BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

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.	))))))))	Docket No. TC11-087 **NAT'S BRIEF IN OPPOSITION TO SPRINT'S MOTION TO QUASH DEPOSITION NOTICES**

The applicant, Native American Telecom, LLC (NAT), by counsel, submits this brief in opposition to Sprint Communications Company L.P.'s (Sprint's) motion to quash the notices of deposition of Sprint, the corporate entity, and its testifying expert, Randy Farrar. Sprint's efforts to obstruct the discovery process and forestall NAT from seeking the truth about Sprint's unsupported, conclusory statements and assertions concerning NAT's business practices and motivations should not be countenanced. The Commission is entitled to know the truth or veracity of Sprint's statements and assertions concerning NAT's ability to satisfy the requirements to obtain a certificate of authority to provide local exchange service. Sprint's motion to quash should be denied.

Sprint contends that the depositions of Sprint and its expert, Randy Farrar, should not go forward, for four reasons: (1) the depositions are simply a delay tactic by NAT, (2) the Rule 30(b)(6) notice of deposition served on Sprint requests the same information the Commission has deemed irrelevant, (3) NAT failed to seek an Order of the Commission allowing it to conduct a discovery deposition of Randy Farrar, and (4) NAT's document requests contained in the Rule 30(b)(6) deposition notice would impose an undue burden

on Sprint. For the reasons set forth below, Sprint has failed to carry its burden of showing good cause for not allowing the depositions to proceed.

1. **NAT is not seeking to delay these proceedings but rather to present all facts relevant to its pending CLEC Application.**

NAT's revised Application for a Certificate of Authority was filed with the Commission on June 3, 2013. It proposes to provide intrastate interexchange access service for traffic that originates and terminates off of the Crow Creek Reservation within the State of South Dakota, pursuant to ARSD 20:10:32:03, 20:10:32:15 and 20:10:24:02. NAT filed the direct testimony of Jeff Holoubek and Brandon Sazue on July 26, 2013. Sprint then filed its amended third motion to compel on August 21, 2013. Clearly, Sprint seeks to conduct further discovery but does not wish to allow NAT the same opportunity.

Only last week did Sprint file the amended direct testimony of its expert, Randy Farrar. For Sprint to suggest that NAT is seeking to delay this proceeding, by engaging in legitimate discovery, is beyond the pale.

Our rules pertaining to discovery and procedure in civil disputes are modeled after the Federal Rules of Civil Procedure (FRCP). *State By and Through Dept. of Transp. v. Grudnik,* 243 N.W.2d 796, 797 (S.D. 1976). SDCL 15-6-26(a) (Rule 26) sets forth the various methods by which discovery may be accomplished:

> Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission. Unless the court orders otherwise under § 15-6-26(c), the frequency of use of these methods is not limited.

There is nothing in the procedural schedule applied to this proceeding which would limit or curtail a party's use of discovery methods, including the use of depositions under SDCL 15-6-30 (FRCP 30). The parties are free to utilize interrogatories, requests for production of documents, requests for admission or depositions. The administrative rules applied to this contested case incorporate the rules of civil procedure set forth in SDCL Ch. 15-6.

The burden rests on the party opposing discovery and seeking a protective order, in this case Sprint, to show that the information sought is a trade secret or other confidential commercial information and that disclosure would be harmful to that party's interest in the information; once the party opposing discovery makes that showing, the burden then shifts to the party seeking discovery to show that the information is relevant to the subject matter of the lawsuit and is necessary to prepare the case for hearing. *Bertelsen v. Allstate Ins. Co.*, 2011 S.D. 13, ¶ 59, 796 N.W.2d 685, 704-05. Good cause supporting the granting of a protective order is established on a showing that disclosure will work a clearly defined and serious injury. *Id.* Injury supporting a finding of good cause to grant a protective order must be shown with specificity; broad allegations of harm will not suffice. *Id.*

2. **NAT seeks to obtain discovery of any matter which is relevant to the subject matter involved in its pending application – whether it relates to the claims being made by NAT or the claims being made by Sprint (or the other interveners) in this proceeding.**

Sprint argues that NAT's deposition notice of Sprint and document requests 1-3 and 6-15 seek information the Commission has already deemed irrelevant. However, relevancy is broadly construed under our discovery rules:

> 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** . . . . 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.

