

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA

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IN RE:

Docket No. TC10-026

SPRINT COMMUNICATIONS  
COMPANY L.P.,

Complainant,

v.

NATIVE AMERICAN TELECOM, LLC,

Respondent.

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**SPRINT COMMUNICATIONS  
COMPANY L.P.'S MEMORANDUM  
IN SUPPORT OF MOTION  
TO COMPEL NAT TO HONOR  
ITS AGREEMENT TO ANSWER  
DISCOVERY**

**INTRODUCTION**

Sprint Communications Company L.P. ("Sprint") initiated this action in May 2010 as part of an effort to end the traffic pumping scheme Native American Telecom, LLC ("NAT") is operating in this state. It seeks discovery from NAT that has been pending since early in 2011. Last November, NAT agreed on the record before the Commission to provide this discovery. It now refuses to do so. The Commission should order NAT to produce this discovery and sanction it for not doing so.

**PROCEDURAL BACKGROUND**

Sprint's present motion relates back to discovery Sprint propounded to NAT on January 31, 2011. On March 7, 2011, NAT moved for a protective order to avoid responding until the Commission had ruled on NAT's then-pending motion to stay. On March 21, 2011, Sprint and NAT reached a compromise whereby NAT would provide answers to a subset of Sprint's discovery. But NAT failed to honor that promise and never provided any response to that subset. During the April 5, 2011 hearing on NAT's

motion to stay, NAT agreed that discovery should go forward in this docket so the Commission would have a full record before it when ruling on NAT's motion to dismiss.<sup>1</sup>

On May 12, 2011, Sprint moved in TC10-26 for an order from the Commission compelling NAT to answer Sprint's discovery that Sprint had served on January 31, 2011. On May 17, 2011, NAT appealed the Commission's May 4, 2011 order denying NAT's motion to stay. The Buffalo County Circuit Court affirmed the Commission in an order signed on August 23, 2011, and NAT took no further appeal.

The Commission placed Sprint's motion to compel on its agenda for the November 22, 2011 meeting. Prior to the hearing, Sprint and NAT reached an agreement through their respective counsel, on what NAT would produce. Counsel for Sprint read that agreement into the record, concluding as follows:

**MR. CHAIRMAN:** In the matter of a complaint filed by Sprint Communications LP against Native American Telecom (NAT) regarding telecommunication services. Did Sprint and NAT reach an agreement on this docket as well?

**SCHENKENBERG:** Thank you Mr. Chairman and members of the Commission, this is Phil Schenkenberg for Sprint, we did, and what I would like to do is just briefly put our Agreement on the record; number one (1) by December 16, of this year, NAT will provide written responses to Sprint's Interrogatories 1-7, 9,

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<sup>1</sup> At the April 5, 2011 hearing on NAT's motion to stay, counsel for NAT argued that discovery should be completed in TC10-26 before ruling on NAT's motion to dismiss:

MR. SWIER: Thank you. Mr. Chair, members of the Commission, I think we're just going to rely on our Brief here. I think that the Staff Brief is correct in that it would be premature at this point based on the factual record to go any further with this Motion to Dismiss.

I think that when you look at the record, this Motion should be deferred and a decision should not be made. Now that we are going to be apparently in front of this Commission, that I think the Motion to Dismiss as the Staff Brief said is premature and that we should move forward with discovery, and when discovery is completed NAT can move forward with its Motion to Dismiss and this Commission can have more information on which to base its decision.

April 5, 2011, Hearing Tr. At 50-51.

10, 12, 14, 15, 16, and 21; 21 is limited to the breakdown of minutes destined to tribal members as compared to minutes destined to a CCC and what is contemplated is responses not objections to those Interrogatories; bullet point number two (2) by that same date December 16, NAT will provide documents responsive to document requests 4, 5, 8, 12, 13, 16, 17 (limited to contracts, price lists, and bills), 18, 19-22, 24 (limited to identifying number blocks that each CCC is using, 31, 34, 36 (limited to settlement agreements) and 48, NAT will again provide responses not objections and will be able to withhold documents only on privilege grounds; next bullet point (3) if Sprint needs to come back to the Commission, to enforce either of the first two bullet points, the Commission will have the discretion to award our costs and fees. The next bullet point (4) we will hold our other interrogatories and document requests in abeyance at this time we'll see what we have on December 16 and if we need anything further those disputes will be disputes going forward not subject to this agreement and if we can limit ourselves just to depositions we'll do that; next bullet point (5) what is produced by NAT here in 10-026 and any depositions that are done in 10-026 will be available to Sprint to use in TC09-098 subject to Confidentiality Agreement that applies in that case and I'll be proposing a Confidentiality Agreement in 10-026 to Mr. Swier here yet this week.

