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| STATE OF SOUTH DAKOTA | ) | IN CIRCUIT COURT |
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| COUNTY OF BUFFALO | ) | FIRST JUDICIAL CIRCUIT |

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| IN THE MATTER OF THE APPLICATION OF NATIVE AMERICAN TELECOM, LLC FOR A CERTIFICATE OF AUTHORITY TO PROVIDE LOCAL EXCHANGE SERVICE WITHIN THE STUDY AREA OF MIDSTATE COMMUNICATIONS, INC. | CIV. 12-06 |

**APPELLANT NATIVE AMERICAN TELECOM, LLC's MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS**

## SUMMARY OF THE ISSUES

This appeal derives from a series of preliminary/intermediate decisions made by the South Dakota Public Utilities Commission ("Commission") in administrative action TC 11-087. The Court should deny any motion to dismiss this appeal because waiting to review the Commission's final decision would not provide Native American Telecom, LLC ("NAT") with an adequate remedy in this contested case proceeding.

First, the Commission erred in denying NAT the ability to engage in basic discovery. (CI 1397-1399).

Second, the Commission erred in quashing NAT's Rule 45 Subpoena. (CI 1562-1563).

Third, the Commission erred in granting CenturyLink's intervention. (CI 103).

## PRELIMINARY STATEMENT

Throughout this brief, Appellant Native American Telecom, LLC will be referred to as "NAT." Intervenor AT&T Communications of the Midwest, Inc. will be referred to as "AT&T." Intervenor Sprint Communications Company L.P. will be referred to as "Sprint." Intervenor Qwest Communications LLC, dba CenturyLink, will be referred to as "CenturyLink." Intervenor Midstate Communications, Inc. will be referred to as "Midstate." Intervenor South Dakota Telecommunications Association will be referred to as "SDTA." The South Dakota Public Utilities Commission will be referred to as "SDPUC" or "Commission." References to the Chronological Index will be designated as "CI" followed by the appropriate page.

## JURISDICTIONAL STATEMENT

The Court has jurisdiction of this appeal pursuant to SDCL 1-26-30 which provides:

> **Right to judicial review of contested cases--Preliminary agency actions**. A person who has exhausted all administrative remedies available within any agency or a party who is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter. If a rehearing is authorized by law or administrative rule, failure to request a rehearing will not be considered a failure to exhaust all administrative remedies and will not prevent an otherwise final decision from becoming final for purposes of such judicial review. This section does not limit utilization of or the scope of judicial review available under other

> means of review, redress, or relief, when provided by law. *A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy.*

(emphasis added).

In this proceeding, NAT has appealed a series of the Commission's "preliminary, procedural, and intermediate actions and rulings." The Commission's actions and rulings have left NAT with no remedy other than an appeal to this Court. The Commission's actions and rulings have denied NAT due process and made it impossible for NAT to fairly engage in any form of "contested case" hearing.

## STATEMENT OF THE FACTS

### *A.) Procedural History*

On October 11, 2011, NAT filed its Application for Certificate of Authority ("Application") with the Commission.[1] (CI 1-26). NAT's Application seeks authority to provide intrastate local exchange and

[1] NAT is a tribally-owned telecommunications company organized as a limited liability company under South Dakota law. (CI 158-159). NAT's principal place of business is located in Fort Thompson (Buffalo County), South Dakota. (CI 159). NAT's ownership structure consists of the Crow Creek Sioux Tribe (51%) ("Tribe"), Native American Telecom Enterprise, LLC (25%) ("NAT Enterprise"), and WideVoice Communications, Inc. (24%) ("WideVoice"). (CI 159-160). The Tribe is a federally-recognized Indian tribe with its tribal headquarters located on the Crow Creek Sioux Tribe Reservation ("Reservation") in Fort Thompson. NAT Enterprise is a telecommunications development company based in South Dakota.

interexchange telecommunication services within the Crow Creek Sioux Tribe Reservation ("Reservation"), which is within the study area of Midstate.[2] (CI 1-26).

After NAT filed its Application, the Commission established an "intervention deadline" of October 28, 2011. On October 13, 2011, Midstate filed its "Petition to Intervene." (CI 27-31). On October 26, 2011, AT&T filed its "Petition to Intervene." (CI 34-36). On October 28,

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WideVoice is a telecommunications engineering company based in Nevada.

[2] In general, NAT seeks the Commission's intrastate approval to (1) provide facilities-based telephone service to compliment its advanced broadband services; (2) provide service through its own facilities; (3) use WiMAX (Worldwide Interoperability for Microwave Access) technology operating in the 3.65 GHZ licensed spectrum to provide service to residential, small business, hospitality and public safety entities; (4) support high-speed broadband services, voice service, data and Internet access, and multimedia; (5) use advanced antenna and radio technology with OFDM1 OFDMA (Orthogonal Frequency Division Multiplexing) to deliver wireless IP (Internet Protocol) voice and data communications; (6) provide 4G technology to offer flexible, scalable and economically viable solutions that are key components to deploying in vast rural environments, such as the Reservation; and (7) provide high-speed Internet access, basic telephone, and long-distance services on and within the Reservation. (CI 163-164).

NAT already provides the Reservation with: (1) physical offices, telecommunications equipment, and telecommunications towers; (2) a computer training facility with free Internet and telephone service to tribal members; (3) 110 high-speed broadband and telephone installations at residential and business locations; and (4) an Internet Library with six work stations that provide computer/Internet opportunities for residents. (CI 161-163).

2011, SDTA, Sprint, and CenturyLink filed their respective "Petitions to Intervene."[3] (CI 37-45). In their respective petitions, AT&T, Sprint, and CenturyLink sought to intervene because of NAT's involvement with "access stimulation" and "revenue sharing agreements."[4] (CI 34-45).

NAT opposed these intervention petitions because (1) CenturyLink's intervention petition was filed in violation of South Dakota's "unauthorized practice of law" rules and (2) NAT's involvement in "access stimulation" and "revenue sharing agreements" is not relevant to the very narrow scope of this certification proceeding. (CI 66-73). Following a hearing, the Commission granted each of the intervention petitions.[5] (CI 103). Shortly after intervention was allowed, the parties filed substantial written testimony (CI 145-171; 174-718; 1368-1391) and served discovery requests.[6]

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[3] Because its intervention petition was improperly filed by out-of-state counsel, CenturyLink later (after the intervention deadline passed) submitted a "Re-filed Petition to Intervene." (CI 54-56).

[4] Where appropriate, AT&T, Sprint, and CenturyLink will be referred to collective as the "Interexchange Carriers" or "IXCs."

[5] On January 27, 2012, NAT filed a Revised Application for Certificate of Authority ("Revised Application") with the Commission. (CI 126-143). NAT's Revised Application made a few minor modifications to its original Application. (CI 126-143). On January 31, 2012, NAT's Revised Application was "deemed complete" by the Commission's Staff.

