

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

**SPRINT COMMUNICATIONS
COMPANY L.P.'S OPPOSITION
TO NATIVE AMERICAN
TELECOM, LLC'S MOTION FOR
SUMMARY JUDGMENT**

INTRODUCTION

Sprint Communications Company L.P. ("Sprint") respectfully opposes Native American Telecom, LLC's ("NAT") motion for summary judgment. Through the direct testimony of Randy Farrar, and in arguments on its motion to compel, Sprint has identified numerous disputes of fact with respect to NAT's compliance with the requirements that apply to an application or a certificate. In addition, NAT cannot obtain summary judgment on matters for which it has refused to provide discovery responses.

A. STANDARD FOR SUMMARY JUDGMENT

Summary judgment is proper only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law." SDCL § 15-6-56(c). All reasonable inferences drawn from the facts must be construed in favor of the nonmoving party, *Rehm v. Lenz*, 547 N.W.2d 560, 564 (S.D. 1996), while the moving party must show the absence of any genuine issue of material fact. *Wilson v. Great N. Ry. Co.*, 83 S.D. 207, 212 (1968).

When a party does not possess facts it would use to defeat summary judgment due to an inability to obtain discovery, the Commission may deny the motion on that basis. SDCL § 15-6-56(f). This rule prevents a party like NAT from making assertions on summary judgment, refusing to provide discovery with respect to those assertions, and yet claiming it is entitled to judgment as a matter of law.

B. STANDARD FOR A CERTIFICATION

The Commission has jurisdiction to authorize the provision of intrastate telecommunication services. SDCL § 49-31-3. By law, an applicant for such authority has the burden to prove that it has “sufficient technical, financial and managerial capabilities to offer the telecommunications services described in its application before the commission may grant a certificate of authority.” SDCL § 49-31-3. The Commission’s rules impose this same burden on the applicant, which, in this case, is NAT. ARSD 20:10:32:05. *See also* SDCL § 49-31-71.

The Commission’s rules establish certain specific information the Commission must examine to determine whether an applicant has “sufficient technical, financial and managerial capabilities” to obtain the requested authority. *See* ARSD 20:10:32:03 (standards for application for local service authority); ARSD 20:10:24:02 (standards for applicant for interexchange service authority). The Commission is then charged with examining the information under the followings standards:

Rejection of incomplete application -- Decision criteria for granting a certificate of authority. A certificate of authority to provide local exchange service may not be granted unless the applicant establishes sufficient technical, financial, and managerial ability to provide the local exchange services described in its application consistent with the requirements of this

chapter and other applicable laws, rules, and commission orders. If an application is incomplete, inaccurate, false, or misleading, the commission shall reject the application. In determining if an applicant has sufficient technical, financial, and managerial capabilities and whether to grant a certificate of authority for local exchange services the commission shall consider:

- (1) If the applicant has an actual intent to provide local exchange services in South Dakota;
- (2) Prior experience of the applicant or the applicant's principals or employees in providing telecommunications services or related services in South Dakota or other jurisdictions, including the extent to which that experience relates to and is comparable to service plans outlined in the filed application;
- (3) The applicant's personnel, staffing, equipment, and procedures, including the extent to which these are adequate to ensure compliance with the commission's rules and orders relating to service obligations, service quality, customer service, and other relevant areas;
- (4) The nature and location of any proposed or existing facilities which the applicant intends to use in providing local exchange services;
- (5) If the applicant intends to resell local exchange services or enter into facility arrangements with other telecommunications carriers, when the necessary arrangements will be in place;
- (6) The applicant's marketing plans and its plan and resources for receiving and responding to customer inquiries and complaints;
- (7) If the applicant has sufficient financial resources to support the provisioning of local exchange service in a manner that ensures the continued quality of telecommunications services and safeguards consumer and public interests;
- (8) If the applicant, in providing its local exchange services, will be able to provide all customers with access to interexchange services, operator services, directory assistance, directory

listings, and emergency services such as 911 and enhanced 911;

- (9) If the applicant is seeking authority to provide local exchange services in the service area of a rural telephone company, if the applicant's plans for meeting the additional service obligations imposed in rural telephone company service areas pursuant to § 20:10:32:15 are adequate and demonstrate that the applicant will in fact meet such obligations;
- (10) The extent to which the applicant, applicant's affiliates, or applicant's principals have been subject to any civil, criminal, or administrative action in connection with the provisioning of telecommunications services; and
- (11) Any other factors relevant to determining the applicant's technical, financial, and managerial capability to provide the services described in the application consistent with the requirements of this chapter and other applicable laws, rules, and commission orders.

