

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE APPLICATION
OF NATIVE AMERICAN TELECOM, LLC
FOR A CERTIFICATE OF AUTHORITY TO
PROVIDE LOCAL EXCHANGE SERVICE
WITHIN THE STUDY AREA OF MIDSTATE
COMMUNICATIONS, INC.

Docket No. TC11-087

**SPRINT COMMUNICATIONS
COMPANY L.P.'S
MEMORANDUM IN SUPPORT
OF ITS SECOND MOTION TO
COMPEL/ENFORCE PRIOR
COMMISSION ORDER**

INTRODUCTION

Sprint Communications Company L.P. (“Sprint”) submits this memorandum in support of its Second Motion to Compel/Enforce Prior Commission Order. Sprint respectfully requests that the Commission once again issue an order compelling Native American Telecom, LLC (“NAT”) to provide complete responses to Sprint’s discovery as ordered by the Commission on May 4, 2012.

FACTS

On January 31, 2011, Sprint served its First Set of Interrogatories and Document Requests on NAT. NAT did not provide responses. Accordingly, on April 2, 2012, Sprint filed a motion to compel, asking the Commission to order NAT to respond to Sprint’s discovery requests. NAT argued that it did not have a duty to respond to Sprint’s discovery requests because, it alleged, Sprint did not have the right to conduct discovery or, if it did, Sprint’s discovery requests were not relevant to the docket. On May 4, 2012, the Commission issued its Order Denying Motion for Summary Judgment; Order Granting Motions to Compel; Order Granting in Part and Denying in Part Motion to Compel (the “May 4 Order”). In the May 4 Order, the Commission granted Sprint’s

motion to compel in full, holding that Sprint had the right to conduct discovery and that “Sprint’s discovery requests are within the proper scope of discovery in this docket.” May 4 Order, p. 2.

Following an appeal, the Commission entered a procedural schedule on January 2, 2013, that required NAT to serve, on or before January 18, 2013, “documents and other discovery as required by the Commission in its May 4, 2012 order.” January 2, 2013 Procedural Schedule, p. 2.

On January 18, 2013, NAT served supplemental discovery responses on Sprint. Affidavit of Philip R. Schenkenberg dated April 4, 2013, ¶ 2, Exs. A and B (“April 4 Schenkenberg Aff.”). After careful review of NAT’s supplemental responses, Sprint addressed particular inadequacies to certain interrogatories by letter on February 5, 2013. April 4 Schenkenberg Aff. ¶ 3, Ex. C.

On February 19, 2013, NAT provided a second set of supplemental responses to Sprint’s first set of discovery requests. Schenkenberg April 4 Aff. ¶ 4, Ex. D. These supplemental responses, however, did not adequately answer two issues related to Sprint’s Interrogatories Nos. 7 and 9. Schenkenberg April 4 Aff. ¶ 5. These issues were again addressed by Sprint by letters to NAT’s counsel on February 25, 2013 and March 14, 2013. April 4 Schenkenberg Aff. ¶¶ 5-6, Exs. E and F. On March 22, 2013, Sprint, through its counsel, notified NAT’s counsel that it would file a motion to compel if NAT failed to provide full and complete discovery responses. April 4 Schenkenberg Aff. ¶ 7. NAT has since provided responses to other discovery requests, but has failed to provide

further supplementation or respond to the inadequacies of its responses to Interrogatories Nos. 7 and 9 in any way. April 4 Schenkenberg Aff. ¶ 8.

ARGUMENT

The Commission should grant Sprint's Second Motion to Compel/Enforce Prior Commission Order. This motion is brought in good faith, as a last-ditch effort to obtain relevant discovery in light of NAT's continued disregard for the rules of civil procedure, this Commission's May 4 Order, and Sprint's repeated requests that NAT produce discovery. NAT has no justifiable reason for its continued failure to provide full and complete responses to Sprint's discovery requests. Accordingly, the Commission should issue an order compelling NAT to provide full and complete answers to Sprint's Interrogatories Nos. 7 and 9 and the Commission should order NAT to pay Sprint's costs associated with this motion.

