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 MOTION TO QUASH DEPOSITION NOTICES**

Sprint Communications Company L.P. ("Sprint") moves to quash the deposition notices of Randy Farrar and Sprint Communications Corp. L.P. filed by Native American Telecom, LLC ("NAT") in this case on August 9, 2013. Randy Farrar is a Sprint employee and expert witness who has not yet filed testimony on NAT's pending Application.[1] The deposition notice of Sprint – the corporate entity – was served under SDCL § 15-6-30(b)(5) and identified 8 testimony topics and demanded production of 15 categories of documents.

SDCL § 15-6-26(c) authorizes the Commission to protect a party from discovery upon a showing of good cause. The depositions at issue should not go forward for four reasons. First, these depositions are simply a delay tactic by NAT, which does not want to move this case to decision. Second, NAT's Notice of Deposition of Sprint requests the same information the Commission has already deemed – in this very case – irrelevant. Third, NAT's Notice of Deposition of Randy Farrar requests expert discovery in a form

[1] Mr. Farrar pre-filed testimony on NAT's January 2012 Application, but Sprint has advised NAT that Mr. Farrar's prior testimony will not be offered into evidence. Whatever testimony Mr. Farrar prepares will be submitted in accordance with the procedural schedule that applies to NAT's 2013 Application.

contrary to the South Dakota Rules of Civil Procedure. And fourth, NAT's Document Requests to Sprint seek information the Commission already decided in Docket No. TC09-098 would impose an undue burden on Sprint.

Sprint addresses each of these four general points below, and then specifically discusses each deposition topic and document request. Given NAT's decision to ignore the Commission's earlier ruling and South Dakota law regarding expert discovery, Sprint requests an order that NAT pay Sprint's costs and fees incurred in bringing this motion.

I. NAT SERVED THESE NOTICES TO CREATE DELAY

It has become clear over the past 12 months that NAT has no interest in moving this docket to completion. NAT likely wants to delay a ruling because NAT is, at present, operating illegally and generating revenue for the benefit of David Erickson and his companies. The longer NAT delays, the better off Erickson and his companies will be. NAT's decision to serve deposition notices at this point in a nearly two-year-old case is calculated to create delay.

NAT could have attempted to take depositions in this case in the spring of 2012 (after Mr. Farrar's testimony was filed and before the case was stayed), or any time before the April 1, 2013 discovery cutoff established by the Commission's January 2, 2013 Procedural Order. NAT failed to do so. NAT also failed to request that the latest amended procedural schedule in this case provide for the right or sufficient time to conduct depositions. Instead, NAT agreed to a short procedural schedule that did not provide for depositions, and then served notices two weeks after the procedural schedule

was entered,[2] thus guaranteeing that depositions would not be taken before NAT's testimony was due. It is only a matter of time before NAT asks to vacate the October hearing dates.

The Commission should quash these deposition notices as untimely, inconsistent with the procedural schedule, and as evidencing NAT's improper attempt to delay this proceeding.

II. THE COMMISSION HAS ALREADY DECIDED THAT THIS DOCKET IS FOCUSED ON NAT'S PRACTICES, NOT SPRINT'S PRACTICES

NAT's Deposition Notice of Sprint and Document Requests 1-3 and 6-15 seek information the Commission already deemed irrelevant. As the parties were proceeding toward hearing in 2012, NAT moved to compel Sprint and CenturyLink to respond to Data Requests and Document Requests that sought information about Sprint and CenturyLink's business practices. *See* NAT's Motion to Compel Discovery (Apr. 3, 2012). NAT argued that it "should be entitled to the same discovery information that CenturyLink and Sprint are seeking from NAT." *Id.* at 1. Sprint and CenturyLink argued that information about interveners' business practices could not bear on whether NAT is eligible for a certificate, and, thus, questions about the interveners' practices are not calculated to lead to the discovery of admissible evidence. *See* Sprint's Mem. in Opp. to Motion to Compel, p. 2 (Apr. 13, 2012).

The Commission considered NAT's motion on April 24, 2012 and agreed with Sprint and CenturyLink:

[2] NAT originally served these deposition notices on July 17, 2013. Aug. 20 Schenkenberg Aff. ¶ 3.

> As support for its Motion to Compel Discovery, NAT asserted that it "has simply requested similar discovery information from CenturyLink and Sprint that these two companies are demanding from NAT. As such, neither CenturyLink nor Sprint can complain that NAT's discovery requests are somehow improper." NAT Reply Brief at 8. NAT argued that it needed answers to the same questions that Sprint and CenturyLink posed to NAT in order to conduct a "comparative analysis between itself and other companies that the Commission has already certificated ...." *Id.* at 9. The Commission finds these arguments unpersuasive. This proceeding regards NAT's ability to meet the requirements to receive a certificate of authority, not the interveners' current ability to meet the requirements. Thus, with the exception of the data requests listed above and the data requests related to expert discovery (discussed below), the Commission finds that NAT's data requests were not within the proper scope of discovery in this docket.

