

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

<b>IN THE MATTER OF THE PETITION BY</b>	)	<b>STAFF'S RESPONSE TO</b>
<b>NORTH AMERICAN LOCAL LLC FOR</b>	)	<b>SOUTH DAKOTA</b>
<b>RECLASSIFICATION AS A FACILITIES</b>	)	<b>TELECOMMUNICATIONS</b>
<b>BASED</b>	)	<b>ASSOCIATIONS MOTION</b>
<b>TELECOMMUNICATIONS CARRIER</b>	)	<b>TO COMPEL DISCOVERY</b>
	)	<b>AND SDCL 15-6-37(a)</b>
	)	<b>CERTIFICATION</b>
		<b>TC23-046</b>

COMES NOW Commission Staff, by and through one of its attorneys, and hereby responds to the Motion to Compel Discovery and SDCL 15-6-37(a)(2) Certification by South Dakota Telecommunications Association (SDTA) filed on January 22, 2024 (“Motion to Compel”). SDTA has moved to compel discovery from North American Local, LLC (NAL) and has asked the South Dakota Public Utilities Commission (Commission) to grant their motion for dismissal.

**ANALYSIS**

**I. South Dakota Telecommunications Association’s Motion to Compel Discovery should be granted in part, limited in part, and information requested in part.**

The Commission has jurisdiction in this matter pursuant to SDCL Chapters 1-26. The Commission has the authority to regulate the proceedings before the Commission according to SDCL 49-1-11(4).

SDCL 49-1-11(4) gives the Commission authority over "regulation of proceedings before the commission, ... all of which shall conform to those used in South Dakota courts." Pursuant to this authority, the Commission promulgated ARSD 20:10:01:22.01 which states in pertinent part: The commission at its discretion, either upon its own motion or for good cause shown by a party to a proceeding, may issue an order to compel discovery. The taking and use of discovery shall be in the same manner as in the circuit courts of this state. The provisions of SDCL 15-6-26(c) are

accordingly applicable to discovery conducted in connection with proceedings before the Commission.

TC03-057, Order to Compel Discovery and Protective Order (July 15, 2003). SDCL

§15-6-26(b)(1) dictates the scope of discovery. It provides:

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 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). The South Dakota Supreme Court (“SDSC”) has said “The proper standard for ruling on a discovery motion is whether the information sought is ‘relevant to the subject matter involved in the pending action . . . .’ SDCL 15-6-26(b)(1).” *Kaarup v. St. Paul Fire & Marine Ins. Co.*, 436 N.W.2d 17, 20 (S.D. 1989). Additionally, the SDSC has explained that pretrial discovery has a broad scope for good reason:

Pretrial discovery has a broad scope. The broad scope ensures the purposes of discovery—“(1) narrowing the issues; (2) obtaining evidence for use at trial; (3) securing information that may lead to admissible evidence”—are satisfied. Evidence is relevant if: “(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.” SDCL 19-19-401. But the definition of relevance at the discovery stage is broad so that it allows for discovery of information that may lead to admissible evidence at trial.

*Ferguson v. Thaemert*, 2020 SD 69, ¶ 12, 952 N.W.2d 277, 281 (quoting *Kaarup v. St.*

*Paul Fire & Marine Ins. Co.*, 436 N.W.2d 17, 19 (S.D. 1989) (internal citations omitted).

Parties to a proceeding may wish for certain information to remain private. In this situation, SDCL § 15-6-26(c) allows for a party to make a motion for a protective order, and the Court (or in this circumstance, the Commission) may limit discovery accordingly.

The statute provides:

The frequency or extent of use of the discovery methods set forth in § 15-6-26(a) shall be limited by the court if it determines that:

(A)(i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;

(ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or

(iii) discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy limitations on the party's resources, and the importance of the issues at stake in the litigation.

SDCL §15-6-26(b) (2023). Regarding this process, the SDSC has said:

“If the party seeking discovery shows both relevance and need, a court must weigh the injury that disclosure might cause against the need for the information.” The court may then “issue a protective order to safeguard the rights of the parties.” “Good cause is established on a showing that disclosure will work a clearly defined and serious injury.” “The injury must be shown with specificity.” “Broad allegations of harm will not suffice.”

