Farrar was denied.

On April 2, 2014, Sprint filed a Motion Regarding Late Filed Exhibits. Post-hearing briefs were filed by NAT, Sprint, Midstate and SDTA, and Commission Staff. On April 21, 2014, Sprint filed a Motion to Strike NAT's Post-Hearing Reply Memorandum and for Sanctions. At its April 30, 2014 meeting, the Commission granted Sprint's Motion Regarding Late Filed Exhibits. The Commission took no action on Sprint's Motion to Strike NAT's Post-Hearing Reply Memorandum and for Sanctions as the Commission was informed that the issues had been resolved with the filing of NAT's revised brief.

At its May 13, 2014 meeting, the Commission considered this matter. The Commission unanimously voted to grant NAT a certificate of authority to provide local and interexchange telecommunications services in the Fort Thompson exchange and found that it did not have primary regulatory authority over the provision of service by NAT to members on the reservation. The Commission also granted NAT a waiver of ARSD 20:10:32:15 pursuant to ARSD 20:10:32:18. The Commission found that it would include in its order NAT's commitment regarding a direct connection to CenturyLink. The Commission also took judicial notice, to the extent necessary, of NAT's updated state sales tax number and new Certificate of Authority from the Secretary of State.

Having considered the evidence of record, applicable law and the arguments of the parties, the Commission makes the following Findings of Fact, Conclusions of Law, and Decision:

## **FINDINGS OF FACT**

### *Procedural Findings*

1. On October 11, 2011, the Commission received an application from NAT for a certificate of authority to provide interexchange long distance service and local exchange services in

South Dakota. In its application, NAT requested a certificate of authority to provide local exchange and interexchange service within the study area of MidState. NAT stated that it "is a tribally-owned full-service telecommunications carrier operating on the Crow Creek Sioux Tribe Indian Reservation pursuant to an *Order Granting Approval To Provide Telecommunications Service* by the Crow Creek Sioux Tribe Crow Creek Utility Authority dated October 28, 2008. Through this application, NAT seeks to expand its authority to include areas within Midstate's study area off of the Crow Creek reservation."

2. 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 22, 2011, the Commission granted intervention to Midstate, AT&T, Sprint, CenturyLink, and SDTA.
3. 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.
4. On February 22, 2012, the Commission issued an Order for and Notice of Procedural Schedule and Hearing, setting the hearing for April 25 and 26, 2012. The parties subsequently agreed to a revised procedural schedule and hearing date which resulted in the hearing being moved to June 7, 2012. *See Amended Order and Notice of Procedural Schedule and Hearing*, dated April 5, 2012.
5. On March 26, 2012, NAT filed a Motion for Summary Judgment. Sprint, CenturyLink, and NAT all filed various Motions to Compel. 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.
6. On March 27, 2012, a Stipulation By and Between NAT, Midstate, and SDTA (NAT/Midstate/SDTA Stipulation) was filed. Midstate/SDTA Exh. 1. As explained in the NAT/Midstate/SDTA Stipulation, NAT had stated that it "intends to provide service only within Midstate's Fort Thompson exchange, all of which is located on the Crow Creek Sioux Reservation." *Id.* at 2. Based upon this representation, neither Midstate nor SDTA objected to NAT's request for a waiver pursuant to ARSD 20:10:32:15. *Id.*
7. 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.
8. 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. The parties agreed to a continuance of the hearing set for June 7, 2012, and the hearing was continued by order dated May 29, 2012. By order dated October 17, 2012, the circuit court dismissed NAT's appeal.

9. By order dated January 2, 2013, a new procedural schedule was set that had been agreed to by the parties. See *Order Setting Procedural Schedule*, dated January 2, 2013. Pursuant to the Order, NAT's supplemental written testimony was due April 8, 2013. NAT did not file any supplemental written testimony and the Intervenor's deadline for filing its supplemental testimony was suspended at the request of the Intervenor. *Order Granting Motions to Suspend Testimony Deadline; Order Granting in Part Motion to Compel/Enforce; Order Denying Request for Fees*, dated May 30, 2013.
10. 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 Exh. 1 at 1 (*Amended Application*).
11. By order dated July 3, 2013, the Commission set another revised procedural schedule that was agreed to by the parties. The hearing was set for October 22-24, 2013. *Amended Procedural Schedule*, dated July 3, 2013.
12. On August 23, 2013, NAT filed a Notice of Change in Corporate Structure. 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."
13. The hearing date was subsequently moved to December 11-12, 2013. *Order Granting Motion to Take Deposition; Order Denying Motion to Grant Temporary Authority*, dated October 23, 2013; *Order for and Notice of Hearing*, dated November 8, 2013.
14. On December 3, 2013, NAT filed a Motion for Continuance of Contested Case Hearing and on December 4, 2013, NAT filed a letter stating that all the parties had stipulated to a continuance. By order dated December 6, 2013, the Commission granted the continuance. *Order Canceling Hearing*, dated December 6, 2013. The parties agreed to new hearing dates of February 24-26, 2014. *Amended Order For and Notice of Hearing*, dated December 31, 2013.
15. On February 10, 2014, NAT filed a Motion to Strike Expert Testimony of Randy J. Farrar and a Motion to Strike Expert Testimony of William R. Easton. On February 18, 2014, CenturyLink filed a Stipulation as to CenturyLink's Withdrawal from Docket (NAT/CenturyLink Stipulation). In the NAT/CenturyLink Stipulation, NAT agreed to make a "direct connection available to CenturyLink at rates identical to those CenturyLink offers and under reasonable terms and conditions."
16. Throughout this proceeding, prefiled testimony was filed by Sprint, CenturyLink, and NAT. The hearing was held as scheduled on February 24 and 25, 2014. At the beginning of the hearing, the Commission unanimously voted to approve the NAT/CenturyLink Stipulation. NAT's Motion to Strike Expert Testimony of Randy J. Farrar was denied. Mr. Farrar is a regulatory policy manager with Sprint and provides "financial, economic, and policy analysis concerning interconnection, switched and special access, reciprocal compensation, and other telecommunications issues at both the state and federal level." Sprint Exh. 1 at 1-2. The Commission found that Mr. Farrar's testimony meets the requirements to testify as a witness before the Commission. The Commission found that it has the ability to independently determine the weight and credibility of the witnesses that

