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 CCT'S MOTION FOR LEAVE TO TAKE A DEPOSITION OF RANDY FARRAR**

Sprint Communications Company L.P. ("Sprint") submits this memorandum in opposition to Crow Creek Telecom, LLC f/k/a Native American Telecom, LLC's ("CCT") Motion for Leave to Take Deposition of Sprint's Expert Randy G. Farrar ("Motion").

As CCT concedes (and as the Commission recognized in its September 27 Order), the South Dakota Rules of Procedure provide that expert discovery is accomplished through interrogatories. The drafters of those rules decided that, in the usual case, all a party needs to know about an expert's opinion testimony to prepare for a hearing can be provided in writing:

> (i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (4)(C) of this section, concerning fees and expenses as the court may deem appropriate.

SDCL § 15-6-26(b)(4)(A). Additional discovery (including depositions) is available only by motion for cause, subject to appropriate fee shifting. *Id.*

This limitation is intentional, not, as CCT has argued, an inadvertent failure by the drafters to track the federal rules. Instead, the federal rule was modified in 1993 to permit expert depositions without leave of court, but the South Dakota drafters have decided time and again (most recently in 2011[1]), that the existing treatment of expert opinion discovery is appropriate for litigation in South Dakota. Other states' drafters agree that this traditional approach is sound. For example, state litigation in Minnesota is guided by the same rule:

> (A) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (B) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to Rule 26.02(e)(3), concerning fees and expenses, as the court may deem appropriate.

Minn. R. Civ. P. 26.02(e)(1). CCT's claim that expert depositions are the norm in South Dakota litigation should be rejected.

Likewise, a court in Massachusetts evaluated an argument similar to that made by CCT here and affirmed that, under this same standard, courts should allow expert depositions only in "narrowly defined circumstances." *Lozoraitis v. Lachman*, 16 Mass. L. Rptr. 809 (Mass. Sup. Ct. 2003) (attached as Exhibit A). The court concluded that, when written discovery provided for under the rule is "inadequate, incomplete, inconsistent, or when the discovering party is unable to obtain equivalent information through other means, that a court should permit a deposition of an expert witness to be

[1] SL 2011, Ch. 244.

taken." *Id.* The court considered the plaintiff's argument that the expert's testimony was "crucial to the outcome of the case," but found that argument was insufficient to take the case out of the "default position … that ordinarily depositions of an adverse party's expert witnesses are not permitted." *Id.* The request for an expert deposition was denied. By maintaining this rule, the South Dakota legislature, like Minnesota and Massachusetts, has reaffirmed that, absent unusual circumstances, written discovery is sufficient to allow a party to prepare its cross-examination of an opposing expert, and that a judge or jury (or Commissioners) can evaluate expert opinions based on live direct and cross.

CCT has made no attempt to identify any special circumstances that require a departure from the default rule that expert depositions are unnecessary. CCT has recounted Mr. Farrar's opinions (Motion at 1-2), and stated simply that "Mr. Farrar makes sweeping statements and conclusions and CCT is entitled to probe the factual basis for such broad, sweeping accusations." Motion at 2. This statement could be made in every case involving expert testimony. CCT identifies no reason why Mr. Farrar's written testimony, which provides a complete recitation of his opinions, facts, and reasoning, leaves CCT in the dark about what he will say at the hearing. Nor has CCT explained why a deposition is necessary for NAT to cross examine Mr. Farrar at the hearing. CCT is essentially asking the Commission to overrule the Legislature and allow expert depositions as a matter of course. This would be a mistake, and would set bad precedent.

In the event that the Commission grants CCT's motion, it should impose appropriate limitations, as follows:

- The deposition should occur in Overland Park, Kansas. CCT has agreed to this location.

- Mr. Farrar's time should be compensated at $100 per hour for time spent preparing for and attending the deposition. CCT has agreed to compensation, but not the rate.

- The scope of the deposition should be limited so that CCT may only ask about Mr. Farrar's August 30, 2013 Testimony. CCT has proposed no limitation on scope, despite the fact that SDCL § 15-6-26(b)(4)(A)(ii) requires a court to impose "restrictions on scope … as the court may deem appropriate." Sprint is concerned that CCT not be allowed to launch a fishing expedition. CCT claims it needs this deposition only to "probe the factual basis for such broad, sweeping accusations," and so this limit should be specifically imposed.

- The deposition should be limited to ½ day (3.5 hours). CCT proposes no limitation on time. By rule, depositions are limited to no more than 1 day (7 hours). SDCL § 15-6-30(d). In this case, Mr. Farrar will be deposed not as a fact witness, and not on years of material. He will presumably be asked to explain his opinions and identify his understanding of the facts, all of which have been disclosed in his written testimony. There is no reason this cannot be accomplished in 3.5 hours of deposition questions.

For the reasons set forth above, Sprint respectfully requests that the Commission deny CCT's Motion. In the event the Commission decides that a deposition is necessary to provide CCT information about Mr. Farrar's opinion, it should impose the appropriate limitations set forth above.

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