

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE COMPLAINT OF )  
SOUTH DAKOTA NETWORK, LLC, )  
AGAINST SPRINT COMMUNICATIONS )  
COMPANY LP )  
)  
IN THE MATTER OF THE THIRD PARTY )  
COMPLAINT OF SPRINT )  
COMMUNICATIONS COMPANY LP )  
AGAINST SPLITROCK PROPERTIES, INC., )  
NORTHERN VALLEY COMMUNICATIONS, )  
INC., SANCOM, INC., AND CAPITAL )  
TELEPHONE COMPANY )

TC 09-098

**MEMORANDUM IN SUPPORT OF SPRINT COMMUNICATIONS COMPANY L.P.'S  
MOTION TO ENFORCE SUBPOENAS AND MODIFY PROCEDURAL SCHEDULE**

Sprint Communications Company L.P. ("Sprint") respectfully submits this Memorandum in Support of its Motion to Enforce Subpoenas and Modify Procedural Schedule. Sprint requests the following relief:

1. An order compelling Native American Telecom, LLC ("NAT") to produce the documents requested by Sprint pursuant to a September 28, 2011, subpoena duces tecum within 14 days after an order of the Commission;
2. An order compelling NAT to appear for a re-set deposition of its corporate representative at a time to be scheduled following its production of documents;
3. An order compelling Free Conferencing Corporation ("Free Conferencing") to produce the documents requested by Sprint pursuant to a September 14, 2011 subpoena within 14 days after an order of the Commission;
4. An order compelling Free Conferencing to appear for a re-set deposition of its corporate representative at a time to be scheduled following its production of documents; and
5. An order modifying the Procedural Schedule in this case to the extent necessary to allow Sprint to complete these depositions after the existing November 8, 2011, deposition deadline.

## FACTS

### I. SPRINT'S DISCOVERY EFFORTS WITH RESPECT TO NAT

In September 2011, Sprint's counsel, Phil Schenkenberg, contacted Scott Swier, counsel for NAT, to advise Mr. Swier that Sprint intended to issue subpoenas to NAT to 1) obtain documents from NAT and 2) take the deposition of a corporate representative. Following that call, on September 14, Mr. Schenkenberg emailed to Mr. Swier a draft set of subpoenas identifying the documents sought and the deposition topics on which testimony would be requested. Schenkenberg Aff. ¶ 1 and Ex. A.

On September 29, in accordance with a conversation between counsel, Mr. Schenkenberg emailed to Mr. Swier an executed subpoena duces tecum compelling document production and an executed subpoena compelling testimony of a corporate representative. Schenkenberg Aff. ¶ 2 and Exs. B-D. The subpoena duces tecum (Schenkenberg Aff. Ex. C) required NAT to produce documents on or before October 26. The subpoena compelling testimony (Schenkenberg Aff. Ex. D) directed NAT to produce one or more corporate representatives to provide testimony on various topics on November 2, in Long Beach, California.<sup>1</sup>

On October 6, Mr. Swier returned an admission of service on NAT. Schenkenberg Aff. Ex. E. On October 14, following further communications between counsel, Mr. Swier sent an email indicating NAT intended to file a motion to quash all of the document requests, and stating it would not produce a witness on November 2. Schenkenberg Aff. Ex. F.

In advance of filing this Motion, Mr. Schenkenberg advised Mr. Swier that Sprint 1) would cancel the November 2 deposition, 2) would file a motion seeking to enforce the subpoena

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<sup>1</sup> NAT is registered as a South Dakota LLC, but because Mr. Swier indicated its corporate representative would likely be Jeff Holoubek (who is employed by Free Conferencing and located in Long Beach), Sprint noticed the deposition to take place in Long Beach in conjunction with a deposition of Free Conferencing (discussed below). Schenkenberg Aff. ¶ 3.

duces tecum, and 3) intended to re-notice the corporate representative deposition following a ruling by the Commission on such a motion. Schenkenberg Aff. ¶ 6. Mr. Swier agreed this was an appropriate way to present these discovery disputes to the Commission. Schenkenberg Aff. ¶ 6.

## **II. SPRINT'S DISCOVERY EFFORTS WITH RESPECT TO FREE CONFERENCING**

Sprint's efforts to obtain third party discovery from Free Conferencing began even earlier. On June 6, 2011, Mr. Schenkenberg had a conversation with Mr. Swier, who also represents Free Conferencing, in which Mr. Schenkenberg advised Mr. Swier that Sprint intended to subpoena documents from Free Conferencing and then conduct a deposition of a corporate representative. Schenkenberg Aff. ¶ 7. The parties agreed they would identify a reasonable document production date, and then schedule a deposition following the production of documents. Schenkenberg Aff. ¶ 7.

