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THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA

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IN THE MATTER OF THE APPLICATION OF TC11-087  
NATIVE AMERICAN TELECOM, LLC FOR A  
CERTIFICATE OF AUTHORITY TO PROVIDE  
INTEREXCHANGE TELECOMMUNICATIONS  
SERVICES AND LOCAL EXCHANGE SERVICES  
IN SOUTH DAKOTA

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Transcript of Recorded Proceedings  
November 22, 2011

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BEFORE THE PUBLIC UTILITIES COMMISSION,  
GARY HANSON, CHAIRMAN  
CHRIS NELSON, COMMISSIONER  
KRISTIE FIEGEN, COMMISSIONER

APPEARANCES

Scott Swier, Native American Telecom  
Tom Welk, CenturyLink  
Richard Coit, South Dakota Telecom Association  
Phil Schenkenberg, Sprint  
Meredith Moore, MidState

Reported By Cheri McComsey Wittler, RPR, CRR

1           CHAIRMAN HANSON: TC11-087, in the matter of  
2 application of Native American Telecom for a COA to  
3 provide interexchange telecommunication services and  
4 local exchange services in South Dakota.

5           The question before the Commission is shall the  
6 Commission grant intervention to MidState, AT&T, Sprint,  
7 Qwest, and SDTA.

8           At this time Mr. Swier -- Mr. Swier is not on  
9 the phone.

10          MR. SWIER: No. I'm here, Mr. Chair.

11          CHAIRMAN HANSON: Thank you.

12          MR. SWIER: Mr. Chair, first of all, to start,  
13 we have not objected to the Petition For Intervention  
14 from MidState. And also yesterday Mr. Coit and I  
15 discussed Native American Telecom no longer objects to  
16 the Petition To Intervene of SDTA either.

17          CHAIRMAN HANSON: So MidState and SDTA, you do  
18 not have objection to?

19          MR. SWIER: That's correct, Mr. Chair.

20          CHAIRMAN HANSON: However, with AT&T, Sprint,  
21 and Qwest you still object?

22          MR. SWIER: We do. And, Mr. Chair, I can  
23 proceed with that argument if you'd like at this time.

24          CHAIRMAN HANSON: Please do.

25          MR. SWIER: Mr. Chair, members of the committee,

1 members of the Commission, the three IXC's in this case,  
2 AT&T, Sprint, and Qwest, have requested intervention  
3 status on NAT's Certificate of Application for  
4 interexchange telecommunication services and local  
5 exchange services.

6 AT&T's primary reason for intervention is that  
7 it is required to pay intrastate access fees to  
8 competitive local exchange carriers throughout the state.  
9 And it has concerns with what it terms to be NAT's  
10 revenues. Sprint's primary reason for intervention is  
11 that it's concerned with the pending litigation between  
12 the parties, which is in TC10-26 and also it's  
13 inquisitive regarding NAT's financial status.

14 Qwest's Petition For Intervention is limited to  
15 simply saying that they're concerned with access  
16 stimulation and revenue sharing agreements. And based on  
17 those reasons, the IXC's believe they should be granted  
18 intervention status here.

19 And I think that there are four very clear  
20 reasons why the IXC's in this case should not be granted  
21 intervention. Number one is, as the Commission is aware,  
22 this is a very limited docket. The only issue in this  
23 docket is whether NAT should be granted a Certificate of  
24 Authority to provide interexchange services and local  
25 exchange services in South Dakota. That's the only issue

1 that we're -- that's in this particular docket.

2 And as the Commission is aware, in granting or  
3 denying certificate of authorities, your review is  
4 limited to financial, technical, and managerial abilities  
5 of the Applicant. So it's a very specific, a very  
6 precise, a very limited docket that is before you in this  
7 case. And there is simply no nexus between the IXCs'  
8 concerns and the limited scope of this document.

9 MidState is the proper party to intervene here.  
10 NAT is looking to expand in MidState's study area. And I  
11 will inform the Commission that Ms. Moore, who is  
12 MidState's attorney, Ms. Moore and I have already been  
13 in contact, and we are very optimistic that MidState  
14 and SDTA and NAT are hopefully going to be able to reach  
15 an agreement very soon on this particular CLEC  
16 application.

17 I think the parties have worked great together  
18 so far, and we're very optimistic that we are going to  
19 reach an agreement.

20 The second reason that I think that the  
21 Commission should deny the Petition To Intervene is the  
22 big news that we all got late on Friday where the FCC  
23 released its long awaited report and order to reform the  
24 Universal Service Fund and intercarrier compensation.