appear before it and SDCL 1-26-19.1 provides the Commission with additional discretion regarding the admission of evidence.

17. NAT, Sprint, Midstate, SDTA, and Commission Staff appeared at the hearing. NAT presented five witnesses at the hearing. The witnesses were Brandon Sazue, Chairman of the Crow Creek Sioux Tribe; Gene DeJordy, founder of Native American Telecom Enterprise, LLC; Jeff Holoubek, President of NAT and Director of Legal and Finance for Free Conferencing Corporation; Dave Erickson, founder and CEO of Free Conferencing Corporation; and Carey Roesel, vice-president and consultant for Technologies Management, Inc. Sprint presented one witness, Randy Farrar, who is the Regulatory Policy Manager for Sprint United Management, the management subsidiary of Sprint Corporation.
18. On April 2, 2014, Sprint filed a Motion Regarding Late Filed Exhibits. Post-hearing briefs were filed by NAT, Sprint, Midstate and SDTA, and Commission Staff.
19. On April 21, 2014, Sprint filed a Motion to Strike NAT's Post-Hearing Reply Memorandum and for Sanctions. On April 29, 2014, NAT filed a revised Reply Memorandum.
20. On May 2, 2014, NAT filed in this docket its recently issued certificate of authority from the Secretary of State. On May 12, 2014, NAT filed in this docket its new state sales tax license.
21. At its April 30, 2014 meeting, the Commission granted Sprint's Motion Regarding Late Filed Exhibits. The Commission took no action on Sprint's Motion to Strike NAT's Post-Hearing Reply Memorandum and for Sanctions as the Commission was informed that the issues had been resolved with the filing of NAT's revised brief. See *Order Granting Motion*, dated May 2, 2014.
22. At its May 13, 2014 meeting, the Commission unanimously voted to grant NAT a certificate of authority to provide local and interexchange telecommunications services in the Fort Thompson exchange and found that it did not have primary regulatory authority over the provision of service by NAT to members on the reservation. The Commission also granted NAT a waiver of ARSD 20:10:32:15, pursuant to ARSD 20:10:32:18. The Commission found that it would include in its order NAT's commitment regarding a direct connection to CenturyLink. The Commission also took judicial notice, to the extent necessary, of NAT's updated state sales tax number and new certificate of authority from the Secretary of State.

#### *Scope of Application*

23. NAT's *Amended Application* provided information for the requirements for obtaining a certificate of authority pursuant to ARSD 20:10:24:02, interexchange authority, and ARSD 20:10:32:03, local exchange authority. The Commission's authority to grant local exchange authority is pursuant to SDCL 49-31-71. The Commission's authority to grant interexchange authority is pursuant to SDCL 49-31-3. 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 Exh. 1 at 1. The Commission points out that "interexchange" service is a service provided between exchanges by an interexchange or toll provider. Exchange "access" is a service provided by a local exchange provider. Although the terminology used by NAT in its *Amended Application* may lack some clarity, NAT clearly stated that it was applying for authority under both the rules regarding applications for local exchange authority (ARSD

20:10:32:03) and interexchange authority (ARSD 20:10:24:02). Some of the lack of clarity is likely due to the questions regarding jurisdiction of the Commission over NAT. See Tr. at 303-05; see also Conclusions of Law 58-60. NAT stated that it intended to make its application "as broad as was necessary to get whatever authority that this Commission determined it needed." NAT's Reply Memorandum at 5-6. NAT submitted an application that addressed the rules applying to both interexchange and local exchange authority and the Commission finds NAT's *Amended Application* applies to both interexchange and local exchange authority.

