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'S MEMORANDUM IN OPPOSITION TO NATIVE AMERICAN TELECOM, LLC'S MOTION TO STRIKE TESTIMONY OF RANDY G. FARRAR

INTRODUCTION

Sprint Communications Company L.P. ("Sprint") submits this memorandum in opposition to Native American Telecom, LLC's ("NAT") motion to strike the testimony of Sprint's employee, Randy G. Farrar ("Mr. Farrar"). In his testimony, Mr. Farrar collects and assembles facts produced in discovery and presents the positions and opinions of Sprint, as well as his own, regarding matters relevant to this proceeding.[1] The Public Utilities Commission of the State of South Dakota (the "Commission") should deny NAT's motion, because (i) NAT is improperly conflating the Commission and district courts, (ii) NAT's witnesses testify on the same topics that NAT contests, (iii) Mr. Farrar cannot be expected to testify on information NAT has failed to produce, and (iv)

[1] As it has done before, NAT has improperly used quotations to make it appear that Sprint has said something it has not said. NAT claims "Sprint filed 'expert written testimony'" and "additional 'expert written testimony'" of Mr. Farrar. (NAT's Br. pp. 1-2.) In fact, Sprint did not caption Mr. Farrar's testimony as "expert" testimony – that word never appears in either piece of testimony.

NAT already presented – and already lost – these arguments in a prior motion in this proceeding.[2]

ARGUMENT

I. NAT IS IMPROPERLY CONFLATING THE COMMISSION AND DISTRICT COURTS

A. The Commission's Admissibility Standard is Broader than that of a District Court

The majority of NAT's motion relies on the inaccurate presumption that the Commission must apply the *Daubert/Kumho* standard to determine whether to accept policy and opinion testimony from company witnesses like Sprint's Mr. Farrar and Qwest's Mr. Easton. (NAT's Br. pp. 4-15.) It is true that, in contested cases before the Commission, the South Dakota Rules of Evidence are followed. *See* SDCL § 1-26-19(1). However, the Commission has additional discretion: "[w]hen necessary to ascertain facts not reasonably susceptible under [the rules of evidence], evidence not otherwise admissible thereunder may be admitted except where precluded by statute if it is of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs." SDCL § 1-26-19(1). The Commission is not tied to the Rules of Evidence and should accept the admissibility of Mr. Farrar's testimony without applying the *Daubert*/*Kumho* standard.

[2] Sprint does not address NAT's irrelevant argument that somehow NAT's managerial fitness and/or ability to meet other standards in the applicable rules are no longer at issue. NAT is incorrect – it bears on the burden of proof, and Sprint will urge the Commission to find that burden has not been met.

B. It Is Typical Practice Before the Commission for a Party or Intervenor to Submit Testimony Like that of Mr. Farrar

Not only is it allowed, but submitting opinions like those of Mr. Farrar is common practice in actions before the Commission and state commissions nationwide. The opinions are rarely considered "expert testimony" in the technical sense. Instead, the testimony provides background, identifies and explains a company's position, and offers witnesses' opinions on matters at issue in the case. Such procedure is compliant with the Commission's evidentiary rules, logical in light of the Commission's ability to independently determine the weight and credibility of the witness's opinions, and consistent with NAT's own testimony filed in this matter.

C. Mr. Farrar Has Provided Similar Testimony to Many Commissions

NAT challenges Mr. Farrar's ability to provide information helpful to the Commission by arguing that Mr. Farrar has never acted as an expert witness before a court. (*See* NAT's Br. pp. 7). Again, NAT improperly blends the Commission with the courts. Since 1995, Mr. Farrar has successfully "presented written or oral testimony or affidavit before twenty-seven state regulatory agencies," as well as the FCC. (Farrar Direct, p. 4.) Mr. Farrar is experienced in this field and the Commission should accept his testimony.

Interestingly, in indicating his authority to present testimony in this proceeding, NAT's witness, Mr. Gene DeJordy, testified that he has "previously testified and/or provided testimony in regulatory proceedings in more than 20 states, including the South

Dakota Public Utility Commission, and [he has] testified before the U.S. Congress." (DeJordy Direct, p. 4.)