Following this initial conversation, Ms. Claire Joseph of Mr. Schenkenberg's office emailed a draft deposition notice and subpoena duces tecum for Free Conferencing to Mr. Swier. Schenkenberg Aff. ¶ 8 and Ex. G. The parties had several follow-up communications in which they discussed Free Conferencing's objections to certain document requests. Schenkenberg Aff. ¶ 9. Following those communications, on July 29, Mr. Schenkenberg provided a revised list of documents to be produced in light of Free Conferencing's objections. Schenkenberg Aff. Ex. H.

On August 25, Mr. Schenkenberg emailed Mr. Swier an executed subpoena duces tecum calling for the production of responsive documents on September 5. Schenkenberg Aff. Ex. I. Mr. Swier did not acknowledge service of this subpoena, but did indicate that Free Conferencing intended to produce documents. Schenkenberg Aff. ¶ 10.

During the week of September 5, Mr. Schenkenberg and Mr. Swier exchanged emails regarding potential deposition dates. Schenkenberg Aff. ¶ 11. On September 6, Mr. Swier proposed the week of November 1 (excluding the 2nd), and Mr. Schenkenberg responded by agreeing to November 3. Schenkenberg Aff. Ex. J. On September 13, Mr. Swier confirmed November 3, and indicated the deposition would take place at Free Conferencing's offices in Long Beach, California. Schenkenberg Aff. Ex. K.

On September 15, Mr. Schenkenberg emailed and mailed to Mr. Swier amended subpoenas dated September 14. The amended subpoena duces tecum (Schenkenberg Aff. Ex. L) directed Free Conferencing to produce documents on September 23, and the amended subpoena for testimony of a corporate representative (Schenkenberg Aff. Ex. M) directed Free Conferencing to produce a corporate representative to appear for deposition on November 3 in Long Beach, California. Mr. Swier accepted service on Free Conferencing's behalf on September 26. Schenkenberg Aff. Ex. N.

As of the date of this filing, Free Conferencing has not produced any documents to Sprint, although Mr. Swier has indicated that Free Conferencing intends to produce some documents soon. Schenkenberg Aff. ¶ 13. Because documents have not yet been produced, Mr. Schenkenberg canceled the November 3 deposition, subject to its right to re-notice the deposition following its receipt of documents. Schenkenberg Aff. Ex. O.

## ARGUMENT

### I. THE COMMISSION SHOULD ORDER NAT TO PRODUCE THE SUBPOENAED DOCUMENTS

#### A. Minutes Delivered to NAT Are Within the Scope of the Pleadings, so the Documents are Relevant

A portion of the minutes in dispute between Sprint and SDN are minutes that travel through SDN to NAT. Schenkenberg Aff. Ex. P (Sprint's response to SDN's interrogatory 4,

which identifies NAT as a South Dakota Pumping LEC that generated disputed minutes). Sprint has disputed SDN's switched access charges for this traffic because Sprint denies these calls are delivered to legitimate end users of local exchange service. *Id.* Instead, the vast majority of these calls have been (and apparently still are) delivered to NAT's call connection company ("CCC") partner, Free Conferencing. Schenkenberg Aff. Ex. Q (Affidavit of Amy Clouser from Federal Court Litigation between Sprint and NAT).

As Sprint has explained in the past, Sprint asserts that because the traffic is not subject to terminating switched access charges (at the end of the calls), it is also not subject to centralized equal access charges billed by SDN (in the middle). Sprint's Answer ¶¶ 6-9.<sup>2</sup> Sprint is thus entitled to defend SDN's tariff enforcement action by proving that the disputed calls do not qualify as access calls under SDN's tariff because of how the purported local exchange carrier (in this case NAT) operates, including its relationship with the entity receiving the calls (the CCC).

Sprint subpoenaed documents from NAT to discover facts regarding NAT's business operations and its relationships with those to whom calls are delivered. *See* Schenkenberg Aff. Ex. C, pp. A-3 - A-7. These are exactly the types of issues that were fully explored by the Federal Communications Commission ("FCC") in the *Farmers* case and by the Iowa Utilities Board ("IUB") in the traffic pumping case it adjudicated. They can only be litigated here with respect to NAT if NAT is required to produce responsive documents.

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<sup>2</sup> A federal court in Minnesota has interpreted a Minnesota Centralized Equal Access tariff in this way. *Minn. Indep. Equal Access Corp. v. Sprint Commc'ns Co.*, No. Civ. 10-2550 (MJD/SER), 2011 WL 3610434, at \*6 (D. Minn. Aug. 15, 2011) ("The Court concludes that, read together, the tariff states that switched access is provided under the tariff when there is completion of the telephone call to 'end users' and in conjunction with switched access from an LEC. Whether MIEAC is providing switched access service, and, thus, can charge for switched access service, depends upon whether the LEC – Tekstar – is also providing switched access service.") (Schenkenberg Aff. Ex. R).