25 And in my Notice of Supplemental Authority that

1 I filed yesterday it's very clear that after years of  
2 study the FCC has now recognized the legality and  
3 legitimacy of access stimulation and revenue sharing  
4 agreements. And the Order adopts a very bright line  
5 definition of access stimulation.

6 And it says that access stimulation and revenue  
7 sharing are perfectly legal. The only issue is at what  
8 rate those type of agreements are going to be compensated  
9 at.

10 So I think those two issues have now been  
11 definitively decided by the FCC and that order now seems  
12 to completely eviscerate the IXCs' longstanding claims  
13 that revenue sharing agreements and access stimulation  
14 violates the Federal Communications Act.

15 It's clear now that NAT's longstanding position  
16 that these are perfectly legitimate and legal business  
17 plans is now really undisputed.

18 For the Commission's information, since August  
19 of this year, August 2011, Native American Telecom has  
20 benchmarked its tariffed interstate rates to the rate of  
21 the price cap LEC with the lowest switched access rate in  
22 South Dakota. In other words, since August NAT has been  
23 doing exactly what the FCC ordered it must do in Friday's  
24 order. So NAT has been ahead of the game by months  
25 anticipating the FCC's order.

1           Also the precedent that this Commission would  
2 set of allowing IXCs to intervene in limited dockets like  
3 Certificates of Application are going to open the door to  
4 potentially all kinds of issues. Again, MidState is the  
5 party here who potentially has an effect on their  
6 business.

7           The IXCs simply don't meet the Commission's  
8 standard for intervention. And if the Commission opens  
9 the door to this intervention, it really opens the door  
10 to any party intervening in any telecommunications case,  
11 which really doesn't provide any teeth to the  
12 intervention standard, and it could potentially lead to  
13 issues down the line.

14           Very simply, the IXCs simply don't meet the  
15 Commission's definition for intervention, the  
16 requirements for intervention. We'd ask that the  
17 Commission, of course, recognize the agreement between  
18 MidState and SDTA, that their intervention be allowed --  
19 hopefully an agreement is reached in the next few  
20 weeks -- and deny the IXCs' Motions To Intervene.

21           Thank you.

22           CHAIRMAN HANSON: Okay. Thank you. I'll remind  
23 the parties that this is a request for intervention, and  
24 we don't necessarily need to argue the points of the  
25 docket itself. Merely that we're looking at whether or

1 not parties should intervene. So you don't need to point  
2 counter point. Appreciate that.

3 I know you might feel compelled to, but we're  
4 interested in just the intervention itself.

5 Mr. Van Camp.

6 MR. VAN CAMP: Thank you, Mr. Chairman.

7 Bill Van Camp on behalf of AT&T. Thanks for that  
8 admonition because I had taken the bait and was ready to  
9 respond, but I will not.

10 On the limited purpose for which we're here  
11 today is whether or not AT&T and the other IXCs should be  
12 granted status as interveners in this party, I'll point  
13 out that the nexus that's referenced by counsel is found  
14 in the Administrative Rule where AT&Ts and IXCs adversely  
15 impacted conceivably by the granting of the Certificate  
16 of Authority in that its position is separate and  
17 distinct from that of the general public, we must pay  
18 CLECS in this state for access by no action of our own.

19 We cannot control who our customers call and  
20 where calls are routed and we have obligations to carry  
21 that traffic and, thus, we pay those fees.

22 And the status of Native American, should it be  
23 granted, its Certificate of Authority will impact us  
24 directly and certainly could have impact on the services  
25 that we provide and the cost which we provide services in

1 the State of South Dakota.

2 Now he's correct that the standards laid out for  
3 the Commission are limited in granting the decision to  
4 issue the Certificate of Authority, but I would argue, of  
5 course, as your statutes and rules show that the burden  
6 is on Native American to prove that they meet those  
7 standards. The burden is not on the Commission to simply  
8 approve them on a presentation by Native American. And  
9 as an Intervener with status granted by statute we have a  
10 right to be a participant in that.

11 Further, I would argue that generally under a  
12 Certificate of Authority a party is subject at any time  
13 to the Commission suspending that or revoking it for  
14 violations of state law and the revenue that he -- that  
15 Mr. Swier addressed in our position clearly goes to the  
16 belief that we have that there are certain services  
17 provided by Native American that probably do not fit  
18 within the intrastate laws in South Dakota separate and  
19 distinct from that issue that we're not going to talk  
20 about, Commissioner Hanson.

21 So we think that some of those issues need to be  
22 addressed in this docket and clearly as an IXC we believe  
23 we have the right to do so under the administrative rule  
24 and statute.