[6] The Court should note that because of the proprietary nature of the parties' discovery requests and production, the Commission

During the discovery process, the parties were unable to agree on the proper scope of discovery and CenturyLink, Sprint, and NAT each filed their respective "motions to compel." (CI 771-838; 839-892; 893-936; 1018-1039; 1040-1063; 1064-1165; 1313-1323; 1324-1335; 1336-1367). On April 24, 2012, the Commission granted Sprint's and CenturyLink's respective "motions to compel" and denied the great majority of NAT's "motion to compel." (CI 1397-1399; 1451-1554). Additionally, on May 16, 2012, the Commission quashed NAT's third-party subpoena requesting from the Commission various financial documents from previous certificate of authority applicants. (CI 1562-1563).

The Commission's preliminary decisions have denied NAT due process and prevented NAT from engaging in any meaningful discovery in preparing for this contested case proceeding. Because of the significance of the issues involved, waiting for judicial review of the Commission's final decision does not provide NAT with an adequate remedy. As such, the Court should immediately review and reverse the Commission's rulings.

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unanimously granted NAT's "Motion for Protective Order" early in this proceeding. (CI 104-119; 144).

### *B.) The Underlying Issue In This Proceeding*

The underlying issue before the Commission in this proceeding is very simple – should NAT be granted a Certificate of Authority to provide interexchange telecommunications services and local exchange services in South Dakota?

Under SDCL 49-31-3, NAT has the burden to prove that it "has sufficient *technical, financial and managerial capabilities* to offer the telecommunications services described in its application. . . ." (emphasis added). *See also* ARSD 20:10:32:05 ("the telecommunications company filing the application shall have the burden of proving that it has sufficient *technical, financial, and managerial capabilities* to provide the local exchange services applied for. . . ."); ARSD 20:10:32:06 (an applicant must establish "sufficient *technical, financial, and managerial ability* to provide the local exchange services described in its application. . . .").

Unfortunately, from the very beginning of this proceeding, Sprint and CenturyLink have inundated the Commission with factual and legal misrepresentations, untruths, and unsupported allegations about NAT, including:

- NAT is a "sham entity" established for the sole purpose of "access stimulation." (CI 187; 683). NAT alleges that (1) that it

is not a "sham entity" and has business interests beyond the acceptance of "access stimulation" traffic; (2) pursuant to the Federal Communications Act, NAT is not allowed to discriminate between the customers that it will accept business from; and (3) the Federal Communications Commission ("FCC") has clearly stated that "access stimulation" is legal under certain guidelines.

- "Access stimulation" and "revenue sharing agreements" are improper and not in the "public interest." (CI 187; 683-685; 699-700). NAT alleges that there is nothing improper about "access stimulation" or its "revenue sharing agreement" with Free Conferencing Corporation ("Free Conferencing") because the FCC has recently established guidelines for these practices. Also, it is undisputed that conference calling is an efficient means of communication. The only difference between a "free" conference call and a "non-free" conference call is the "organizer fee" charged by the "non-free" conferencing company (like Sprint and CenturyLink). This "organizer fee" increases the costs of conferencing and prevents some individuals and organizations from using conferencing services. Access fees are charged in both "free" conference calls and "non-free" conference calls.

Therefore, "access stimulation" (such as free conference calling traffic) is very much in the public interest.

- NAT provides little, if any, "financial benefit" to the Crow Creek Sioux Tribe ("Tribe"). (CI 188). NAT alleges that it has already provided substantial financial benefits to the Tribe, including economic development, employment, a computer learning center, free telephone, and free internet service. It is ironic that Sprint and CenturyLink claim that NAT provides little financial benefit to the Tribe when these two companies refuse to pay NAT for the services NAT provides.
- NAT is not a "financially viable entity." (CI 209; 697-699). Once again, NAT alleges that Sprint's and CenturyLink's claims are ironic (and circular) because these two companies refuse to pay NAT for the services NAT provides. Also, because some Interexchange Carriers are now paying NAT for its services (pursuant to the FCC's recent guidelines), NAT's financial position has substantially improved.
- NAT's business model is not sustainable. (CI 211). NAT alleges that this assertion is incorrect because NAT's business model involves: (1) applying for government business/contracts under the Buy Indian Act; (2) accepting business from multiple end-

users[7]; (3) receiving revenues from end-users on the Reservation; and (4) potentially extending its network outside of the Reservation's boundaries.

- NAT is engaged in "mileage pumping." (CI 213; 693; 700-702). NAT alleges that this claim is a diversion from the principal issue in this proceeding and is completely false. There is only one path to NAT's facilities. "Mileage pumping" implies that a company is sending its traffic over a longer path in order to charge a higher rate. There is only one way to reach NAT's facilities on the Reservation and NAT charges the lowest rate in South Dakota ($.006327 per minute) even though the Reservation is located in a remote area of South Dakota.

In other words, Sprint and CenturyLink have taken a very simple and straight-forward certification process and turned it into a referendum on "access stimulation" and "revenue sharing agreements." In turn, the Commission's preliminary actions have denied NAT due process by refusing to allow NAT to conduct basic discovery to defend itself and contest Sprint's and CenturyLink's erroneous allegations.

[7] For example, NAT will continue to have a customer relationship with Free Conferencing. Free Conferencing has over 20,000,000 users and hundreds of millions of minutes of conferencing traffic each month. In some circumstances, Free Conferencing will continue to charge its customers a small fee for the conferencing services and will need access services from companies like NAT.

### *C.) Sprint's and CenturyLink's Objections to NAT's Certificate of Authority are Based Upon "Access Stimulation" and "Revenue Sharing Agreements."*

It is clear that the reasons Sprint and CenturyLink have intervened in this *routine and limited certification matter* involve the issues of (1) "access stimulation" and (2) "revenue sharing agreements." (*See e.g.,* CI 37-40; 41-45; 174-675; 676-718; 771-838; and 839-892).

NAT readily admits that one of its customers is Free Conferencing and therefore NAT engages in "access stimulation." NAT also acknowledges that it has entered into a "revenue sharing agreement"[8]

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[8] By way of background, a "revenue sharing agreement" is created when a conferencing service provider (like Free Conferencing) subscribes to local exchange access services from, and enters into a marketing arrangement with, a Competitive Local Exchange Carrier ("CLEC") (like NAT).

In this case, Free Conferencing subscribes to NAT's telecommunications services so that Free Conferencing can provide conferencing services to its customers. NAT, in turn, provides terminating access service to the IXCs, including Sprint and CenturyLink, which enables the IXCs to deliver calls destined for telephone numbers assigned to Free Conferencing by NAT. In other words, to participate in a conference call, a Sprint or CenturyLink long distance customer would dial a number assigned to Free Conferencing by NAT, the customer would pay Sprint or CenturyLink for its long distance services, Sprint or CenturyLink would pay a portion of the collected amount to NAT for switched access services, and NAT would pay Free Conferencing for its efforts in marketing the services.