**SCHENKENBERG:** I think the final agreement was that we would hold our motions, Sprint would hold its motion to enforce in 09-098 in abeyance as related to NAT which we have already discussed about on the record. Mr. Swier, is there anything I've missed?

**SWIER:** No, I think that is our agreement in total.

**SCHENKENBERG:** And so I don't believe we are asking you to do anything, we just wanted the agreement to be part of the record and now it is, I'm certainly available to answer any questions.

**MR. CHAIRMAN:** Thank you Mr. Schenkenberg and Mr. Swier, you did respond in the positive that the agreement as articulated by Mr. Schenkenberg does include everything that NAT has agreed to?

**SWIER:** Correct.

**MR. CHAIRMAN:** Then it is a part of the record and we will expect that that will be complied with, is there anything further that we need to do on TC10-026? Seeing no, are there any questions by commissions on this item? If not we will then move on to Telecommunications Docket TC11-083 and with our

appreciation to Mr. Schenkenberg and Mr. Swier for reaching a mutually agreeable agreement.<sup>2</sup>

NAT has obviously reversed course and applied for a certificate of authority to operate, which application is being processed in TC11-87. NAT again is refusing to honor its promises to Sprint to provide discovery in TC10-26. But NAT's application does not subsume TC10-26 or moot Sprint's complaint in TC10-26. Sprint is entitled to responses in TC10-26 that NAT agreed to provide on November 22, 2011.<sup>3</sup>

### ARGUMENT

The Commission should grant Sprint's Motion to Compel. NAT has flouted its discovery obligations and dishonored its representations to the Commission and Sprint. NAT should be held to account for its contumacious behavior.

#### Standards for a Motion to Compel

The Commission "may issue an order to compel discovery" "for good cause shown by a party." A.R.S.D. 20:10:01:22.01. The Commission has adopted the South Dakota Rules of Civil Procedure relating to discovery. *Id.* Under those rules, a party may move for an order compelling an answer if a party fails to answer an interrogatory or request for production of documents. SDCL 15-6-37(a)(2). In this case not only has NAT failed to answer Sprint's interrogatories and requests for production of documents as required by the Commission's discovery rules, but NAT has repeatedly violated its

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<sup>2</sup> The public recording of the Commission's November 22, 2011 meeting can be found at the Commission's website at <http://puc.sd.gov/Archives/2011/default.aspx>.

<sup>3</sup> The meet and confer history on Sprint's discovery goes back, first, to a three-way discussion between counsel for Sprint and NAT and PUC staff on March 21, 2011. On March 19, 2012, counsel for Sprint and NAT met by phone, where NAT's counsel made it clear NAT would not be responding to Sprint's outstanding requests. See April 11, 2012 Knudson Aff. at ¶¶ 2-4 and Ex. 1.

agreement with Sprint and reneged on its representations to the Commission. This is unacceptable – the “statutory mandate and court order [establishing the time period for responding to discovery requests] are not invitations, requests, or even demands; they are mandatory.” *Schwartz v. Palachuk*, 1999 SD 100, ¶ 23, 597 N.W.2d 442, 447.

**The Issues Raised by Sprint’s Complaint Need to be Decided in TC10-26**

Sprint brought its complaint against NAT in May 2010 to stop NAT from billing Sprint for alleged terminating access charges under authority purportedly granted it by the Crow Creek Sioux Tribal Utility Authority. In Sprint’s view, NAT was violating and continues to violate state law by operating within this state without a certificate of authority from the Commission. It was and remains Sprint’s position that the traffic pumping scheme NAT has operated in conjunction with Free Conferencing Corporation does not involve legitimate switched access service which may be charged to Sprint or other IXCs pursuant to a tariff.

NAT’s present application for state authority to operate as a Competitive Local Exchange Carrier does not moot TC10-26, which involves, among other issues, the important and unresolved question of the Commission’s authority to regulate telecommunications services on the Crow Creek Reservation. The Commission could (and should, in Sprint’s view) deny NAT’s application in TC11-87. But given NAT’s willingness to flout state law so far, it is fair to conclude NAT will continue to operate on the Crow Creek Reservation and bill Sprint and other IXC’s for intrastate traffic. Moreover, South Dakota Network seeks to bill for NAT’s traffic pumping scheme, and

has an ongoing action against Sprint that involves in part charges for NAT's traffic pumping activities. SDN's claims are not resolved in this docket.

