

1 THE PUBLIC UTILITIES COMMISSION
2 OF THE STATE OF SOUTH DAKOTA
3 =====
4 IN THE MATTER OF THE COMPLAINT FILED TC10-026
5 BY SPRINT COMMUNICATIONS COMPANY, LP
6 AGAINST NATIVE AMERICAN TELECOM, LLC
7 REGARDING TELECOMMUNICATIONS SERVICES
8 =====
9 Transcript of Proceedings
10 July 17, 2012
11 =====
12 BEFORE THE PUBLIC UTILITIES COMMISSION,
13 CHRIS NELSON, CHAIRMAN
14 KRISTIE FIEGEN, VICE CHAIRMAN
15 GARY HANSON, COMMISSIONER
16
17 COMMISSION STAFF
18 Rolayne Ailts Wiest
19 Karen Cremer
20 Kara Semmler (by telephone)
21 Ryan Soye
22 Greg Rislov
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29 Brittany Mehlhaff
30 Deb Gregg
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33 APPEARANCES
34 Scott Swier (by telephone)
35 Scott Knudson
36 Tom Tobin
37
38 Reported By Cheri McComsey Wittler, RPR, CRR
39
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1 CHAIRMAN NELSON: TC10-026, In the matter of the
2 Complaint filed by Sprint Communications Company, LP,
3 against Native American Telecom, LLC, regarding
4 telecommunications services.
5 Before I go any further, Mr. Swier, are you on
6 the line?
7 MR. SWIER: I am, Mr. Chair.
8 CHAIRMAN NELSON: Thank you. The questions
9 we're dealing with today, shall the Commission grant
10 Native American Telecom, LLC's Motion to Dismiss and
11 shall the Commission grant Motion to Compel NAT to answer
12 discovery?
13 At this point I think before we proceed I'm
14 going to turn to Ms. Wiest who may have a few questions
15 before we begin arguments on each of the two questions.
16 MS. AILTS WIEST: Yes. With respect to the
17 Motion to Dismiss, my question to both of you --
18 CHAIRMAN NELSON: And before I begin, maybe if I
19 could have Sprint's counsel just identify themselves at
20 the table for everybody.
21 MR. KNUDSON: Thank you, Mr. Commissioner.
22 Scott Knudson for Sprint Communications. And with me is
23 Tom Tobin, also representing Sprint Communications.
24 One more time. Scott Knudson representing
25 Sprint Communications, and with me at counsel table is

1 TRANSCRIPT OF PROCEEDINGS, held in the
2 above-entitled matter, at the South Dakota State Capitol
3 Building, 500 East Capitol Avenue, Pierre, South Dakota,
4 on the 17th day of July, 2012, commencing at 9:30 a.m.
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1 Tom Tobin, also representing Sprint.
2 CHAIRMAN NELSON: Thank you. Go ahead.
3 MS. AILTS WIEST: Yes. My question to the
4 parties with respect to the Motion to Dismiss is I
5 noticed that with the Motion to Dismiss, the Brief and
6 with the reply to that Brief by Sprint, both parties did
7 submit Affidavits and additional material.
8 And my question is pursuant to 15-6-12(b), if a
9 party submits additional outside of the Pleadings, then
10 should this be treated as a Motion for Summary
11 Judgment?
12 CHAIRMAN NELSON: I would turn to Mr. Swier for
13 his answer first.
14 MR. SWIER: Thank you, Mr. Chair.
15 I believe that under the circumstances in this
16 case under the Mootness Doctrine that we can still
17 proceed under a 12(b) Motion to Dismiss, and this does
18 not have to be transferred to a Motion for Summary
19 Judgment.
20 However, if the Commission determines that it is
21 a Motion for Summary Judgment, then I still believe the
22 analysis would be the same, and based on what is in the
23 record we think the result would be the same.
24 However, I think we can still proceed under
25 Rule 12(b) here.

1 MS. AILTS WIEST: When you said we can still
2 proceed, would that mean that the Commission would not
3 consider any of the Affidavits submitted by the -- either
4 party because those would be matters outside of the
5 Pleadings?

6 MR. SWIER: Well, I think that regarding that,
7 with the 12(b) Motion I think that based on the
8 circumstances in the case that we can still proceed with
9 12(b). Because I think the only additional information
10 we've provided was simply an acknowledgment that NAT will
11 pay the \$281 that Sprint is alleging in damages here.

12 So I think when you look at that, I don't think
13 this has to be transferred to a Motion for Summary
14 Judgment because that is the only matter that's outside
15 the Pleading here.

16 MS. AILTS WIEST: So that's outside the
17 Pleading, but we can still consider it?

18 MR. SWIER: I believe you can.

19 Now if you want to take it to a Motion for
20 Summary Judgment, again, I think the record's complete
21 where we can surely transfer that to a Motion for Summary
22 Judgment, but I don't think it's necessary based on our
23 mootness allegation.

24 MS. AILTS WIEST: Sprint.

25 CHAIRMAN NELSON: I'm going to turn to

1 Mr. Knudson for his response.

2 MR. KNUDSON: Thank you.

3 I would concur with Mr. Swier that the context
4 of this Motion is in the nature of a 12(b) Motion
5 challenging the Commission's subject matter jurisdiction.

6 I think the rule is that the Commission could
7 consider matters outside the Pleadings with respect to
8 that issue without converting it to a Motion for Summary
9 Judgment.

10 Otherwise, the facts that are being raised by
11 these Affidavits really are not in dispute with respect
12 to the Commission's jurisdiction, which is the mootness
13 argument. So I think we can go forward today considering
14 the record before the Commission, including the
15 additional submissions.

16 MS. AILTS WIEST: I would just note that in
17 Mr. Swier's Brief supporting his Motion to Dismiss he
18 refers to 12(b)(1), but he also refers to 12(b)(5). And
19 the statute says if you're talking about 12(b)(5), it
20 says that if there are matters outside the Pleadings and
21 not excluded by the court, the Motion shall be treated as
22 one for summary judgment.

23 So what are we proceeding under? Are we just
24 proceeding under 12(b)(1)?

25 CHAIRMAN NELSON: Mr. Swier?

1 MR. SWIER: I think we're proceeding under both
2 Rule 12(b)(1) and 12(b)(5). I think the court can make
3 its decision here under either of those provisions.

4 And I guess I agree with Mr. Knudson that
5 procedurally the case is teed up under a 12(b) Motion,
6 and that is appropriate here, under either 12(b)(1) or
7 12(b)(5).

8 MS. AILTS WIEST: Well, at this point I guess we
9 can listen to the arguments of the parties.

10 CHAIRMAN NELSON: Okay. At this point we will
11 proceed with arguments on the Motion to Dismiss.

12 Mr. Swier.

13 MR. SWIER: Thank you.

14 Mr. Chair, members of the Commission, on May 5
15 of 2010 Sprint filed an Amended Complaint in this matter.
16 That Amended Complaint asked the Commission to rule on
17 four very specific items.

18 The first was that Sprint's Complaint asked the
19 Commission to declare that it has the sole authority to
20 regulate Sprint's interexchange services within the State
21 of South Dakota.

22 The second item the Complaint requested was
23 declaring that the Crow Creek Sioux Tribe Utility
24 Authority lacks jurisdiction over Sprint.

25 The third item the Complaint requests was a

1 declaration that NAT must seek a Certificate of Authority
2 from the Commission before it can assess charges for
3 switched access service.

4 And, finally, the fourth item the Complaint
5 requests is an award of money damages in an amount to be
6 determined.

7 We believe based on the Commission's previous
8 jurisdictional decisions and the fact that NAT has agreed
9 to confess judgment in this case for \$281 that the issues
10 in this case are now moot.