Sprint's and CenturyLink's obligations to pay NAT arises under NAT's switched access tariff. NAT provides switched access services to Sprint and CenturyLink on an equal and nondiscriminatory bases in accordance with uniform service terms known as "access tariffs," which are regulated and subject to review by the FCC and the Commission for

with Free Conferencing.[9] Unfortunately, Sprint and CenturyLink continuously mislead the Commission by depicting "access stimulation" and "revenue sharing agreements" as improper and subject to an extensive "investigation and hearing" in this, what should be, a limited certification proceeding. However, as Sprint and CenturyLink are well-aware, these issues have been decided by the Federal Communication Commission ("FCC") which recently recognized the legality of "access stimulation" and "revenue sharing agreement" by adopting rules governing its practice.

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interstate and intrastate calls, respectively. This service enables Sprint and CenturyLink to send and receive long distance telecommunications traffic across NAT's network to or from an end user.

[9] Free Conferencing is a competitive provider of conference calling services. In addition to certain fee-based product offerings, Free Conferencing offers a conference call product that allows each participant in the conference call to pay his/her own way by dialing a long distance number to access the conference call and paying the long distance charges billed by his/her long distance carrier. Free Conferencing's services contrast with the exceedingly expensive "host pays" 8XX conference call business model (marketed by Sprint and CenturyLink), in which the individual or organization hosting the conference call pays the long distance charges of the call's participants.

It is important to note that that IXCs charge for and collect access revenues on conferencing traffic in addition to the up-front "organizer fees." For example, CenturyLink has an agreement with Intercall for conferencing traffic. Sprint and AT&T each have agreements with other companies (the exact names of which need to be discovered) for conferencing traffic. Free Conferencing does not charge these up-front "organizer fees." Rather, Free Conferencing merely shares a portion of the access fees collected by NAT.

In November of 2011, the FCC released its long-awaited Final Rule which addresses "access stimulation" and "revenue sharing agreements."[10] *Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers,* 76 Fed. Reg. 73830, 2011 WL 5909863 (November 29, 2011) (to be codified at 47 C.F.R. pts. 0, 1, 20, 36, 51, 54, 61, 64, and 69) ("Final Rule"). In its Final Rule, the FCC specifically recognized the legality of "access stimulation" and "revenue sharing agreements." In fact, the FCC's Final Rule adopted a "bright line definition" to identify when an "access stimulating" CLEC (like NAT) must re-file its interstate access tariffs at rates that are presumptively consistent with the Federal Communications Act.

In a nutshell, the first condition is met where a CLEC has entered into an access *revenue sharing agreement.*[11] The second condition is met

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[10] The FCC's nearly-800 page Final Rule can be found at www.fcc.gov.

[11] This "revenue sharing" condition of the definition is met when a CLEC:

> [H]as 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 LEC or competitive LEC 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,

where a CLEC either has had (a) a three-to-one interstate terminating-to-originating traffic ratio in a calendar month; or (b) a greater than 100 percent increase in interstate originating and/or terminating switched access Minutes of Use ("MOU") in a month compared to the same month in the preceding year. (Final Rule, ¶¶ 658, 667, 675-678).

If a CLEC meets both conditions of this definition, it must file a revised tariff and benchmark its tariffed access rates to the rates of the price cap LEC with the lowest interstate switched access rates in the state. (Final Rule, ¶ 679). Specifically, the Final Rule requires a CLEC to file its revised interstate switched access tariff within 45 days of meeting the definition, or within 45 days of the effective date of the rule if on that date it meets the definition. A CLEC whose rates are already at or below the rate to which they would have to benchmark in the re-filed tariff will not be required to make a tariff filing.[12] (Final Rule, ¶ 691).

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> credits, services, features, functions, and other items of value, regardless of form, provided by the rate-of-return LEC or competitive LEC to the other party to the agreement shall be taken into account.

(Final Rule, ¶ 669).

[12] The FCC's Final Rule became effective on December 29, 2011. The Court should note that the rates contained in NAT's current tariff with the FCC became effective on August 23, 2011 - four months before the Final Rule's effective date. In this tariff, NAT properly benchmarked its interstate switched access rate to that of the lowest price cap LEC in South Dakota (*i.e.,* CenturyLink's access rate). In fact, NAT mirrored CenturyLink's tariff. In other words*, several months before the FCC's*

The FCC's Final Rule rejects Sprint's and CenturyLink's long-standing claims that "access stimulation" and "revenue sharing agreements" violate the Federal Communications Act. In fact, the FCC declares just the opposite:

> [W]e do not declare revenue sharing to be a *per se* violation of section 201(b) of the Act. A ban on all revenue sharing arrangements could be overly broad, and no party has suggested a way to overcome this shortcoming. *Nor do we find that parties have demonstrated that traffic directed to access stimulators should not be subject to tariffed access charges in all cases*. We note that the access stimulation rules we adopt today are part of our comprehensive intercarrier compensation reform. That reform will, as the transition unfolds, address remaining incentives to engage in access stimulation

(Final Rule, ¶ 672) (emphasis added).

In other words, Sprint's and CenturyLink's reason for intervening in this SDPUC certification matter is based on attempting to "police" a practice ("access stimulation" and "revenue sharing agreements") that the FCC has finally deemed to be appropriate as long as certain guidelines are followed. Simply stated, Sprint and CenturyLink lost their long-standing battle with the FCC over the legitimacy of "access

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*Final Rule became effective, NAT's current tariff fully complied with the FCC's Final Rule and mirrored the tariff of one of its primary opponents in this proceeding.*

stimulation" and "revenue sharing agreements."[13] Now, Sprint and CenturyLink are engaging in "gamesmanship" before the Commission in an attempt to derail NAT's routine certification proceeding.

Additionally, the Court should note that Sprint, CenturyLink, most other IXCs, and Free Conferencing are competitors in the lucrative conference calling marketplace. Free Conferencing has become the world's largest privately-held conference calling company by providing consumers with a product that is more cost-efficient than Sprint's and CenturyLink's traditional (and expensive) "host pays" conferencing services.[14]

NAT intends to prove that Sprint and CenturyLink initially tried to impact Free Conferencing's business by blocking the completion of its calls. When the FCC ordered Sprint and CenturyLink to discontinue call-blocking, Sprint and CenturyLink raised the cost to deliver the calls

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[13] If Sprint and CenturyLink believe that NAT's "access stimulation" activities or "revenue sharing agreements" do not comply with the FCC's Final Rule, they are entitled to commence a dispute action with the FCC (not the SDPUC). *See* Final Rule, ¶ 659 (stating that IXCs will be permitted to file a complaint if it believes that a CLEC has failed to comply with the Final Rule's guidelines).

