

**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
MOTION TO DISMISS BASED ON MOOTNESS**

INTRODUCTION

COMES NOW Native American Telecom, LLC ("NAT"), and pursuant to ARSD 20:10:01:11.1 and SDCL 15-6-12(b), moves to dismiss the Amended Complaint of Sprint Communications Company, LP ("Sprint"). The South Dakota Public Utilities Commission ("Commission") should dismiss Sprint's Amended Complaint because Sprint has received everything it asked for in this case. There is nothing left to litigate and the case is 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 now moves the Commission to dismiss the Amended Complaint based on the mootness of Sprint's claims.

LAW & ANALYSIS

A. Summary

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.

B. This Motion Is Appropriate Under Either SDCL 15-6-12(b)(1) or 15-6-12(b)(5)

The issue of mootness pertains to the Commission’s jurisdiction and is properly raised in a motion to dismiss under SDCL 15-6-12(b)(1) or SDCL 15-6-12(b)(5). The South Dakota Supreme Court has recognized that a court (or an administrative agency) can only render opinions “pertaining to actual controversies affecting people’s rights.” *Rapid City Journal v. Circuit Ct.*, 283 N.W.2d 563, 565 (S.D.1979) (citing *Clarke v. Beadle County*, 40 S.D. 597, 169 N.W. 23 (1918)). “Accordingly, a[] [case] will be dismissed as moot, where, . . . there has been a change of circumstances or the occurrence of an event by which the actual controversy ceases and it becomes impossible for the . . . court to grant effectual relief.” *In re Woodruff*, 1997 SD 95, ¶ 10, 567 N.W.2d 226, 228 (quoting *Rapid City Journal v. Circuit Ct.*, 283 N.W.2d 563, 565 (S.D.1979)).

C. The Issues 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.

i.) This Commission Has Decided The Jurisdictional Issues

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).

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).

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.

ii.) NAT Has Applied For A Certificate of Authority

Sprint’s Amended Complaint next 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 proceeding is pending before the Commission and a hearing date on NAT's application is scheduled for June 2012. As such, Sprint has received the relief it requested and this Certificate of Authority issue is now moot.

iii.) NAT Has Agreed to Reimburse Sprint For Any Damages

Lastly, 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.

iv.) Despite The Clear Mootness Of Its Claims, Sprint Refuses To Voluntarily Agree To A Dismiss Of This Case

Before filing this motion, NAT's counsel and Sprint's counsel discussed the mootness of this matter. During these discussions, NAT's counsel confirmed that (1) NAT would agree to pay Sprint its refund claim of \$281.95 and (2) NAT would not charge Sprint \$5,141.68 in intrastate terminating access "back fees" that NAT believes Sprint owes NAT. (Swier Affidavit, ¶¶ 5-7).

Despite these representations, Sprint refuses (with no justification) to agree to a dismissal of this case. Frankly, NAT is perplexed as to why Sprint, after receiving everything that its Amended Complaint requested, refuses to agree to this dismissal. Nonetheless, NAT has now been forced to expend additional time and resources in bringing this motion before the Commission.

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

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).

Commission should enter an order of dismissal based on the mootness of Sprint's claims.

Dated this 23rd day of April, 2012.

SWIER LAW FIRM, PROF. LLC

/s/ Scott R. Swier _____

Scott R. Swier

202 N. Main Street

P.O. Box 256

Avon, South Dakota 57315

Telephone: (605) 286-3218

Facsimile: (605) 286-3219

www.SwierLaw.com

scott@swierlaw.com

Attorneys for NAT

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of *NATIVE AMERICAN TELECOM, LLC'S MOTION TO DISMISS BASED ON MOOTNESS* was delivered *via electronic mail* on this 23rd day of April 2012, to the following parties:

Service List (SDPUC TC 10-026)

/s/ Scott R. Swier
Scott R. Swier