11 Going back to the first two issues, which are
12 the jurisdictional issues, as the Court will remember --
13 or excuse me. As the Commission will remember, the
14 Commission has already ruled that it has the exclusive
15 jurisdiction regarding intrastate switched access fees.

16 That decision was appealed to the Buffalo County
17 Circuit Court. The Buffalo County Circuit Court affirmed
18 the Commission's decision. The Circuit Court, indeed,
19 found that exclusive jurisdiction in this case relies --
20 or lies with the Commission and that the Crow Creek
21 Tribal Utility Authority has no jurisdiction over
22 Sprint.

23 So those jurisdictional issues have been
24 determined. There is no other relief the Commission can
25 grant regarding the jurisdictional issues.

1 The third item that Sprint requested from the
2 Commission was that the Commission declare that NAT has
3 to apply for a Certificate of Authority in South Dakota.

4 As the Commission is aware, in TC11-087 NAT has
5 applied for a Certificate of Authority for the
6 Commission -- with the Commission.

7 In other words, the Commission at this point in
8 10-26 cannot grant any further relief. The only relief
9 the Commission could grant with regard to this request is
10 that NAT apply for a Certificate of Authority. That's
11 already been done.

12 And, finally, the fourth item that Sprint asked
13 for is money damages. It is undisputed that Sprint's
14 entire money damages in this case are approximately \$281.
15 It simply does not make any business sense for NAT to
16 continue to expend tens of thousands of dollars in
17 attorney fees in a case where Sprint's damages are \$281.

18 We have agreed and told Sprint that we will
19 refund -- we will provide them with their \$281 in
20 damages. NAT will not be charging Sprint for any
21 intrastate switched access fees that occur before the
22 Commission ultimately grants their sort of authority.

23 So in sum, the Commission no longer can declare
24 any money damages and award them to Sprint because the
25 money damages are \$281. NAT's agreed to pay those \$280.

1 As such, there's nothing under Sprint's Amended Complaint
2 that the Commission can give them anymore relief.

3 The jurisdictional issues have been decided.
4 The damages issues, we've now given them \$281, as we said
5 we would. And, lastly, we've applied for a Certificate
6 of Authority.

7 So because of that, this case has really become
8 moot. The Mootness Doctrine clearly applies to
9 administrative agencies. And because of the case is
10 moot, the docket should now be closed, and there should
11 be no further proceedings with regard to this docket.

12 Thank you.

13 CHAIRMAN NELSON: Mr. Knudson.

14 MR. KNUDSON: Thank you, Mr. Chairman.

15 I think you can appreciate the position of
16 Sprint here, that its action brought in 2010 against
17 Native American Telecom or NAT is not moot as that
18 principle is understood to mean.

19 Sprint brought its Complaint to get a
20 declaration that NAT cannot provide local exchange
21 services without a Certificate of Authority from this
22 Commission.

23 Now if the Doctrine of Mootness applies -- and
24 in our Brief we suggested that an administrative agency
25 which is part of the executive branch isn't necessarily

1 bound by the same doctrine that the courts have followed
2 with respect to mootness. But assuming that Doctrine
3 does apply, and even under the definition of mootness the
4 courts use, this case is not moot. There is relief that
5 this Commission can grant Sprint pursuant to its
6 Complaint for Declaratory Relief.

7 The issue specifically is that we seek a
8 declaration regarding the fact that NAT must get a
9 Certificate of Authority from this Commission and must
10 have a lawful tariff on file before it provides services,
11 intrastate basis, in the State of South Dakota.

12 This issue remains before the Commission. This
13 issue was not a question of money.

14 So I'd also like to point out that even if the
15 Commission were to grant the relief requested, legal
16 authorities in this state support the Commission
17 continuing to assert jurisdiction.

18 There's a case cited by NAT itself, the
19 Clark v. Beadle County case, and that was a case where
20 there was a dispute over whether or not there was a
21 lawful contract for a construction project. And
22 taxpayers were opposing the contract. By the time this
23 got litigated the project had been completed.

24 So, in effect, that would be the same situation
25 here, that the Commission grants the Certificate of

1 Authority. The court said the case is not moot. The
2 Complainant can go back into court and seek additional
3 relief.

4 We think that case stands for the proposition
5 that this Commission can go forward, rule on 11-87, rule
6 on 10-26 and make a determination as to the propriety of
7 NAT's operating in this state without a Certificate of
8 Authority.

9 I'd also like to point out NAT's making much
10 about, well, we're offering to forego collecting any
11 further bills from Sprint until we get approval from the
12 Commission, and we'll refund the money that's been paid.

13 At this point I understand that they've never
14 tendered the money to Sprint for the money that Sprint
15 paid pursuant to the first two invoices it received.

16 But more important there's an important legal
17 distinction to be made with respect to NAT's position on
18 mootness here. The Doctrine of Mootness says that if you
19 voluntarily cease the offending conduct, that does not
20 moot the case. We cite two cases in our Brief that I
21 want to bring to the Commission's attention.

22 One of these is the Kidder Peabody case, and
23 that case involved a merger where the succeeding or
24 successor company turned back to its financial advisor
25 and saying, well, you gave away inside information so

1 Ivan Boesky can make money on this transaction. We're
2 going to sue you under the securities loss, federal
3 securities loss.

4 They got into that dispute. The successor
5 company sued under state law in Texas. Kidder Peabody
6 countersued, brought a dec. action, declaratory judgment
7 action, in Federal Court. And the company -- the
8 successor company said we won't bring any federal
9 securities law claims; therefore, your action for
10 declaratory relief in Federal Court is moot because we
11 won't bring any federal securities law claims, therefore,
12 your allegation that you are not in violation of federal
13 securities laws is moot.

14 The Second Circuit very expressly on this point
15 said no. This case is still viable. Simply because you
16 promise not to bring this claim doesn't mean it's moot.
17 So I'd apply the principle that voluntary cessation of
18 the offending conduct does not moot the case to Kidder
19 Peabody and affirm the court's jurisdiction.

20 We believe this situation that NAT presents to
21 the Commission is analogous, and, therefore, under the
22 Doctrine of Mootness and the exception of voluntarily
23 cessation of offending conduct there is no argument any
24 longer. The Commission has jurisdiction to go forward
25 and rule on Sprint's Complaint.

1 There are practical considerations for this
2 Commission as well in going forward in this docket.
3 First I think the Commission should understand that it
4 needs to enforce South Dakota Law.

5 NAT has been operating without a Certificate of
6 Authority from this Commission providing intrastate
7 services since 2009 without a Certificate of Authority
8 from the Commission.

9 It now concedes that it needs that Certificate
10 of Authority, but it doesn't have it. So I think it's
11 important precedentially for the Commission to go forward
12 and rule on that issue in 10-26.

13 The precedential value of that decision is also
14 important with respect to saying, first of all, to NAT
15 you need a Certificate of Authority or to anybody else
16 who tries to structure a situation like NAT to come into
17 South Dakota and operate under some kind of authority
18 from a tribal organization but try to provide intrastate
19 services without a Certificate of Authority from this
20 Commission, this Commission should say you cannot do
21 that.

22 That has also important practical considerations
23 because the federal case that Sprint brought against NAT
24 has been referred -- three issues have been referred by
25 the Federal Court to the FCC.

1 And the FCC is going to be concerned about
2 whether or not NAT is lawfully operating as a local
3 exchange carrier and then would be entitled to offer
4 terminating access services in interstate commerce.

5 If NAT is not operating lawfully as a local
6 exchange carrier, then it begs the question whether it
7 can charge for terminating access service on interstate
8 commerce.

9 We think the Commission should rule in the first
10 instance on that question, which is why we urge the
11 Commission to go forward and address the merits of
12 Sprint's Complaint.