[14] As the Court can appreciate, conference calling is a multi-billion dollar business for IXCs offering "host pays" conferencing services. Sprint's and CenturyLink's intervention and opposition to NAT's Certificate of Authority is based on stifling competition in this lucrative marketplace.

to the final destination by charging extremely high rates via the wholesale transport market.[15]

Competition then arose in the wholesale transport market to compete with Sprint's and CenturyLink's high rates ($.08 to $.12/minute). Ironically, once this competition arose, Sprint and CenturyLink lowered their wholesale rates to compete for this traffic. Sprint and CenturyLink were then able to undercut the competition, in part, by refusing to pay for the terminating access "leg" of the call. In sum, Sprint and CenturyLink compete with other companies to carry the "access stimulation" traffic that they so vehemently oppose, but then refuse to pay for the most important part of the call – call completion. Sprint and CenturyLink then claim that they should not have to pay for this service, leaving small rural telephone companies (like NAT) with the unpaid cost to terminate the call. At the same time, Sprint and CenturyLink accuse small rural telephone companies (like NAT) of engaging in a "scheme" and mislead the Commission with their unsubstantiated claims.

[15] NAT believes that Sprint's and CenturyLink's wholesale rate sheets will support this premise.

NAT is simply asking that it be allowed to engage in meaningful discovery to defend itself from these accusations and meet its burden in this contested case proceeding.

## STANDARD OF REVIEW

South Dakota's statute dealing with the review of administrative agency decisions was enacted in 1966 and has been amended five times. SDCL 1-26-36 states as follows:

> The court shall give great weight to the findings made and inferences drawn by an agency on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
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> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority of the agency;
> (3) Made upon unlawful procedure;
> (4) Affected by other error of law;
> (5) Clearly erroneous in light of the entire evidence in the record; or
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.[16]

[16] The South Dakota Supreme Court has noted "[o]ne of the problems with SDCL 1-26-36 is that it does not specifically set out which standards of review listed in subsections (1) through (6) apply to the appropriate item being reviewed, i.e., findings, inferences, conclusions, or decisions. Furthermore, since a decision of the agency must necessarily include findings of fact and conclusions of law (each of which have been historically reviewed under different standards) it is confusing to mingle these terms as was done in SDCL 1-26-36." *Permann v. South Dakota*

Recently, in *McNeil v. Superior Siding, Inc.,* 771 N.W.2d 345 (SD 2009), our Supreme Court stated:

> "We review appeals from administrative decisions in the same manner as the circuit court[,]" the standard for which is controlled by SDCL 1-26-37. *Kuhle v. Lecy Chiropractic,* 2006 SD 16, ¶ 15, 711 N.W.2d 244, 247 (citations omitted). "The Department's factual findings and credibility determinations are reviewed under the clearly erroneous standard." *Id.* (citing *Enger v. FMC,* 1997 SD 70, ¶ 10, 565 N.W.2d 79, 83). "We will reverse those findings only if we are definitely and firmly convinced a mistake has been made." *Id.* (citing *Gordon v. St. Mary's Healthcare Ctr.,* 2000 SD 130, ¶ 16, 617 N.W.2d 151, 157). "Questions of law are reviewed de novo." *Id.* ¶ 16 (citing *Enger,* 1997 SD 70, ¶ 10, 565 N.W.2d at 83). Mixed questions of law and fact require further analysis. *See Permann v. S.D. Dep't of Labor,* 411 N.W.2d 113, 119 (S.D.1987).
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> If application of the rule of law to the facts requires an inquiry that is "essentially factual" - one that is founded "on the application of the fact-finding tribunal's experience with the mainsprings of human conduct" - the concerns of judicial administration will favor the district court, and the district court's determination should be classified as one of fact reviewable under the clearly erroneous standard. *If, on the other hand, the question requires us to consider legal concepts in the mix of fact and law and to exercise judgment about the values that animate legal principles, then the concerns of judicial administration will favor the appellate court, and the question should be classified as one of law and reviewed de novo.*

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*Department of Labor, Unemployment Insurance Division,* 411 N.W.2d 113, 115 (SD 1987).

*McNeil*, 771 N.W.2d at 347-348 (citations omitted) (emphasis added). *See also Darling v. West River Masonry, Inc.,* 777 N.W.2d 363, 366 (SD 2009) ("the applicable standard of review [for administrative appeals] 'will vary depending on whether the issue is one of fact or one of law.' The actions of the agency are judged by the clearly erroneous standard when the issue is a question of fact. The actions of the agency are fully reviewable when the issue is a question of law").

In this case, NAT's appeal issues encompass questions of law – (1) did the Commission commit error in its pre-hearing discovery rulings under SDCL 15-6-26(b) and (2) did the Commission commit error in its decision to allow CenturyLink's intervention. As such, NAT's appeal issues should be reviewed by the Court under the de novo standard.

## LAW & ANALYSIS

### I. THE COMMISSION ERRED BY DENYING NAT DUE PROCESS AND ANY MEANINGFUL DISCOVERY IN THIS CONTESTED CASE PROCEEDING.

#### *A.) The Commission Has Refused to Allow NAT Basic Discovery in this Proceeding.*

The Court should deny the pending motion to dismiss because deferring a judicial ruling on these basic discovery issues until after the Commission's final decision simply does not provide NAT with an adequate remedy. SDCL 1-26-30.

The scope of pre-trial discovery is governed by SDCL 15-6-26(b)(1)

which provides:

> *Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party*, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.[17]

(emphasis added).

The South Dakota Supreme Court has consistently held that the discovery rules are to be liberally construed. A broad construction of the discovery rules is necessary to satisfy the three purposes of discovery: (1) narrow the issues; (2) obtain evidence for use at trial; and (3) secure information that may lead to admissible evidence at trial. *Kaarup v. St. Paul Fire and Marine Ins. Co.,* 436 N.W.2d 17, 19-20 (SD 1989). "This phraseology implies a broad construction of 'relevancy' at the discovery stage because one of the purposes of discovery is to examine information that may lead to admissible evidence at trial." *Id.* at 20.

[17] Additionally, under the South Dakota Administrative Rules, the Commission must find there is "good cause" to order the production of the relevant information requested. ARSD 20:10:01:22.01.

The reason for the broad scope of discovery is that "[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession." *Hickman v. Taylor,* 329 U.S. 495, 507–08 (1947). South Dakota's Rules of Civil Procedure distinguish between discoverability and admissibility of evidence. Therefore, the rules of evidence assume the task of keeping out incompetent, unreliable, or prejudicial evidence at trial. However, these considerations are not inherent barriers to discovery.

