BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN RE:

SPRINT COMMUNICATIONS COMPANY L.P.,

Complainant,

v.

NATIVE AMERICAN TELECOM, LLC,

Respondent.

Docket No. TC10-026

**SPRINT COMMUNICATIONS COMPANY L.P.'S MOTION TO COMPEL**

COMES NOW Sprint Communications Company L.P. ("Sprint"), by and through its attorney of record Stanley E. Whiting of Whiting Law Office, 142 E. 3rd Street Winner, SD 57580, Tom D. Tobin of Tobin Law Offices, PO Box 730, 422 Main Street Winner, SD 57580 and Philip R. Schenkenberg and Scott G. Knudson, Briggs and Morgan, P.A., 2200 IDS Center, 80 South Eighth Street, Minneapolis, Minnesota 55402, pursuant to A.R.S.D. 20:10:01:22.01 and SDCL 15-6-37(a)(2) move to compel discovery responses from Native American Telecom, LLC ("NAT") for the following reasons:

NAT's discovery responses are more than two months late, in violation of the rules of civil procedure, the parties' agreement, and NAT's representations to the Commission as more specifically set forth in Sprint's Memorandum in Support of Its Motion to Compel filed contemporaneously herewith.

Dated: May 12, 2011

**BRIGGS AND MORGAN, P.A.**

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**SPRINT COMMUNICATIONS COMPANY L.P.'S MEMORANDUM IN SUPPORT OF ITS MOTION TO COMPEL**

## INTRODUCTION

Sprint Communications Company L.P. ("Sprint") submits this memorandum in support of its motion to compel Native American Telecom, LLC's ("NAT") responses to Sprint's discovery. Despite the Commission's denial of NAT's motion for a stay, the parties' agreement, and NAT's representations to the Commission, NAT has failed to respond to Sprint's discovery. NAT's responses are now over two months late.

## FACTS

The facts underlying this dispute are well established, as they have been outlined in various motions to the Commission.

On January 31, 2010, Sprint served NAT with interrogatories and document requests. Four days before NAT was to serve its answers to the discovery, NAT refused to meet its deadline. (Affidavit of Scott G. Knudson dated May 12, 2011, Ex. 1) (email from Swier stating that NAT would not meet its discovery obligation). In an effort to resolve NAT's dispute, Sprint offered NAT one extra week in which to reply to Sprint's

discovery. Knudson Aff. Ex. 2 (correspondence objecting to NAT's refusal to respond to discovery and allowing NAT one additional week in which to respond). NAT responded by filing a motion for a protective order on March 7, 2011. A hearing on NAT's motion for a protective order was scheduled for March 22, 2011. In advance of a hearing on that motion, however, NAT and Sprint reached an agreement whereby NAT would provide some information in advance of the Commission's hearing on NAT's motion for a stay.

The agreement, as shared with Commission staff, Karen Cremer, was as follows:

> Karen and Scott:
> I believe the solution offered by Mr. Knudson to the parties' discovery dispute is as follows:
> NAT would provide answers to Sprint's Interrogatories 8, 9, 12, 19, 20, and 21.
> NAT would provide responses to Sprint's RFPD 8, 9, 10, 14, and 18.
> I will agree to provide this information to Sprint by the end of March. Of course, NAT reserves the right to object to any of these discovery requests on the basis of privilege and/or any other legally justifiable reason.

Knudson Aff. Ex. 3 (Swier March 21, 2011 email). Sprint did not receive any information from NAT by the end of March. To date, Sprint has yet to receive *any* answers to Sprint's Interrogatories or responses to Sprint's Document Requests from NAT. In short, NAT has violated its promise and reneged on its representations to the Commission.

In the months since Sprint served its discovery requests, the Commission has taken two key actions. First the Commission denied NAT's Motion for a Stay. *See* May 4, 2011 Order. NAT premised much of its resistance to answering Sprint's discovery on the motion for a stay. *See* NAT's Motion for a Protective Order ¶¶ 3, 6 (filed with the

Commission on March 7, 2011). Now that the Commission has removed any reason for NAT's delay, NAT must answer Sprint's discovery so that the case may move forward.

In fact, the second key Commission action was to delay the Commission's decision on NAT's Motion to Dismiss, based upon NAT's request "that its Motion to Dismiss be deferred until after discovery at which time the Commission could have more information on which to base its decision." May 4 Order, page 1. As revealed in the April 5, 2011, hearing transcript, NAT represented to the Commission that discovery should proceed:

> I think the Motion to Dismiss as the Staff Brief said is premature and that we should move forward with discovery, and when discovery is completed NAT can move forward with its Motion to Dismiss and this Commission can have more information on which to base its decision.