*Technical, Financial, and Managerial Capabilities*

24. An applicant for a certificate of authority must show that it has sufficient technical, financial and managerial capabilities to offer telecommunications services. See SDCL 49-31-3, 49-31-71.
25. In its *Amended Application*, NAT stated that it "is a tribally-owned full-service telecommunications carrier providing local exchange and interexchange telecommunications services on the Crow Creek reservation pursuant to an *Order Granting Approval To Provide Telecommunications Service* by the Crow Creek Sioux Tribal Utility Authority dated October 28, 2008." NAT Exh.1 at 1; see also NAT Exh. 2.
26. At the time its *Amended Application* was filed, NAT was a tribally-owned telecommunications company that was organized as a limited liability company under the laws of South Dakota. NAT Exh. 1 at 2. At the hearing, NAT presented a certificate of organization of Crow Creek Telecom, LLC issued by the Crow Creek Sioux Tribe. NAT Exh. 22 at 1. The certificate referred to Crow Creek Telecom LLC as a limited liability company formed as a project company of the Crow Creek Sioux Tribe. *Id.* NAT submitted Articles of Merger and Addendum and an Agreement and Plan of Merger Among Native American Telecom, LLC and Crow Creek Telecom, LLC. NAT Exhs. 20 and 21. Following the merger, the name was changed back to NAT. Tr. at 249. The membership interests in the company are: 1) 51% held by Crow Creek Holdings, LLC, an LLC wholly owned by the Crow Creek Sioux Tribe; 2) 25% held by Native American Telecom Enterprise, LLC (NATE); and 3) 24% held by WideVoice Communications, Inc. (WideVoice). NAT Exh. 23 at 1. The Commission finds that NAT has provided a sufficient explanation of its organizational structure.
27. NATE is "a business development company working with Native American Indian Tribes on economic development matters, including the establishment of tribally-owned broadband and telecommunications companies." NAT Exh. 11 at 5-6.
28. WideVoice is an engineering and consulting company that manages NAT's network. Tr. at 306.
29. NAT's Board of Directors consists of three directors from the Crow Creek Sioux Tribe, three directors from NATE, and three directors from WideVoice. Exh. 11 at 5.
30. In its *Amended Application*, NAT provided a copy of its certificate of authority from the Secretary of State from 2008 when NAT was a domestic limited liability company. NAT Exh. 1, attached as Exh. A. This certificate of authority was not in effect at the time of hearing. Tr. at 250-51. Following the hearing, NAT applied for a certificate of authority as a foreign limited liability company with the Secretary of State. The certificate was issued on April 23, 2014, and filed in this docket on May 2, 2014. On May 12, 2014, NAT filed in this



docket its new state sales tax license. As its May 13, 2014 meeting, the Commission took judicial notice of these documents, to the extent necessary.

### *Technical Capabilities*

31. Regarding technical capabilities, NAT provides service through its own facilities on the Crow Creek Reservation. NAT Exh. 11 at 14-15. NAT uses WiMAX (Worldwide Interoperability for Microwave Access) technology that operates in the 3.65 GHz licensed spectrum. *Id.* at 14. This “network supports high-speed broadband services, voice service, data and Internet access, and multimedia.” *Id.* at 15. Through this network, NAT delivers wireless Internet Protocol (IP) voice and data communications. *Id.* NAT installs a receiver at the location of the customer in order for the customer to receive service. *Id.* In addition, NAT has “established connectivity with telecommunications carriers, including Midstate Communications, to provide its customers with access to 911, operator services, interexchange services, directory assistance, and telecommunications relay services.” NAT Exh. 3 at 9. Sprint’s witness did not dispute that NAT was capable of running the company from a technical standpoint. Tr. at 581. The Commission finds that NAT has shown it has sufficient technical capabilities.

### *Financial Capabilities*

32. Regarding NAT’s financial capabilities, NAT provided financial information with its *Amended Application*. NAT Exh. 1, attached Exh. C. NAT later provided additional financial information. NAT Exh. 13. NAT has a revenue-sharing agreement with Free Conferencing Corporation (Free Conferencing).<sup>5</sup> Free Conferencing provides conference calling to consumers without the fees associated with organizing and facilitating conference calls. NAT Exh. 5 at 2. Free Conferencing’s business model is focused “on earning income through revenue-sharing agreements with Local Exchange Carriers.” NAT Exh. 9 at 5. These revenue sharing agreements typically involve the revenue from access charges that interexchange carriers or wireless carriers pay local exchange carriers. See 47 C.F.R. § 61.3 (bbb)(1)(i).
33. The Federal Communications Commission (FCC) has defined the conditions under which a revenue sharing agreement will meet the definition of access stimulation. *Id.* The FCC requires local exchange carriers engaged in access stimulation to reduce their interstate switched access tariff rates.<sup>6</sup> In addition, the FCC has implemented a multi-year transition to gradually reduce access charges to bill-and-keep.<sup>7</sup> Bill-and-keep is an arrangement in which “carriers exchanging telecommunications traffic do not charge each other for specific transport and/or termination functions or services.” 47 C.F.R. § 51.713.
34. Sprint asserted that NAT’s business plan is reliant on access revenues from access stimulation and that the FCC-mandated reductions and future elimination of those revenues means that NAT does not have a viable financial future. Sprint Exh. 1 at 27-28. Sprint contended that it is impossible for NAT “to be profitable in the future if ‘traffic pumping’

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<sup>5</sup> See *infra* Finding of Fact 51 for an explanation of the revenue-sharing agreement entered into between NAT and Free Conferencing.

<sup>6</sup> See *infra* Findings of Fact 46-48 for a more detailed explanation of access stimulation.

<sup>7</sup> See *infra* Finding of Fact 49 for an explanation of this transition.

remains its sole business purpose.”<sup>8</sup> Sprint also had issues with NAT’s financial statements. Sprint Conf. Exh. 2 at 27-34.