NAT has met this liberal discovery standard because the evidence NAT seeks bears on matters that Sprint and CenturyLink allege disqualify NAT from receiving a Certificate of Authority. As described below, the information NAT seeks is either directly related to the legal standards that apply in this certification proceeding, or is calculated to obtain information that may be used to test the veracity of the statements Sprint and CenturyLink have made in its testimony. NAT is simply requesting that it be provided with basic discovery so that this proceeding can be properly litigated and NAT can defend itself from the erroneous allegations made by Sprint and CenturyLink.

On February 24, 2012, NAT served discovery requests on Sprint

and CenturyLink. (CI 893-936). On March 9, 2012, Sprint served its objections and responses to NAT's discovery requests. (CI 896-908). NAT subsequently filed its "motion to compel discovery" and a hearing was held before the Commission on April 24, 2012. (CI 893-936; 1451-1554). At this hearing, the Commission refused to compel answers to the vast majority of NAT's basic discovery requests despite the fact that Sprint either refused to respond (or provided incomplete responses) to issues that directly relate to the heart of this proceeding. For example:

- Data Requests 1.1 and 1.2 seek information about Sprint's relationships with Free Conference Service Companies (FCSCs) and/or conference calling companies that compete with NAT and Free Conferencing Corporation. (CI 896-897). Sprint and CenturyLink allege that NAT's Application should be denied because (1) NAT is involved in "access stimulation" or "traffic pumping" and (2) NAT's revenue sharing agreement with Free Conferencing is "not in the public interest." Therefore, NAT intends to demonstrate that Sprint and CenturyLink have engaged in a nationwide scheme to obstruct the "access stimulation" activities of free conferencing providers and small rural telephone companies. Simply stated, Sprint and CenturyLink refuse to pay small rural telephone companies

engaged in "access stimulation" and "revenue sharing agreements." These payment-withholding activities have become Sprint's and CenturyLink's "business model." Additionally, the FCC has already rejected Sprint's and CenturyLink's claims that "access stimulation" and "revenue sharing agreements" are not in the "public interest." Instead, the FCC provided specific guidelines for these activities.

- Data Request 1.7 seeks information about Sprint's local exchange tariffs, price lists or catalogs that it has filed in each state where Sprint is certificated. (CI 898). Sprint's objections to this Data Request and its allegations that "[t]hese documents are publicly available" do not comply with South Dakota's rules of discovery. (CI 898). Furthermore, this information is not publicly available. Sprint and CenturyLink offer wholesale rate sheets used to price "access stimulation" traffic at very high rates. NAT needs this information to demonstrate that Sprint's and CenturyLink's motives in opposing NAT's Application are to prohibit NAT from handling conferencing traffic.
- Data Request 1.8 asks Sprint to identify each FSCS that receives calls delivered by Sprint in each state in which Sprint is certificated. (CI 898). Sprint objects to this Data Request as

"neither admissible nor reasonably calculated to lead to the discovery of admissible evidence" with no further justification. (CI 898). Of course, not only is this issue relevant, the issues of "access stimulation" and "revenue sharing agreements" regarding conferencing services are the *principal reasons* why Sprint has intervened in this action. Once again, Sprint and CenturyLink offer wholesale rate sheets used to price "access stimulation" traffic at very high rates. NAT needs this information to demonstrate that Sprint's and CenturyLink's motives in opposing NAT's Application are to prohibit NAT from handling conferencing traffic.

- Data Request 1.9 seeks information regarding Sprint's transportation of calls from other interexchange carriers in South Dakota and the rate and mileage applicable to these calls. (CI 898). Once again, Sprint objects to this Data Request as "neither admissible nor reasonably calculated to lead to the discovery of admissible evidence" with no further justification. (CI 899). Not only is this information relevant, the issues of "access stimulation" and "revenue sharing agreements" regarding conferencing services are the *principal reasons* why Sprint has intervened in this action. NAT needs this information

to demonstrate that Sprint competes for, carries, and then refuses to pay small rural telephone companies for conferencing traffic. Sprint captures the conferencing traffic at the wholesale level from other carriers that would pay the small rural telephone companies. Sprint then obtains a competitive advantage because it does not have to pay the terminating access fees. NAT is then negatively impacted because Sprint competes to carry the traffic that it publicly and vehemently disputes.

- Data Request 1.15 requests that Sprint produce "all documents evidencing communications between you and any LEC, ILEC, CLEC, and/or IXC offering services in the state of South Dakota." (CI 900). Sprint objects to this Data Request on the grounds that it is "overbroad, unduly burdensome, and seeks information that is neither admissible nor reasonably calculated to lead to the discovery of admissible evidence" and seeking "information protected by the joint defense privilege." (CI 900). This request is intended to demonstrate that Sprint's response to other small rural telephone companies has been to refuse payment due to "access stimulation" and that Sprint's objections in this proceeding are not related to NAT obtaining a Certificate

of Authority. Rather, Sprint's objections are based on its "business plan" of "policing" practices that the FCC has already addressed.

- Data Request 1.16 seeks "all documents evidencing communications between [Sprint] and any FCSC." (CI 900). Sprint objects to this Data Request on the grounds that it is "overbroad, unduly burdensome, and seeks information that is neither admissible nor reasonably calculated to lead to the discovery of admissible evidence." (CI 900). Once again, not only is this issue relevant, the issues of "access stimulation" and "revenue sharing agreements" regarding conferencing services are the *principal reasons* why Sprint has intervened in this action.

- Data Request 1.17 seeks "all documents evidencing communications between you and any centralized access provider in South Dakota." (CI 900). Sprint objects to this Data Request on the grounds that it "seeks information that is neither admissible nor reasonably calculated to lead to the discovery of admissible evidence." (CI 900). NAT needs this information to demonstrate that Sprint pays other entities for conferencing traffic, but not to small rural telephone companies (like NAT).

This information will also demonstrate if Sprint entered into any "agreements" with these other entities.

- Data Request 1.18 seeks "all contracts, agreements or other documentation of understanding or arrangement between you and any LEC and/or IXC offering services in South Dakota." (CI 901). Sprint objects to this Data Request on the grounds that it "seeks information that is neither admissible nor reasonably calculated to lead to the discovery of admissible evidence." (CI 901). NAT needs this information to demonstrate that Sprint accepts the duty of delivering traffic from other IXCs to the small rural telephone companies but then refuses to make payments to the small rural telephone companies.

- Data Request 1.24 seeks "all documents, memos, and correspondence relating to your wholesale pricing rates ("rate decks") from 2009-present." (CI 902). Sprint objects to this Data Request on the grounds that it is "overbroad, unduly burdensome, and seeks information that is neither admissible nor reasonably calculated to lead to the discovery of admissible evidence" and "protected by the attorney-client or attorney work product privilege." (CI 902-903). NAT needs this information to demonstrate that Sprint attempted to stifle competition for

conferencing services by charging excessive transport rates at the wholesale level. Later, when competition entered the wholesale market, Sprint lowered its rates to compete to carry the traffic and then refused to pay the small rural companies for their services.

