BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN RE:

SPRINT COMMUNICATIONS COMPANY L.P.,

Complainant,

v.

NATIVE AMERICAN TELECOM, LLC,

Respondent.

Docket No. TC10-026

SPRINT'S RESPONSE IN OPPOSITION TO NAT'S MOTION TO DISMISS

INTRODUCTION

On June 1, 2010, respondent Native American Telecom, LLC ("NAT") moved to dismiss the complaint Sprint Communications Company, L.P. ("Sprint") had brought against NAT. Among the grounds for NAT's motion was an assertion that the Crow Creek Sioux Tribal Court and the Crow Creek Sioux Tribal Utility Authority had exclusive jurisdiction over Sprint's dispute with NAT. This motion, along with a companion motion to stay until the tribal court had acted on NAT's tribal court complaint, was the subject of a April 5, 2011 hearing before the Commission.

At that hearing, NAT argued that the Commission should rule on NAT's motion to dismiss only after discovery was completed, so the

Commission would have a full record to review.[1] Since then, as shown by Sprint's motion to compel filed in this docket on April 11, 2012, NAT has refused to cooperate in discovery, breaching repeated promises to provide complete responses.

NAT now eschews any interest in billing Sprint for intrastate services and moves yet again to dismiss Sprint's complaint, this time on mootness grounds. That is simply not so, and the Commission should deny this second motion to dismiss. The case should be decided on the merits.

SPRINT'S COMPLAINT AGAINST NAT

In December 2009, Sprint received its first bill from NAT, through a billing company called CABS Agent. Sprint paid that bill and the next NAT bill from CABS Agent in the ordinary course of business. But NAT's third invoice was substantially larger, triggering an internal review that

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[1] NAT's counsel had this to say:

> MR. SWIER: Thank you. Mr. Chair, members of the Commission, I think we're just going to rely on our Brief here. I think that the Staff Brief is correct in that it would be premature at this point based on the factual record to go any further with this Motion to Dismiss.
>
> I think that when you look at the record, this Motion should be deferred and a decision should not be made. Now that we are going to be apparently in front of this Commission, that I think the Motion to Dismiss as the Staff Brief said is premature and that we should move forward with discovery, and when discovery is completed NAT can move forward with its Motion to Dismiss and this Commission can have more information on which to base its decision.

April 5, 2011, Hearing Tr. at 50-51 (emphasis added).

discovered that NAT was engaged in what Sprint calls traffic pumping, which is a coordinated effort between local exchange carriers and conference calling companies to bill interexchange carriers like Sprint for hyper-inflated terminating access charges. Affidavit of Scott G. Knudson dated May 14, 2012 at ¶ 2 and Ex. A. In discovery in a related federal proceeding, Sprint has learned that NAT's traffic pumping partner is Free Conferencing Corporation, that NAT pays Free Conferencing 75% of the gross revenues NAT receives, that Free Conferencing has total control over NAT's books and finances and that a Free Conferencing employee, Jeff Holubek, is the president of NAT. *Id.* at ¶ 3, ¶ 4 and Exs. B and C.

To put an end to NAT's pumping scheme, in May 2010 Sprint first brought a complaint to the Commission seeking a declaration that:

> (1) The Commission has the sole jurisdiction over Sprint's intrastate interexchange services in South Dakota;
>
> (2) The Crow Creek Sioux Tribal Utility Authority lacks jurisdiction over Sprint's intrastate interexchange services;
>
> (3) NAT must have a Certificate of Authority from the Commission and have a lawful tariff on file with the Commission before it can assess charges for switched access service.

Amended Complaint in TC10-26 at 8 ¶ 1-3. Sprint also sought money damages from NAT. *Id.* at 8, ¶ 4.

The Commission is aware from earlier filings and hearings in TC10-26 that Sprint has filed an action in federal district court against NAT, and that

NAT sued Sprint in Crow Creek Sioux Tribal Court. Sprint succeeded in federal court in obtaining a stay of NAT's tribal court action, on the ground that only the Federal Communications Commission ("FCC") or a federal court can rule on the legality of NAT's interstate tariffs. Order Granting Preliminary Injunction dated December 1, 2010, in *Sprint Communications Co., L.P. v. Native American Telecom LLC*, Civ. No. 4:10-cv-04110. In an order dated February 22, 2012, as modified by an order dated May 7, 2012, the court in Sprint's federal action referred three key questions to the FCC.

(1) Whether, under the facts of the present dispute between NAT and Sprint, NAT is entitled to collect interstate switched access charges including services that utilize VoIP or a similar technology, that it has billed to Sprint pursuant to NAT's interstate access tariff number one, interstate access tariff number two, or revised interstate tariff number two, for calls to numbers assigned to free calling providers.

(2) If the services provided by NAT do not qualify as switched access services to Free Conferencing Corporation or other free calling providers, determination of how the traffic should be classified, whether that traffic can be tariffed and whether NAT is entitled to any compensation for the services NAT provided, and if so, what a reasonable rate would be for NAT's services.

(3) In the event that the services provided by NAT to Sprint do not qualify as switched access services under NAT's applicable interstate access tariff, but NAT is otherwise entitled to compensation for these services, determination of a reasonable rate for these services.

See Order of February 22, 2012 at 25 and Order of May 7, 2012 at 3-4 in 4:10 Civ. 04110.