NAT's motion to strike should be denied based on the maxim, "what is good for the goose is good for the gander." In its motion, NAT is asking the Commission to strike the testimony of Sprint's witnesses on grounds that – if applied to all parties – would also strike the testimony of NAT's witnesses. NAT's motion is illogical and must be denied.

D. The Commission Has the Authority to Determine the Weight and Credibility of the Testimony and to Afford it the Power it Deserves

NAT will have an opportunity to cross examine Mr. Farrar at the hearing and, should NAT wish, it may ask questions that go to the weight and credibility of Mr. Farrar's testimony. "A party may conduct cross-examinations required for a full and true disclosure of the facts." SDCL § 1-26-19(2). Once this cross examination is complete, the Commission can afford Mr. Farrar's testimony the weight and credibility the Commission deems appropriate and can adjudicate this action based on the facts it finds to be true.

In matters like this one, state commissions view testimony like Mr. Farrar's as helpful, consider cross examination, evaluate the credibility of the testimony, and give the testimony the weight it deserves in making findings. The Commission should deny NAT's motion and should maintain its right to determine the weight and credibility of Mr. Farrar's testimony, as well as all other testimony presented.

II. NAT'S CHALLENGES TO THE SPECIFIC TOPICS ADDRESSED BY MR. FARRAR FAIL

NAT's motion must also be denied because (a) NAT's own witnesses testify to the same matters as Mr. Farrar, (b) Mr. Farrar's testimony should not be stricken because he is unfamiliar with information that NAT has refused to provide, and (c) Mr. Farrar's aggregation and presentation of information from discovery in this case is not "expert" testimony.

A. NAT's Own Witnesses Testify to the Same Matters as Mr. Farrar

In its memorandum, NAT argues that certain elements of Mr. Farrar's testimony are inadmissible because he opines on certain topics. (*See, e.g.,* NAT's Br. p. 13.) However, NAT's own witnesses opine on the same topics and, thus, NAT's motion must be denied or its own witnesses' testimony must also be stricken.

First, NAT's witnesses Mr. DeJordy and Mr. Roesel, both consultants with less experience in financial matters than Mr. Farrar, testify that, in their opinion, NAT has the "financial capability to provide" telecommunications services. (DeJordy Direct p. 14; Roesel 2012 Direct p. 10). There is no way to strike Mr. Farrar's testimony and admit the testimony of Mr. DeJordy and Mr. Roesel.

Second, NAT argues that Mr. Farrar's opinion about the "public interest" is not admissible. (NAT's Br. p. 13.) However, NAT's own witness, Mr. DeJordy, testifies that one "purpose" of his testimony is to provide his opinion on "the public interest benefits to the Crow Creek Sioux Tribe, tribal members, and South Dakota consumers in

general to be realized by approval of NAT's application for intrastate interexchange authority." (DeJordy Direct pp. 3-4 (emphasis added).)

Third, NAT argues that Mr. Farrar's opinion about the meaning of the Federal Communications Commission's *Connect America Fund Order* ("*CAF Order*") is improper because it constitutes "legal analysis." However, again, NAT's own witness, Mr. Roesel, offers his opinion on the effects the *CAF Order* had on the regulatory framework for terminating access fees and on access stimulation (Roesel Direct, pp. 8-9.)

Fourth, NAT's argument regarding Mr. Farrar's analysis of the *CAF* Order is part of a larger argument that, apparently, no party should submit testimony containing "legal analysis" or interpreting "legal issues" because such matters are for the Commission. (*See* NAT's Br. pp. 14-15.) However, NAT's witness, Mr. DeJordy, spends much of his testimony opining on legal matters. *See, e.g.,* DeJordy Direct p. 7 (opining on whether tribally owned telecommunications carriers operating exclusively on reservations are subject to federal and tribal regulation or state regulation); *and see Id.* at p. 11 (opining on the scope of the Commission's regulatory oversight over NAT's services).