May 4, 2012 Order at 3 (emphasis added). NAT's appeal of that order was dismissed by the district court.

NAT's specific document requests, which are discussed in detail below, are calculated to obtain the same kind of information that the Commission already deemed off limits. For example, NAT's new Document Request 1 requests wholesale rate information:

> All documents reflecting or constituting Sprint's wholesale rate decks from January 1, 2009 to the present.

NAT's 2012 Data Request 1.24,[3] deemed irrelevant, asked for identical information:

> Produce all documents, memos, and correspondence relating to your wholesale pricing rates ("rate decks") from 2009-present.

Similarly, NAT's new Document Request 8 asks for payment information:

> All documents related to payments made by Sprint of other local exchange carriers' access rates for the termination of conferencing traffic ….

NAT's improper 2012 Data Request 1.25 sought the same production:

[3] NAT's 2012 Discovery Requests were filed as part of NAT's 2012 Motion to Compel and are attached as Exhibit A to the Aug. 20, 2013 Schenkenberg Affidavit.

> Produce all documents, memos, and correspondence relating to your history of making payments to LECs, ILECs, and/or CLECs for terminating switched access charges from 2009-present date.

As these two examples prove, NAT has decided to ignore Commission precedent.

Sprint met and conferred with NAT before bringing this motion. August 20, 2013 Affidavit of Philip R. Schenkenberg ("Aug. 20, 2013 Schenkenberg Aff.") ¶ 3. Sprint reminded NAT's counsel of the Commission's previous ruling. Aug. 20, 2013 Schenkenberg Aff. ¶ 3. NAT's counsel recognized that NAT's new requests are contrary to that prior ruling, but still refused to withdraw the requests. Aug. 20, 2013 Schenkenberg Aff. ¶ 3. Sprint believes NAT is acting in bad faith for the purpose of delay and harassment. The Commission should apply the law of the case and quash Document Requests 1-3 and 6-15.[4]

III. NAT SERVED EXPERT DISCOVERY IN VIOLATION OF SOUTH DAKOTA LAW

NAT's Notice of Deposition of Randy Farrar, and Document Requests 4 and 5, must be quashed because they violate the South Dakota Rules of Civil Procedure. The rules authorize a party to obtain specific, limited information regarding expert opinions via interrogatories:

> A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

[4] Document Requests 4 and 5 are in the nature of expert discovery, and are addressed below.

SDCL § 15-6-26(b)(4)(A)(i). NAT availed itself of this right in 2012, and Sprint responded to those interrogatories. *See* May 4, 2012 Order at 3. *See also* Aug. 20, 2013 Schenkenberg Aff. Ex. B (Sprint's supplemental responses to Data Requests 1.34-1.36).

Additional expert discovery is available "upon motion" if need is demonstrated, subject to appropriate cost-shifting provisions:

> Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (4)(C) of this section, concerning fees and expenses as the court may deem appropriate.

SDCL § 15-6-26(b)(4)(A)(ii).

NAT noticed the deposition of an expert without obtaining leave, and without making necessary compensation arrangements. This is a violation of the rules and cannot be condoned. Sprint advised NAT of this rule in the parties' meet-and-confer session, and NAT acknowledged this rule applied to its attempt to obtain expert discovery. Aug. 20, 2013 Schenkenberg Aff. ¶ 4. And yet, rather than bring a motion, NAT re-served its expert deposition notice, thus forcing Sprint to bear the burden of moving to quash. Aug. 20, 2013 Schenkenberg Aff. ¶ 4. Again, NAT's actions violate the law, are in bad faith, and should prompt the Commission to grant Sprint's motion.[5]

[5] In effect, the rules impose a presumption that expert reports and limited expert interrogatories are all that are needed for the advocacy process to work. Sprint is confident that, if NAT had brought a motion to go beyond these default rules, the Commission would have found standard expert discovery to be sufficient.

