

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

IN THE MATTER OF THE COMPLAINT
FILED BY SPRINT COMMUNICATIONS
COMPANY, LP, AGAINST NATIVE
AMERICAN TELECOM, LLC REGARDING
TELECOMMUNICATIONS SERVICES

TC10-026

**NATIVE AMERICAN TELECOM, LLC'S
MEMORANDUM IN OPPOSITION TO SPRINT'S
"MOTION TO COMPEL NAT TO HONOR ITS AGREEMENT"**

INTRODUCTION

Native American Telecom, LLC ("NAT") respectfully submits this opposition to Sprint's "motion to compel NAT to honor its agreement." The Commission should reject Sprint's motion as all issues in this matter have become moot.

FACTUAL BACKGROUND

On May 5, 2010, Sprint filed its Amended Complaint in this case. Sprint's Amended Complaint asks the Commission for the following relief:

- (1) Declaring that the Commission has sole authority to regulate Sprint's interexchange services within the State of South Dakota;
- (2) Declaring that the Crow Creek Sioux Tribe Utility Authority lacks jurisdiction over Sprint;
- (3) Declaring that NAT must seek a Certificate of Authority from the Commission and file a lawful tariff with the Commission

before it can assess charges for switched access service; and

- (4) Awarding money damages in an amount to be determined at a hearing.

(Amended Complaint, page 8). Based on the Commission's previous jurisdictional decision and NAT's recent actions and stipulations, NAT has moved the Commission to dismiss the Amended Complaint based on the mootness of Sprint's claims.

However, despite the fact that Sprint has received all of the relief it sought in its Amended Complaint, Sprint now seeks to compel further discovery in this case. The Commission should deny Sprint's motion to compel additional discovery.

LAW & ANALYSIS

A. Summary

As NAT has previously explained, this case is moot because there is no longer a live controversy and the Commission can provide no further relief. Nothing is left to litigate or decide. Very simply, Sprint has gotten the relief it sought (either through Commission action, NAT's actions, or NAT's stipulations) in its Amended Complaint. As such, Sprint's motion to compel additional discovery should be denied.

B. Additional Discovery Is Unnecessary Because The Matters At Issue In This Case Have Become Moot.

The issues that formerly existed in this case are no longer present and the Commission is prevented from granting any further relief with respect to Sprint's Amended Complaint. As such, Sprint's motion to compel additional discovery is unnecessary and continues Sprint's unfortunate actions in these "access stimulation" cases.

Sprint's Amended Complaint first asks the Commission to (1) declare that the Commission has sole authority to regulate Sprint's interexchange services within the State of South Dakota and (2) declare that the Crow Creek Sioux Tribe Utility Authority lacks jurisdiction over Sprint. (Amended Complaint, page 8). The Commission's May 4, 2011, "Order Denying Motion to Stay" provides Sprint with the relief it requested regarding these jurisdictional issues.

Second, Sprint's Amended Complaint asks the Commission to declare that NAT must seek a Certificate of Authority and file a lawful tariff before it can assess charges for intrastate switched access service. (Amended Complaint, page 8). On October 11, 2011, NAT applied for a Certificate of Authority with the Commission. (See SDPUC TC 11-087). This certification proceeding is currently pending before the Commission. As such, Sprint has received the relief it requested and this issue is now moot.

Third, Sprint's Amended Complaint asks the Commission to award money damages. (Amended Complaint, page 8). NAT has recently been advised that Sprint's money damages in this case constitute an intrastate refund claim of \$281.95. (See Affidavit of Scott R. Swier in Support of Motion to Dismiss, ¶ 3) (hereinafter "Swier Affidavit, ¶ --"). It is NAT's desire to not expend tens of thousands of dollars in additional attorney's fees in this case when Sprint is seeking a refund claim of less than \$300.00. (Swier Affidavit, ¶ 4). As such, NAT has informed Sprint's counsel that it will pay Sprint its refund claim of \$281.95. (Swier Affidavit, ¶ 5). NAT has also informed Sprint that NAT will not charge Sprint for intrastate terminating access charges in South Dakota until NAT receives its Certificate of Authority from the Commission.¹ (Swier Affidavit, ¶ 6). As such, Sprint has received the relief it requested and this damages issue is now moot.

C. The Commission Should Deny Sprint's Motion for Additional Discovery

Despite the fact that Sprint has received all the relief it requested in its Amended Complaint, Sprint still refuses to agree to a dismissal of this case. Instead, Sprint now seeks an order from the Commission

¹ Although NAT believes that Sprint owes NAT \$5,141.68 in intrastate terminating access "back fees," NAT has informed Sprint that NAT will waive these "back fees." (Swier Affidavit, ¶ 7).

compelling NAT to produce additional discovery in a case that is clearly moot. Frankly, NAT is perplexed by Sprint's actions.

First, Sprint seems to allege that NAT somehow "promised" to provide additional discovery to Sprint despite the fact that recent events have made this case moot. Sprint's claim is ridiculous. At no time did NAT ever agree to forgo filing any future dispositive motions. NAT's current dispositive motion to dismiss (based on mootness) should bring this docket to a conclusion and no further discovery is appropriate.