- Document Request No. 6 seeks "all costs studies or similar analyses that you have performed or had prepared on your behalf by any consultant or other third party for access services and high volume access services," (CI 907). Sprint objects to this Request on the grounds of "work product privilege, and seeks information that is neither admissible nor reasonably calculated to lead to the discovery of admissible evidence." (CI 907). Sprint has directly referenced these studies and those of its designated experts as to why the Commission should deny NAT's Application. NAT needs this information in order to respond to Sprint's allegations.
- Document request No. 7 seeks "any documents that evidence commitments for future financing of Sprint's operations." (CI 907). Sprint objects to this Request on the grounds that it is "attorney-client privileged, overbroad, and seeks information that is neither admissible nor reasonably calculated to lead to

> the discovery of admissible evidence. Subject to those objections and without waiver thereof, a significant amount of financial information about Sprint Nextel is available publicly within its Securities and Exchange Commission filings." (CI 908). NAT needs this information because industry analysts have opined that Sprint is on the verge of bankruptcy. NAT seeks to demonstrate that Sprint's opposition to NAT's Application furthers its "business plan" to maintain financial viability.

NAT's discovery requests seek information that is directly related to the fundamental issues in this proceeding. Without this basic information, the Commission has placed NAT in a position that precludes it from engaging in any meaningful contested case proceeding. The Court should deny the pending motion to dismiss and allow NAT to engage in proper discovery.

### *B.) The Commission Erred In Quashing NAT's Rule 45 Subpoena.*

SDCL 15-6-45(b) provides that "[a] subpoena may . . . command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein. . . ." A Rule 45 subpoena has a close relation to the proper functioning of the discovery rules. Most notably, a Rule 45 subpoena is necessary to compel a *non-party* to produce various material things. In other words, the purpose of a Rule

45 subpoena is to compel a *non-party* to produce documents or things relevant to the facts at issue in a pending judicial proceeding.[18] *See* WRIGHT & MILLER, 9A FEDERAL PRACTICE & PROCEDURE, Civ. § 2452 (3d ed.). In South Dakota, a Rule 45 subpoena may be quashed or modified "if it is unreasonable and oppressive." SDCL 15-6-45(b)(1). The party seeking to modify or quash a subpoena has the burden of proving the necessity of doing so. *State ex rel. Dep't of Transp. v. Grudnik,* 90 S.D. 571, 243 N.W.2d 796, 798 (1976).

On Monday, May 7, 2012, NAT served its "Rule 45 Subpoena" ("Subpoena") upon the Commission. (CI 1400-1450). NAT's Subpoena requested that the Commission produce:

> All . . . documents sought below seek the respective applicant's "confidential" (i.e., non-public) financial statements, consisting of balance sheets, income statements, and cash flow statements (including any audited financial statements) provided by the respective applicant to the [Commission] from January 1, 2000 to the present date in the following telecommunications dockets. (CI 1402).

NAT's Subpoena also provided a list of cases that relate specifically to the Commission's prior Certificate of Authority proceedings since 2000. (CI 1402-1438). It is undisputed that the Commission is the custodian of the subpoenaed documents.

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[18] A Rule 45 subpoena is also reviewed under the discovery standards set forth in SDCL § 15-6-26(b)(1) and ARSD 20:10:01:22.01.

On May 14, 2012, the Commission held a hearing on NAT's Subpoena. (CI 1593-1623). First, the Court should note that the Commission was clearly confused as to the scope of its review. At the hearing, Chairman Nelson made it very clear that he only wanted the parties to comment on the "due process" implications of NAT's Subpoena.[19] (CI 1599-1600). In fact, Commission Nelson specifically stated "I don't see the issue today dealing with the relevancy question. That is not an issue for today." (CI 1601).

However, in quashing NAT's Subpoena, Commissioner Hanson chastised NAT's Subpoena as engaging in a "fishing expedition" and specifically stated "I'm very concerned about the *relevance* of the information that's being sought. *It needs to be substantiated*. And there simply must be a reasonable assumption that the information that's being requested is somehow – *contributes to the conclusion of the docket*." (CI 1615, lines 7-14) (emphasis added). Commission Hanson further opined "I'm very uncomfortable with just a Subpoena asking for information – *I won't use the term fishing expedition but it absolutely has to be germane in some context and has to be shown to us to be relevant*

[19] For clarification purposes, the Court should note the transcript occasionally refers to "Chairman Hanson" when the correct reference should be "Chairman Nelson." (*See e.g.,* CI 1595, lines 2-9; CI 1597, lines 13-25; CI 1599, lines 6-25; CI 1600, lines 9-10; and CI 1600, lines 19-21).

and the parties need to be able to go through the due process. And I think this particular Subpoena circumvents all of those." (CI 1615) (emphasis added). In other words, the Commission clearly made its decision to quash, at least in part, on an issue that NAT was specifically precluded from even addressing – the *relevancy* of its Rule 45 subpoena.

As a procedural matter, the Commission simply quashed the Rule 45 Subpoena without even considering whether it was "unreasonable and oppressive." SDCL 15-6-45(b)(1). As a substantive matter, NAT's Subpoena was improperly quashed for a variety of reasons.

First, in the past twelve years (the time period covered by NAT's Subpoena), the Commission has granted literally hundreds of certifications to provide telecommunications services in South Dakota. Each of these dockets has included a review by the Commission of the applicant's confidential financial information. NAT is entitled to review the confidential financial documents of these previous applicants so that NAT can analyze the "financial thresholds" that the Commission has established as adequate to receive a Certificate of Authority in South Dakota. As a matter of fundamental fairness, the nature of this proceeding requires that NAT be provided with this information so that it may meet its burden under the Commission's rules.

In sum, NAT has the burden of proving its "financial capabilities" to offer the telecommunications services proposed in its Application.[20] The information NAT seeks in its Subpoena is directly related to the legal standards that apply in this certification proceeding. This information is necessary for the case to be properly litigated, and the production of this information will ensure that the Commission has before it that which it needs to properly review NAT's Application.

NAT's financial capabilities to provide telecommunications services are directly relevant to this proceeding. And indeed, NAT has represented that it has the financial resources to provide the telecommunications services. Sprint and CenturyLink dispute NAT's claim. NAT's Rule 45 Subpoena seeks information from the Commission that is directly related to a fundamental issue in this proceeding and the Court should reverse the Commission's decision to quash.

[20] As previously noted, NAT has the burden to prove that it has "sufficient technical, financial and managerial capabilities to offer the telecommunications services described in its application before the commission may grant a certificate of authority." SDCL § 49-31-3.

## II. THE COMMISSION ERRED BY GRANTING CENTURYLINK'S "PETITION TO INTERVENE" BECAUSE THE PETITION WAS FILED IN VIOLATION OF SOUTH DAKOTA'S "UNAUTHORIZED PRACTICE OF LAW" REQUIREMENTS.