35. NAT contended that it “has the financial capability to provide telecommunications services on the Crow Creek reservation, as demonstrated by its more than 4 years in business and providing competitive local exchange service on the Crow Creek reservation.” NAT Exh. 3 at 14. An NAT witness stated that “[b]y building a telecommunications infrastructure that can support economic development, NAT is enabling technology companies to locate and/or do business on the Crow Creek reservation. Free Conferencing Corporation is now located on the Crow Creek reservation and there are on-going discussions with other businesses, including call centers, wireless service providers, and internet and radio providers.” *Id.* at 14-15. NAT has plans for expansion of service on the Crow Creek reservation. NAT entered into a purchase agreement with Sprint for 1.8 Ghz of spectrum that NAT intends to use to provide expanded coverage, enhanced services, and new services, including roaming. NAT Exh. 3 at 11. In addition, NAT’s witness stated that NAT and the Crow Creek Sioux Tribe are “charting a course for economic development in a historically under-developed area of the country.” *Id.* at 16. Crow Creek Holdings has filed an application for participation “in the HUBZone Program, which among other things, enables the Tribe, through NAT, to participate in sole source government contracts.” NAT Exh. 3 at 16; see also NAT Exh. 3, attached Exh. F. NAT’s witness stated that this application “was the culmination of a year-long initiative and has since been followed by the filing of a Tribal 8(a) Business Development Program application, all of which position the Crow Creek Sioux Tribe and its tribally-owned businesses to participate in programs under the Buy Indian Act.” NAT Exh. 3, attached as Supplemental Direct Testimony of Gene DeJordy at 5. In addition, the CEO of Free Conferencing stated that when access goes to bill-and-keep, Free Conferencing’s customers will still need conferencing services and will pay for such services. Tr. at 367. To account for these changes in the business, he stated that Free Conferencing will then restructure its business arrangement with NAT. Tr. at 368-69. He stated that it is his intent to keep doing business on the reservation. Tr. at 363.
36. When evaluating whether a company has sufficient financial capabilities to receive a certificate of authority, the Commission takes into consideration the applicant’s financial statements; whether it is a start-up company; if not a start-up company, how it has operated as a telecommunications company; and its business plan and commitments for the future. The Commission does not base its decision regarding financial capabilities solely on financial statements, as it is not uncommon for a company starting to operate, or in the beginning years of operation, to not have a positive cash flow. The Commission has reviewed NAT’s financial statements, its operation as a telecommunications company, and its business plans. To date, NAT’s revenues are reliant on its business relationship with Free Conferencing. NAT Exh. 1, attached Exh. C; NAT Exh. 13. The Commission recognizes that, as with other telecommunications companies, the FCC’s order transitioning access revenue to bill-and-keep will negatively affect NAT’s revenues. In recognition of this issue, the Commission finds that NAT is actively planning for a future without these revenues. NAT has purchased spectrum that it intends to use to provide expanded coverage, enhanced services, and new services on the reservation. NAT Exh. 3 at 11. Crow Creek Holdings has filed for participation in the HUBZone program. NAT Exh. 3, attached Exh. F. Free Conferencing has made commitments regarding its continuation of a business relationship with NAT that is not dependent on access charges. Tr. at 368-69. The telecommunications industry is going through many changes and NAT is developing a business model to adapt to those changes. Therefore, taking into consideration the entirety

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<sup>8</sup> *Id.* at 28. “Traffic pumping” is another term for “access stimulation.”

of evidence regarding financial capabilities, the Commission finds that NAT has shown it has sufficient financial capabilities to be granted a certificate of authority.

### *Managerial Capabilities*

37. In its *Amended Application* and testimony, NAT provided a list of key management personnel and their qualifications. NAT Exh. 1, attached as Exh. B; NAT Exh. 11 at 5-11. A number of the key personnel listed showed that they had many years of experience in the telecommunications field, and some of the personnel also had experience in legal, management, and regulatory fields. *Id.*
38. Sprint contested NAT's managerial capabilities. Sprint contended that NAT has been operating illegally for more than four years. Sprint's Post-Hearing Brief at 40-41; Sprint Exh. 1 at 12-13. Sprint further asserted that NAT was a "sham" entity that was "established for the sole purpose of 'traffic pumping.'" Sprint Exh. 1 at 7. Sprint contended that NAT has "brought very little benefit" to the Crow Creek Sioux Tribe but has provided "significant financial benefit to NATE, WideVoice, and Free Conferencing Corporation." Sprint Exh. 1 at 15. Sprint raised other managerial issues, including mistakes made by NAT's management in the operation of the company, the relationship between NAT and Free Conferencing, the exclusivity clause in one of the service agreements, and the lack of paying customers other than Free Conferencing. Sprint's Post Hearing Brief at 41-47.
39. In response to Sprint's contention that NAT was a sham entity that brought little benefit to the Tribe, NAT pointed to its Internet library and Internet Technology and Learning Center. NAT "provides the Crow Creek Sioux Tribe with an Internet library with six computers, located within the Tribal Headquarters. NAT also provides an additional facility for use by Tribal members called the Native American Telecom Internet Technology and Learning Center. The Internet Technology and Learning Center is located in a stand-alone building with eleven (11) PCs and Apple computers for tribal members to use." NAT Exh. 11 at 16. NAT also pointed to the "high speed broadband and telephone installations" provided to over 150 tribal members on the Reservation. *Id.* These services are provided at no cost to tribal members. Tr. at 95.
40. In addition, Brandon Sazue, the Chairman of CCST stated:

Through NAT, tribal members now have access to affordable advanced broadband and basic voice telecommunications services on the Crow Creek Reservation, along with free Internet and computer access at its new Internet Library and Technology Center. The Tribe is also taking advantage of NAT's deployment of a telecommunications infrastructure to (i) develop private sector incentive programs, such as the Minority Business Enterprise Program, (ii) engage in new business as a tribally-owned enterprise, (iii) establish a foreign trade zone on the Crow Creek reservation, and (iv) expand access to information and services to enable tribal members to take advantage of programs and services aimed at addressing the social needs of the Reservation.