SDCL 15-6-26(b) (emphasis added). The scope of pretrial discovery "is, for most part, broadly construed." *Kaarup v. St. Paul Fire and Marine Ins. Co.*, 436 N.W.2d 17 (S.D. 1989). Discovery cannot be denied on the ground that the documents sought could not legally become part of action. *Id.*

In this case, Sprint has made broad, sweeping accusations that it has been forced to pay to NAT exorbitant access charges for originating and terminating long distance calls. Sprint asserts it is losing money on account of access charges paid to NAT for originating and terminating traffic. NAT is entitled to probe and discover the factual basis underlying Sprint's accusations, largely presented through the direct testimony of its expert, Randy Farrar. NAT can then show to the Commission that its access rates are substantially less than what Sprint pays to other Local Exchange Carriers (LECs) across the country, and the volume of traffic carried by Sprint that is originated or terminated at the NAT exchange is miniscule as compared to the traffic carried by Sprint that is originated and terminated at other LEC exchanges. Suffice it to say, NAT has a well-

founded basis to believe that Sprint's protestations to the effect that "NAT access rates are too high" and that "having to pay these access rates is causing Sprint to lose money" are simply untrue. Of course, the only way for NAT to prove this is to discover the factual basis for Sprint's broad, sweeping accusations. NAT is entitled to know what Sprint pays for access rates charged by other LECs, in comparison to NAT's access rates – as well as the overall volume of traffic carried by Sprint that is originated or terminated at other LEC exchanges.

Sprint made these matters an issue in this proceeding. It cannot make such broad, sweeping accusations and then refuse to offer up the supporting data and facts to prove its accusations leveled at NAT.

Sprint's asserts that NAT's counsel "recognized that NAT's new requests are contrary to [the Commission's] prior ruling, but still refused to withdraw its requests." Sprint Memorandum at 5. This is absolutely false. The fact is that Sprint wants desperately to hide its own history of making payments to a host of LECs, ILECs and/or CLECs for terminating switched access charges from 2009 to the present. NAT is entitled through discovery to probe these matters, particularly because Sprint has made access stimulation a central part of its claims for denying NAT's CLEC Application.

3. **NAT merely seeks to take the discovery deposition of Sprint's expert, Randy Farrar – a routine discovery device under the Federal Rules of Civil Procedure.**

Sprint contends that the notice of taking deposition of its expert, Randy Farrar should be quashed because NAT should have sought an Order from the Commission allowing it to take the deposition. NAT's counsel explained to Mr. Schenkenberg that in

his 29 years in the practice of law in South Dakota, he has never applied to the court for leave to take a discovery deposition of an opposing party's testifying expert. It is common practice in South Dakota for all parties to a contested case to permit depositions of testifying experts. In fact, the Federal Rules of Civil Procedure allow for depositions of opposing experts, without first seeking leave of court. FRCP 26(a)(4)(A).

In this case, NAT offered to conduct the depositions at Sprint's home office in Overland Park, Kansas and to pay a reasonable expert fee and expenses associated with taking the deposition.

Again, Sprint would rather put up roadblocks and deny NAT the opportunity to discover all facts pertinent to its pending Application.

4. **NAT seeks to discover all facts which may be relevant to its own pending Application – particularly if it is shown that Sprint and the other telecommunications carriers operating in South Dakota impose and collect terminating access rates in the same manner as NAT.**

Sprint desperately attempts to limit the scope of discovery in this contested case proceeding. It seeks to hide from the Commission what it has paid over the last four (4) years in origination and termination access rates charged by other LECs across the country. By doing so, it can conveniently call out and condemn NAT for what it describes as "traffic pumping." Sprint indiscriminately objects to document requests 1 through 15. However, its own business practices, to the extent they match what NAT proposes to do, are certainly relevant to its claims and assertions denouncing NAT and requesting that NAT's pending CLEC Application be denied. NAT is not requesting that Sprint create documents to comply with the document requests set forth in the deposition

notice served on Sprint. The document requests are narrowly tailored to Sprint's business practices involving payments made to other LECs for the origination and termination of long distance calls. What NAT ultimately wishes to show to the Commission is that its access rates are substantially less than what Sprint has paid to other LECs across the country, and for much higher volumes of traffic than what is originated or terminated at the NAT exchange in South Dakota.