25 Thank you.

1           CHAIRMAN HANSON: Thank you, Mr. Van Camp.  
2 Mr. Welk representing CenturyLink, Qwest. Do you have --

3           MR. WELK: Thank you, Mr. Chairman and  
4 Commissioners. I believe this is the first time I've  
5 appeared before the new constituted Commission, and I  
6 thank you for the opportunity.

7           I will not repeat what Mr. Van Camp said. I  
8 will not address all of the plethora of issues that  
9 Mr. Swier -- but I will remind the Commission, because  
10 you see these interventions quite frequently, that the  
11 Commission enacted a regulation but the Administrative  
12 Procedures Act, which is basically the rubric in which  
13 you operate under the auspices of the legislature has an  
14 intervention provision that allows that any person whose  
15 pecuniary interest would be directly or immediately  
16 affected to have the opportunity to be a party.

17           And obviously the payment of interexchange  
18 services by the IXC clearly meets that. It's something  
19 that's separate from the public.

20           So I don't have anything further to ask. This  
21 is a Certificate of Authority. This is an intervention.  
22 We're not dealing with the merits today. And that's all  
23 I have on the merits of the intervention, other than  
24 what's in our papers.

25           But I would like to address one other issue that

1 was peculiar to Qwest regarding its Petition that I think  
2 especially with two new Commissioners that has been an  
3 issue that I've dealt with for I was thinking about the  
4 last 25 years I've appeared before the Commission. And  
5 that's the practice of law by the attorneys.

6 And it happened in this case because we had  
7 in-house counsel for Qwest file a Petition To Intervene.  
8 An objection was made by Mr. Swier. We were then  
9 contacted and rectified that by filing it under my name  
10 and Mr. Madsen's name. And the there has been no  
11 prejudice because of the inadvertent filing.

12 But mine is more of a policy issue for the  
13 Commission, and that is -- and to give you a little bit  
14 of history, the issue of how out-of-state counsel appear  
15 before you is an issue that's been inconsistent over the  
16 years because of the nature of the dockets the Commission  
17 has.

18 You deal, as you've already seen in your early  
19 tenure, the new Commissioners, with some minor matters  
20 with very substantive issues to minor tariff revisions,  
21 and the telecommunications companies that appear before  
22 you, some have offices in South Dakota, some don't. They  
23 have in-state counsel, out-of-state counsel, and we  
24 really don't understand the rules for the Commission  
25 regarding when resident counsel may be required.

1           In prior dockets we've always kind of had this  
2 unwritten rule that if there was a contested matter, that  
3 resident counsel was required to appear. And that's the  
4 way it's always been as far as I remember in my 25 years'  
5 history. And part of your history arises for sometimes  
6 you have agencies or entities that might be profit or  
7 nonprofit that really don't have an attorney. And so the  
8 Commission has had to grapple with a myriad of issues.

9           And I would just ask the Commission either  
10 through rule or an order -- and it's not part of this  
11 docket -- that we address that for the benefit of all the  
12 telecommunications companies so that we know what the  
13 rules are with regard to when resident counsel has to  
14 appear.

15           I think it would be impractical for a number of  
16 companies that are out of state to have resident counsel  
17 appear on minor tariff revisions, to incur the expense of  
18 going through paying the \$200 fee, having someone on the  
19 phone.

20           And so there are issues that need to be  
21 legitimately addressed by the Commission. But I'd ask  
22 you in some other docket, some other time, to address  
23 that so we can have some clarity as we go forward.

24           So thank you, Mr. Chairman, for giving me the  
25 opportunity to make those comments.

1           CHAIRMAN HANSON: Thank you, Mr. Welk. Point's  
2 well taken. Appreciate it very much.

3           Mr. Schenkenberg, are you still on the line with  
4 Sprint?

5           MR. SCHENKENBERG: I am, Mr. Chairman, members  
6 of the Commission.

7           Sprint has no further argument. We would concur  
8 in the statements made by AT&T, Qwest (Inaudible) the  
9 intervention standards and the interests that  
10 interexchange carriers like Sprint and Qwest and AT&T  
11 have, and we'd ask that Sprint be allowed to intervene.

12           Thank you.

13           CHAIRMAN HANSON: Thank you.

14           Ms. Moore, you don't appear to have any  
15 challenge here. Is there anything that you feel that you  
16 need to say?

17           MS. MOORE: No. Thank you, Mr. Chairman.  
18 MidState has a statutory right to intervene under  
19 Administrative Rules of South Dakota, and we would simply  
20 ask that the Commission honor that particular legislative  
21 rule acknowledgment in this particular case and grant the  
22 intervention.

