STATE OF SOUTH DAKOTA

COUNTY OF BUFFALO

IN CIRCUIT COURT

FIRST JUDICIAL CIRCUIT

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

MEMORANDUM OF SPRINT COMMUNICATIONS COMPANY IN SUPPORT OF CENTURYLINK'S MOTION TO DISMISS

Sprint Communications Company L.P. ("Sprint") urges the Court to grant the motion of CenturyLink QCC ("CenturyLink") to dismiss the appeal of Native American Telecom, LLC ("NAT"). NAT has appealed three interim orders that the South Dakota Public Utilities Commission ("Commission") entered in Telecom Docket 11-087, in which the Commission has yet to issue a final order on NAT's application for a certificate of authority. Because SDCL 1-26-30 grants this Court jurisdiction over final orders of the Commission, this Court must dismiss NAT's appeal unless the Court determines NAT will have no adequate remedy absent interlocutory review. NAT essentially avoids that question in its 45-page brief, preferring instead to argue the merits of its appeal. NAT's inescapable dilemma is that this Court, as well as the South Dakota Supreme Court, will be able to give NAT effective relief should the

Commission deny NAT's application. Hence, SDCL 1-26-30 compels this Court to grant CenturyLink's motion and dismiss NAT's appeal.

BACKGROUND

Under SDCL 49-31-3, no one can operate as a local exchange carrier unless it has a certificate of authority from the Commission.[1] NAT initially sought such a certificate in 2009, but withdrew its application after purportedly receiving authority to operate in this state from the Crow Creek Sioux Tribal Utility Authority. *See* Order Granting Motion to Dismiss dated Feb. 5, 2009, in Telecom Dkt. 08-110. NAT began invoicing Sprint in late 2009 and presumably other interexchange carriers, for providing what NAT calls terminating access charges. But NAT still has no certificate of authority from the Commission to provide any service in this state and thus is operating illegally in this state.[2]

---

[1] SDCL 49-31-3 provides in relevant part:

> Each telecommunications company that plans to offer or provide interexchange telecommunications service shall file an application for a certificate of authority with the commission pursuant to this section. . . . The commission shall have the exclusive authority to grant a certificate of authority.

[2] In SDCL 49-31-3, the Legislature has made NAT's conduct a Class 1 misdemeanor:

> The offering of such telecommunications services by a telecommunications company without a certificate of authority or inconsistent with this section is a Class 1 misdemeanor.

NAT's brief is loaded with unsupported allegations and innuendo about why Sprint and CenturyLink oppose NAT and others of its ilk. What NAT and its partner Free Conferencing Corporation have done is exploit a regulatory system that permits rural local exchange carriers to charge above-market rates for terminating access service. NAT (and other traffic pumpers) then exploit the filed rate doctrine and the FCC's prohibition on call blocking self help to protect their overpriced tariffs. *See* Declaratory Ruling and Order ¶¶ 1, 6 in FCC WC Dkt. 07-135 (released June 28, 2007).[3] NAT claims Sprint and other interexchange carriers must pay for its overpriced access services (which are not provided to bona fide customers living within the service area), unless Sprint can prevail on the FCC to order NAT to lower its rates. The FCC cannot order refunds, only prospective relief, so the regulatory regime is stacked in favor of entities like NAT. *ACS of Anchorage, Inc. v. FCC*, 290 F.3d 403, 461 (D.C. Cir. 2002) (overturning an FCC order requiring refunds).

NAT trumpets the recent FCC decision *In re Connect America Fund* that permits traffic pumpers to operate under certain conditions. The FCC recognized the market-distorting effects that companies like NAT

[3] The 2007 FCC order predates NAT's startup, and NAT has never before argued to the Commission or to any court that Sprint has not complied with the FCC order. Sprint in fact has complied with that order, and NAT's insinuation to the contrary is utterly baseless.

cause and directed those local exchanges with revenue sharing agreements with entities like Free Conferencing to dramatically lower their rates. *See* Report and Order, *In re Connect America Fund*, FCC 11-111 at ¶¶ 662-65 (discussing market distortion) and ¶¶ 689-91 (requiring rates to be reduced) (Nov. 18, 2011) (reported at 76 Fed. Reg. 73830). Ultimately, the FCC's initiative to move to a "bill and keep" system will eliminate the arbitrage opportunities that companies like NAT exploit. *See* Testimony of Randy G. Farrar in TC 11-087, at 30 and n. 33 (filed March 26, 2012) (Record 174-675).

In its unsupported diatribe, NAT also implies Sprint that operates a competitive conferencing service and earns large fees from hosting conferences. NAT Memorandum in Opposition at 12 n. 9. NAT made this same unfounded assertion in the federal litigation Sprint brought against NAT. In that case, Sprint introduced evidence that it does not operate a conference calling service and does not benefit from the use of its facilities for users of Free Conferencing or similar services. Affidavits of Randy C. Farrar and Jack Buettner.[4] NAT knows this, and it is improper to suggest otherwise.

[4] The affidavits can be found as documents 61-1 (Buettner) and 61-3 (Farrar) in the court docket in Sprint's federal lawsuit against NAT, venued in the District of South Dakota, Case No. 4:10-cv-4110.

In yet another accusation utterly unsupported by the record, NAT asserts that Sprint has marked down its wholesale rates to capture business for which Sprint refuses to pay NAT. NAT Memorandum in Opposition at 16-17. This allegation, baseless in fact, has nothing at all to do with NAT's application for a certificate of authority. The Court should simply ignore NAT's calumny.

