BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN RE:	Docket No. TC10-026
SPRINT COMMUNICATIONS COMPANY L.P.,	
Complainant,	**RESPONSE OF SPRINT OPPOSING NAT'S MOTION TO REOPEN DISCOVERY**
v.	
NATIVE AMERICAN TELECOM, LLC,	
Respondent.	

On July 25, 2013, Native American Telecom, LLC ("NAT") filed a pleading styled "Motion to Re-open Discovery and Stay Sprint's Motion for Summary Judgment." Sprint Communications Company L.P. ("Sprint") opposes this motion as procedurally improper and legally and logically unfounded. The Commission should see the motion for what it is – another of NAT's delaying tactics.

NAT'S MOTION TO DISMISS PENDING BEFORE THE COMMISSION SINCE JUNE 1, 2010 IS READY FOR A DECISION

On May 5, 2010, Sprint filed its Amended Complaint seeking declaratory relief from the Commission to halt NAT's unlawful provision of intrastate telecommunications services in South Dakota. NAT has never answered that complaint, but instead has two motions before the Commission to dismiss the Amended Complaint. The first of these

motions NAT filed on June 1, 2010, which principally attacked the Commission's jurisdiction over NAT on the ground that jurisdiction over Sprint's complaint with NAT rested with the Crow Creek Sioux Tribal Utility Authority. On July 29, 2010, NAT filed a motion to stay the PUC proceeding in deference to an action NAT brought against Sprint in Crow Creek Sioux Tribal Court.

The parties extensively briefed both motions. In their brief filed November 15, 2010, staff recommended granting the motion to stay. (Staff Brief at 7.) Regarding the motion to dismiss, staff recommended denying the motion (Staff Brief at 7-8), arguing that the facts were too disputed to determine whether the Crow Creek Sioux Tribal Utility Authority had jurisdiction over Sprint under one of the two bases the United States Supreme articulated in *Montana v. United States*, 450 U.S. 544 (1981)[1]. In reply to staff, however, NAT stated it "believes that the current voluminous record provides this Commission with a sufficient factual basis to dismiss Sprint's complaint under the *Montana* exceptions." NAT Reply to Staff Brief at 6 (filed December 7, 2010).

[1] The general rule is that an Indian tribe lacks authority over non-Indians, even within a reservation, unless the non-Indian has consented to tribal jurisdiction, or the inability to exercise jurisdiction over the non-Indian's activity would threaten the very existence of the tribe. *See Plains Commerce Bank v. Long Family Land and Cattle Co., Inc.*, 554 U.S. 316, 330-31, 341 (2008).

The Commission heard both the motion to stay and motion to dismiss on April 5, 2011. The Commission first heard argument on NAT's motion to stay and decided unanimously to deny that motion. (April 5, 2011 Hearing Tr. at 50.) At this point, NAT reversed course on the motion to dismiss. Suddenly, the "voluminous record" was inadequate, and NAT instead asked the Commission to defer ruling, so "when discovery is completed NAT can move forward with its Motion to Dismiss . . . ." (April 5, 2011 Hearing Tr. at 51.) The Commission acceded to that request without significant discussion. (April 5, 2011 Hearing Tr. at 54-55.)

Despite its representation to the Commission that it was necessary to move forward with discovery, NAT has in fact never served any discovery on Sprint or anyone else in this docket. NAT has not, indeed cannot, identify any issue in its June 1, 2010, motion to dismiss that needs discovery. Accordingly, NAT cannot gainsay that its June 1, 2010, motion to dismiss is ripe for Commission deliberation and decision.

NAT'S MOTION TO DISMISS ON MOOTNESS GROUNDS IS READY FOR A DECISION

On April 23, 2012, NAT again moved to dismiss Sprint's Amended Complaint, this time on the ground that the case was moot. NAT's claim of mootness was based on the fact NAT had offered to refund to Sprint the intrastate charges Sprint had inadvertently paid. NAT Motion to

Dismiss Based on Mootness at 6. NAT's mootness motion was argued to the Commission on July 17, 2012, when the Commission heard argument as well on Sprint's motion to compel. At the hearing, NAT did not seek leave for discovery on the mootness issue as an alternative to the Commission denying the motion outright. Obviously, NAT's motion to dismiss on mootness grounds is ready for deliberation and decision.