Admissibility of opinion testimony should be a two-way street. Accordingly, if NAT's motion is granted, the admissibility of NAT's opinion testimony – and the topics of that testimony – must be reviewed, as well. It will be a long hearing if the Commission agrees to review each party's testimony, line by line, to determine which topics are off limits. NAT's motion should be denied.

B. **Mr. Farrar Cannot Be Expected to Be Familiar with Information NAT Refused to Provide**

Mr. Farrar's opinion that NAT's current business model is not sustainable is based on his review and analysis of NAT's financial documents. Mr. Farrar has an MBA, performs financial analyses as part of his job, and has a long history of being involved in cost and rate cases. He is certainly qualified to present his opinion that, based on NAT's finances, it cannot stay solvent as traffic pumping revenues are reduced to $0. NAT challenges Mr. Farrar, claiming he did not consider all relevant information. Yet, Mr. Farrar cannot be expected to testify regarding information NAT failed to provide. For example, NAT claims Mr. Farrar's opinion is inadmissible because he did not consider NAT's business plans, other than traffic pumping. (*See* NAT's Br. p. 12.) However, prior to Mr. Farrar submitting his testimony, Sprint explicitly asked NAT for its business plan: "Please provide all Business Plans you have prepared for the South Dakota market." (Sprint's Interrogatory No. 34.) On March 9, 2012, NAT responded with a general objection and provided no business plan, and never supplemented its 2012 discovery response to provide a business plan. At no time before February of 2014 did NAT identify any non-pumping potential business revenues.[3] Mr. Farrar's testimony should not be stricken on the grounds he was unfamiliar with information that NAT refused to provide.

[3] On February 6, 2014, NAT filed the testimony of Mr. DeJordy, in which Mr. DeJordy outlines new components of a potential business plan. (*See, e.g.,* DeJordy Testimony p. 10.) The Commission should have the opportunity to consider Mr. Farrar's testimony and Mr. DeJordy's testimony in resolving this matter.

C. <u>Mr. Farrar's Summarization of Information in Discovery Is Not Expert Testimony Subject to a *Daubert* Analysis</u>

Third, much of Mr. Farrar's testimony identifies and summarizes evidence obtained from discovery. This is commonplace in Commission proceedings, and such testimony and supporting exhibits, are not expert opinion subject to challenge under the *Daubert*/*Kumho* standard. The exhibits are evidence in their own right, and the testimony adds presentation and organization. No such testimony should be excluded by NAT's motion.

III. <u>NAT ALREADY MADE THIS ARGUMENT IN THIS PROCEEDING AND ALREADY LOST</u>

On April 16, 2012, NAT filed its Reply Memorandum in Support of its Motion for Summary Judgment in this proceeding. In that memorandum, NAT made the argument that portions of Mr. Farrar's testimony must be stricken because it "is comprised solely of improper legal analyses, legal conclusions, and irrelevant, speculative, and conclusory allegations." (NAT's April 16, 2012 Br., p. 23-32.) NAT presented these arguments at hearing before the Commission. (*See, e.g.,* April 24, 2012 Transcript, p. 13.)

On May 4, 2012, the Commission issued an order memorializing its unanimous decision to deny NAT's motion for summary judgment. (May 4, 2012 Order, p. 1.) While the Commission did not specifically address the admissibility of Mr. Farrar's testimony, it did state that it came to its decision after "review of the documents filed in this proceeding." (May 4, 2012 Order, p. 2.) Despite NAT's requests, Mr. Farrar's testimony was not stricken in 2012 and it should not be stricken now.

CONCLUSION

For the reasons set forth herein, NAT's motion should be denied.

Dated: February 17, 2014

BRIGGS AND MORGAN, P.A.

s/Philip R. Schenkenberg

Philip R. Schenkenberg
Scott G. Knudson
2200 IDS Center
Minneapolis, MN 55402
(612) 977-8400

TOBIN LAW OFFICES
Tom D. Tobin
PO Box 730
422 Main Street
Winner, SD 57580
(605) 842-2500

Counsel for Sprint Communications Company L.P.