23           Thank you.

24           CHAIRMAN HANSON: Thank you, Ms. Moore. And,  
25 Mr. Coit, Mr. Swier has taken you out of the do not play

1 with list.

2 MR. COIT: And I do appreciate the fact that  
3 NAT and Mr. Swier have decided not to object to our  
4 Petition To Intervene.

5 I would like to, though, just offer a little bit  
6 more comment than what we offered in our Petition as to  
7 why we feel as a state association we have an interest in  
8 this particular docket that might go beyond what  
9 MidState's as a company's particular interests are.

10 And first, obviously, this is an application for  
11 a Certificate of Authority to provide local exchange  
12 service involving a rural service area. MidState is a  
13 rural telephone company, one of our members, and they  
14 obviously provide service in an area that is classified  
15 as a rural service area or study area under the 1996 Act.

16 When the 1996 Act came into effect basically,  
17 you know, it ushered in local exchange competition into a  
18 lot of areas where there was no competition for local  
19 exchange service. And there were all kinds of rules put  
20 in that Act in terms of, you know, how certification  
21 proceedings, how competitive entry situations were to be  
22 addressed.

23 And there were specific statutes or provisions  
24 in the 1996 Act that deal with entry, competitive entry  
25 into rural service areas.

1           And under Section 253 of that Act states have  
2 the ability to impose on a competitively neutral basis  
3 and consistent with Section 254, which is the Universal  
4 Service Section, requirements necessary to preserve and  
5 advance universal service, protect the public safety and  
6 welfare, ensure the continued quality of telecom  
7 services, and safeguard the rights of consumers.

8           More specifically, pursuant to Section 253(f),  
9 which we have through the years referred to as kind of  
10 the rural safeguard provision in the Federal Act and  
11 also under our State Statute Section 43-31-73 if the  
12 Applicant seeking a COA proposes to provide local  
13 exchange services in the service area of a rural  
14 telephone company, this Commission to effectively prevent  
15 and protect rural consumers from the negative  
16 consequences associated with cherry picking, cream  
17 skimming, that sort of thing, has the authority to  
18 require as a condition on the Certificate of Authority  
19 that the competitive LEC effectively meet the same  
20 service obligations that are imposed on ETCs or eligible  
21 telecommunications carriers.

22           That particular rural safeguard is at issue in  
23 this proceeding, and it's for that reason primarily that  
24 we are seeking intervention in this docket. And we  
25 actually believe now looking at the -- you know, at least

1 based on the brief review that we've been able to do at  
2 this point of the FCC's USF and ICC Order that issues  
3 surrounding that particular rural safeguard involving  
4 Certificates of Authority that extend to entire rural  
5 study areas take on an added significance.

6 Questions as to whether a rural telephone -- a  
7 competitive company is actually meeting obligations,  
8 making services available throughout the entirety of the  
9 rural LEC service area has other consequences. And it's  
10 for that reason that we believe that it is important that  
11 we weigh in on this docket and ensure that the rural  
12 safeguard provisions that are there are, obviously,  
13 considered.

14 And, you know, one of the interesting things in  
15 this docket, if you look at the last docket that NAT  
16 filed for certification for local service authority, they  
17 actually filed a request for a waiver of the obligation  
18 to meet these ETC service requirements.

19 They have not done that in this case. So this  
20 case is a little bit different than before. MidState  
21 service area's over 2,000 square miles. It includes  
22 11 exchanges. We certainly have some questions as to  
23 whether AT&T could actually provide service throughout  
24 the entirety of that area, and we have some questions as  
25 to why they are seeking certification throughout the

1 entirety of the MidState service area.

2 And for those reasons primarily, given the fact  
3 that any of these dockets certainly hold the potential to  
4 be precedent setting in some way, given the fact that  
5 kind of the rules that we're going to be faced with going  
6 forward starting in 2012 certainly look like they're  
7 going to be different, we did feel that it was important  
8 for us to be involved in this case.

9 And with that I guess I will conclude my  
10 comments. But I did feel it was important for me to kind  
11 of explain to you as Commissioners why we felt our  
12 interest was different.

13 Thank you.

14 CHAIRMAN HANSON: Thank you, Mr. Coit.

15 Ms. Cremer.

16 MS. CREMER: Thank you. This is Karen Cremer of  
17 Staff. The Petitioners have shown that they have met the  
18 statutory and administrative threshold for intervention  
19 and their petitions for intervention should be granted.