*In re Estate of Jones*, 2022 SD 9, ¶¶ 28-29, 970 N.W.2d 520, 530 (internal citations omitted). Additionally, the Commission has promulgated rules on what constitutes confidential information. ARSD 20:10:01:39 says:

All facts, information, reports, orders, memoranda books, accounts, documents, and computer peripherals of any nature in the possession of the commission are available for examination by the public except the following:

- (4) Trade secrets or other confidential research, development, or commercial information recognized and protected by SDCL 15-6-26(c)(7) or other law;
- (5) Information which is made confidential under any other provisions of state or federal law; and
- (6) Information which is determined by the commission to be confidential and entitled to protection from disclosure or improper use.

S.D. Admin. R. 20:10:01:39 (2023).

**I. The Commission should grant SDTA’s Motion to Compel Regarding SDTA Request 2, because the information is relevant to this proceeding and SDTA has agreed to sign a nondisclosure.**

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. *Motion to Compel* at 3.

As a part of the initial filing and supplemental filings to the docket, NAL filed documents marked as confidential including Exhibit A- NAL’s Facilities in South Dakota Confidential (Filed 09/29/2023); Exhibit A-NAL’s South Dakota Network Architecture Confidential (Filed 10/30/23); Network Facilities Confidential (Filed 02/20/24); Exhibit A- NAL’s South Dakota Network Diagram Confidential (Filed 02/20/24); Exhibit - Description of NAL’s Equipment and Circuits Confidential (Filed 02/20/24); and Exhibit C- Pictures of Network Facilities Confidential (Filed 02/20/24). NAL did make a public filing specifying why these documents are confidential but indicated in its response to SDTA’s discovery request that the “Highly Confidential” documents “include business sensitive information.” *Id.*

While these documents may fall under one of the provisions of ARSD

20:10:01:31, that is difficult to ascertain without further explanation by NAL. *See* ARSD

20:10:01:31. SDTA argues that:

[I]n 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.

*Motion to Compel* at 3. After review, Staff believes the information contained in these documents is relevant to the proceeding before the Commission. Specifically, NAL is Petitioning for Reclassification as a Facilities Based Eligible Telecommunications Carrier. To be considered as an Eligible Telecommunications Carrier, 47 U.S.C. § 241(e) states that the carrier, throughout its service area for which the designation is received “Offer services that are supported by Federal universal service support mechanisms under section 254(c), either using its own facilities or a combination of its own facilities and resale of another carrier’s services.” 47 U.S.C. § 214(e).

SDTA has been granted intervention and has an interest in this docket because NAL requests that its designation extend into areas currently served by a rural telecommunications provider. Knowing the location and details of the facilities in the state would be relevant, within the scope of the proceeding, and necessary for SDTA to fully participate in this proceeding. The SDSC has said “Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.” *Kaarup*, 436 N.W.2d, at 20. As a participating party with a unique interest, it seems necessary that SDTA be provided with access to all relevant documents in order to have a fair

opportunity to be heard in this matter. The SDSC has reversed decisions in which a “[circuit] court denied [a party] the opportunity to develop and present evidence that may be relevant to their Petition.” *In re Estate of Jones*, 2022 SD 9, ¶ 33, 970 N.W.2d 520, 531. In the matter at hand, SDTA has shown the documents sought are relevant and necessary to participate in the proceeding. NAL has not yet provided a response to SDTA’s Motion to Compel and therefore has not met its burden of showing good cause as to why the information sought is not discoverable and harmful to its interest. Staff reserves the right to comment further on any response NAL provides.

If the Commission determines these documents are properly confidential under ARSD 20:10:01:39, and there is potential injury to NAL in releasing the documents to SDTA, the Commission has the authority to require SDTA to sign a nondisclosure agreement or deny the motion to compel. Therefore, Staff recommends that the Commission grant SDTA’s Motion to Compel Regarding SDTA Request 2.

- II. **The Commission should grant SDTA’s Motion to Compel Regarding SDTA Request 2(a) because it may lead to information relevant and necessary to this proceeding. Staff needs more information regarding SDTA requests 2(b) and 2(c) as to why these documents in their entirety are necessary before they can provide a recommendation.**

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 objected to this request for “all documents” as being overly broad and unduly burdensome. *Motion to Compel* at 4.

