

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

IN THE MATTER OF THE APPLICATION
OF NATIVE AMERICAN TELECOM, LLC
FOR A CERTIFICATE OF AUTHORITY TO
PROVIDE LOCAL EXCHANGE SERVICE
WITHIN THE STUDY AREA OF
MIDSTATE COMMUNICATIONS, INC.

Docket No. TC11-087

**NAT'S MEMORANDUM
(RE: ENFORCEMENT OF RULE 45 SUBPOENA)**

INTRODUCTION

Native American Telecom, LLC ("NAT"), through its counsel and pursuant to SDCL 15-6-45, submits this "Memorandum (Re: Enforcement of Rule 45 Subpoena)."

FACTS

On Monday, May 7, 2012, NAT served its "Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises in a Civil Matter" ("Subpoena") upon the South Dakota Public Utilities Commission ("Commission") and the South Dakota Attorney General's Office ("Attorney General").¹

NAT's Subpoena requests that the Commission produce the following:

¹ The Attorney General's Office was served with NAT's Subpoena pursuant to SDCL 15-6-4(d)(5).

All of the documents sought below seek the respective applicant's "confidential" (i.e., non-public) financial statements, consisting of balance sheets, income statements, and cash flow statements (including any audited financial statements) provided by the respective applicant to the [Commission] from January 1, 2000 to the present date in the following telecommunications dockets.

NAT's Subpoena then provides a list of cases that relate specifically to the Commission's prior certificate of authority dockets since 2000. NAT's Subpoena also provides a "place of production" and "date and time of production" of May 17, 2012.

LAW & ANALYSIS

I. THE COMMISSION SHOULD PRODUCE THE REQUESTED DOCUMENTS

A.) Rule 15-6-45 Subpoena

SDCL 15-6-45(b) provides that "[a] subpoena may . . . command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein. . . ." SDCL 15-6-45 ("Rule 45") has a close relation to the proper functioning of the discovery rules. Most notably, a Rule 45 subpoena is necessary to compel a person *who is not a party* to produce various material things. In other words, the purpose of a Rule 45 subpoena is to compel the production of documents or things relevant to the facts at issue in a pending judicial proceeding.

See Wright & Miller, 9A Federal Practice & Procedure, Civ. § 2452 (3d ed.).

B.) The Information NAT Seeks From The Commission Through Its Subpoena Is Directly Relevant To Issues In This Docket.

SDCL § 15-6-26(b)(1) establishes that relevant evidence is within the scope 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 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)(1). In addition, under the South Dakota Administrative Rules, the Commission must find there is “good cause” to order the production of the relevant information requested. ARSD 20:10:01:22.01. These standards are met because the information NAT seeks bears on matters that must be reviewed before a certificate can be issued, and is necessary for NAT to meet its burden of proof on all aspects of its Application.²

² By law, NAT has the burden to prove that it has “sufficient technical, financial and managerial capabilities to offer the telecommunications

The information NAT seeks is directly related to the legal standards that apply in this certification proceeding. This information is necessary for the case to be properly litigated, and the production of this information will ensure that the Commission has before it that which it needs to properly review NAT's Application.

NAT's financial capabilities to provide local exchange services are directly relevant to this case. *See ARSD 20:10:32:06(7)* (Commission shall consider whether applicant has "sufficient financial resources to support the provisioning of local exchange service in a manner that ensures the continued quality of telecommunications service and safeguards consumer and public interests[.]"). And indeed, NAT has represented that it has the financial resources to provide the telecommunications services as outlined in its Application. Sprint and CenturyLink dispute NAT's claim.

Since 2000, the Commission has granted hundreds of applications to provide telecommunications services in South Dakota. *See Subpoena*, pages 5-39. Each of these dockets has included a review by the Commission of the applicant's financial capabilities. NAT is entitled to review the financial documents of these previous applicants so that NAT

services described in its application before the commission may grant a certificate of authority." SDCL § 49-31-3. The Commission's rules impose this same burden on NAT. ARSD 20:10:32:05. *See also* SDCL § 49-31-71.

can analyze the "financial thresholds" that the Commission has established as adequate to receive a certificate of authority in South Dakota.

C.) *The Intervenors' Lack Standing To Raise Objections to NAT's Subpoena.*

When a Rule 45 subpoena is directed to a nonparty, any motion to quash or modify the subpoena generally must be brought by the nonparty, and a *party* to the action does not have standing to assert any right of the nonparty as a basis for a motion to quash or modify the subpoena. *See* 7 Moore's Federal Practice, § 45.50[3]; *Thomas v. Marina Assocs.*, 202 FRD 433, 434-35 (E.D. Pa. 2001) (party does not have standing to move to quash subpoena served on nonparty based on asserted confidentiality interest of nonparty). *But see Allocco Recycling, Ltd. v. Doherty*, 220 FRD 407, 411 (S.D.N.Y. 2004) (if a party claims a *personal right* as to production sought by a nonparty subpoena, the party has standing to quash or modify the subpoena).

In this case, if an intervenor has a *personal right or interest* relating to the documents NAT seeks, an intervenor may have standing to object to NAT's Subpoena. However, without this personal right or interest, an intervenor simply lacks standing to object to the Subpoena because NAT is seeking information about entities other than the intervenors themselves.

CONCLUSION

For the foregoing reasons, NAT respectfully requests that the Commission provide the information NAT seeks in its Subpoena.

Dated this 11th day of May, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of NAT'S
MEMORANDUM (RE: ENFORCEMENT OF RULE 45 SUBPOENA) was
delivered *via electronic mail* on this 11th day of May, 2012, to the
following parties:

Service List (SDPUC TC 11-087)

/s/ Scott R. Swier
Scott R. Swier