BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN RE:	Docket No. TC10-026
SPRINT COMMUNICATIONS COMPANY L.P., Complainant, v. NATIVE AMERICAN TELECOM, LLC, Respondent.	**REPLY MEMORANDUM OF SPRINT COMMUNICATIONS COMPANY IN SUPPORT OF MOTION TO COMPEL**

Sprint Communications Company L.P. ("Sprint") has been seeking discovery from Native American Telecom, LLC ("NAT") in docket TC10-26 since January 2011, or for nearly 18 months. NAT has repeatedly promised to provide discovery responses and expressly represented to the Commission that discovery should be completed in order for the Commission to rule on NAT's motion to dismiss based on a complete record. NAT now argues that Sprint's complaint in TC10-26 is moot and thus, no discovery should be allowed. But as Sprint demonstrated in its response to NAT's latest motion to dismiss (filed on May 14, 2012), the issues raised by Sprint's complaint are not moot, but remain for determination by the Commission.

Sprint is entitled to discovery in TC10-26 as the case is not moot.

Sprint filed its complaint against NAT to establish that NAT could not provide intrastate telecommunications services without a certificate of authority from the Commission and that the Crow Creek Sioux Tribal Utility Authority lacked jurisdiction over Sprint. Sprint also sought damages for the amounts Sprint had paid NAT for intrastate services. Pending before the Commission is NAT's motion to dismiss in deference to jurisdiction of the Crow Creek Sioux Tribal Utility Authority, which NAT explicitly urged the Commission to defer deciding until discovery had been completed. Now, having filed for a certificate of authority and disclaiming any present intent to seek to collect on past due amounts, NAT claims Sprint's case is now moot.

NAT's shifting litigating positions do not mean this proceeding is effectively over. As Sprint demonstrated in its brief opposing NAT's latest motion to dismiss, this proceeding is not moot. Sprint is entitled to a definitive ruling from the Commission as to the Commission's jurisdiction to regulate intrastate telecommunications services within the boundaries of the State, an issue raised by Sprint's complaint and NAT's first motion to dismiss. The Commission's ruling denying NAT's motion to stay points in the direction the Commission should rule on this issue. Moreover, what the Commission says on the issue of its jurisdiction will

figure in what jurisdiction, if any, the Crow Creek Sioux Tribal Authority has to regulate providers of telecommunications services.

Pending before the Commission in TC11-87 is NAT's application for a certificate of authority. Regardless of how the Commission rules on that application, the issues in this docket must be decided. If the Commission denies NAT's application, Sprint is entitled to judgment against NAT in TC10-26 and a refund for sums unnecessarily paid. Presumably, other IXCs who have paid NAT could seek refunds as well. But even if NAT's application is granted, Sprint is still entitled to a declaration that NAT has operated illegally within the state and must be accountable for that wrongful conduct.

NAT's offer not to pursue collection of past due amounts does not moot this proceeding

NAT now professes that it will not pursue any claim against Sprint for past due amounts. When coupled with its pending application for a certificate of authority, NAT claims this offer moots this proceeding. NAT Brief at 3-4. Assuming, *arguendo*, that the mootness doctrine applies to an administrative agency, once litigation has started NAT's voluntary cessation of illegal conduct does not moot the case. *See, e.g., Kidder, Peabody & Co. v. Maxus Energy Corp.*, 925 F.2d 556, 563 (2d Cir. 1991)(simple representation that party would not bring a federal securities law claim not sufficient to moot claim);*cf. Stanley County*

School Dist. No. 57-1 v. Stanley County Educ. Ass'n, 310 N.W.2d 162, 163-64 (S.D. 1981)(fact school district and union had entered into new two-year contract did not moot controversy). NAT's offer is not binding. Who knows what NAT would do to collect on previously invoiced services should the Commission grant NAT's motion to dismiss. Nor does the offer not to pursue collection affect the rights of other IXCs who have been illegally billed. *See* 15 MOORE'S FED. PRACTICE ¶101.99[3] (3d ed.)(discussing when past acts may be judicially addressed because of collateral consequences). In short, the Commission should disregard NAT's self-proclaimed mootness argument. It is conjured *ex nihilo.*

The subpoena Sprint served on NAT in TC09-98 does not mean Sprint is not entitled to discovery in TC10-26

NAT also suggests (at pages 7-8) that Sprint is conflating discovery served on NAT in TC09-98 with the discovery Sprint seeks in TC10-26. Sprint served a subpoena on NAT in TC09-98 and believes NAT's responses to that subpoena are inadequate. Sprint has merely deferred bringing a motion in TC09-98 to enforce the subpoena (or order to show cause) pending NAT's responses to Sprint's discovery in this docket. The Commission should simply direct NAT to provide the discovery it promised in TC10-26. If NAT responds fully, that should (hopefully) avoid any need to enforce the subpoena in TC09-98.

CONCLUSION

The time has come for NAT to own up to its promises and representations to the Commission and Sprint. The Commission should order NAT to provide the discovery sought and sanction NAT for its vexatious conduct in prolonging this discovery dispute.

Dated: July 11, 2012.

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