NAT Exh. 12 at 4.
41. Regarding the operation of NAT prior to receiving a certificate of authority from the Commission, the Commission notes that this application involved jurisdictional issues regarding the scope of the Commission's jurisdiction over NAT's provisioning of services on the Crow Creek Reservation. Prior to filing this application, NAT had sought, and received, authority to operate from the Crow Creek Tribal Utility Authority. Exh. 11 at 11; NAT Exh. 2.

Under these unique circumstances, the Commission finds that NAT's operation without a certificate of authority does not bar it from receiving a certificate of authority.

42. The Commission points out that some of the issues raised by Sprint involve mistakes made by NAT that NAT has sought to correct. These include the incorrect filling out of FCC forms and the use of a company credit card. The Commission notes that following the incorrect filling out of FCC forms by an employee, NAT used its consulting firm to prepare the FCC filings. Tr. at 407-08. Regarding the company credit card, it was later determined that certain expenses on the credit card should not be classified as NAT specific expenditures. Tr. at 127-28. The Commission further points out that the exclusivity clause for Free Conferencing has been removed in a subsequent service agreement. Tr. at 273; Sprint Conf. Exh 34 at 10. The lack of additional paying customers is largely due to the decision to provide free services to tribal member. Tr. at 95. Regarding the close relationship between Free Conferencing and NAT, the Commission finds that Sprint has raised some issues that show that NAT and Free Conferencing need to make improvements to its processes. The Commission fully expects that NAT and Free Conferencing will improve its processes to ensure that full disclosure of its transactions are provided and all necessary approvals are received.
43. Regarding Sprint's argument that NAT is a "sham entity" that has brought little benefit to the tribe, the Commission first notes that Sprint's contention that NAT has brought little benefit to the Crow Creek Sioux Tribe was refuted by the chairman of the tribe. See NAT Exh. 12 at 4. NAT is providing high-speed broadband and voice services to tribal members. NAT Exh. 11 at 16. It is providing access to the internet through an Internet Library and the Internet Technology and Learning Center. *Id.* In addition, NAT and the tribe are actively seeking additional development opportunities. NAT Exh. 3 at 11-16. NAT has acquired spectrum from Sprint that it intends to use to provide new and enhanced services. *Id.* at 12-13. Further, NAT has now become a limited liability company of the Crow Creek Sioux Tribe. NAT Exh. 22 at 1. The Commission does not find that NAT is a sham entity.
44. NAT has shown that its management has experience in the provisioning of telecommunications services as well as legal and management experience. Exh. 1, attached Exh. B; Exh. 11 at 5-11. The Commission has considered Sprint's issues with NAT's management and finds that these issues do not rise to the level of denying NAT a certificate of authority. The Commission finds that NAT has shown it has the managerial capabilities to receive a certificate of authority.

#### *Public Interest*

45. Sprint contended that granting a certificate of authority to NAT is not in the public interest due to NAT's business plan. Sprint's Post-Hearing Brief at 33-40. Sprint cites to NAT's involvement in access stimulation and the money that is received by Free Conferencing through NAT and Free Conferencing's service agreement. *Id.*
46. The FCC stated that "[a]ccess stimulation occurs when a LEC with high switched access rates enters into an arrangement with a provider of high call volume operations such as chat lines, adult entertainment calls, and 'free' conference calls. The arrangement inflates or stimulates the access minutes terminated to the LEC, and the LEC then shares a portion of the increased access revenues resulting from the increased demand with the 'free' service provider, or offers some other benefit to the 'free' service provider." *Connect America Fund*, WC Docket No. 10-90 *et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17874, at para. 656 (2011) ("*Transformation Order*").

47. The FCC found that “[a]ccess stimulation schemes work because when LECs enter traffic-inflating revenue-sharing agreements, they are currently not required to reduce their access rates to reflect their increased volume of minutes. The combination of significant increases in switched access traffic with unchanged access rates results in a jump in revenues and thus inflated profits that almost uniformly make the LEC’s interstate switched access rates unjust and unreasonable under section 201(b) of the Act.” *Transformation Order*, 26 FCC Rcd at 17874, para. 657. In order to correct this, the FCC did not prohibit the practice of access stimulation but instead required local exchange carriers engaged in access stimulation to reduce their “interstate switched access tariff rates to the rates of the price cap LEC in the state with the lowest rates...” *Id.*; see also 47 C.F.R. § 61.3(bbb). The FCC declined to ban revenue-sharing arrangements. *Transformation Order*, 26 FCC Rcd at 17879, para. 672.

48. The specific FCC rule that defines access stimulation states as follows:

*Access stimulation.* (1) A rate-of-return local exchange carrier or a Competitive Local Exchange Carrier engages in access stimulation when it satisfies the following two conditions:

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

(ii) Has either an interstate terminating-to-originating traffic ratio of at least 3:1 in a calendar month, or has had more than a 100 percent growth in interstate originating and/or terminating switched access minutes of use in a month compared to the same month in the preceding year.

