

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA**

IN THE MATTER OF THE PETITION BY)
NORTH AMERICAN LOCAL LLC FOR)
RECLASSIFICATION AS A FACILITIES BASED) **TC23-046**
ELIGIBLE TELECOMMUNICATIONS CARRIER)
)

**BRIEF IN SUPPORT OF MOTION TO
COMPEL DISCOVERY RESPONSES FROM NORTH AMERICAN LOCAL, LLC**

The South Dakota Telecommunications Association (SDTA), pursuant to ARSD 20:10:01:22.01 and SDCL 15-6-37(a), requests the South Dakota Public Utilities Commission (Commission or PUC) to compel North American Local, LLC (NAL) to respond to certain discovery requests.

BACKGROUND

NAL seeks authority to provide Lifeline services in South Dakota. To provide Lifeline services in South Dakota NAL must either receive FCC approval of its compliance plan or be classified by this Commission as a “facilities-based” provider. This docket is NAL’s attempt to receive “facilities-based” classification from the Commission. SDTA argues NAL’s chosen process is improper and in a separate Motion request the Commission dismiss this docket.

If this docket is not dismissed, SDTA argues information it requested in its first discovery request to NAL is necessary for SDTA’s analysis. On November 22, 2023, SDTA sent its first discovery request to NAL. On December 13, 2023, NAL objected to various discovery requests. On January 2, 2024, in compliance with, SDCL 15-6-37(a)(2) SDTA conferred with NAL’s counsel in an attempt to secure the information without Commission action. To date, NAL maintains its objection and has not provided any additional information to SDTA. As a result,

this Motion to Compel is necessary. SDTA respectfully requests the PUC grant SDTA's Motion to Compel.

STANDARD FOR MOTION TO COMPEL

The Commission "may issue an order to compel discovery" "for good cause shown by a party." ARSD 20:10:01:22.01. The South Dakota Rules of Civil Procedure relating to discovery apply in this proceeding. Id. Under the civil procedure rules, a party may move for an order compelling an answer if a party fails to answer an interrogatory or request for production of documents. SDCL 15-6-37(a)(2). In this case NAL failed to answer SDTA's interrogatories and requests for production of documents as required by the Commission's discovery rules. SDTA now requests the PUC's assistance in gathering necessary information - the "statutory mandate and court order [establishing the time period for responding to discovery requests] are not invitations, requests, or even demands; they are mandatory." Schwartz v. Palachuk, 1999 SD 100.

SDCL 15-6-26(b) establishes the general scope and limits of discovery:

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, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not grounds 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.

This Rule is applicable to Commission proceedings by way of ARSD 20:10:01:01.02. The South Dakota Supreme Court explained that "the scope of pretrial discovery is, for the most part, broadly construed." Kaarup v. St. Paul Fire and Marine Ins. Co., 436 N. W.2d 16, 19 (S. Dakota, 1989). "A broad construction of the discovery rules is necessary to assist in the three distinct

purposes of discovery: (1) narrow the issues; (2) obtain evidence for use at trial; (3) secure information that may lead to admissible evidence at trial." *Id.* The wording of SDCL 15-6-26(b) itself "implies a broad construction of 'relevancy' at the discovery stage because one of the purposes of discovery is to examine information that may lead to admissible evidence at trial." *Id.*, 436 N.W.2d at 20.

**NAL MUST PROVIDE A SUBSTANTIVE RESPONSE
TO SDTA'S DISCOVERY REQUESTS**

All requests made by SDTA are relevant and either (1) narrow the issues; (2) seek evidence for use at PUC hearing; (3) secure information that may lead to admissible evidence at PUC hearing. *Id.* Therefore, the Commission should compel NAL to answer the following discovery requests:

SDTA REQUEST 2: Provide a copy of all documents marked "Confidential" that were filed with the PUC or provided to the PUC Staff.

NAL Response: The network diagram filed with NAL's application was marked "Highly Confidential" as it includes business sensitive information about the specific location of key network assets of NAL, and, as such, it is not subject to disclosure. However, in paragraph 33 of its Supplement to Petition for Reclassification As a Facilities Based Eligible Telecommunications Carrier, NAL identifies and explains the network facilities that it now has in South Dakota without identifying the precise location of these facilities.