ARGUMENT

The issue before this Court on CenturyLink's motion is whether it has jurisdiction over NAT's appeal because, as provided by the last sentence of SDCL 1-26-30, this Court cannot give NAT adequate relief on appeal from an order denying NAT's application. NAT has no explanation for why it believed the record before the Commission was adequate to support NAT's motion for summary judgment, but cannot now proceed without its requested discovery. The standard for summary judgment is that there are no material facts in dispute and the Commission should rule as a matter of law in NAT's favor. The Commission obviously did not agree when it denied NAT's motion in its May 4, 2012 order. Order Denying Motion for Summary Judgment at 2. (Record at 1397-99.)

NAT pursues three issues in its appeal:

1. Whether the Commission erred in denying NAT's motion to compel Sprint and CenturyLink to respond to NAT's discovery;

2. Whether the Commission erred in quashing the Rule 45 subpoena NAT served on the Commission; and

3. Whether the Commission erred in granting CenturyLink's petition to intervene.

NAT Memorandum in Opposition at 1.

The question whether this Court needs to review the Commission's rulings on these issues now turns on whether this Court could provide NAT an adequate remedy on these issues after a final Commission order. The issues would be ripe for review only if the Commission ruled adversely to NAT. Should the Commission deny NAT's application, this Court could review each of these three issues to determine whether the Commission abused its discretion in ruling as it did on each of these issues. *Cf. Maynard v. Heeren*, 1997 SD 60 ¶ 5, 563 N.W.2d 830, 833 (circuit court discovery orders reviewed for abuse of discretion). If this Court reverses on any of these issues, it could remand the case back to the Commission for further proceedings. For example, if this Court determined that Sprint and CenturyLink should have been ordered to provide responses to all of NAT's discovery (both responded to some of the requests), then the case would be back before the Commission, where the agency could rule on NAT's application after the record has been supplemented with the additional information. The Court could likewise provide the same relief on the other two issues.

Under federal practice, discovery orders are almost never appealable before final judgment. *See* 15B C. Wright, A. Miller & E. Cooper, FEDERAL PRACTICE & PROCEDURE § 3914.23 (2d ed. 1992). This bar to interlocutory review applies even to discovery orders denying a claim of attorney-client privilege. *See Mohawk Indus., Inc. v. Carpenter*, ___ U.S. ___, 130 S. Ct. 599 (2007). In *Mohawk Indus.*, the Court deemed review after final judgment to be adequate, despite the acknowledged importance of the privilege. The reviewing court could order a new trial where "the now protected material and its fruits are excluded from evidence." *Id.* at 607. The common sense logic to this rule is simple: interlocutory appeals in discovery orders would, among other things, delay and disrupt the progress of a case. *See American Express Warehousing, Ltd. v. Transamerica Ins. Co.*, 380 F. 2d 277, 280 (2d. Cir. 1967). This same delay is occurring here, and this Court should follow the federal rule. *Cf. Jacquot v. Rozum*, 2010 SD 84, ¶15, 790 N.W. 2d 498, 503 (South Dakota court will look to federal precedent that interprets comparable rule of procedure).

NAT's argument is simply that review is needed because the Commission's rulings have denied it "due process" and "made it impossible for NAT to fairly engage in any 'contested case' hearing." NAT Memorandum in Opposition at 3. But these assertions are not the test

set by SDCL 1-26-30, which is whether no adequate relief would be available on review of a final order. As discussed above, that simply is not the case here.

The Commission acted well within its discretion when it denied NAT's motion to compel. The reason NAT propounded such extensive discovery on Sprint and CenturyLink was that "NAT should be entitled to the same discovery information that CenturyLink and Sprint are seeking from NAT." NAT April 2, 2012, Motion to Compel Discovery at 1 (Record at 893-93); Aff. of Todd Lundy dated April 1, 2012 ¶ 5 (Record at 971-988); April 24, 2012 Hearing Transcript at 78 (Record at 1451-1554). Very simply, NAT asserted a tit-for-tat justification to its discovery requests.

The substantive standards that govern NAT's application for a certificate of authority are in ARSD 20:10:24:02, ARSD 20:10:32:03 and ARSD 20:10:32:06. Nothing in any of these rules implicates Sprint's internal business information or business practices, or that makes such information relevant to the Commission's determination on NAT's application. All of these standards are focused on the applicant, NAT. While Sprint asked for information focused solely on NAT's operations on the Crow Creek Reservation in South Dakota, NAT asked for business and financial information with respect to Sprint's nationwide operations.

NAT's argument that it should be entitled to the same discovery that the intervenors sought was utterly unsupported by the Commission's rules. Thus, the Commission very correctly decided not to order Sprint to produce irrelevant information. That decision simply will not deny NAT due process or cramp its ability to contest the issues raised by its application.[5]

CONCLUSION

The Court can review the issues that NAT is pursuing in this forum another day, after the Commission issues a final order. The Court thus should grant CenturyLink's motion to dismiss.

Dated: August 9, 2012.

BRIGGS AND MORGAN, P.A.

By 
Scott G. Knudson
Philip R. Schenkenberg
2200 IDS Center
Minneapolis, MN 55402
(612) 977-8400

WHITING LAW OFFICE
Stanley E. Whiting
142 E. 3rd Street
Winner, SD 57580
(605) 842-3373

Counsel for Sprint
Communications Company, L.P.

[5] The same conclusion holds for the other two issues, which are directed at the Commission and CenturyLink.