**The Discovery NAT Should Answer**

Despite NAT's agreement presented to the Commission, several of NAT's responses remain woefully inadequate. Here are the discovery requests for which Sprint now seeks full and complete responses:

**INTERROGATORY NO. 6.** Identify every Call Connection Company with which you have or have had any kind of Business Relationship.

**ANSWER:** NAT has a Business Relationship with Free Conferencing Corporation. Free Conferencing Corporation is based in Long Beach, California.

Indicative of NAT's approach, this Answer could easily be clarified by confirming that NAT neither has nor has had Business Relationship with any other Call Connection Company.

**INTERROGATORY NO. 7.** For each Call Connection Company with which you have or have had any kind of Business Relationship, describe in detail the Call Connection Services provided by the Call Connection Company for the existence of the Business Relationship.

**ANSWER:** Free Conferencing Corporation purchases services from NAT.

This Answer is not responsive. The question asked to describe in detail the Call Connection Services Free Conferencing Corporation or any other Call Connection Company provides to its customers.

**INTERROGATORY NO. 9.** For each Call Connection Company to which you have routed calls, identify and describe the services, goods, or products you provide to the Call Connection Company, including all features and practices associated with the provisions of each service, the specific tariff or contract provision(s) pursuant to which each service, good, or product is provided, and the telephone number(s) or block(s) of telephone numbers that you assigned to the Call Connection Company.

**ANSWER:** NAT provides switched access service and collocation of equipment to Free Conferencing Corporation pursuant to its interstate tariffs and local tariffs. The telephone number(s) that are assigned to the Call Connection Company is as follows: 605-477-1000 thru 605-477-9999.

This response does not identify the specific tariff provisions by which NAT provides switched access services and collocation of equipment to Free Conferencing Corporation, nor does it describe in detail all the services and associated features and practices provided to Free Conferencing Corporation. In addition, NAT should clarify whether NAT provides “switched access services” to Free Conferencing Corporation and, if so, provide the billing documentation to Free Conferencing Corporation.

**INTERROGATORY NO. 21.** For each and every bill submitted to Sprint or any other interexchange carrier on your behalf, identify each and every bill and provide the call data supporting any charge for intrastate charges assessed by you. Please also identify how many calls were made and completed purely within the exterior boundaries of the Crow Creek Indian Reservation.

**ANSWER:** NAT is attempting to obtain this information because billing is done by an outside firm and is not readily available at the time of providing these answers. However, it appears that the amount in controversy in this case is *de minimis* compared to the cost of obtaining this information from the outside firm.

NAT agreed to provide a breakdown of minutes to tribal members as compared to minutes destined to a CCC, and needs to meet its commitment to Sprint. This information goes directly to the issue of the Commission’s jurisdiction. In similar litigation, the United States District Court for the District of Minnesota compelled a CLEC to specifically provide summary information rather than producing the records that would contain the information because the producing party had a distinct advantage in knowing its own records to obtain the information. *See Tekstar Commc’n Inc. v. Sprint*

*Comm'n Co. L.P.*, Civ. No. 8-cv-1130, Order on Motion to Compel dated May 14, 2009, at 34-35.

**DOCUMENT REQUEST NO. 4:** Produce all documents that reflect NAT Board of Directors' minutes, meetings, and resolutions, and NAT's bylaws.

**RESPONSE:** *See* attached "Exhibit 6." (Please note that matters protected by the attorney-client privilege have been redacted).

NAT failed to produce any documents reflecting meetings of NAT's Board of Directors, which Peter Lengkeek, one of NAT's directors, testified in his deposition had taken place. NAT produced no Board minutes, resolutions or bylaws nor any Board information packets, or correspondence regarding Board meetings. NAT Board minutes may address the jurisdiction issues Sprint's complaint raises.

**DOCUMENT REQUEST NO. 8:** Produce documents sufficient to show both NAT's total number of originating and its total number of terminating access minutes, broken down by intrastate and interstate minutes, and the charges NAT billed interexchange carriers for those minutes for all time periods within the scope of the Amended Complaint.