CONCLUSION

For the reasons stated above, NAT respectfully urges the Commission to deny Sprint's motion to quash the deposition notices served on Sprint and its expert, Randy Farrar.

Dated this 6th day of September, 2013.

LYNN, JACKSON, SHULTZ & LEBRUN, P.C.

By: /s/Jay C. Shultz

Jay C. Shultz
PO Box 8250
Rapid City, SD 57709-8250
Phone: 605-342-2592
Fax: 605-342-5185
jshultz@lynnjackson.com

SWIER LAW FIRM, Prof. LLC

By: /s/Scott R. Swier

Scott R. Swier
202 N. Main St.
PO Box 256
Avon, SD 57315
Phone: 605-286-3218
Fax: 605-286-3219
scott@swierlaw.com

Attorneys for Native American Telecom LLC

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of September, 2013, I sent to:

Ms. Patricia Van Gerpen
Executive Director
South Dakota Public Utilities Commission
500 E. Capitol Ave.
Pierre, SD 57501
patty.vangerpen@state.sd.us

Ms. Karen E. Cremer
Staff Attorney
South Dakota Public Utilities Commission
500 E. Capitol Ave.
Pierre, SD 57501
karen.cremer@state.sd.us

Mr. Patrick Steffensen
Staff Analyst
South Dakota Public Utilities Commission
500 E. Capitol Ave.
Pierre, SD 57501
patrick.steffensen@state.sd.us

Mr. Jeff Holoubek
President
Native American Telecom, LLC
253 Ree Circle
Fort Thompson, SD 574339
jeff@nativeamericantelecom.com

Mr. William VanCamp
Olinger, Lovald, McCahren & Reimers, P.C.
117 East Capitol
PO Box 66
Pierre, SD 57501-0066
bvancamp@olingerlaw.net

Mr. Scott G. Knudson
Briggs and Morgan, PA.
80 S. Eighth St.
2200 IDS Center
Minneapolis, MN 55402
sknudson@briggs.com

Mr. Phillip Schenkenberg
Briggs and Morgan, PA.
80 South Eighth Street
2200 IDS Center
Minneapolis, MN 55402
pschenkenberg@briggs.com

Mr. Tom D. Tobin
422 Main St.
PO Box 730
Winner, SD 57580
tobinlaw@gwtc.net

Mr. Jason D. Topp
Corporate Counsel
Qwest Corporation dba CenturyLink
200 S. Fifth St., Room 2200
Minneapolis, MN 55402
jason.topp@centurylink.com

Mr. Thomas J. Welk
Boyce Greenfield Pashby & Welk LLP
101 N. Phillips Ave., Ste. 600
Sioux Falls, SD 57117-5015
tjwelk@bgpw.com

Ms. Diane C. Browning
6450 Sprint Parkway
Mailstop: KSOPHN0212-2A511
Overland Park, KS 66251
diane.c.browning@sprint.com

Mr. Richard D. Coit
SDTA
PO Box 57
Pierre, SD 57501-0057
richcoit@sdtaonline.com

Mr. Jason R. Sutton
Boyce Greenfield Pashby & Welk LLP
101 N. Phillips Ave., Ste. 600
Sioux Falls, SD 57117-5015
jrsutton@bgpw.com

Ms. Meredith A. Moore
Cutler & Donahoe, LLP
100 N. Phillips Ave., 9th Floor
Sioux Falls, SD 57104-6725
meredithm@cutlerlawfirm.com

by electronic mail, a true and correct copy of the foregoing **NAT's Brief In Opposition To Sprint's Motion To Quash Deposition Notices** relative to the above-entitled matter.

/s/Jay C. Shultz
Jay C. Shultz