On October 11, 2011, NAT filed its Application for Certificate of Authority ("Application") with the Commission. (CI 1-26). Immediately after NAT filed its Application, the Commission established an "intervention deadline" of October 28, 2011.

On October 28, 2011 (the intervention deadline) CenturyLink filed its "Petition to Intervene" ("Petition"). (CI 41-45). Mr. Jason D. Topp and Mr. Todd Lundy (in their respective capacities as CenturyLink's corporate counsel) filed CenturyLink's Petition. (CI 41-45). It is undisputed that neither Mr. Topp nor Mr. Lundy are licensed to practice law in South Dakota. Additionally, at the time they filed CenturyLink's Petition, neither Mr. Topp nor Mr. Lundy had applied for *pro hac vice* ("for this one particular occasion") status from the Circuit Court.[21] NAT responded to CenturyLink's Petition, asserting that the Petition was improper and should be stricken because it was submitted on behalf of a corporate entity by attorneys not licensed to practice law in South Dakota. (CI 66-73; 95-102).

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[21] After NAT's counsel informed CenturyLink of its inappropriate filing, CenturyLink attempted to cure its filing by obtaining local counsel. On November 1, 2011 (after the Commission's intervention deadline had passed), local counsel filed CenturyLink's "Re-filed Petition to Intervene."

On November 22, 2011, the Commission held a hearing on CenturyLink's Petition. (CI 1569-1592). At the end of this hearing, the Commission denied NAT's request to strike CenturyLink's improper Petition.[22] (CI 103). The Commission clearly erred in its legal ruling.

***A.) Carlson v. Workforce Safety & Insurance***

In *Carlson v. Workforce Safety & Insurance*, 2009 ND 87, 765 N.W.2d 691, an employee appealed a district court judgment affirming a decision by Workforce Safety & Insurance ("WSI"), which reconsidered and reversed its earlier decision granting the employee workers' compensation benefits. *Id.* at ¶1. The employee argued that that WSI's decision was void, because the company's attorneys were not authorized to practice law in North Dakota during WSI's reconsideration of the employee's claim. *Id.* On appeal, the North Dakota Supreme Court reversed the district court's decision, struck the company's legal filings, and found that the company's non-resident attorney's preparation of a

[22] The Court should note that CenturyLink's response at the hearing to NAT's objections were limited to CenturyLink's alleging "confusion" and "unwritten rules" regarding whether our state's "unauthorized practice of law" requirements apply to matters before the Commission. (CI 1577-1579). Of course, CenturyLink provided no authority for this position. Also, it was unfortunate that when NAT's counsel attempted to reply to CenturyLink's baseless assertions, then-Commission Chairperson Gary Hanson refused to even let NAT's counsel respond to this very significant legal issue. (CI 1584-1586).

request for reconsideration constituted the "unauthorized practice of law."

First, the North Dakota Supreme Court found that "[w]hether a corporation can be represented by a non-attorney agent in a legal proceeding and what happens to the matter when a corporation is not represented by an attorney are questions of law . . . [which] are fully reviewable on appeal." *Id.* at ¶ 13 (quoting *Wetzel v. Schlenvogt,* 2005 ND 190, ¶ 10, 705 N.W.2d 836).

Second, the Supreme Court noted that "[t]he record reflects that [for a period of time], [until] an attorney licensed to practice law in North Dakota filed a notice of appearance on behalf of [the company], [the company] was represented in the administrative proceedings for [the employee's] claim by attorneys who were not authorized to practice law in North Dakota, and the issue is whether that representation constitutes the unauthorized practice of law."[23] *Id.* at ¶ 16.

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[23] Section 27-11-01 prohibits the unauthorized practice of law in North Dakota, and provides:

> Except as otherwise provided by state law or supreme court rule, a person may not practice law, act as an attorney or counselor at law in this state, or commence, conduct, or defend in any court of record of this state, any action or proceeding in which the person is not a party concerned . . . unless that person has:
>
> 1. Secured from the supreme court a certificate of admission to the bar of this state; and

Third, the Supreme Court rejected the employer's assertion that its non-licensed attorney's request for reconsideration was not the unauthorized practice of law under N.D.R. Prof. Conduct 5.5(b)(5), because the request could have been filed by a person without a license to practice law. *Id.* at ¶¶ 24-25 The Court noted:

> [A] request for consideration requires the preparation of a document with a statement of alleged errors in the prior decision, which *necessarily requires the application of legal skill and knowledge to the facts of the case.* Under that statute, a request for reconsideration requires more than providing information on a claim form provided by WSI and, contrary to [the employer's] assertion, is not a "purely mechanical service that could have been performed by a non-lawyer."
>
> . . . .
>
> We conclude that the preparation of a request for reconsideration . . . with the statement of the alleged errors in the prior decision *requires the application of legal skill and knowledge to the facts of the case and constitutes the practice of law*. . . .

*Id.* at ¶ 25 (emphasis added).

Fourth, the Court opined:

> "A corporation is an artificial person that must act through its agents." (quoting *Wetzel*, 2005 ND 190, ¶ 11, 705 N.W.2d 836). We have "firmly adhered to the

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2. Secured an annual license therefor from the state board of law examiners.

Any person who violates this section is guilty of a class A misdemeanor.

> common law rule that a corporation may not be represented by a non-attorney agent in a legal proceeding." . . . "Just as one unlicensed natural person may not act as an attorney for another natural person in his or her cause, *an unlicensed natural person cannot attorn for an artificial person, such as a corporation.*" *Id. The proper remedy when a corporation is represented by a non-attorney agent is to dismiss the action and strike as void all legal documents signed and filed by the non-attorney*. *Id.* at ¶¶ 12-13. . . . In *Wetzel,* at ¶ 13, we held "that when a case is commenced on behalf of a corporation by a non-attorney agent, *the case and all documents signed by the non-attorney agent are void from the beginning*." Under *Wetzel,* we conclude [the company's non-licensed attorney's] request for reconsideration on behalf of a corporate entity such as [the employer] was not conduct that could be performed by a non-lawyer and is not subject to the [pro hac vice] safe harbor of N.D.R. Prof. Conduct 5.5(b)(5).

*Id.* at ¶ 26 (emphasis added).

***B.) Preston v. University of Arkansas for Medical Sciences***

In *Preston v. University of Arkansas for Medical Sciences,* 128 SW3d 430 (Ark. 2003), a patient brought a medical malpractice action against the state university hospital and its physicians. *Id.* at 431-32. The circuit court dismissed the complaint against the hospital without prejudice and struck the complaint because the patient's out-of-state attorneys were not licensed to practice in Arkansas and had not sought *pro hac vice* admission before filing the complaint.[24] *Id.* at

[24] The patient's out-of-state attorneys admitted that they were not licensed to practice law in Arkansas and were engaged in the unauthorized practice of law. *Id.* at 434.