**RESPONSE:** *See* attached "Exhibit 1."

NAT failed to produce responsive documents. Exhibit 1 is a simply a one page chart of end user fees and taxes inception through September 2011. That document does not contain any of the requested information.

**DOCUMENT REQUEST NO. 12:** Produce all documents submitted to the Crow Creek Tribal Utility Authority to obtain your authority to provide telecommunications services on the Crow Creek Reservation.

**RESPONSE:** *See* attached "Exhibit 7."

Exhibit 7 includes a February 8, 2010 press release from the Crow Creek Sioux Tribe; a March 29, 2010 *ex parte* "Order" of the Crow Creek Sioux Tribal Utility

Authority (“TUA”); an August 19, 2008 press release announcing a tribal telecommunications plan; and an October 28, 2009 TUA order granting NAT authority to operate on the reservation. NAT produced no correspondence with the TUA, begging the question how the TUA received information to issue its March 29, 2010 *ex parte* order. Nor did NAT produce the Tribal telecommunications plan. Presumably NAT has a copy, assuming one exists beyond the August 19, 2008 press release. Regarding the October 28, 2008 TUA order there should be correspondence and filings leading up to that order that were not produced.

**DOCUMENT REQUEST NO. 13:** Produce bills issued by NAT to Call Connection Companies, all documents relating to such bills, and all documents reflecting payments or other considerations given to NAT or any of its Affiliates in response to such bills.

**RESPONSE:** See attached “Exhibit 1,” “Exhibit 3,” and “Exhibit 3 – CONFIDENTIAL.”

These exhibits cannot be a complete response. NAT produced no bills to Free Conferencing Corporation, nor any documents to support Exhibits 1 and 3. The “confidential” bank statements were produced in open court in the federal case and stop at the end of 2010. NAT should produce all responsive documents to the present.

**DOCUMENT REQUEST NO. 16:** Produce all documents related to any payments or other consideration you have made or received related to any Call Connection Service or Call Connection Company (regardless of whether any payments were netted against other payments), including payments to any brokers or consultants related to a Call Connection Company or related to a Call Connection Service, and including all documents showing how any payments encompassed within this document request were calculated.

**RESPONSE:** See attached “Exhibit 1.”

Exhibit 1 is not *all documents*. It is a summary chart of only some, but not responsive information.

**DOCUMENT REQUEST NO. 17:** Produce all documents reflecting any service that you allege you provided to any Call Connection Company.

**RESPONSE:** This information is contained in NAT's tariffs, current tariffs which are available for review at [www.nativeamericantelecom.com](http://www.nativeamericantelecom.com). See also attached "Exhibit 4."

Exhibit 4 is simply NAT's latest FCC and TUA tariffs. As such this is not the complete production that was promised.

**DOCUMENT REQUEST NO. 31:** Produce documents that show the source of your revenues, including any documents that show what portion of revenues come from Call Connection Companies, business customers, residential customers, access charges on calls to Call Connection Companies, access charges on calls to non-customers (that are not to Call Connection Companies), and other sources of revenue. Include your financial statements (unaudited and audited if available) and those of your Affiliates, including Balance Sheets, Income Statements, and Statements of Cash Flow, for 2009 and 2010.

**RESPONSE:** See attached "Exhibit 8 – CONFIDENTIAL"

Exhibit 8 is a balance sheet, profit and loss statement and statement of cash flows for 2009 and 2010, a redacted transaction detail for CABS Collection Income for 2010. We are entitled, first, to financial documents without redaction. Moreover, we are entitled to the transaction detail responses to the categories set out in Request No. 31.

Exhibit 8 is nowhere near a complete response that was promised.

**DOCUMENT REQUEST NO. 48:** Produce all documents discussing, referring to or reflecting the nature of your relationship with Call Connection Companies, including any documents using the term customer, partner or end user to refer to Call Connection Companies and any documents discussing whether those terms should be used to refer to Call Connection Companies.

**RESPONSE:** See attached "Exhibit 6."

Exhibit 6 was described above. Exhibit 6 cannot possibly be a complete production.

**CONCLUSION**

The time has come for the Commission to require NAT to honor its word and its obligations to provide meaningful discovery. The Commission should order NAT to provide full and complete responses to the above discovery requests immediately and to pay Sprint's attorneys' fees and costs associated with this motion.

Dated: April 11, 2012.

**BRIGGS AND MORGAN, P.A.**

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