13 I think an important practical issue here is
14 that a company should not be able to profit from
15 operating illegally in this state, and for now NAT has
16 been charging and collecting on some intrastate invoices.
17 There may be collateral benefits to other interexchange
18 carriers who have been unlawfully charged intrastate
19 services by NAT. We're not carrying water for these
20 companies, but that's a practical consideration as well
21 for the Commission to consider.

22 I'd also want to point out that there is another
23 docket before the Commission, 09-098, which is
24 South Dakota Network v. Sprint Communications, and a
25 portion of the damages action that South Dakota Network

1 is bringing against Sprint involves the services that
2 NAT had been providing that would operate over SDN's
3 network.

4 So in sum we urge that the Commission deny NAT's
5 Motion to Dismiss on mootness grounds. This case is not
6 moot. The Commission has jurisdiction to move forward,
7 and it should exercise that authority that's it has.

8 Thank you.

9 CHAIRMAN NELSON: Mr. Swier, brief rebuttal.

10 MR. SWIER: Thank you.

11 The Commission has to look at what Sprint's
12 Complaint requests in TC10-26. We've already gone
13 through the four very specific items that Sprint has
14 asked the Commission to rule upon: The jurisdictional
15 issues, which are complete, the Certificate of Authority,
16 which NAT has now applied for, and the money damages of
17 \$281, which NAT has agreed to pay to Sprint.

18 If this case goes forward, what is the
19 Commission -- what type of remedy is the Commission going
20 to provide here? Through its decisions and through NAT's
21 actions, all four of the requests that Sprint has asked
22 for have now been decided. The case is over. There is
23 nothing else to litigate. There is no other relief that
24 the court -- excuse me, that the Commission can provide
25 in this case so to talk about its implications in other

1 cases, be it federal, administrative, or state cases, is
2 entirely irrelevant when it comes to the four specific
3 matters in this particular docket.

4 There is simply nothing else that Sprint can be
5 awarded that it hasn't already gotten. So because of
6 that, this is the classic case that a case is simply
7 moot. There is nothing else the Commission can provide
8 here.

9 Now regarding the Kidder Peabody case, that
10 case, of course, was never cited by Sprint in its Reply
11 Brief. So, of course, at this time I can't make any type
12 of cogent argument regarding that case because it wasn't
13 cited previously by Sprint.

14 However, when you look at the four items that
15 are requested here, we think it's very clear that the
16 Commission can no longer grant anything else under this
17 Complaint. And we think it's clear that the Commission
18 must dismiss this matter on mootness grounds.

19 Thank you.

20 CHAIRMAN NELSON: Thank you.

21 Questions from the Commission.

22 MS. AILTS WIEST: Do you want to hear from
23 Staff?

24 CHAIRMAN NELSON: Staff.

25 MS. CREMER: Staff would like to hear your

1 questions because before I recommend anything, I need
2 clarification also.

3 CHAIRMAN NELSON: Okay. Yeah. Let's go ahead.
4 We'll ask our questions. I'm good with that.

5 Starting with Mr. Swier, you used the word and
6 said that the Circuit Court found that we had "exclusive
7 jurisdiction." And that's an important point for me. I
8 just breezed through the Court's decision, and I'm not
9 finding that strong of language.

10 Can you help me out there?

11 MR. SWIER: Sure. Let's first take a look at
12 the Commission's May 4 Order, 2011 Order. This Order
13 specifically states that "The Commission has clear
14 jurisdiction over intrastate telecommunications."

15 The Order then went on to say that "The
16 Commission's jurisdiction over intrastate
17 telecommunications services is extensive." And that was
18 quoting the Cheyenne River case back in 1999.

19 On appeal here's what the Circuit Court
20 specifically said: "The issue presented in this case is
21 whether or not the South Dakota PUC or the Tribal Utility
22 Authority has jurisdiction over this matter with respect
23 to intrastate telecommunications." That's page 4 of the
24 Circuit Court Decision.

25 Here's how the Circuit Court answered that:

1 "The South Dakota Supreme Court has reviewed this
2 jurisdictional dispute under a similar context and has
3 found that the Tribe does not have jurisdiction."

4 So under Sprint's Amended Complaint, number two,
5 it asks for a declaration that the Tribal Utility
6 Authority lacks jurisdiction. That's exactly what the
7 court said. It said that the Tribe does not have
8 jurisdiction in this intrastate telecommunications
9 issue.

10 So I think it's very clear that the Tribal
11 Utility Authority lacks jurisdiction, that the Commission
12 has sole authority to regulate intrastate
13 telecommunications services. So those two jurisdictional
14 issues right off the bat have been decided by both the
15 Commission and affirmed by the court.

16 So I don't know really, Mr. Chair, how much
17 clearer both the Commission and court can be. The Tribe
18 has no jurisdiction. The Commission has full
19 jurisdiction over intrastate telecommunications
20 matters.

21 CHAIRMAN NELSON: Thank you.

22 Mr. Knudson, I didn't hear you address that
23 point specifically. Can you give us your position on
24 that?

25 MR. KNUDSON: You are correct. I focused on the

1 third part of our declaratory relief, which is the need
2 for a Certificate of Authority.

3 I think what we said in our Brief and I think
4 what I would say here is the same. I think you do
5 observe correctly in the Circuit Court Opinion it doesn't
6 squarely hold that the Crow Creek Sioux Tribal Utility
7 Authority lacks jurisdiction over Sprint.

8 It does hold that the Commission has
9 jurisdiction to move here, and it didn't need to defer to
10 the tribal court jurisdiction in this instance.

11 I think that it's good language in that
12 decision, but if you roll back to the Order being
13 appealed, which is the Order of this Commission, I don't
14 think you can read that Order as saying that the
15 Commission has concluded it has the sole authority to
16 regulate Sprint's interexchange services within the State
17 of South Dakota.

18 So I think we're still seeking the relief sought
19 in our declaratory relief in terms of paragraph 1 for our
20 prayer for relief. So the Order we issued earlier didn't
21 squarely hold in Sprint's favor on that particular
22 point.

23 CHAIRMAN NELSON: If I might follow up on that,
24 I think everybody is under agreement that -- and
25 specifically our Order indicated that we have

1 jurisdiction. And so the remaining question is what, if
2 any, jurisdiction the Tribe has.

3 The Circuit Court said, and Mr. Swier has
4 already quoted this, it's quite clear that the Tribe does
5 not have jurisdiction over calls that would originate off
6 the reservation and terminate on the reservation or
7 otherwise originate on the reservation and terminate off
8 the reservation.

9 How can you construe that as meaning the Tribe
10 has any jurisdiction over Sprint?

11 MR. KNUDSON: I think you would conclude that
12 based on that holding that the Tribe would not have
13 authority over those services over Sprint, absent
14 Sprint's consent, which has not been given.

15 CHAIRMAN NELSON: So would point number 2 not
16 already be resolved?

17 MR. KNUDSON: I think you could say that there
18 still remains the issue of what happens to traffic within
19 the exterior boundaries of the reservation. And that
20 Order of the Circuit Court didn't specifically address
21 that narrower niche of services.

22 CHAIRMAN NELSON: Does Sprint have traffic
23 that is exclusively within the boundaries of the
24 reservation?

25 MR. KNUDSON: I don't believe it does, sir.

1 CHAIRMAN NELSON: So is that question not
2 already answered?

3 MR. KNUDSON: I think as a practical matter it
4 probably has been.

5 CHAIRMAN NELSON: Thank you.
6 Other questions from the Commission?
7 Mr. Hanson. Commissioner Hanson.

8 COMMISSIONER HANSON: Mr. Works. It shows our
9 age difference.

10 It's an interesting point that you make, you
11 know, about the traffic, that excludes that one little
12 tiny piece. And maybe we'll be back here in future years
13 going over that.