(2) The local exchange carrier will continue to be engaging in access stimulation until it terminates all revenue sharing arrangements covered in paragraph (a)(1)(i) of this section. A local exchange carrier engaging in access stimulation is subject to revised interstate switched access charge rules under §61.38 and §69.3(e)(12) of this chapter.

47 C.F.R. § 61.3 (bbb).

49. In addition to the FCC rules that specifically apply to access stimulation traffic, the FCC also implemented comprehensive intercarrier compensation reform. Under this reform, the FCC adopted a multi-year gradual reduction in terminating access rates until the rates are reduced to bill-and-keep. *Transformation Order*, 26 FCC Rcd at 17904, 17905, paras. 736, 739. These reductions affect both interstate and intrastate access rates. *Id.* at 17934, para. 801.

50. NAT submitted three tariffs into the record. One was an access service tariff filed with the FCC for interstate traffic. NAT Exh. 17. NAT also submitted an access services tariff and a telecommunications services tariff. NAT Exhs. 16 and 18. NAT's consultant stated that NAT reduced its interstate rates to the levels required by the FCC's *Transformation Order* in advance of the order. NAT Exh. 4 at 5-6. The consultant also stated that NAT chose to mirror its interstate rates in the intrastate tariff about a year and a half before being required to do so by the FCC's intercarrier compensation reform. *Id.* at 6.
51. NAT is engaged in access stimulation. Tr. at 295-96; NAT Exh. 4 at 5-6; Sprint Exh. 29 at 6-7. The 2009 Service Agreement entered into between NAT and Free Conferencing, provided that Free Conferencing could retain 75% to 95% of the gross revenues received from interexchange traffic terminating on Free Conferencing's equipment. Sprint Exh. 4 at 9. An NAT witness stated that Free Conferencing has never received more than 75% of collected revenues, and never intended to receive more than 75% of collected revenues. NAT Exh. 11 at 18.
52. Sprint did not dispute that NAT is complying with the transition and access stimulation rules as set forth by the FCC. Tr. at 540-41.
53. The Commission finds that it is in the public interest to grant NAT a certificate of authority. The Commission finds that, under the specific facts of this case, NAT's involvement in access stimulation does not warrant denial of its application for a certificate of authority. The Commission notes that the FCC declined to ban revenue-sharing arrangements and promulgated rules to limit adverse effects of access stimulation through its mandated reductions in access rates charged by those companies engaged in access stimulation and mandated reductions in access rates through the FCC's intercarrier compensation reform. As required by the FCC's Transformation Order, NAT's access rates have been reduced. The Commission has found that NAT is not a sham entity. See Finding of Fact 43. The Commission further notes that NAT has plans for further expansion of telecommunications services that do not include access stimulation. See Finding of Fact 36.

#### *NAT's Service Area*

54. Pursuant to ARSD 20:10:24:02(8) and ARSD 20:10:32:03(9), an applicant must describe its service area it proposes to serve. In its *Amended Application*, NAT stated that it would provide service within the boundaries of the Crow Creek Reservation. NAT Exh. 1 at 8. However, this service area was narrowed pursuant to a stipulation, entered into among NAT, Midstate, and SDTA, that limits the provision of services by NAT to the Fort Thompson exchange. Midstate/SDTA Exh. 1. The boundaries of the Crow Creek Sioux Reservation extend beyond the Fort Thompson exchange. The boundaries of the Fort Thompson exchange are shown by the map submitted by Midstate. Midstate/SDTA Exh. 3. The Commission finds that, based on the NAT/Midstate/SDTA Stipulation, that NAT's service area is the area of the Fort Thompson exchange.
55. Pursuant to ARSD 20:10:32:15, an applicant seeking authority to provide local exchange service in the service area of a rural telephone company is required to satisfy service requirements imposed pursuant to 47 U.S.C. § 214(e)(1) and any applicable federal regulations. One of the requirements of section 214 (e)(1) is that a carrier offer services throughout the incumbent carrier's service area. By offering service only in the Fort Thompson exchange, NAT would not be offering service throughout Midstate's service area, which is comprised of a number of exchange areas. Midstate/SDTA Exh. 3. NAT requested a waiver of ARSD 20:10:32:15. Pursuant to the NAT/Midstate/SDTA Stipulation, Midstate and SDTA did not object to this waiver. The requirement to serve the entire

service area of a rural incumbent local exchange carrier is designed to ensure that a competitive local exchange carrier does not serve only the most populated areas of an incumbent local exchange carrier's service area. In this case, the affected incumbent local exchange carrier, Midstate, has agreed to the waiver. Pursuant to ARSD 20:10:32:18, the Commission grants the requested waiver of ARSD 20:10:32:15. Consistent with ARSD 20:10:32:18, the Commission finds that the granting of this waiver is in the public interest, that it does not adversely impact universal service, and that quality of service shall continue.

#### *NAT/CenturyLink Stipulation*

56. In the NAT/CenturyLink Stipulation regarding CenturyLink's withdrawal from this case, NAT agreed to make a "direct connection available to CenturyLink at rates identical to those CenturyLink offers and under reasonable terms and conditions." The Stipulation further provided that NAT and CenturyLink consented "to this commitment being included in any commission order granting NAT a certificate of authority in this proceeding." In exchange for NAT's commitment regarding the direct connection, CenturyLink withdrew its objection to NAT's application. The Commission approved this stipulation.
57. To the extent that any conclusion of law set forth below is more appropriately a finding of fact, that conclusion of law is incorporated by reference as a finding of fact.