NO FURTHER DISCOVERY IS NEEDED TO RULE ON SPRINT'S MOTION FOR SUMMARY JUDGMENT

On December 11, 2012, Sprint moved for summary judgment on its claims for declaratory relief. Because there were no material facts in dispute, Sprint sought a declaration that NAT must have a certificate of authority before it can offer intrastate telecommunications in the state; that because NAT has no certificate of authority, it is operating illegally in this state; that NAT cannot bill Sprint (or any IXC) for intrastate services until it has a certification of authority, and that only the Commission has regulatory jurisdiction over Sprint. In opposing Sprint's motion, NAT did not identify any material facts in dispute, argue that it needed more discovery or ask the Commission to defer ruling on Sprint's motion.

The Commission should deny NAT's motion to "re-open" discovery first because it fails to comply with South Dakota's rules on summary judgment practice. Discovery need not be reopened because there is no

scheduling order cutting off discovery in this docket. What Sprint's summary judgment motion did was put the burden on NAT to produce admissible evidence creating a disputed issue of material fact. NAT did not do this in its responsive papers.

If a party opposing summary judgment cannot produce admissible evidence to create a disputed issue of material fact, the party can seek a continuance if the party demonstrates by way of affidavit the reasons why discovery is needed. SDCL § 15-6-56(f). The South Dakota Supreme Court has interpreted this rule to require "a showing how further discovery will defeat a motion for summary judgment." *Dakota Indus., Inc. v. Cabela's.Com, Inc.,* 2009 SD 39 ¶ 6, 766 N.W.2d 510, 512 (quoting *Anderson v. Keller*, 2007 SD 89 ¶ 31, 739 N.W.2d 35, 43). In this affidavit, the party seeking discovery must articulate what facts will be learned through discovery. *See Dulany v. Carnahan,* 132 F.3d 1234, 1238 (8th Cir. 1997). NAT has not complied with Rule 56(f), neither filing an affidavit nor showing how discovery will unearth facts that could defeat Sprint's motion. This failure alone defeats NAT's motion.

THE MOTIONS PENDING BEFORE THE COMMISSION IN TC10-026 ARE LEGALLY DISTINCT FROM THE ISSUES BEFORE THE COMMISSION IN TC11-087

NAT justifies its last minute delaying tactic by blaming it on Sprint's statement in a discovery response served on June 18, 2013, that

because NAT had amended its application for a certificate of authority, Sprint did not intend to move the admission of Randy Farrar's written direct testimony filed in TC11-087 on March 26, 2012. NAT argues that because Sprint relied on admissions NAT made in TC11-087 as part of Sprint's record for summary judgment with TC10-026, these two dockets are "invariably intertwined." NAT Motion to Re-open at 2, ¶5. Hence, NAT argues, it should be entitled to discovery into Sprint's decision not to offer Mr. Farrar's March 26, 2012, direct testimony.

These arguments can be rejected out of hand. The mere fact Sprint used an admission of a party opponent from another docket as part of its summary judgment record in TC10-026 does not, without more, make the issues in TC10-026 dependent on resolution of issues in TC11-087. The Commission noticed the distinction between the two dockets in its May 4, 2012, order denying NAT extensive discovery from Sprint and CenturyLink, stating "this proceeding regards NAT's ability to meet the requirements to receive a certificate of authority, not the interveners' current ability to meet the requirements." May 4, 2012, order in TC11-087 at 3. NAT's motion papers likewise do not identify what it hopes to learn in discovery in TC11-087 that will relate to the issues

presented in the pending motions in TC10-026, a failure that, as noted, vitiates NAT's motion to reopen.[2]

NAT also asserts in its motion that it "is not seeking to reopen discovery on the eve of trial." NAT's Motion to Re-open at 4, ¶ 12. That assertion ignores the last minute nature of the motion, filed only a few days before the Commission was to take up the question of addressing the pending motions in TC10-026. This motion was another delay tactic of NAT to avoid a decision on the merits – holding that the Commission had jurisdiction over NAT and granting Sprint the declaratory relief it seeks.

CONCLUSION

The Commission should deny NAT's motion to reopen. That motion does not comply with SDCL § 15-6-56(f) and on its face does not establish how discovery in TC11-087 will affect the issues the Commission must decide when addressing the open motions in TC10-026.

[2] Sprint has resisted NAT's efforts at additional discovery of Sprint in TC11-087, despite the Commission's May 4, 2012, order, which held that discovery in TC11-087 should be directed at NAT's fitness to receive a certificate of authority, not Sprint's right to operate. The issues in TC10-026 are so legally distinct from what the Commission must decide in TC11-087, that any motion to compel NAT may file is that docket should not detain the Commission from addressing the pending motions in TC10-026.

Respectfully submitted,

Dated: August 8, 2013.

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