14 Mr. Swier, I'm concerned with ambiguities, and
15 there seems to be a number of ambiguities in responses to
16 Sprint's -- well, to the requirements that you reply to
17 document requests.

18 Primarily right now I'm concerned with the COA
19 and the fact that you state that you've applied for a COA
20 but yet the NAT has applied for a COA in the past and
21 withdrawn that COA.

22 We can be in the -- this can be a never ending
23 story going back and forth and back and forth if we
24 choose to dismiss this at this time without having
25 accomplished all of the -- or at least disposed of all of

1 the issues that are before us.

2 And I really think, Mr. Chairman, that we need
3 to have that -- go through the entire duration and
4 culmination of the COA prior to dismissing this
5 particular docket. And I say that now rather than after
6 a Motion because I want to hear what Mr. Swier might have
7 to say.

8 CHAIRMAN NELSON: Mr. Swier.

9 MR. SWIER: Thank you for the question.

10 Well, again, when you look -- I think we have to
11 look specifically at this particular docket. I think
12 it's improper to bring in what's happening in other
13 dockets.

14 Sprint asked in this docket for four specific
15 things. One, that NAT has to get a Certificate of
16 Authority. All right. The only thing the Commission
17 could order here in this docket is that NAT seek a
18 Certificate of Authority. The jurisdictional issues are
19 decided. The damages issues are decided. The only thing
20 this Commission could continue to ask is for NAT to get a
21 Certificate of Authority.

22 Commissioner Hanson, as you indicated, NAT has
23 now done that. There is a live docket happening in
24 11-087. So for this Commission to continue with this
25 case when the ultimate result is going to be you're going

1 to issue a decision saying we need to seek a Certificate
2 of Authority, that's already been done.

3 So I understand your concern about potentially
4 dismissing the Certificate of Authority action, but you
5 have to look at the four corners of this case. NAT has
6 already done what Sprint wanted, and that's to seek a
7 Certificate of Authority.

8 So the Certificate of Authority matter is
9 entirely different from the mootness issues in this case.
10 That's why I don't believe this case can move forward.
11 The issues are moot because that Certificate of Authority
12 application is pending.

13 COMMISSIONER HANSON: Thank you, Mr. Chairman.

14 CHAIRMAN NELSON: Additional questions.

15 I have one additional for Mr. Knudson.

16 Regarding the point 4, the monetary damages, Mr. Swier
17 states that the monetary damages are undisputed by
18 Sprint.

19 Do you concur with that?

20 MR. KNUDSON: I would say yes, we're in
21 agreement as to the amount that Sprint had paid NAT for
22 which it would seek a refund.

23 CHAIRMAN NELSON: But your issue is really the
24 precedential value of a ruling on that; is that
25 correct?

1 MR. KNUDSON: Yes. It expands to the larger
2 issue. And I would like to address the question of
3 Commissioner Hanson, if I may.

4 CHAIRMAN NELSON: Certainly.

5 MR. KNUDSON: I think it's important and here on
6 the -- bigger picture issue, Sprint is engaged in a
7 jurisdictional fight with NAT as to who regulates NAT
8 within the State of South Dakota.

9 And it brought this action in 10-26. And then
10 as you point out, NAT, which had previously withdrawn its
11 application for a Certificate of Authority, then files
12 one in 11-087. But as the Commission knows, now NAT has
13 appealed your rulings on discovery and intervention in
14 that case tying that docket up while it sits in Buffalo
15 County Circuit Court.

16 But what -- you know, if that appeal goes
17 adverse, what is to prevent NAT from then withdrawing its
18 application in 11-87?

19 So I think what we need to do is tie 11-87 and
20 10-26 together because they intersect on this issue as to
21 whether or not NAT has to have a Certificate of Authority
22 and whether it's entitled to such a Certificate of
23 Authority given its financial picture, its prior conduct,
24 bring this all together.

25 I point out that what we say in the prayer for

1 relief is there must be a lawful tariff on file with the
2 Commission. You need a Certificate of Authority to have
3 that happen. We're asking for a practical construction
4 of that request for relief. Let's bring this all
5 together.

6 I would also point out that the discovery being
7 sought in 10-26 overlaps with the discovery being sought
8 of NAT in 09-098, which is the South Dakota Network case.
9 And before the Commission you heard the parties come to
10 an agreement as to NAT's going to provide discovery in
11 10-26 and Sprint would hold in abeyance any effort to
12 enforce a subpoena on that in 09-098.

13 So these all come together. That's one of the
14 practical considerations the Commission should have in
15 denying this Motion to Dismiss.

16 Because you can reach the end result determining
17 what is the effect of NAT's failure to have a Certificate
18 of Authority when you decide whether or not to grant it
19 or deny it in 11-87 and then address that issue in 10-26
20 at the same time.

21 Meanwhile, we'd like to get our discovery done
22 in 10-26.

23 CHAIRMAN NELSON: Additional questions.

24 MS. AILTS WIEST: I do.

25 CHAIRMAN NELSON: Ms. Wiest.

1 MS. AILTS WIEST: So with respect to your fourth
2 request for relief awarding money damages, is that
3 essentially gone?

4 Have you agreed on the amount of money damages?

5 MR. KNUDSON: Well, I don't think we're
6 disputing the amount of money damages. But it's not gone
7 in the sense that if you're looking at mootness, that
8 issue still is out there, and the question is haven't
9 been paid, what about the invoices that were sent to
10 Sprint that added up to several thousand dollars. Those
11 also are an issue in this case.

12 They say we will waive our right to enforce
13 that. That waiver isn't binding going forward. So under
14 the Mootness Doctrine and the Kidder Peabody case, which
15 is cited in our Reply Brief on the Motion to Compel which
16 is also the mootness argument -- so they can't just say
17 we will voluntarily quit the offending conduct and then
18 try to deprive this Commission of jurisdiction. Kidder
19 Peabody --

20 The other case we cited, the Friends of the
21 Earth case from the U.S. Supreme Court comes from the
22 same principle, which is sure you're in compliance now
23 but you might not be in compliance with your permit in
24 the future. The court still has jurisdiction to rule on
25 the request and enforce the terms.

1 So I think on mootness grounds we feel confident
2 that this case and this Commission has jurisdiction to
3 move forward on 10-26 as well as 11-87.

4 MS. AILTS WIEST: But you're not contesting the
5 actual amounts that NAT has come up with, with respect to
6 the refund amount?

7 MR. KNUDSON: No, we're not.

8 MS. AILTS WIEST: So the parties could agree on
9 that damages issue; right?

10 MR. KNUDSON: Well, we are saying it's not --
11 this is not simply a case about money damages.

12 MS. AILTS WIEST: Right. I'm only speaking with
13 respect to your number 4 request for relief.

14 MR. KNUDSON: That's right. We know what we
15 paid improperly -- unnecessarily to NAT, and that's the
16 amount of money we seek as a refund under this
17 proceeding.

18 MS. AILTS WIEST: And given the pending COA in
19 the other case, would it make sense to just hold this
20 case in abeyance at this point?

21 I understand your point on the 09-098 and
22 discovery, but you can proceed with the discovery
23 request, I would assume, in that docket.

24 It's not necessarily depend on this case, is
25 it?

1 MR. KNUDSON: Well, I think that the Commission
2 should look from the point of view of whether or not it
3 would be economizing any of its resources if we get a
4 decision in 10-26 to require NAT to produce the discovery
5 it promised to produce, we don't have to do it in 09-098.

6 So you either do it once in 10-26 or you have to
7 do it 09-098. We won't be sparing the Commission of any
8 time or effort in seeking that discovery. So I think we
9 as a practical matter can tie 10-26 with 11-87, move
10 forward with the discovery in 10-26, which solves the
11 issue in 09-098, and gets a consolidated, coordinated
12 ruling on these jurisdictional issues, the implications
13 of operating without a Certificate of Authority.