April 5, 2011, Transcript at 51:5-10 (argument of NAT counsel). Yet, in the month since the April hearing at which the NAT made these representations, NAT has failed to produce any discovery responses, let alone any responses that may yield more information on which the Commission could base its decision. In fact, NAT's counsel has said no discovery will be forthcoming. Knudson Aff. Ex. 4 (Swier April 19, 2011 email).

**ARGUMENT**

The Commission should grant Sprint's Motion to Compel. NAT has no justifiable reason for its failure to comply with its agreement and the rules of the Commission.

## A. Standards for a Motion to Compel

The Commission "may issue an order to compel discovery" "for good cause shown by a party." A.R.S.D. 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 not only has NAT failed to answer Sprint's interrogatories and requests for production of documents as required by the Commission's discovery rules, but NAT has violated its agreement with Sprint and reneged on its representations to the Commission. This is unacceptable – 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, ¶ 23, 597 N.W.2d 442, 447.

## B. Standards for Discovery

S.D.C.L. § 15-6-26(b)[1] 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. (emphasis added)

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[1] This Rule is applicable to Commission proceedings by way of S.D. Admin. R. 20:10:01:01.02.

The South Dakota Supreme Court has 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 satisfy 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.

**C. <u>The enjoined tribal court action is not good cause for delay</u>**

NAT moved for a stay before the Commission premised on a tribal court action that the South Dakota federal district court enjoined. *See* NAT's Motion for a Protective Order ¶ 3 ("NAT's 'Motion to Stay' requests that this matter be stayed until the lawsuit now being prosecuted by Native American Telecom against Sprint Communications Company, L.P. ("Sprint") in Crow Creek Sioux Tribe – Tribal Court is concluded."). Commission staff found merit in NAT's motion to stay <u>only</u> until the question of jurisdiction had been resolved. *See* Staff Brief at 3. That question has been answered.

As the tribal court action is no longer a factor, NAT's underlying motion for a stay became moot, as did NAT's contention that answering Sprint's discovery would be an undue expense. When considering NAT's motions, Commission staff determined that NAT's motion to dismiss should be denied. NAT can no longer ignore its obligations.

There is no question that Sprint's discovery requests are relevant to this action. Through interrogatories and document requests, Sprint has inquired into NAT's relationship with call connection companies, NAT's call-routing practices, NAT's provision of service to South Dakota residents and NAT's revenue sharing arrangements. Each of these is relevant to Sprint's contention that NAT is illegally operating a traffic pumping scheme within South Dakota.

To date, NAT has not provided any information to Sprint. NAT has flouted its obligations under the civil rules of procedure, its agreement with Sprint and its representations to the Commission. This effort to avoid discovery must stop. Sprint's discovery seeks information relevant to Sprint's case before the Commission. Sprint is entitled to full and accurate answers from NAT so that Sprint can finally move forward with the investigations of its claims, an investigation that has been delayed over 11 months. The Commission is likewise entitled to know.

## CONCLUSION

The Commission should issue an order compelling NAT's full and accurate answers and responses to Sprint's discovery. NAT cannot continue to thwart the Commission's rules on discovery and ignore its representations to Sprint and the Commission.

Dated: May 12, 2011

**BRIGGS AND MORGAN, P.A.**

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**AFFIDAVIT OF SCOTT G. KNUDSON IN SUPPORT OF SPRINT'S MOTION TO COMPEL**

COUNTY OF HENNEPIN )
) S.S.
STATE OF MINNESOTA )

Scott G. Knudson, being duly sworn, states under oath as follows:

1. My name is Scott G. Knudson. I am an attorney licensed to practice in Minnesota and representing the Complainant, Sprint Communications Company, L.P. ("Sprint"), in this action. I provide this affidavit in support of Sprint's Memorandum in Support of its Motion to Compel.

2. Exhibit 1 is an e-mail dated February 26, 2011 received from Scott Swier in which NAT, for the first time, indicated that it was refusing to meet its discovery obligations.

3. Exhibit 2 is a letter dated March 1, 2011 to Scott Swier outlining Sprint's position regarding his February 26, 2011 email.

4. Exhibit 3 is an e-mail dated March 21, 2011 to Karen Cremer from Scott Swier regarding Sprint's discovery requests.

5. Exhibit 4 is an e-mail dated April 19, 2011 received from Scott Swier regarding NAT's appeal of the PUC's decision to deny NAT's Motion to Stay.

This concludes my affidavit.

By : Scott D. Knudson
Scott G. Knudson

Subscribed and sworn to before
me this 18th day of May, 2011.
Elizabeth Wold
Notary Public

2724420v4

ELIZABETH A WOLD
Notary Public
Minnesota
My Commission Expires January 31,2015

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E 1146

**From:** scott@swierlaw.com
**To:** Swenson, Brooke
**Cc:** Knudson, Scott
**Subject:** RE: Sprint v. NAT, TC10-026
**Date:** Saturday, February 26, 2011 9:35:19 AM

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Brooke:

Thank you for forwarding these discovery documents in the SDPUC case.