SDCL §15-6-26(b) provides that the extent of discovery can be limited if the court determines that the discovery sought is unreasonably cumulative, unduly

burdensome, or expensive. SDCL §15-6-26(b). This statute also says that the court can determine if a discovery request is unduly burdensome or expensive by “taking into account the needs of the case, the amount in controversy, limitations on the party’s resources, and the importance of the issues at stake in the litigation.” *Id.* After review, Staff believes that SDTA’s request “(a) the election notice sent to USAC to enable participation in the ACP program” could lead to information that is relevant to this proceeding. SDTA argues that “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.” *Motion to Compel* at 4. SDTA has shown that Request 2(a) could lead to information relevant to this proceeding. In order to take part in the ACP, 47 C.F.R. § 54.1801(c) states “All participating providers shall file an election notice with the Administrator.” 47 C.F.R. § 54.1801. Since it appears NAL may have been providing service in South Dakota and functioning under the ACP, NAL’s statements to the USAC in order gain access to ACP may contain or lead to relevant and admissible evidence in NAL’s current filing, particularly about services that would be provided in South Dakota as an ETC. Denying SDTA access to this information would prevent SDTA from participating fully in the proceeding.

SDTA’s requests 2(b) and 2(c)—that NAL release all ACP documents—is difficult for staff to make a recommendation on without further information. SDTA has not explained whether the information they seek is obtainable from another source that is less burdensome or less expensive as required by SDCL §15-6-26. SDTA has also not explained why these documents, in their entirety, are relevant or necessary. On the other hand, NAL has not explained how this

request is overly burdensome. Without this information, it is difficult for staff to determine the number of documents or the amount of effort that this discovery request would entail. Therefore, it is premature for Staff to provide a recommendation to the Commission on whether it is overly burdensome. Staff recommends that SDTA's discovery request 2(a) be approved, and that more information be requested before a ruling is made on SDTA's discovery request 2(b) and 2(c).

**III. The Commission should limit SDTA's Request 4 to list and describe all NAL owned facilities in other states because it is not relevant or necessary to this proceeding. Or in the alternative, require more information from both SDTA and NAL.**

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. *Motion to Compel* at 5.

After review, Staff agrees that a list of all facilities located in other states is not relevant. Absent further explanation, Staff believes that facilities not used to transport ETC traffic for South Dakota customers are not relevant or necessary to this South Dakota proceeding. Staff would recommend that the Commission limit the scope of this discovery request, to include all facilities located in other states that are to be used to provide transport of ETC traffic for South Dakota customers.

SDTA argues that "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)." *Id.*



Specifically, for ETC designation, it is required that NAL remain functional in emergency situations, and NAL is requesting modification to their ETC designation. 47 U.S.C. § 214(e) (2024). While it is important that NAL remain functional in emergency situations, providing a list of all facilities in other states that do not accomplish that objective in South Dakota is irrelevant. It is, however, relevant and necessary to the proceeding to provide the list of facilities in other states used to transport ETC traffic for South Dakota customers.

SDTA has failed to show how receiving a listing and description of all of NAL's facilities in other states would be relevant, necessary, or lead to information relevant to this proceeding. Therefore, Staff would recommend that the Commission limit the scope of SDTA's discovery request to compel NAL to release the locations of facilities in other states that provide service in South Dakota. Or, in the alternative, the Commission may require more information from both SDTA and NAL.

**IV. The Commission should deny SDTA's Motion to Compel Regarding SDTA Request 7 a list of all South Dakota Customers because it is not relevant or necessary to this proceeding. Or, in the alternative, require more information on this point.**

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 refused to consider a nondisclosure agreement as a possible solution to the dispute. *Motion to Compel* at 5.

NAL has objected to Request 7 on the grounds of confidentiality and consumer proprietary information. SDTA argues that "NAL's objection rests solely on an assertion that the requested information is confidential. SDTA agrees the information is

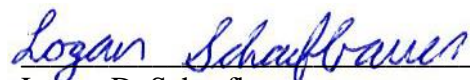
confidential and agrees to sign a nondisclosure agreement.” *Id.* Staff agrees with SDTA that a nondisclosure agreement can solve the issue of confidentiality.

However, Staff has concerns regarding the relevance of Request 7. SDTA has not explained how specific customer information is relevant to this proceeding. *See* SDCL §15-6-26(b). As relevance is always required, the Commission has the authority to limit discovery based on this requirement. SDTA has also not explained how obtaining customer information would lead to admissible information in this proceeding. Because there is no substantive explanation regarding the relevance of this evidence, and because there is a large potential of injury to NAL and its Customers by the release of this information, Staff would recommend that the Commission deny the motion to compel the customer information at this point. In the alternative, the Commission may require more information on this point.

### **CONCLUSION**

Wherefore, Staff respectfully submits that SDTA’s Motion to Compel should be granted in part, denied in part, and information requested in part. Because NAL has yet to file a response to SDTA’s Motion to Compel, Staff reserves the right to file an additional response once NAL’s response is filed.

Dated this 26<sup>th</sup> day of February, 2024.



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