14 And if the Commission were to deny the request,
15 then a clear ruling on that point, it's a legal effect
16 within the State of South Dakota would be important. So
17 we don't see NAT running to tribal court to try to seek
18 some kind of relief under its tribal tariff.

19 CHAIRMAN NELSON: Mr. Swier, would you like to
20 address Ms. Wiest's abeyance suggestion?

21 MR. SWIER: Well, I think that that's a
22 potential practical idea. But here's my argument with
23 that is you cannot keep a case in abeyance when there is
24 no further relief to be provided.

25 I mean, in this case there is simply no other

1 relief the Commission can provide here. So to keep a
2 docket open when the Commission knows that the matters
3 are moot I think is improper.

4 I think the case should just be dismissed and we
5 can deal with the other dockets, you know, in those other
6 dockets.

7 But when we're looking at this particular case,
8 I think dismissal based on mootness is the -- actually
9 the most practical way to go here. Because the issues in
10 those other cases are different than what they are in
11 10-26.

12 So it would seem for economy reasons that this
13 case should be dismissed, that we should proceed with
14 09-098 in that docket, we should proceed with the CLEC
15 application in 11-87 in that docket.

16 To all the sudden take this docket now and meld
17 it into the other dockets I think is not only improper
18 but it's going to make it even more of a mess than what
19 it would be if we just continued to proceed in each case
20 individually.

21 And there's simply nothing here that the
22 Commission can give Sprint anymore. The case is over in
23 this case.

24 CHAIRMAN NELSON: Additional questions?

25 At this point I'm going to ask if there are any

1 motions to move forward on this issue? And if there are
2 not, we will go to take arguments on --

3 MS. AILTS WIEST: Karen.

4 CHAIRMAN NELSON: Oh, yes. I apologize,
5 Ms. Cremer.

6 MS. CREMER: No. And I really don't want to
7 weigh in on any of this, quite frankly, other than to say
8 I would just note, you know, your concern about the --
9 NAT withdrawing their COA in TC11-087, I would note we
10 have a rule, and it's 20:10:01:02.4, and that is the
11 withdrawal and dismissal of a Pleading prior to a final
12 order.

13 And what it says in there is the Commission -- a
14 Pleading may be dismissed or withdrawn prior to the
15 filing -- prior to the entry of a final order by the
16 Commission if a stipulated agreement is filed and the
17 Commission does not find that the public interest
18 requires the proceeding to be continued.

19 My point being they could apply to withdraw, but
20 you don't have to grant that for the COA. So I don't
21 know if that -- if that helps with any concerns on that
22 at all.

23 As to the economizing of resources, that has not
24 been the case here, putting these all together. Clearly
25 that has not worked. I can almost guarantee that no

1 matter what they respond in discovery it's not going to
2 fit TC09-098. And so I just don't buy that argument at
3 all.

4 As to Sprint's first issue, I think the
5 Commission's jurisdiction has clearly been decided, and I
6 think that has been gone over.

7 I guess the Commission, if this would satisfy
8 Sprint in order to wrap this up and make this docket go
9 away, you could declare that NAT must abide by the
10 statutes found in Chapter 49 and receive a COA from this
11 Commission and file a tariff before it can offer
12 intrastate services in South Dakota.

13 And if that satisfies Sprint, that appears --
14 that's what I heard them saying. Well, then that might
15 help this go away. The other thing is write the check
16 for \$281 and cash it, and then you've got your money.

17 And I find it hard to believe that Sprint's
18 attorneys cannot come up with some sort of a release
19 saying that there will be no back-billing and some sort
20 of a something, stipulation, settlement, something, that
21 would prohibit that back-billing that they seem to be
22 concerned about.

23 So if that can -- I wouldn't dismiss at this
24 point. See if those sorts of things will make this go
25 away. But I do agree with NAT that there seems to be

1 very little that the Commission can offer here.
2 The other thing would be discovery. I'm not
3 clear at all what discovery is needed or what's it needed
4 for in this docket. I get it that they need it for their
5 other dockets, but I'm not sure this is the proper forum
6 to get discovery in another matter.

7 Thank you.

8 CHAIRMAN NELSON: I was most intrigued by your
9 comment that you felt we could make a declaration on
10 point number 3.

11 Can we make that as part of a Motion to
12 Dismiss?

13 MS. CREMER: Is it point 2 or 3? I don't think
14 the Commission can declare -- and I should have probably
15 made that clear -- the jurisdiction of another
16 Commission. I don't think you can say --

17 CHAIRMAN NELSON: No. I'm on point 3. Talking
18 about making a declaration that they must seek a
19 Certificate of Authority.

20 MS. CREMER: Yeah. I think you can do that.
21 It's a given. You know, everybody has to follow our
22 statutes and that, but if that would make Sprint feel
23 better and be amenable to dismissing that, then I think
24 you could declare that NAT must abide by the statutes
25 found in Chapter 49 and receive a Certificate of

1 Authority before it can offer intrastate services.

2 CHAIRMAN NELSON: Okay. Questions of Staff.

3 Okay. At this point I will ask if there are any
4 motions in regard to this Motion to Dismiss. And if
5 there are not, then we will move very quickly and take
6 arguments on discovery.

7 Seeing none -- Commissioner Hanson.

8 COMMISSIONER HANSON: Mr. Chairman, I still feel
9 that there are -- for a person who's not interested in
10 weighing in, you certainly weighed in with some real
11 interesting positions. And not that I disagree with
12 them, but I still believe that there are unresolved
13 issues with this particular docket, and for that reason I
14 would at least like to float the Motion and see what --
15 see where it comes down.

16 Mr. Chairman, I will move in this docket in
17 TC10-026 that the Commission does not grant Native
18 American Telecom's LLC's Motion to Dismiss.

19 CHAIRMAN NELSON: Discussion on the Motion?

20 Let me -- I am very close to moving to dismiss.
21 My biggest hang-up is what Commissioner Hanson has
22 already talked about, the fact that NAT at one point
23 applied for a COA and then withdrew it and has now come
24 back.

25 And I am concerned about getting into some ugly

1 cycle and never getting that ultimately resolved. That
2 is literally my problem, my only hang-up at this point
3 with dismissing this.

4 I am very intrigued with Ms. Wiest's suggestion
5 that perhaps this needs to be held in abeyance while some
6 of these others move forward and we actually see how the
7 COA application turns out.

8 I guess those are my thoughts at this point.
9 Other discussion?

10 COMMISSIONER FIEGEN: Mr. Chairman, I think a
11 lot of us would love to dismiss this case today, but I
12 don't believe we can because the COA is something that we
13 have to make sure that we have and that NAT abides by the
14 rules of this state in Chapter 49.

15 COMMISSIONER HANSON: Mr. Chair.

16 CHAIRMAN NELSON: Commissioner Hanson.

17 COMMISSIONER HANSON: I agree with you fully, as
18 I expressed earlier, and that is the one issue that
19 pushed me over the ledge, so to speak. Plus that fact
20 that if we're going to continue on any road with this, we
21 can't dismiss it. If we are going to pursue any of the
22 other issues in this docket, then whether it's discovery
23 or anything else, we have to deal with dismissal.

24 If we're going to look at anything else further,
25 then we have to have the docket open. So I just feel

1 that we cannot dismiss it.

2 CHAIRMAN NELSON: Ms. Wiest.

3 MS. AILTS WIEST: The Commission may want to
4 take this under advisement, perhaps consistent with what
5 Staff has stated. I don't know if Staff wanted to try to
6 work with the parties with respect to that issue on
7 damages or that declaration, but it might be helpful if
8 that was explored before the Commission ruled on either
9 Motion.