Second, Sprint alleges that "unresolved" issues remain in this docket. (Sprint's memorandum, pages 5-6). Sprint incorrectly states that NAT's pending application for a certificate of authority (in SDPUC TC 11-087) "does not moot [this case]." In fact, NAT's pending application (in SDPUC TC 11-087) *does moot* this particular issue. Sprint's Amended Complaint specifically requests that the Commission "[d]eclare that NAT must seek a Certificate of Authority . . . and file a lawful tariff before it can assess charges for [intrastate] switched access service." (Amended Complaint, page 8). NAT has now sought this certificate of authority and Sprint's request is rendered moot.

Third, Sprint claims that the Commission must still resolve the question of "the Commission's authority to regulate telecommunications services on the Crow Creek Reservation." (Sprint's memorandum, pages

5-6). This issue has already been resolved. On May 4, 2011, the Commission issued its “Order Denying Motion to Stay” (“Order”). This Order states that “[t]he Commission has clear jurisdiction over intrastate telecommunications.” (Order, page 2) (citing SDCL chapters 49-13, 49-31, and 47 U.S.C. §152(b)). This Order further opined that “[t]he Commission’s jurisdiction over intrastate telecommunications services is extensive.” (Order, page 2). Additionally, the Commission found:

The regulatory scheme of telecommunications services specifically grants PUC authority and jurisdiction over intrastate facilities. See 47 U.S.C. §152(b). The authority of PUC is extensive and crucial to the overall regulatory scheme. See SDCL ch 49-31. Among other things, it has “general supervision and control of all telecommunications companies offering common carrier services within the state to the extent such business is not otherwise regulated by federal law or regulation.”

(Order, pages 2-3) (quoting *Cheyenne River Sioux Tribe Telephone Authority v. Public Utilities Commission of South Dakota*, 1999 SD 60, ¶21, 595 NW2d 604, 609).

On appeal, the Buffalo County Circuit Court affirmed the Commission’s Order. (Buffalo County Circuit Court – Civ. 08-11-8). The Circuit Court noted that “the issue presented in this case is whether or not the PUC or the Tribal Utility Authority has jurisdiction over this matter with respect to intrastate telecommunications.” (Circuit Court Decision, page 4). In analyzing this issue, the Circuit Court stated that

“[i]t is quite clear that the South Dakota statutes provide the PUC substantial and broad authority to regulate telecommunications throughout South Dakota. The South Dakota Supreme Court has reviewed this jurisdictional dispute under a similar context *and has found that the tribe does not have jurisdiction.*” (Circuit Court Decision, page 7) (emphasis added).

As such, the Commission has (1) declared that it has sole authority to regulate Sprint’s interexchange services within the State of South Dakota and (2) declared that the Crow Creek Sioux Tribe Utility Authority lacks jurisdiction over Sprint. Sprint has received the relief it requested and these jurisdictional issues are now moot.

Fourth, Sprint claims that pending matters in *South Dakota Network, LLC v. Sprint Communications Company L.P.* (SDPUC TC 09-098) require NAT to provide discovery in this (SDPUC TC 10-026) case, despite its mootness. *NAT is not even a party to this dispute between SDN and Sprint.* NAT acknowledges that it received a Rule 15-6-45 (non-party) subpoena in the dispute between SDN and Sprint. However, Sprint’s counsel represented to the Commission that the parties “would hold our motions, Sprint would hold its motion to enforce in [TC] 09-098 in abeyance as related to NAT.” (Sprint’s memorandum, page 3). Sprint has not filed any “motion to enforce” in SDPUC TC 09-098.

Demanding discovery after a case has clearly become moot is a needless and excessive expenditure of resources. “[I]t is in the interest of judicial economy to temporarily stay the advance of discovery until such time as the Court . . . decides the motions to dismiss which are pending . . . Obviously, if [the motion to dismiss] were to be granted, then discovery in this case would become moot.” *Stock v. C.I.R.*, No. Civ. 00-0467, 2000 WL 33138102, at *2 (D. Idaho Dec. 20, 2000). *See also Ellingson Timber Co. v. Great N. Ry. Co.*, 424 F.2d 497, 499 (9th Cir. 1970) (costly and potentially unnecessary proceedings should be deferred pending resolution of dispositive issues).

CONCLUSION

Sprint has achieved the goals it sought in this case. There is nothing else to litigate. The issues are moot. The case is over. The Commission should enter an order of dismissal based on the mootness of Sprint’s claims and deny Sprint’s motion to compel further discover.

Dated this 9th day of May, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of *NATIVE AMERICAN TELECOM, LLC'S MEMORANDUM IN OPPOSITION TO SPRINT'S "MOTION TO COMPEL NAT TO HONOR ITS AGREEMENT"* was delivered *via electronic mail* on this 9th day of May 2012, to the following parties:

Service List (SDPUC TC 10-026)

/s/ Scott R. Swier