Because of the pending federal court preliminary injunction, our client's will not have these discovery documents completed within thirty days.

Also, because NAT's Motion to Stay is currently pending, I do not believe my client would be ordered to complete these discovery documents until the Motion to Stay is decided by the SDPUC.

Can we agree to hold these discovery documents "in abeyance" until the SDPUC rules on NAT's Motion to Stay?

Thank you for this consideration.

Scott

Scott R. Swier
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> -------- Original Message --------
> Subject: Sprint v. NAT, TC10-026
> From: "Swenson, Brooke" <BSwenson@Briggs.com>
> Date: Mon, January 31, 2011 3:28 pm
> To: "scott@swierlaw.com" <scott@swierlaw.com>
> Cc: "Knudson, Scott" <SKnudson@Briggs.com>
>
> Mr. Swier,

Please review and respond to the attached.

Regards,
Brooke Swenson

**Brooke C. Swenson**
**Associate**

Briggs and Morgan, P.A.
Direct 612.977.8855
Fax 612.977.8650
bswenson@briggs.com
2200 IDS Center | 80 South 8th Street | Minneapolis, MN 55402



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March 2, 2011

**Brooke C. Swenson**
(612) 977-8855
bswenson@briggs.com

**VIA E-MAIL AND U.S. MAIL**

Scott R. Swier
Swier Law Firm, Prof. LLC
133 N. Main Street
PO Box 256
Avon, SD 57315

**Re: Sprint v. NAT, TC10-026**

Dear Scott:

We write in response to your email correspondence of Saturday, February 26 (attached). Because Sprint's discovery was validly served within the rules of the SD PUC, we will not agree to hold the discovery documents in abeyance.

Sprint served NAT with discovery on January 31, 2010. Pursuant to S.D.C.L. §§ 15-6-33(a) and 15-6-34, applicable to this proceeding through S.D. Admin. R. 20:10:01:01.02 and 20:10:01:22.01, NAT's responses are due today, March 2, 2011. It was not until Saturday, February 26, four days before NAT's deadline, that you notified us that NAT was refusing to meet its deadline. If NAT believed that its own pending motion in federal court (which is unrelated to the pending SD PUC action) would impact its ability to comply with its discovery deadlines, NAT could have supplied us, and the SD PUC, with additional notice.

The motion to dismiss pending before the SD PUC does not alter your obligations. There is no rule in South Dakota, administrative, civil or otherwise, that holds discovery in abeyance pending a motion to dismiss. In fact, S.D.C.L. § 15-6-26(d) provides that:

> Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

This rule is clear. NAT must seek affirmative relief from the PUC in order to be relieved of its obligation to respond timely to Sprint's discovery requests. The motion to dismiss will not be heard by the PUC until April. There is no good reason to forestall the development of each parties' case before the SD PUC.

In an attempt to obtain timely and complete responses to its discovery, Sprint is willing to offer a one week extension of NAT's obligations to respond to Sprint's discovery requests. If Sprint does not receive timely and complete responses from NAT by Wednesday, March 9, please consider this Sprint's attempt to confer in good faith under S.D.C.L. § 15-6-37(a)(2).

Very truly yours,

Brooke C. Swenson

Brooke C. Swenson

BCS/cf

**Knudson, Scott**

**From:** scott@swierlaw.com
**Sent:** Monday, March 21, 2011 11:50 AM
**To:** Karen Cremer
**Cc:** Knudson, Scott
**Subject:** SDPUC TC0-26

Karen and Scott:

I believe the solution offered by Mr. Knudson to the parties' discovery dispute is as follows:

NAT would provide answers to Sprint's Interrogatories 8, 9, 12, 19, 20, and 21.

NAT would provide responses to Sprint's RFPD 8, 9, 10, 14, and 18.

I will agree to provide this information to Sprint by the end of March. Of course, NAT reserves the right to object to any of these discovery requests on the basis of privilege and/or any other legally justifiable reason.

Karen, if this is acceptable to everyone, do you still want the parties to appear tomorrow (Tuesday) for a hearing regarding these discovery disputes?

Thanks.

Scott

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www.SwierLaw.com





Exhibit 3
1151

## Knudson, Scott

**From:** scott@swierlaw.com
**Sent:** Tuesday, April 19, 2011 4:29 PM
**To:** Knudson, Scott
**Subject:** SDPUC TC-10-026

Scott:

Thank you for your recent correspondence in this matter regarding the status of discovery.

Please note that Native American Telecom, LLC will be appealing the South Dakota Public Utilities Commission's decision to deny NAT's Motion to Stay to the Circuit Court. As such, I believe that the SDPUC would not have jurisdiction to rule on any matters (including discovery disputes) while an appeal is pending in the Circuit Court.

If you have any questions, please feel free to contact our office.

Thank you.

Scott

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Exhibit 4
1152