10 CHAIRMAN NELSON: I will just -- that makes
11 sense to me. If there's any possible way of pairing this
12 thing down, I would like to give an opportunity to pursue
13 that.

14 I'm going to offer a substitute Motion to Defer
15 action on the Motion to Dismiss for two weeks. And my
16 only purpose in that is to give Staff and the parties an
17 opportunity to try to pare this down.

18 Further discussion on the Substitute Motion?
19 Commissioner Hanson.

20 COMMISSIONER HANSON: I appreciate that offer,
21 and I don't know that I'd be opposed to it. But am I
22 incorrect that in order to do anything further, we have
23 to deal with the Motion to Dismiss?

24 Because if they're making a Motion saying they
25 wish it dismissed, aren't we ignoring that Motion by

1 continuing?

2 CHAIRMAN NELSON: Essentially we would be
3 ignoring that Motion.

4 The reason that I wanted to open it up for
5 motions at this point is that if a Motion to -- if a
6 Motion from this Commission to actually dismiss passed,
7 then we wouldn't have to go any further.

8 But if we defer ruling on that, we can still
9 take action on -- well, take argument and/or action on
10 the additional question.

11 MS. AILTS WIEST: Right. I would -- I'm sorry.

12 COMMISSIONER HANSON: We'd still be doing that,
13 though. That's where I'm trying to -- I mean, you're
14 leaving the docket open. We can always deal with a
15 dismissal in the future.

16 CHAIRMAN NELSON: Let me ask our counsel that
17 question.

18 If we were to support Commissioner Hanson's
19 original Motion to Deny that Motion to Dismiss, would we
20 be able to reopen that on our own Motion at a later time,
21 or would that take a Motion from NAT?

22 MR. SWIER: This is Mr. Swier.

23 I think from a procedural standpoint the
24 Commission could always go back and reconsider any
25 decision that it could make either at the request of the

1 parties or on the Commission's own volition.

2 MS. AILTS WIEST: At this --

3 CHAIRMAN NELSON: Thank you for that.

4 Ms. Wiest.

5 MS. AILTS WIEST: I think at this point it would
6 be preferable to actually not vote and defer voting on
7 the Motion to Dismiss and on the Motion to Compel, though
8 we certainly can hear arguments on the Motion to Compel,
9 rather than voting on the Motion to Dismiss and perhaps
10 reconsidering later.

11 CHAIRMAN NELSON: Thank you. Additional
12 discussion on the substitute Motion to Defer action on
13 the Motion to Dismiss for two weeks.

14 COMMISSIONER HANSON: Mr. Chairman, I think it's
15 procedurally incorrect for us to pursue that particular
16 avenue.

17 However, in order to remove any consternation at
18 the desk, I will remove my Motion at this time, and we
19 can continue with the docket, notwithstanding the fact
20 that there's a -- a Motion by -- or a request to move by
21 Native American to dismiss it.

22 CHAIRMAN NELSON: Understood. I will remove my
23 substitute Motion first and then you can remove yours and
24 we will move forward.

25 COMMISSIONER HANSON: Okay.

1 CHAIRMAN NELSON: Thank you. We are then on to
2 the Motion to Compel.

3 Mr. Knudson.

4 MR. KNUDSON: Given the tenor of the discussion
5 on the Motion to Dismiss, I'm reluctant to pound the
6 table on the Motion to Compel because it's not clear to
7 me where you're going with respect to 10-26. But let me
8 tell you why we believe we're entitled to this
9 discovery.

10 And it comes up in the context of why there is a
11 bigger picture here, and you can't just put blinders on
12 and deal with 10-26 without considering what else is
13 going on before the Commission on these parties.

14 We've articulated why we believe the case is not
15 moot. In that context Sprint's entitled to discovery set
16 out as described in our opening Brief. And that Brief
17 then, of course, goes through the request that the
18 parties agreed NAT would comply to. This was agreed to
19 in front of the Commission and read into the record.

20 NAT's obligations to respond are not
21 discretionary with NAT. They're mandatory. And we cite
22 the Schwartz case from the South Dakota Supreme Court.
23 And that Court affirmed Circuit Court's dismissal of the
24 case when the Plaintiff refused to answer questions about
25 his drug use in a personal injury action.

1 And the Court said you don't get to choose which
2 discovery you want to answer, unless you get an order
3 from the Court saying you don't have to answer it. And
4 in Schwartz, he was ordered to answer those questions.
5 The Plaintiff refused. The case was dismissed.

6 Here we have a situation where we've got a
7 representation and a promise to you that NAT will provide
8 this discovery, and that's still the agreement that was
9 what Sprint exceeded to in November of last year.

10 So what we've received thus far with respect to
11 those discovery responses were wholly inadequate. And I
12 just have to say you cannot allow a party to flout the
13 rules of discovery before the Commission.

14 And so I think it's important to take a stand on
15 Sprint's Motion to Compel and send a message to NAT,
16 which would be a message to other parties before the
17 Commission going forward.

18 Also you might have noticed this before earlier
19 that you do have the parallel discovery served on NAT by
20 way of subpoena in the SDN case. So if you defer on our
21 Motion to Compel in 10-26, which if you're not going to
22 grant it, I would urge you to defer it because we don't
23 need any ruling on the merits denying it when we want to
24 bring a Motion to enforce a subpoena in 09-098 if we
25 choose to do so. And given the discovery responses to

1 date, I think we will.

2 And I think as part of the prophylactic need to
3 keep parties focused on their compliance with these rules
4 Sprint has sought an award of attorneys' fees because
5 we've been back before the Commission, been back before
6 the Commission to get this discovery.

7 You shouldn't allow NAT to continue to flout its
8 obligations under the rules and to this Commission; and,
9 therefore, we urge you to grant our Motion, but in the
10 context of what's going on in 10-26 if you're not going
11 to grant it, then don't deny it. Just defer it.

12 Thank you.

13 CHAIRMAN NELSON: Thank you.

14 Mr. Swier.

15 MR. SWIER: Thank you, Mr. Chair.

16 First of all, I want to address the inadequacy
17 allegation from Sprint. Pursuant to our agreement, we
18 provided Sprint with a CD full of responsive materials.
19 So to say that we just ignored the agreement is
20 absolutely incorrect. We've provided a CD full of
21 information to Sprint.

22 Whether Sprint thinks it's inadequate or not is
23 another issue. We believe much of their discovery has
24 also been wholly inadequate.

25 Nonetheless, put that issue to the side a

1 moment. What we're dealing with here is the case that we
2 believe is clearly moot. NAT has no obligation to
3 provide any further discovery in a case that is moot.
4 That's just something that from a common sense
5 perspective you don't keep litigating a case when there's
6 no further remedy that can be provided by the
7 decision-making body.

8 So, again, I don't think that we can really take
9 up this issue in this particular docket. If Sprint has a
10 problem with NAT's production in 09-098, they can proceed
11 in that case. If Sprint has a problem with NAT's
12 production in the CLEC application, then it can proceed
13 in that case.

14 But, number one, we think that we have provided
15 more than adequate material to Sprint. And, number two,
16 again, because this case is clearly moot, we have no
17 further obligation to provide voluminous discovery in a
18 case that's moot.

19 So that would be my position on the discovery
20 issue.

21 CHAIRMAN NELSON: Thank you.

22 Staff. Didn't forget you on this one.

23 MS. CREMER: I wish you had.

24 Again, until a decision is made in the Motion to
25 Dismiss, it would be difficult to order this granted if

1 ultimately you dismiss it. So at this point I would hold
2 this one also.

3 But maybe the parties -- if Sprint doesn't feel
4 NAT has responded fully enough -- and that's somewhat
5 their Motion to Compel. You know, they have done that.
6 I don't know where they are on the standoff there.