**B. NAT Did Not Follow the Proper Procedure to Assert Objections to the Subpoena Duces Tecum**

While NAT's counsel has asserted in communications that Sprint is seeking information that is irrelevant and overbroad, NAT has not served specific objections within ten days of service as required by SDCL § 15-6-45(d). Nor has it identified any specific burdens it seeks to avoid. Schenkenberg Aff. ¶ 5.

In addition, the facts Sprint has from other ongoing litigation with NAT suggests that the information Sprint requested is highly relevant. In a hearing in Federal Court earlier this year, the man who served as NAT's controller testified:

- \* He also is employed by Free Conferencing, and serves as controller for both NAT and Free Conferencing (Schenkenberg Aff. Ex. S, p. 13);
- \* Jeff Holoubek serves as President of NAT and Director of Legal and Finance for Free Conferencing (*id.* at 73);
- \* NAT has agreed to pay Free Conferencing 75% of all gross access fees received (*id.* at 52, 72); and
- \* The only two signors on NAT's primary bank account are Free Conferencing employees (*id.* at 80).

These facts suggest further discovery is warranted with respect to the relationship between NAT and Free Conferencing. Sprint is, and remains, willing to make accommodations based on evidence of burdensomeness, but having been provided no specifics by NAT, it has no choice but to seek production of the documents as requested.

**C. The Commission Should Order the Production of Documents, Followed by a Re-Set Deposition**

NAT should be ordered to do that which the subpoena commanded – produce documents within the identified categories to Sprint's counsel – within 14 days of any Commission order. Following that production, NAT and Sprint should be ordered to schedule a re-set deposition to occur within a reasonable time at an appropriate location.

**II. THE COMMISSION SHOULD ORDER FREE CONFERENCING TO PRODUCE THE SUBPOENAED DOCUMENTS**<sup>3</sup>

**A. Free Conferencing Has Had Relationships with Northern Valley and NAT, So the Documents Requested are Relevant**

Free Conferencing is a well-known call connection company that either uses, or has used, telephone numbers assigned to it by Northern Valley and NAT. As such, calls from Sprint, through SDN, then through either Northern Valley or NAT, to Free Conferencing, are within the scope of the pleadings in this case.

**B. The Commission Should Order the Production of Documents, Followed by a Re-Set Deposition**

Free Conferencing intends to produce documents, but has not done so by the deadline established in the subpoena. Nor has it served objections to the executed subpoena duces tecum as required by SDCL § 15-6-45(d), or moved to quash as allowed by ARSD 20:10:01:17:01. These documents must be produced.

Because of Free Conferencing's delay, Sprint has postponed the corporate representative deposition. On this Motion, then, Sprint seeks an order requiring Free Conferencing to produce responsive documents within 14 days of a Commission order. Following that production, Free Conferencing and Sprint should schedule a re-set deposition date to occur within a reasonable time at an appropriate location.<sup>4</sup>

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<sup>3</sup> Although Free Conferencing is not a South Dakota company, its counsel has agreed that disputes regarding the scope and enforceability of this subpoena can and should be resolved by this Commission. Schenkenberg Aff. ¶ 6.

<sup>4</sup> Mr. Schenkenberg and Mr. Swier have discussed having the NAT and Free Conferencing depositions take place on consecutive days in Long Beach, California, to minimize travel and cost. Schenkenberg Aff. ¶ 14.

**III. THE COMMISSION SHOULD MODIFY THE SCHEDULE TO ALLOW SPRINT TO COMPLETE THIS DISCOVERY**

The current deposition deadline in this action is November 8, 2011. As a result of the failure of NAT and Free Conferencing to comply with subpoenas issued in the Commission's name, Sprint was unable to complete depositions of NAT and Free Conferencing by that date. As set forth in Mr. Schenkenberg's affidavit, Sprint has acted with appropriate diligence in seeking to obtain these documents and take these depositions prior to the November 8 deposition deadline. The proper remedy in this circumstance is for the Commission to issue an order modifying the Procedural Order to the extent necessary to allow Sprint to complete these third party depositions after November 8. Sprint is not requesting a stay of all proceedings (which would be authorized by ARSD 20:10:01:17:02), but seeks only this slight modification. Such a modification will not prejudice any party.

**CONCLUSION**

For the above reasons, Sprint respectfully requests the Commission grant Sprint's Motion.



Dated this 27<sup>th</sup> Day of October, 2011.

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By 

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