ARSD 20:10:32:06 (emphasis added).¹

And NAT seems to understand, it bears the burden on summary judgment as both the applicant and the movant of proving that it meets every one of these standards in order for its motion to be granted.

C. THERE ARE DISPUTES OF FACT AS TO NAT'S COMPLIANCE WITH THE CERTIFICATION STANDARDS

1. Sprint Properly Disputes Many of NAT's Statements of Fact

As set forth on Sprint's Response to Native American Telecom, LLC's Statement of Undisputed Facts, Sprint has disputed numerous of NAT's statements of fact, and has done so with appropriate citations to the record. These disputes are material, as they all

¹ NAT's argument that the Commission does not carefully and thoughtfully regulate entry of new carriers into the intrastate market is clearly wrong. *See* NAT Mem. pp. 21-24.

relate to matters the Commission is required to consider. Sprint incorporates that document herein by reference.

2. Mr. Farrar's Testimony Identifies Issues of Disputed Facts With Respect to NAT's Compliance With the Certification Standards

Sprint's witness, Randy Farrar, has presented evidence that there are material disputes of fact with respect to NAT's compliance with the standards for certification.

These fall into three categories:

- * NAT's Application should be denied because it has been operating unlawfully, without a certificate. Direct Testimony of Randy Farrar ("Farrar Direct"), pp. 7-9.
- * NAT does not meet the standards for certification because it is a sham entity. Farrar Direct, pp. 9-19.
- * Nat's finances show that NAT is not a viable business entity, and thus does not have sufficient financial resources. Farrar Direct, pp. 19-28.

Mr. Farrar's testimony and the exhibits thereto, create disputes of fact that prevent the entry of summary judgment.

3. Sprint's Motion to Compel Identifies Material Disputes of Fact With Respect to NAT's Compliance with the Certification Standards

Sprint's Motion to Compel raises additional issues not contained within Mr. Farrar's testimony. For example, Sprint has pointed out that NAT has not identified all facilities that will be used in providing service. The application does not describe how or where calls will be switched, nor is that addressed in testimony. Sprint's Mem. in Supp. of Motion to Compel, pp. 18-19, 21-23 (discussing Interrogatory Nos. 5, 6, 7, 23, 24, 29, 43, and 44). This lack of information renders the application incomplete and prevents entry of summary judgment. In addition, NAT's application is incomplete to the extent it

fails to explain in any way how NAT will provide intrastate interexchange service, even though it has asked for that authority. *Id.* p. 20 (discussing Interrogatory No. 18).

These create additional disputes of fact that prevent the entry of summary judgment.

4. Many of NAT’s Statements of Fact Lack Appropriate Record Citation

SDCL § 15-6-56(c)(1) requires a movant to make an “appropriate citation to the record” with respect to all statements of material fact. SDCL § 15-6-56(e) requires that affidavits be made on personal knowledge, set forth such facts as would be admissible in evidence, and show affirmatively that the affiant is competent to testify to the matters stated therein. Many of NAT’s statements of facts contain numerous statements that are not supported by any sworn testimony, or other “appropriate” citation to the record. Citations to the application, which was not verified, are not admissible in evidence and do not form the basis for a finding of fact. In addition, statements in testimony that are beyond the personal knowledge of the affiant likewise cannot be considered undisputed on this motion.

For the above reasons, there are disputes of fact with respect NAT’s Statements of Fact 7, 11, 22-24, 33, 45, and 55-64.

5. Sprint’s Inability to Obtain Discovery Prevents the Entry of Summary Judgment

As noted above, South Dakota law prevents a party from being penalized when the opposing party has refused to provide discovery on matters relevant to summary judgment. SDCL § 15-6-56(f). As is set forth in Sprint’s motion to compel and

memorandum in support thereof (which are incorporated herein by reference), and confirmed in the April 10, 2012 Affidavit of Philip R. Schenkenberg filed herewith, NAT has failed to provide any meaningful discovery with respect to its operations, its finances, and its facilities. Under these circumstances, it would be contrary to South Dakota law and patently unfair, to allow NAT to obtain summary judgment. NAT must either provide the discovery and allow the intervenors and the Commission to test the statements made in the application, or it should withdraw its application altogether.

CONCLUSION

For the above reasons, Sprint respectfully requests the Commission deny NAT's motion for summary judgment.

Dated this 11th day of April, 2012.

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