7 You know, I too got the CD with all of their
8 responses. I don't know if that adequately addresses.
9 Or once they've reviewed all that material is the Motion
10 to Compel what's left?

11 Again, a lot of it seems to go to the other
12 dockets, and I wish we could just keep a bright line
13 division between those dockets and everyone just pursue
14 what they need in those dockets rather than just this
15 mixing and matching -- it's like a shotgun approach, and
16 it just has not worked well here.

17 And so I guess, both parties, respond more
18 fully, and if you've got an objection, file it and let's
19 hear it. And that's about all I can say.

20 CHAIRMAN NELSON: Rebuttal from Sprint.

21 MR. KNUDSON: Thank you.

22 With respect to the question of the adequacy of
23 responses, we wouldn't have brought this Motion if we
24 thought we had gotten adequate responses.

25 We've been through the CDs, voluminous of --

1 it depends on who's making the claim. It's not that
2 large a quantity of documents. The checking account
3 records for a year and a half stopping at the end of 2010
4 only partially respond to our requests, and they're not
5 brought up to date.

6 So we think we've laid out in our opening Brief
7 why the responses were inadequate on their face. So it's
8 not like we've not looked at this material but when we
9 tried to meet and confer we're basically saying we're not
10 going to produce anything more than we've produced and so
11 that's why we're here on that Motion.

12 Now if the Commission thinks it needs to defer
13 on 10-26, then we'll have to revisit the issue in the
14 other docket to see what we want. But the discovery
15 overlaps very much. And because there may be different
16 issues in each docket, the information being sought can
17 relate to a number of issues.

18 And the test is for whether they have -- the
19 proper request is whether they're reasonably calculated
20 to lead to discovery of admissible evidence. It's a very
21 liberal and broad standard. And you can ask for
22 information that's going to relate to a number of issues.
23 And it may be the same information but it can be used to
24 address different legal issues that are being raised in
25 these three dockets.

1 So we do believe that we're entitled to this
2 discovery. We've pushed to get this information. We
3 thought we would get it, and we have not. And I think
4 the Commission has to keep in mind that these rules are
5 to be followed. We can't permit this kind of conduct to
6 go on, even in this docket.

7 Thank you.

8 CHAIRMAN NELSON: Questions from the
9 Commission?

10 MR. SWIER: Mr. Chair, could I respond to that
11 briefly?

12 CHAIRMAN NELSON: Certainly.

13 MR. SWIER: You know, I don't know exactly what
14 kind of conduct that Sprint is alleging that NAT has not
15 done here. We have provided them with discovery. We
16 obviously have issues with their discovery also.

17 It was our feeling that because this case is
18 moot, that no discovery was needed. Now we know for sure
19 that three out of the four issues that's in their
20 Amended Complaint, those are taken care of. So clearly
21 any discovery that relates to the jurisdictional issues
22 or the damages issues, that clearly is moot.

23 So we're under no obligation to supplement our
24 discovery with regard to issues that are clearly moot.
25 And I think everybody agrees that the jurisdictional

1 and the damages issues, everybody's on the same page
2 there.

3 So just from a practical perspective, we're
4 under no obligation to expend tens of thousands of
5 dollars to provide supplemental discovery on issues that
6 aren't even teed up, so to speak, anymore. So to say
7 that we've been shirking our responsibility and we're not
8 following the rules is absolutely incorrect.

9 What's happening here is Sprint wants to obtain
10 discovery in other cases that either, number one, it
11 hasn't been able to obtain based primarily on Federal
12 Court rulings, and, number two, they're simply trying to
13 once again keep this case alive so that they can simply
14 beat down on NAT requiring supplemental discovery.

15 But, again, to say that we're not following
16 the rules and we're playing games is absolutely
17 incorrect. And I just want to make sure that that's on
18 the record.

19 CHAIRMAN NELSON: Thank you.

20 Ms. Wiest.

21 MS. AILTS WIEST: I would have a question for
22 Sprint first.

23 Are there any of the outstanding data requests
24 that you want more fully answered that would relate
25 solely to the damages issue?

1 MR. KNUDSON: In terms of the refund being
2 sought?

3 MS. AILTS WIEST: Yes. The entire damages
4 issue.

5 MR. KNUDSON: No. We're not fighting over that
6 part of the case.

7 MS. AILTS WIEST: None of these requests when
8 you're talking about bills and those kind of things are
9 related to your damages request?

10 MR. KNUDSON: They go more to what -- the
11 jurisdiction of the Commission with respect to NAT's
12 activities within the State of South Dakota.

13 MS. AILTS WIEST: I would also note that trying
14 to go through this and analyze it it's somewhat of a
15 problem because, for example, in Document Request No. 4
16 the response was attached to Exhibit 6, and then you
17 state what they did didn't produce but I'm not sure what
18 they did produce in certain cases because their actual
19 exhibits with respect to their responses were not
20 included.

21 MR. KNUDSON: Well, if I understood correctly
22 from Ms. Cremer, Staff did have our responses.

23 No. 4, to produce minutes, meetings,
24 resolutions, and NAT's bylaws. And, quite candidly,
25 that's not very difficult to understand. And other than

1 getting the LLC Operating Agreement, we don't get any
2 minutes of any meetings or resolutions. None.

3 MS. AILTS WIEST: Well, my question was just I
4 just didn't know what they had included in Exhibit 6. I
5 understand that Staff may have received it, but I don't
6 believe it was filed in the Commission's docket. So then
7 I wouldn't have received it. And I don't have access to
8 what Staff has.

9 And maybe a question for Mr. Swier is if I
10 understand the time line correctly, I believe that NAT
11 agreed to respond to this discovery request after the
12 Commission issued its Decision and after the Circuit
13 Court issued its Decision.

14 So why weren't your mootness arguments that you
15 actually made before you guys settled this issue -- they
16 didn't seem to matter when you came to an agreement to
17 respond to this discovery request so why are you bringing
18 them up now, I guess?

19 MR. SWIER: Well, because when you look at this
20 from a business decision, we didn't know at the time that
21 Sprint's damages in this case were \$281. And when you
22 look at this from just a purely common sense business
23 perspective, why would we continue after we've provided
24 what we think is a very good document response?

25 After we made those responses we found out that

1 Sprint's total claim there was \$281. We offered them,
2 look, we'll pay you the \$281 and the case goes away.

3 At the time the original production was provided
4 we didn't know what those damages were. We assumed that
5 they'd be substantially larger than \$281. But when they
6 were \$281 NAT made the business decision that rather than
7 proceed with tens of thousands of dollars in attorneys
8 fees, it would pay the \$281, which I think any good
9 business person would probably do.

10 So from the time that we made that voluminous
11 initial production to this Motion NAT made a business
12 decision not to fight over \$281. That's why the Motion
13 for mootness wasn't brought until it was.

14 MS. AILTS WIEST: And exactly when did you
15 discover that?

16 MR. SWIER: That it was \$281?

17 MS. AILTS WIEST: Yes.

18 MR. SWIER: It would have been in an e-mail from
19 Mr. Schenkenberg dated Friday, February 24, 2012, at
20 12:07 p.m. And our initial production was done, I
21 believe, in December of 2011.

22 MS. AILTS WIEST: So you had not checked your
23 own records to see what was owed prior to that time?

24 MR. SWIER: Well, I think what the deal was is
25 if we would have checked our own records, based on the

1 way these dockets have been going, I don't think Sprint
2 probably would have agreed with our numbers. That's why
3 I specifically asked Sprint in February, hey, how much do
4 you guys actually claim that we owe you?

