BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN RE:	Docket No. TC10-026
SPRINT COMMUNICATIONS COMPANY L.P., Complainant, v. NATIVE AMERICAN TELECOM, LLC, Respondent.	**SPRINT'S STATEMENT REGARDING RIPENESS OF PENDING MOTIONS FOR DELIBERATION AND DECISION**

In email correspondence dated July 22, 2013, from Commission staff, the parties in Commission docket TC10-26 were invited to state their positions on how the Commission should proceed in TC10-26. There are currently three fully briefed and argued motions before the Commission in TC10-26. No further discovery is needed in TC10-26, nor is any discovery that may be had in TC11-87 relevant to what the Commission must decide in TC10-26. Accordingly, Sprint believes each motion is ripe for deliberation and decision.

NAT's Motion to Dismiss

Sprint filed its Amended Complaint on May 5, 2010. NAT moved to dismiss on June 1, 2010, on several grounds, but principally on the grounds that the Crow Creek Sioux Tribal Utility Authority had jurisdiction over Sprint and any dispute Sprint had with NAT had to be

first determined by the Crow Creek Sioux Tribal Court. Both sides extensively briefed the issue; both sides filed numerous exhibits with their submissions.

On July 29, 2010, NAT moved as well to stay proceedings in TC10-26 in deference to the Crow Creek Sioux Tribal Court, where NAT had recently filed a complaint against Sprint. The parties also briefed this motion, and both of NAT's motions went before the Commission at a hearing on April 5, 2011.

In its brief in support of its motion to dismiss, NAT argued that the tribal court had jurisdiction over the dispute under the two bases the United States Supreme Court set forth in *Montana v. United States*, 450 U.S. 544 (1981). First, NAT asserted Sprint had consented to tribal court jurisdiction when it paid two invoices NAT had submitted through a third-party billing agent. Second, NAT argued for tribal court jurisdiction because Sprint's complaint allegedly threatened the political integrity and welfare of the tribe. See NAT Brief in Support of Motion to Dismiss at 10-11 (filed 9/7/10). Nowhere in its brief did NAT state that any discovery was needed before the motion to dismiss was ripe. Nor did Sprint so argue in opposing the motion.

In an Order dated May 4, 2011, the Commission denied NAT's Motion to Stay. At the April 5 hearing, after the Commission had voted

to deny NAT's stay request, NAT's counsel for the first time argued the parties should conduct discovery before ruling on the motion to dismiss, seizing on the Staff's recommendation that some discovery be had on the motion to dismiss. April 5, 2011, Hearing Transcript at 50-51. The Commission granted NAT's request to defer ruling on NAT's motion to dismiss without significant discussion. *Id.* at 54.

NAT appealed the Order denying NAT's motion to stay to the Circuit Court for Buffalo County. That Court, like the United States District Court that enjoined the tribal court proceeding, did not find NAT's tribal court exhaustion arguments persuasive. NAT did not argue in its appeal to the Circuit Court that NAT should have had discovery on the issues raised in its stay request, which were closely related to legal issues presented in its motion to dismiss.

NAT's Motion to Dismiss on Mootness Grounds

On April 23, 2013, NAT moved to dismiss TC10-26 on the grounds of mootness. NAT asserted that because NAT had repaid Sprint the amounts Sprint had paid NAT for intrastate service, no refund order was needed. Because NAT now had an application for a certificate of authority on file before the Commission, NAT argued there was no further relief available to Sprint in TC10-26, making that docket moot. NAT did not, indeed logically could not, assert that discovery was needed

for the Commission to have an adequate record before it to resolve NAT's mootness argument.

NAT's mootness motion came before the Commission on July 17, 2012, when Sprint's motion to compel responses to its discovery was also heard. At no point in that hearing did NAT argue that it needed discovery to complete the record before the Commission on its mootness motion, which remains pending before the Commission.

Sprint's Motion for Summary Judgment

On December 11, 2012, Sprint moved for summary judgment on its claims for declaratory relief in its Complaint.[1] Sprint's motion was based on its belief there were no material facts in dispute: that NAT must have a certificate of authority before it can offer intrastate telecommunications services in South Dakota, that NAT has no certificate of authority, that NAT is offering intrastate telecommunications services in violation of state law and that NAT cannot bill Sprint (or any other IXC) for intrastate services until property certificated.

The Commission heard argument on Sprint's motion on April 9, 2013. NAT opposed Sprint's motion on mootness and jurisdictional grounds, but did not identify any material facts in dispute that precluded summary judgment. Nor did NAT argue for more discovery under SDCL

[1] When Sprint moved for summary judgment, that motion obviated the need for the Commission to resolve Sprint's motion to compel.

15-6-56(f) before the Commission ruled. That rule, moreover, "'requires a showing how further discovery will defeat the motion for summary judgment.'" *Dakota Indus., Inc. v. Cabela's.Com, Inc.*, 2009 SD 39 ¶6, 766 N.W.2d 510, 512 (quoting *Anderson v. Keller*, 2007 SD 89 ¶ 31, 739 N.W.2d 35, 43).

NAT has Never Served Discovery in TC10-26

From June 1, 2010, when NAT moved to dismiss, to today, NAT has never served any discovery requests on Sprint in TC10-26. This is not a criticism of NAT, because its motions raise legal issues that can be decided on the record already before the Commission. (Nor could information within Sprint's possession possibly bear on whether NAT is operating illegally without a certificate.) But its current claim to need to serve as yet unidentified discovery at some point in the future on all three pending motions should be rejected for what it is – a delaying tactic.

NAT has propounded some additional discovery on Sprint in TC11-87 that it asserts may bear on the legal issues raised in the three motions pending in TC10-26. This claim is pure poppycock. In its Order dated May 4, 2012, the Commission greatly limited what discovery NAT could have of Sprint or CenturyLink in TC11-87, observing: "[t]his proceeding [TC11-87] regards NAT's ability to meet the requirements to

receive a certificate of authority, not the Interveners' current ability to meet the requirements." That observation holds true with equal force today. NAT is entitled only to minimal discovery of Sprint in TC11-87, and none of that discovery will bear on the legal issues or undisputed material facts in TC10-26.

CONCLUSION

There are three fully briefed and argued motions before the Commission in TC10-26. The Commission should get on with business and decide those motions.

Respectfully submitted,

Dated: July 23, 2013.

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