As a party to the docket, SDTA should have access to all materials that NAL filed. NAL filed a depiction of its "network architecture," presumably because it assists in the determination of whether its self-defined status as a "facilities-based provider" is accurate. SDTA questions whether NAL's facilities or network are sufficient to meet that standard and seeks to provide the Commission with information and argument regarding the same. However, absent the network diagram, SDTA is put at a disadvantage in doing so. NAL does not claim the diagram is

irrelevant or outside the scope of this proceeding. Rather, NAL's objection is based solely on the fact it considers the diagram to be "highly confidential."

SDTA appreciates the need to protect confidential information. SDTA previously offered and remains willing to sign a nondisclosure agreement to protect the information. NAL has not explained why a nondisclosure agreement fails to adequately protect what it believes to be confidential. SDTA requests the Commission compel NAL to provide the diagram, filed with its Petition as Exhibit A.

SDTA REQUEST 3: Provide a copy of all documents and communications provided to or received from USAC with respect to the provision of ACP services in South Dakota. This request includes, but is not limited to:

- a. The election notice sent to USAC, to enable participation in the ACP program.**
- b. A copy of all documents filed as a part of the annual ACP certification process.**
- c. A copy of all documents submitted to USAC through the Affordable Connectivity Claims System.**

NAL Response: *NAL objects to this request for "all documents" as being overly broad and unduly burdensome. Without waiving this objection, attached is a copy of FCC's Broadband Benefit Program Carrier Participation Approval for South Dakota dated September 16, 2021.*

NAL does not claim the requested documents are irrelevant or outside the scope of these proceedings. Rather, NAL's objection is completely based upon an assertion that SDTA's request is "burdensome." SDTA argues the NAL objection has no merit.

NAL's original ETC docket at the PUC (TC19-001) was not resolved until 5/12/22, less than 2 years ago. Therefore, the period of time over which documents could be generated is limited. Furthermore, any prudent operator should keep a record of communications with regulatory entities. The documents should be readily available. NAL has, to date, refused to quantify or further explain why this SDTA discovery request is burdensome. As such, SDTA

maintains its request and asks the Commission to compel NAL to disclose the requested documents.

REQUEST 4: List and describe all NAL owned facilities in other states. In your answer, specify the state in which the facilities are located.

NAL Response: *NAL objects to this request as it seeks information that is not relevant to NAL's request with respect to its South Dakota facilities.*

NAL requests this Commission designate it as a “facilities-based provider.” As such, NAL must be prepared to demonstrate its ability to remain functional in emergency situations (ARSD 20:10:32:43.03), its ability to satisfy service quality standards (ARSD 20:10:32:43.04), its ability to provide services throughout the designated service area (ARSD 20:10:32:43.07) and generally that its request is consistent with the public interest (ARSD 20:10:32:42). NAL's ability to effectively operate and maintain its facilities dictates its ability to meet its legal burden and impacts South Dakota consumers. NAL's experience in the operation of facilities in other states is a relevant consideration. SDTA maintains its request and asks the Commission to compel NAL to disclose the requested documents.

REQUEST 7: Provide a list of all South Dakota ACP customers. Include the customer's name, address and phone number.

NAL Response: *NAL objects to this request as it seeks highly confidential business sensitive and consumer proprietary information.*

NAL's objection rests solely on an assertion that the requested information is confidential. SDTA agrees the information is confidential and agrees to sign a nondisclosure agreement. However, without explanation, NAL refused to consider a nondisclosure agreement as a possible solution to the dispute. SDTA requests the Commission compel NAL to disclose the requested information subject to a mutually agreeable nondisclosure agreement.

REQUEST FOR RELIEF

SDTA requests the Commission compel NAL to provide discovery responses as outlined above.

NOTICE OF HEARING

SDTA requests its Motion be heard at the February 6, 2024, or next available regularly scheduled Commission meeting.

Dated this 22 day of January 2024.

Respectfully submitted:

/s/ Kara Semmler
Kara C. Semmler
Executive Director and General Counsel
SD Telecommunications Association
320 East Capitol Ave.
P.O. Box 57
Pierre, SD 57501