5 MS. AILTS WIEST: And prior to that you had no
6 idea what you had owed them on the intrastate claim?

7 MR. SWIER: No, we hadn't been provided any
8 discovery from them on what their damages were.

9 MS. AILTS WIEST: That's all I have.

10 CHAIRMAN NELSON: If I could ask Sprint a
11 similar question to what Ms. Wiest asked, she asked which
12 of your discovery issues went to point No. 4. And I'd
13 like to know which of your discovery issues go to points
14 No. 1 and 2 on jurisdiction?

15 MR. KNUDSON: Well, using the touchstone as to
16 what the standard for discovery requests is, which is the
17 liberal one I mentioned earlier, what we believe here is
18 that the discovery that was the subset that was presented
19 to the Commission which relates to NAT's business
20 dealings in the State of South Dakota go to issues 1 and
21 2 and that we were seeking discovery as to how many
22 customers, where were they located, is there any business
23 wholly within the reservation, do you have customers who
24 are not tribal members.

25 All of those sorts of things go to establish

1 whether or not NAT was operating illegally in the State
2 of South Dakota. And so that's the nature of the
3 discovery we're seeking. And that's what the discovery
4 was directed toward.

5 For example, requesting the minutes and bylaws
6 could go to determining what kind of business decisions
7 NAT was making, whether it was electing to go forward
8 without a Certificate of Authority because it thought it
9 could hide under the jurisdiction of the tribal court and
10 not -- deflect any inquiry under state law.

11 Alternatively, to say that if we get pushed back
12 in a state area, we can just tender back the small amount
13 of money we seem to have collected and force Sprint to go
14 away before the PUC. I mean, that's another kind of
15 business decision we could find out if they produced any
16 minutes of their board meetings.

17 So that's the kind of discovery. We narrowed it
18 down, and that's what we were seeking to establish. So
19 to say NAT did not know until Mr. Schenkenberg told them
20 what we believe the dollar amount was, well, it's based
21 on the bills we got from NAT, and those are from NAT's
22 own billing agent. And so to say we didn't know is they
23 didn't look. But that's, you know, what we're trying to
24 do with our discovery.

25 CHAIRMAN NELSON: Thank you. Additional

1 questions.

2 COMMISSIONER HANSON: Mr. Chair.

3 CHAIRMAN NELSON: Commissioner Hanson.

4 COMMISSIONER HANSON: When we write letters in
5 response, at least when I do, in response to issues and
6 I'm going to send a letter to the editor I often sit with
7 that letter for a day or two before I send it. We're not
8 given that opportunity here during these meetings, and
9 sometimes I wonder if my feelings of being compelled to
10 speak -- whether they're well thought out or not. And so
11 I try not to say some things I may regret later.

12 Having prefaced my remarks with that, Mr. Swier,
13 I have to say thank you to you for arguing my point that
14 we need to first deal with the Motion to Dismiss first
15 because you're going to use that and simply continue to
16 say you won't respond because the issues are moot and
17 because the Commission has not made that decision.

18 And I'm frustrated with that. I think it's a
19 slap in the face to the Commission to refuse to work with
20 the other parties in a discovery because this is an open
21 docket.

22 You have an agreement. The Commission placed a
23 Sprint Motion to Compel on the agenda in November 22 of
24 last year. Prior to the meeting Sprint and NAT reached
25 an agreement through your counsel, including yourself,

1 that NAT would produce considerable amount of
2 information, that counsel for Sprint read that agreement
3 into the record. We have that. It's very lengthy.

4 It comprises the Interrogatories that you have
5 given some answer to, but your answers are ambiguous.
6 They are open to interpretation. They do not succinctly
7 state or answer the questions that were submitted to
8 you.

9 I think it's disingenuous to argue that we
10 should ignore past bad behavior and then basically
11 continue with that bad behavior. And I'm really
12 disappointed in hearing your arguments because they are
13 so circular. And this has been going on for such a long
14 period of time, and I don't think we're going to resolve
15 things in a fashion that in good business practices that
16 you would resolve.

17 You say it's only -- that there's no question on
18 the dollar amount. It's pretty simple to write the check
19 and get that taken care of. There are matters that will
20 remain unresolved until the Commission just takes the
21 action basically. And we've gone through the court
22 process. You appeal whatever we make for a
23 determination.

24 It's obvious that you are not working to resolve
25 this -- at least it's extremely obvious to me that you

1 are not genuinely, sincerely working to resolve the
2 issues that exist here. Otherwise, they would have been
3 resolved some period of time ago.

4 And, Mr. Swier, if you consider that a question,
5 then I'm sure I would enjoy listening to your response
6 again.

7 Thank you, Mr. Chair.

8 CHAIRMAN NELSON: Mr. Swier, would you care to
9 respond?

10 MR. SWIER: Well, I'm not going to respond
11 because, number one, as far as what we've done to work
12 with parties, to be perfectly honest I don't think that
13 Commissioner Hanson is privy to any of that and how we
14 have tried to work with Sprint.

15 This is not a one-way street when it comes to
16 discovery disputes and disputes. We have tried to make
17 this case as clear for the Commission as possible. The
18 fact is you have no other authority to order anything
19 else under this docket.

20 So to say that we aren't working with Sprint, to
21 say that we are playing games, I think is extremely
22 disingenuous of anybody who would claim that. With all
23 due respect. And these kind of claims have been made
24 against NAT since the beginning of this docket, which is
25 incredibly unfortunate.

1 The fact of the matter is whether you like NAT
2 or not, this is a purely legal decision regarding our
3 Motion here. And to say that we've been playing games
4 without really knowing what's been going on behind the
5 scenes I think is extremely unfortunate.

6 COMMISSIONER HANSON: Mr. Swier, so that we
7 don't get into too much of a match in each other's pocket
8 here, I'm just simply going to say that I have read the
9 Interrogatories. I have read the requests. I have read
10 the responses.

11 I have seen how ambiguous and how
12 multi-interpretive they are. And that is not by
13 accident. And refusal to answer additional questions is
14 not by accident either.

15 Your actions speak much, much louder than your
16 words in this particular situation. And you can say it's
17 disingenuous, but it's based on fact, black-and-white, on
18 the papers that have been filed.

19 Thank you, Mr. Chairman.

20 CHAIRMAN NELSON: Additional questions.

21 I'm going to take just a moment.

22 (Pause)

23 CHAIRMAN NELSON: At this point we are open to
24 any motions from the Commission.

25 I will tell you my thought at this point would

1 be to take this under advisement for two weeks. But this
2 is a time for any motions if anybody would like to.

3 COMMISSIONER HANSON: Like to?

4 CHAIRMAN NELSON: You knew who I was talking to.

5 COMMISSIONER HANSON: Compelled to, like to.

6 Seeing no motions, we will take this under
7 advisement.

8 I think anybody that has watched me for a while
9 knows I don't like to let these things hang around very
10 long. And so I would hope over the next couple of weeks
11 we could maybe resolve some of these issues and, if not,
12 come back and deal with the questions that were asked
13 today.

14 I appreciate both parties and their assistance
15 to us today to try to bring this to a close.

16 MR. KNUDSON: Thank you.

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1 STATE OF SOUTH DAKOTA)
2 :SS CERTIFICATE
3 COUNTY OF SULLY)
4

5 I, CHERI MCCOMSEY WITTLER, a Registered
6 Professional Reporter, Certified Realtime Reporter and
7 Notary Public in and for the State of South Dakota:
8 DO HEREBY CERTIFY that as the duly-appointed
9 shorthand reporter, I took in shorthand the proceedings
10 had in the above-entitled matter on the 17th day of July,
11 2012, and that the attached is a true and correct
12 transcription of the proceedings so taken.

13 Dated at Onida, South Dakota this 24th day of
14 July, 2012.
15
16
17

18 _____
19 Cheri McComsey Wittler,
20 Notary Public and
21 Registered Professional Reporter
22 Certified Realtime Reporter
23
24
25

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