A. Standards for a Motion to Compel

If a party shows good cause, the Commission "may issue an order to compel discovery." A.R.S.D. 20:10:01:22.01. The South Dakota Rules of Civil Procedure relating to discovery apply in this proceeding. *Id.* Under the rules, a party may move for an order compelling an answer if a party fails to answer an interrogatory or request for production of documents. SDCL 15-6-37(a)(2). In this case, NAT failed to answer Sprint's discovery as required by the Commission's discovery rules and the May 4 Order. This is unacceptable – the "statutory mandate and court order [establishing the time period for responding to discovery requests] are not invitations, requests, or even

demands; they are mandatory.” *Schwartz v. Palachuk*, 1999 SD 100, ¶ 23, 597 N.W.2d 442, 447.

B. Standards for Discovery

S.D.C.L. § 15-6-26(b)¹ establishes the general scope and limits of discovery:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not grounds for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. (emphasis added)

The South Dakota Supreme Court has explained that “the scope of pretrial discovery is, for the most part, broadly construed.” *Kaarup v. St. Paul Fire and Marine Ins. Co.*, 436 N.W.2d 16, 19 (S.D. 1989). “A broad construction of the discovery rules is necessary to satisfy the three distinct purposes of discovery: (1) narrow the issues; (2) obtain evidence for use at trial; (3) secure information that may lead to admissible evidence at trial.” *Id.* The wording of SDCL 15-6-26(b) itself “implies a broad construction of ‘relevancy’ at the discovery stage because one of the purposes of discovery is to examine information that may lead to admissible evidence at trial.” *Id.*, 436 N.W.2d at 20.

¹ This rule is applicable to Commission proceedings. A.R.S.D. 20:10:01:01.02.

C. The Commission Should Grant Sprint's Motion

The Commission should once again order NAT to fully respond to Sprint's discovery requests. In particular, the Commission should compel NAT to provide full and complete responses to Sprint's Interrogatories Nos. 7 and 9.

1. NAT should be required to fully respond to Sprint's Interrogatory No. 7.

The Commission should order NAT to provide a full and complete response to Sprint's Interrogatory No. 7. Sprint's Interrogatory No. 7 requests information regarding the location of NAT's towers and equipment:

INTERROGATORY NO. 7: Identify the location of the cell towers and WiMax equipment you claim allows you to provide service throughout the reservation. Provide coverage maps that demonstrate the signals being generated can reach throughout the reservation.

April 4 Schenkenberg Aff. Exs. A and D. After the Commission's May 4 Order, NAT provided an inadequate response to Interrogatory No. 7:

RESPONSE/OBJECTIONS: Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority Matter.

FIRST SUPPLEMENTAL RESPONSE/OBJECTIONS: See "NAT's Response to Sprint's Interrogatory No. 7" (attached).²

The attachment³ provided a "Crow Creek/Fort Thomas RAN Overview," which includes an initial RF feasibility study. The feasibility study NAT produced is dated February 24, 2009 and identifies proposed coverage information regarding tower locations and equipment. Interrogatory No. 7, however, does not seek proposed locations

² April 4 Schenkenberg Aff. ¶ 2, Ex. A.

³ April 4 Schenkenberg Aff. ¶ 2, Ex. B.

and equipment. The request is for NAT's actual, as-constructed tower locations and equipment, which will allow Sprint to test NAT's claim that it can serve the geographic location identified in its application. The Commission should order NAT to provide "as-constructed," rather than proposed information. And, further, the RF map on page 2 of NAT's response cannot be read in the form produced. NAT should be required to reproduce this map in readable form. The Commission should compel NAT to provide a full and complete response to Sprint's Interrogatory No. 7.

2. NAT must provide a full and complete response to Sprint's Interrogatory No. 9.

NAT's current response to Sprint's Interrogatory No. 9 is inadequate. The Commission should compel NAT to provide a full and complete response. Sprint's Interrogatory No. 9 relates to assessments and surcharges that are (or should be) collected by a carrier providing local exchange service:

INTERROGATORY NO. 9: With respect to the voice services you have been providing, identify the taxes, assessments and surcharges that apply, including USF surcharges, TRS, and 911 assessments. Has NAT been collecting and/or remitting such amounts? If so, explain how amounts have been calculated. If not, why not? In doing so you should explain the calculations that resulted in NAT's remittance of \$10,665 to USAC for the 2012 calendar year.