LEGAL ISSUES REMAIN FOR THE COMMISSION TO DECIDE IN TC10-26

NAT claims it has offered to forgo billing Sprint (and CenturyLink) until its application for a certificate of authority is resolved. In its April 13, 2012, Memorandum in Opposition to Sprint's and CenturyLink's Motions to Compel discovery in TC 11-87, NAT proclaimed:

> However, in the utmost deference to the Commission and its certification rules NAT has agreed not to "bill" Sprint or CenturyLink for any intrastate access fees until this certification matter is decided by the Commission.

April 13 Memorandum of NAT at 29. What this concession means is unclear – if NAT is certificated, will NAT bill retroactively (or CenturyLink as well) or only going forward?[2]

Based on that supposed concession, NAT argues that this proceeding is moot because Sprint has received all of the relief the Commission can order from NAT. NAT's "offer" not to bill Sprint does not address the status of the previously billed amounts to Sprint, amounts Sprint has paid or anything

[2] In its May 9, 2012, memorandum in opposition to Sprint's motion to compel, NAT made a similar offer not to bill Sprint until NAT has a certificate of authority from the Commission.

about other IXC's who have been billed and who paid previously or who are currently now paying those bills.[3]

First, although NAT claims that the mootness doctrine applies to state agencies, the case cited for that proposition specifically held only that the doctrine also applied to cases brought to the South Dakota Supreme Court on writs of certiorari. *See Rapid City Journal Co. v. Circuit Court for Pennington County*, 283 N.W.2d 563, 565 and n.3 (S.D. 1979) ("The general rules of mootness apply to an application for a writ of certiorari."). That case did not specifically hold that an independent agency of the Executive Branch is bound by that doctrine, and NAT cites to none. The theoretical underpinnings to the mootness doctrine – that courts should decide concrete cases or avoid advisory opinions – apply with less force to an administrative agency, if at all. *See Friends of the Earth, Inc. v. Laidlaw Env. Serv., Inc.*, 528 U.S. 167, 189-92 (2000) (in distinguishing standing from mootness, holding that voluntary compliance with permit standard did not moot case);

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[3] In his sworn testimony to the Commission, filed on April 20, 2012 in TC11-87, David Erickson, owner of Free Conferencing Corporation and a Director of NAT, stated:

> However, if CenturyLink and Sprint, the two primary carriers that continue to refuse to pay NAT for its services, begin to remit payment, NAT would become profitable.

Knudson Aff. Ex. D at p. 13.

The plain implication from Erickson's testimony is that some IXC's are currently paying NAT terminating access charges. If those charges include intrastate access charges, as seems likely, then NAT is blatantly flouting South Dakota law.

cf. In re Appeal of Centron Indus., Inc., ASBCA No. 52581, 2002 WL 31242207 (A.S.B.C.A.) (government's withdrawal of contested decision did not deprive Board of Contract Appeals of jurisdiction); *see generally* Richard J. Pierce, Jr. ADMIN. LAW TREATISE (5th ed. 2009) § 16.2 (discussing historical evolution of Case or Controversy Clause jurisprudence).

But assuming *arguendo*, that the Commission will adhere to the mootness doctrine in instances like TC10-26, the doctrine nevertheless does not apply to this proceeding. The Commission can still afford Sprint meaningful relief.

The Precise Scope of the Commission's Jurisdiction Over Sprint Remains Undecided

The first issue raised by Sprint's Complaint is a request to declare the Commission has sole intrastate jurisdiction over Sprint. NAT argues that because the Commission stated in its May 4, 2011, order denying NAT's motion to stay that the Commission had "clear jurisdiction over intrastate telecommunications" (May 4, 2011 Order at 2), the Commission has declared it has sole jurisdiction over intrastate telecommunications. Sprint's position is that the Federal Communications Act divides regulatory authority between the Federal Communications Commission for interstate traffic and state regulatory agencies for intrastate traffic, leaving none for tribal agencies. That means the Commission would have sole authority over Sprint's

intrastate activities in South Dakota, but the Commission has not yet expressly adopted Sprint's position.[4]

The converse of the first issue is Sprint's second declaratory request, that the Crow Creek Sioux Tribal Utility Authority lacks jurisdiction over Sprint's intrastate interexchange services. The Commission has yet to address that issue. Unsurprisingly, NAT does not argue otherwise.

The Commission Has Yet to Declare NAT Must Be Certified Before Ordering Intrastate Service

Finally, NAT argues that by applying for a certificate of authority it has rendered Sprint's third declaratory request moot. But the Commission has yet to state expressly that NAT cannot lawfully offer intrastate services within the exterior boundaries of the State of South Dakota without a Commission–issued Certificate of Authority. In 2009 NAT applied for such a certificate, only then later to withdraw the application after the Crow Creek Sioux Tribal Utility Authority purportedly authorized NAT to offer telecommunications services within the state. If the Commission rejects NAT's application, then the declaration Sprint seeks will be germane to any Commission enforcement proceeding against NAT.

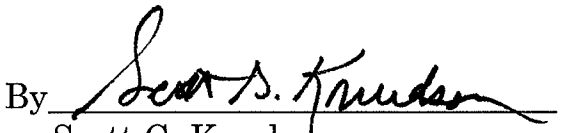
[4] Nor did the Buffalo County Circuit Court so hold in affirming the Commission's May 4, 2011 Order.

CONCLUSION

Pending before the Commission in TC10-26 is Sprint's motion to compel long overdue discovery responses. Despite NAT's protestations to the contrary, this action remains an active, concrete dispute, with potentially far reaching consequences. The Commission should deny NAT's most recent motion to dismiss and order it to respond immediately and fully to Sprint's outstanding discovery requests.

Dated: May 14, 2012.

BRIGGS AND MORGAN, P.A.

By 

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