In affirming the circuit court's decision, the Arkansas Supreme Court first noted that "[t]he [out-of-state] counsel unquestionably were practicing law in Arkansas, because they filed a complaint on behalf of the [patient] in an Arkansas court." (citing *Davenport v. Lee*, 72 SW3d 85 (Ark. 2002) and *Arkansas Bar Assn. v. Union National Bank of Little Rock,* 273 S.W.2d 408 (Ark. 1954)). The Supreme Court also opined:

> The real question for this court to resolve is whether that legal practice was authorized under Arkansas law. In the past, we have emphasized the importance of being authorized to practice law in this state by noting:
>
> It seems well settled that unauthorized practice of law, at least by court appearances, *is an unlawful intrusion and usurpation of the function of an officer of the court, and constitutes a contempt of any court in which or under whose authority or sanction the unauthorized person pretends to act*.

*Id.* at 434 (citing *McKenzie v. Burris,* 500 S.W.2d 357, 361 (Ark. 1973)).

Next, in considering the appropriate consequences for the out-of-state attorney's unauthorized actions, the Supreme Court stated "it is axiomatic that it is illegal to practice law in Arkansas without a license." *Id.* at 436 (quoting *Davenport*, 72 SW3d at 92). The Supreme Court then noted:

> In light of our duty to ensure that parties are represented by people knowledgeable and trained in the law, *we cannot say that the unauthorized practice of law simply results in an amendable defect*. Where a party not licensed to practice law in this state attempts to represent the interests of others by submitting himself

> or herself to jurisdiction of a court, *those actions such as the filing of pleadings, are rendered a nullity*.

*Id.* at 436-37 (quoting *Davenport*, 72 SW3d at 94) (emphasis added).

The Supreme Court concluded its opinion by stating "[w]e further [ruled in *Davenport*] that 'the original complaint, as a nullity never existed, and thus, an *amended complaint cannot relate back to something that never existed, nor can a nonexistent complaint be corrected*.'" *Id.* at 437 (quoting *Davenport*, 72 SW3d at 94) (emphasis added). "We hold that the same is true for the case before us. The *Davenport* case governs our decision, and the [patient's] complaint is a nullity." *Id.*

### *C.) The Court Should Review and Reverse the Commission's Decision and Strike CenturyLink's Intervention Petition Because it was Filed By Out-Of-State Attorneys Who Engaged in the Unauthorized Practice of Law*

In this case, the Commission clearly erred in granting CenturyLink's Petition. CenturyLink's Petition was filed in direct violation of South Dakota's "unauthorized practice of law" rules and South Dakota Supreme Court precedent. SDCL 16-18-1 provides:

> **License and bar membership required to practice law-Injunction to restrain violations**. Excepting as provided by § 16-18-2, *no person shall engage in any manner in the practice of law in the State of South Dakota unless such person be duly licensed as an attorney at law, and be an active member of the State Bar in good standing*. Any person engaging in any manner in the practice of law in violation of this section may be restrained by permanent injunction in any court

> of competent jurisdiction, at the suit of the attorney general or any citizen of the state. (emphasis added).

SDCL 16-18-2 provides in relevant part:

> **Attorney licensing-Non-resident attorneys-"Pro hac vice" admission on motion-Requirements.** A nonresident attorney, although not licensed to practice law in the State of South Dakota, but licensed in another jurisdiction within the United States, may, after first complying with the requirements hereinafter set forth, participate in the trial or hearing of any particular cause in this state, provided a resident practicing attorney of this state, a member of the State Bar of South Dakota, is actually employed and associated and personally participates with such nonresident attorney in such a trial or hearing.
>
> . . .
>
> The appearance of a nonresident attorney, unlicensed in the State of South Dakota, in an *administrative hearing* under chapter 1-26 *shall be in accordance with the requirements of this section* and subject to the approval of the circuit court for the county in which the hearing takes place or the circuit court for Hughes County, South Dakota.

(emphasis added).

The South Dakota Supreme Court has taken a strong stance against the unauthorized practice of law in our state. *See Steele v. Bonner,* 2010 SD 37, 782 NW2d 379; *In re Widdison,* 539 N.W.2d 671, 675 (S.D.1995). Consistent with this stance, our Supreme Court has previously held that filings in a lawsuit by a person not entitled to practice law in South Dakota are a "nullity." *Stevens v. Jas. A. Smith*

*Lumber Co.,* 222 N.W. 665 (S.D. 1929). *See Jacobs v. Queen Ins. Co. of America,* 213 N.W. 14 (S.D. 1927) (summons signed only by Minnesota attorney who was not admitted to practice law in South Dakota is not "signed" by "plaintiff or his attorney" and is a "nullity").

Attorneys Topp and Lundy (in their respective capacities as CenturyLink's corporate counsel) improperly filed CenturyLink's Petition on October 28, 2011 (the Commission's deadline for intervention). Neither Mr. Topp nor Mr. Lundy are licensed to practice law in South Dakota. Additionally, at the time they filed CenturyLink's Petition, neither Mr. Topp nor Mr. Lundy had applied for *pro hac vice* status from the Hughes County Circuit Court. Finally, it cannot be disputed that CenturyLink's Petition required the application of legal skill and knowledge to the facts of the case and constituted the "practice of law."

CenturyLink is a sophisticated company and well-aware of the impropriety of making a "last minute filing" in direct contravention of South Dakota Supreme Court precedent and our state's unauthorized practice of law rules. Furthermore, CenturyLink's subsequent retention of local counsel (and local counsel's submission of CenturyLink's "Re-Filed Petition to Intervene") was accomplished *after* the Commission's intervention deadline. CenturyLink cannot argue that its subsequent "Re-Filed Petition to Intervene" should somehow "relate back" to its

original improper Petition. As the Arkansas Supreme Court properly stated, "[a]n [improper filing] cannot relate back to something that never existed, nor can a nonexistent [filing] be corrected." *Preston,* 128 S.W.3d at 437.

The Commission erred in granting CenturyLink's intervention. CenturyLink should not be allowed to simply "flaunt" South Dakota law at its convenience. The Court should take CenturyLink's improper actions seriously, follow the requirements of South Dakota's "unauthorized practice of law" requirements, the reasoning of the South Dakota Supreme Court, North Dakota Supreme Court and Arkansas Supreme Court, and strike CenturyLink's Petition.

## CONCLUSION

For these reasons, the Court should deny any motion to dismiss this appeal because waiting to review the Commission's final decision would not provide NAT with an adequate remedy in this contested case proceeding.

Dated this 31st day of July, 2012.

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of *APPELLANT NATIVE AMERICAN TELECOM, LLC's MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS* was delivered *via electronic mail* on this 31st day of July, 2012, to the following:

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