### **CONCLUSIONS OF LAW**

1. The Commission has jurisdiction in this matter pursuant to SDCL Chapters 1-26 and 49-31, including SDCL 1-26-17 through 1-26-25, 49-31-3, 49-31-5, and 49-31-69 through 49-31-72.
2. Regarding the issue of the Commission's jurisdiction, the South Dakota Supreme Court has found that the Commission's intrastate authority is extensive and crucial. *Cheyenne River Sioux Tribe Telephone Authority v. Public Utilities Commission of South Dakota*, 1999 SD 60, ¶ 21, 595 N.W.2d 604, 609. The South Dakota Supreme Court stated:

The regulatory scheme of telecommunications services specifically grants PUC authority and jurisdiction over intrastate facilities. See 47 USC §152(b). The authority of PUC 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.* This decision involved the Commission's jurisdiction over the sale by U S WEST of telephone exchanges located on the Cheyenne River Sioux Indian Reservation and the Standing Rock Sioux Indian Reservation.

3. The Commission points out that this case involves a telecommunications company that is a limited liability company formed under the Crow Creek Sioux Tribe in which the tribe is the majority owner. See Finding of Fact 26. The requested service area is on the reservation. See Finding of Fact 54. The United States Supreme Court has found that Indian tribes possess "attributes of sovereignty over both their members and their territory...." *Montana v. United States*, 450 U.S. 544, 563, (1981), citing *United States v Wheeler*, 435 U.S. 313,

323 (1978). NAT's service is not limited to tribal members, as it also provides service to Free Conferencing. See Finding of Fact 32. In *Montana*, the court found that the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." *Montana*, 450 U.S. at 564. Regarding jurisdiction over nonmembers, the Court generally found that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Id.* at 565. The Court then found that there were two exceptions to this general rule. The first is that "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Id.* The second exception is that "[a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566.

4. The Commission finds it has the necessary jurisdiction to grant a certificate of authority to NAT pursuant to SDCL chapter 49-31 and 47 U.S.C. § 152(b). However, the Commission finds that it does not have primary regulatory authority over the provision of service by NAT to members on the reservation as NAT is a telecommunications company operating on the Crow Creek Reservation as a limited liability company formed under the Crow Creek Sioux Tribe. Since this is an application for a certificate of authority, the Commission makes no findings on whether any specific nonmember that receives service from NAT has consented to jurisdiction as set forth in the first *Montana* exception.<sup>9</sup> Regarding the second *Montana* exception, the Commission finds there has been no showing that the requirements of this exception have been met.
5. Sprint has raised another jurisdictional issue regarding Voice over Internet Protocol (VoIP). Sprint contended that "[b]ecause Free Conferencing receives voice calls in IP, the Commission will need to decide whether it has the jurisdiction to regulate IP voice service." Sprint's Post-Hearing Brief at 17. Sprint asserted that "[i]f 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 [sic] competitive local exchange carrier under the access rules." *Id.* at 17-18. Sprint cites to the case in which the FCC preempted the Minnesota Public Utilities Commission from applying its traditional telephone regulations to a VoIP service provided by Vonage Holdings Corporation. *Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minn. Pub. Utils. Comm'n*, 19 FCC Rcd. 22404, Memorandum Opinion & Order (2004) (*Vonage Order*), *aff'd*, *Minn. Pub. Utils. Comm'n v. FCC*, 483 F.3d 570 (8th Cir. 2007).
6. NAT asserted that "access service functions are not being provided via VoIP, although some of the connections in the call path may be IP." NAT's Reply Memorandum at 21. NAT further stated that the "FCC's test for identifying traffic as 'VoIP' is not whether a link used to provide the service is IP, but rather whether the service 'requires Internet-Protocol-compatible customer premises equipment (CPE).'" *Id.*, citing to *Transformation Order*, 26 FCC Rcd at fn. 1892 (emphasis omitted). In addition, NAT contended that "while someday

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<sup>9</sup> An NAT witness stated that an entity that agrees to be subject to the Tribe's jurisdiction would not be subject to the Commission's jurisdiction. Tr. at 160-61. The witness stated that Free Conferencing has agreed to be subject to the Tribe's jurisdiction. Tr. at 161. Sprint contended it is unclear as to whether Free Conferencing has consented. Sprint Post-Hearing Brief at 23.



the Commission might have to address the scope of its authority over service [sic] that are solely VoIP, that issue has nothing to do with NAT, its application, or this proceeding." *Id.*