20 That would be our recommendation. Thank you.

21 CHAIRMAN HANSON: Thank you. And, Mr. Swier,  
22 you've heard the arguments of why they should intervene.

23 Do you have any final remarks pertaining to  
24 intervention?

25 MR. SWIER: Just real briefly I do. If you go

1 back from the year 2000 there has never been an IXC that  
2 has moved to Petition in an interexchange or local  
3 exchange CLEC application.

4 Secondly, if the IXCs believe that there's a  
5 problem with the tariffs, with whatever, they can file a  
6 Complaint. They've done that to dozens and dozens of  
7 CLECs and ILECs throughout the country, both in Federal  
8 Court and before state administrative agencies. So  
9 there's no question that they have the ability to file  
10 Complaints if they want.

11 Next regarding Qwest and their statement that  
12 it's unclear, first of all, their Petition -- there's no  
13 doubt it's an unauthorized paragraph law. And they filed  
14 it at the last minute through corporate counsel. They  
15 filed it at the last hour when the Commission's  
16 intervention deadline was. And Qwest indicates that it's  
17 really unclear and they think it's unclear whether this  
18 is the unauthorized practice of law.

19 I'd like the Commission to know that 10 years  
20 ago this very --

21 CHAIRMAN HANSON: Mr. Swier.

22 MR. SWIER: (Inaudible).

23 CHAIRMAN HANSON: Mr. Swier. Mr. Swier, I  
24 believe they have refiled and they have -- Mr. Madsen and  
25 Mr. Welk, who are both attorneys. So they have, in fact,

1 disposed of that particular argument.

2 MR. SWIER: Then I have nothing further then,  
3 Mr. Chair.

4 CHAIRMAN HANSON: Thank you.

5 Is there any one further who has not been called  
6 upon who is compelled to speak to this issue?

7 If not, I would agree that this is a limited  
8 docket, and, in fact, as far as no nexus for  
9 intervention, this Commission has always given a broad  
10 interpretation of who is allowed to intervene. And for a  
11 number of reasons.

12 We don't know everything that's going to be  
13 argued. And, in fact, we'd like to know everything  
14 that's going to be argued. Knowledge and information is  
15 extremely important. So we need that point counter  
16 point, and so we've always allowed a pretty broad sweep  
17 of the brush for intervention. And so I will be  
18 supporting a Motion in allowing all of the folks to  
19 intervene.

20 Any further discussion from the Commissioners?

21 If not, I will make a Motion that in TC11-087  
22 that the Commission grant intervention to MidState, AT&T,  
23 Sprint, CenturyLink aka Qwest, and SDTA.

24 Is there a discussion on the Motion?

25 Hearing none, Commissioner Fiegen.

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COMMISSIONER FIEGEN: Fiegen votes aye.

CHAIRMAN HANSON: Commissioner Nelson.

COMMISSIONER NELSON: Aye.

CHAIRMAN HANSON: Hanson votes aye. The Motion carries.

1 STATE OF SOUTH DAKOTA)

2 :SS CERTIFICATE

3 COUNTY OF HUGHES )

4

5 I, CHERI MCCOMSEY WITTLER, a Registered  
6 Professional Reporter, Certified Realtime Reporter and  
7 Notary Public in and for the State of South Dakota:

8 DO HEREBY CERTIFY that as the duly-appointed  
9 shorthand reporter, I transcribed the recording of the  
10 foregoing proceedings.

11 Dated at Onida, South Dakota this 5th day of  
12 June, 2012.

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Cheri McComsey Wittler,  
Notary Public and  
Registered Professional Reporter  
Certified Realtime Reporter

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| <b>10</b> [1] - 17:19<br><b>11</b> [1] - 15:22<br><b>1996</b> [3] - 13:15, 13:16, 13:24   | <b>affected</b> [1] - 9:16  | <b>AT&amp;Ts</b> [1] - 7:14  | <b>carries</b> [1] - 19:5   | <b>Commission</b> [29] - 2:5, 2:6, 3:1, 3:21, 4:2, 4:11, 4:21, 6:1, 6:8, 6:17, 8:3, 8:7, 8:13, 9:5, 9:9, 9:11, 10:4, 10:13, 10:16, 10:24, 11:8, 11:9, 11:21, 12:6, 12:20, 14:14, 17:19, 18:9, 18:22 |
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| <b>4</b>  | <b>agree</b> [1] - 18:7   | <b>August</b> [3] - 5:18, 5:19, 5:22                                       | <b>CenturyLink</b> [3] - 1:16, 9:2, 18:23   | <b>Commissioner</b> [3] - 8:20, 18:25, 19:2   |
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