April 4 Schenkenberg Aff. Exs. A and D. NAT's January 18, 2013 supplemental responses did not even purport to address Interrogatory No. 9. April 4 Schenkenberg Aff. ¶ 2, Ex. A. No response was provided. *Id.* In its second supplemental responses, NAT provided an inadequate response to Interrogatory No. 9:

RESPONSE/OBJECTIONS: Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor

reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter.

SECOND SUPPLEMENTAL RESPONSE/OBJECTIONS: USF is calculated based on the number of end-users (on the reservation) and trunks provided multiplied by the USF contribution rate for each perspective quarter. NAT has been remitting USF since it crossed the de minimus threshold. In accordance with the FCC's rules, NAT remits all applicable taxes and surcharges. For USF, the calculations are based on the billed end-user revenue multiplied by the prospective USF contribution rate on a quarterly basis.

April 4 Schenkenberg Aff. ¶ 4, Ex. D. This response is inadequate because NAT addressed only federal universal service surcharges; failed to state whether any other charges, assessments, or surcharges apply; and did not disclose whether NAT has been collecting and/or remitting such amounts. The Commission should once again compel NAT to provide this requested information. NAT must also explain the methodology for how such amounts are collected and/or remitted or, if they are not, NAT should be ordered to explain that practice. In addition, NAT has not explained the calculations that resulted in its remittance of \$10,665 to USAC for the 2010 calendar year. NAT should be ordered to do so.

D. Sprint is Entitled to its Fees

If the Commission grants this motion, it should also find that Sprint is entitled to its fees. South Dakota law mandates such a finding in this particular instance:

If the motion is granted or if the requested discovery is provided after the motion was filed, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorneys' fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without

court action, or that the opposing party's nondisclosure, response or objection was substantially justified or that other circumstances make an award of expenses unjust.

SDCL § 15-6-37(a)(4)(A) (emphasis added).⁴

The Supreme Court of South Dakota has ruled that “the award of terms under § 15-6-37(a)(4) is mandatory, rather than discretionary, unless the non-prevailing person’s position was substantially justified’ or ‘other circumstances make an award of expenses unjust.’” *Pub. Entity Pool for Liability v. Score*, 658 N.W.2d 64, 72 (S.D. 2003) (quoting SDCL § 15-6-37(a)(4)(A)). NAT’s position is not “substantially justified.” To the contrary, this motion is being made after NAT first refused to respond to Sprint’s discovery requests; was ordered to respond in the May 4 Order; was scheduled to respond in the Commission’s Scheduling Order; failed to provide full and complete answers in its first set of supplemental responses; was requested to respond to the discovery by Sprint’s letter dated February 5; failed to provide full and complete answers in its second set of supplemental responses; and was requested to respond to the discovery by Sprint’s letters dated February 25 and March 14. At best, NAT’s position was no longer justified after the Commission’s May 4 Order. In addition, there are no circumstances that make an award of expenses unjust.

The award must be reasonable. There are four factors used to determine the reasonableness of an award:

(1) reasonable hours expended multiplied by a reasonable fee, (2) the severity of the sanction weighted against the equities of the parties, including ability to pay, (3) availability of less drastic sanctions which

⁴ This Rule is applicable to Commission proceedings. A.R.S.D. 20:10:01:01.02.

would prevent future abuses, and (4) other factors including the offending party's history and degree of bad faith contributing to the violation.

Pub. Entity Pool for Liability, 658 N.W.2d at 72 (quoting *State v. Guthrie*, 631 N.W.2d 190, 195 (S.D. 2001)). If the Commission deems it appropriate, Sprint will provide an application for fees pursuant to the rules. Sprint requests that the Commission allow Sprint to recoup the costs associated with this motion—a motion that could have been avoided, should NAT have complied with the rules of civil procedure and this Commission's orders.

CONCLUSION

NAT must comply with the May 4 Order. NAT cannot continue to thwart the Commission's rules on discovery and ignore its representations to Sprint and the Commission. Accordingly, the Commission should issue an order again compelling NAT's full and accurate responses to Sprint's discovery. In addition, because NAT's continued refusal to provide full and complete responses to Sprint's discovery requests is not "substantially justified," the Commission should order NAT to pay Sprint's costs associated with this motion.

Dated: April 4, 2013

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