7. The Commission first points out that our state's definition of a telecommunications service is quite broad and does not exclude VoIP or otherwise limit the regulation of VoIP services. It defines a telecommunications service, in part, as "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." SDCL 49-31-1(29).
8. As addressed in the Eighth Circuit Court of Appeal's decision that upheld the FCC's *Vonage Order*, the FCC has not classified VoIP as either an "information service" or a "telecommunications service." *Minn. Pub. Utils. Comm'n v. FCC*, 483 F.3d at 577. Notably, the court upheld the *Vonage Order* on the basis of the "impossibility exception." The court found that this exception "allows the FCC to preempt state regulation of a service if (1) it is not possible to separate the interstate and intrastate aspects of the service, and (2) federal regulation is necessary to further a valid federal regulatory objective, i.e., state regulation would conflict with federal regulatory policies." *Id.* at 578. Under the facts presented in the *Vonage Order*, the Eighth Circuit found that the "FCC did not arbitrarily or capriciously determine it was impractical or impossible to separate the intrastate components of VoIP service from its interstate components." *Id.* at 579. The court was careful to point out the narrow scope of its decision by limiting its review to the issue of "whether the FCC's determination was reasonable based on the record existing before it at the time. If, in the future, advances in technology undermine the central rationale of the FCC's decision, its preemptive effect may be reexamined." *Id.* at 580. In its decision, the court also referenced a finding made by the FCC in an FCC order that addressed the responsibility of VoIP providers to contribute to the universal service fund. *Id.* at 579-80. In that proceeding, the FCC stated that an "interconnected VoIP provider with a capability to track the jurisdictional confines of customer calls would no longer qualify for the preemptive effects of our *Vonage Order* and would be subject to state regulation. This is because the central rationale justifying preemption set forth in the *Vonage Order* would no longer be applicable to such an interconnected VoIP provider." *Id.* at 580 (*citing Universal Service Contribution Methodology*, 21 F.C.C.R. 7518, 7546, at para. 56 (2006)). In this case, there was no evidence presented that would show that it was impossible to separate the interstate and intrastate aspects of the service. And, in fact, the record reflects that NAT was able to separate interstate and intrastate components. Tr. at 303-04.
9. Sprint seems to suggest that the services provided by NAT might be "information services" as defined in federal law and that NAT would then not be a telecommunications company. Sprint's Post Hearing Brief at 17-18. The federal term "information service" is defined as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operations of a telecommunications network or the management of a telecommunications service." 47 U.S.C. § 153(24). This is a factual inquiry, yet Sprint has not cited to evidence in the record that would demonstrate that the services as provided by NAT are "information services." The Commission further points out that the applicant in this case, NAT, is not asserting that the Commission lacks jurisdiction due to any VoIP connections used by NAT. The Commission finds that the record in this case does not support a finding that the Commission lacks jurisdiction to grant NAT a certificate of authority due to the provisioning of any voice services through IP.
10. In its *Amended Application*, NAT provided a copy of its certificate of authority from the Secretary of State from 2008 when NAT was a domestic limited liability company. NAT

Exh. 1, attached as Exh. A. This certificate of authority was not in effect at the time of hearing. Tr. at 250-51. Following the hearing, NAT applied for a certificate of authority as a foreign limited liability company with the Secretary of State. The certificate was issued on April 23, 2014, and filed in this docket on May 2, 2014. On May 12, 2014, NAT filed in this docket its new state sales tax license. To the extent necessary, the Commission takes judicial notice of NAT's certificate of authority as a foreign limited liability company issued by the Secretary of State and NAT's new state sales tax license.

11. Pursuant to SDCL 49-31-3 and 49-31-71, NAT has shown that it has sufficient technical, financial and managerial capabilities to offer telecommunications services. The Commission finds that it is in the public interest to grant NAT a certificate of authority for local exchange and interexchange authority. See Findings of Fact 24-53.
12. The Commission finds that, based on the NAT/Midstate/SDTA Stipulation, that NAT's service area is the area of the Fort Thompson exchange. See Findings of Fact 54-55.
13. The Commission approves the NAT/CenturyLink Stipulation regarding CenturyLink's withdrawal from this case. See Finding of Fact 56.
14. Pursuant to ARSD 20:10:32:18, the Commission grants the requested waiver of ARSD 20:10:32:15. Consistent with ARSD 20:10:32:18, the Commission finds that the granting of this waiver is in the public interest, that it does not adversely impact universal service, and that quality of service shall continue. See Finding of Fact 55.
15. Based on its findings of fact and the applicable law, the Commission grants NAT a certificate of authority to provide local and interexchange telecommunications services in the Fort Thompson exchange.
16. To the extent that any of the findings of fact in this decision are determined to be conclusions of law or mixed findings of fact and conclusions of law, the same are incorporated herein by this reference as a conclusion of law as if set forth in full herein.

It is therefore

ORDERED, that NAT is granted a certificate of authority to provide local and interexchange telecommunications services in the Fort Thompson exchange; and it is further

ORDERED, that NAT is granted a waiver of ARSD 20:10:32:15 pursuant to ARSD 20:10:32:18.

### **NOTICE OF ENTRY AND OF RIGHT TO APPEAL**

PLEASE TAKE NOTICE that this Final Decision and Order was duly issued and entered on the 13<sup>th</sup> day of June, 2014. Pursuant to SDCL 1-26-32, this Final Decision and Order will take effect 10 days after the date of receipt or failure to accept delivery of the decision by the parties. Pursuant to ARSD 20:10:01:30.01, an application for a rehearing or reconsideration may be made by filing a written petition with the Commission within 30 days from the date of issuance of this Final Decision and Order; Notice of Entry. Pursuant to SDCL 1-26-31, the parties have the right to appeal this Final Decision and Order to the appropriate circuit court by serving notice of appeal of this decision to the circuit court within thirty (30) days after the date of service of this Notice of Decision.

Dated at Pierre, South Dakota, this 12<sup>th</sup> day of June, 2014.

**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: *[Signature]*

Date: 06.13.14

(OFFICIAL SEAL)

BY ORDER OF THE COMMISSION:

*[Signature]*  
GARY HANSON, Chairman

*[Signature]*  
CHRIS NELSON, Commissioner

*[Signature]*  
KRISTIE FIEGEN, Commissioner