IV. NAT IS ASKING FOR THE SAME DISCOVERY THE COMMISSION DEEMED UNDULY BURDENSOME IN THE DISPUTE INVOLVING SPRINT AND NORTHERN VALLEY

NAT is attempting the same kind of scorched-earth discovery that Sprint successfully opposed on grounds of undue burden in TC09-098. There, Northern Valley moved to compel Sprint to respond to interrogatories and document requests that sought information on Sprint's business practices, business plans, revenues, and costs. *See* June 14, 2012 Order in TC09-098, at 4-5. The Commission denied most of Northern Valley's requests after it weighed the amount of intrastate charges in dispute, the need for the information in that case (which was a complaint case, not a certification proceeding), and the burden of producing that information. *Id.*

Here, NAT seeks the same kind of discovery, and has made no attempt to narrow the requests to reduce the burden of responding. For example, NAT's new Document Request 13 seeks "All documents related to Sprint's payments to LECs for access stimulation traffic." The request is not limited in time; is not limited to the state of South Dakota; and gives no regard to the time, cost, and expense that would be incurred by Sprint to comply. The Commission should reject NAT's bad-faith tactics and confirm that any arguable relevance to the requested information would be outweighed by the burden of complying.

V. OBJECTIONS TO SPECIFIC DOCUMENT REQUESTS

Document Request 1. All documents reflecting or constituting Sprint's wholesale rate decks from January 1, 2009 to the present.

As noted above, Document Request 1 seeks the identical information the Commission deemed irrelevant in its May 4, 2012 order. Sprint's "wholesale rate decks" identify the rates Sprint charges other carriers (on a wholesale basis) to deliver calls across the public switched network. The Commission rejected NAT's attempt to obtain this information when it denied NAT's motion to compel Sprint to respond to NAT's 2012 Data Request 1.24. The same result is warranted here.

NAT's Document Request 1 is also overbroad. It asks Sprint to provide this irrelevant information for over three years, and with respect to calls delivered by Sprint to thousands of LECs across the country.

Responding to NAT's Document Request 1 would also impose an undue hardship on Sprint in comparison to the value of the information to the case. *See* Aug. 20, 2013 Schenkenberg Aff. Ex. C (Affidavit of Bruce R. Tillotson ("Tillotson"), addressing how wholesale information is maintained). Given that the information has nothing to do with NAT's ability to meet the requirements for a certificate, the burden of responding certainly outweighs the benefits.

Document Request 2. All documents reflecting Sprint's wholesale interstate rates to NAT from October 2009 to the present.

Document Request 3. All documents reflecting Sprint's wholesale intrastate rates to NAT from October 2009 to the present.

Document Requests 2-3 are a subset of Document Request 1. NAT wants to know the interstate[6] and intrastate rates Sprint has charged other carriers to deliver traffic through Sprint to NAT (assuming there are any such calls). This information relates to Sprint's business practices, not NAT's, and, thus, has no place in this certification proceeding. If NAT wants to try to make a case for relevance in the parties' federal court action that involves monetary claims, it can certainly do so. Here, however, there is no relevance to the information. The Commission essentially decided this issue when it refused to grant NAT's motion to compel on 2012 Data Request 1.23, which requested documents seeking Sprint's nationwide wholesale revenues.

> **Document Request 4. All documents supporting Randy Farrar's assertion that NAT is a "sham entity, established for the sole purpose of 'traffic pumping.'"**
>
> **Document Request 5. All documents supporting Randy Farrar's assertion that "it is not in the public interest to grant [NAT's] Certificate."**

Document Requests 4 and 5 seek expert discovery about Mr. Farrar's opinions in his 2012 testimony. Sprint provided all information about Mr. Farrar's earlier testimony required by SDCL § 15-6-26(b)(4) in its response to NAT's 2012 Data Requests 1.34-1.36. Aug. 20, 2013 Schenkenberg Aff. Ex. B. NAT's new requests are either duplicative, or they go beyond allowable discovery under SDCL § 15-6-26(b)(4). *See*, *Supra* § III.

> **Document Request 6. All documents demonstrating the profits and/or losses realized by Sprint traffic terminated in at the NAT exchange.**

[6] The Commission lacks jurisdiction over Sprint's interstate practices.

Document Request 6 seeks information the Commission found to be irrelevant in its May 4, 2012 order. Sprint's profits and losses related to NAT's traffic are Sprint's business information and have nothing to do with NAT's ability to meet the statutory requirements to obtain a certificate. The Commission rejected NAT's attempt to obtain this information when it denied NAT's motion to compel Sprint to respond to NAT's 2012 Data Request 1.29 (asking for Sprint's business plans), and its 2012 Document Requests 1, 2, 4, 5, and 7, which asked for Sprint's financial information. Document Request 6 should be quashed.

In addition, the burden of responding to Document Request 6 outweighs the benefits. *See* Aug. 20 Schenkenberg Aff. Ex. C (Affidavit of Tillotson, describing process for obtaining wholesale revenue information). *See also* Aug. 20 Schenkenberg Aff. Ex. D (Affidavit of Karine M. Hellwig ("Hellwig"), describing process for tracking where minutes were billed).

> **Document Request 7. All documents related to Sprint's provision of telecommunications services on the Crow Creek Reservation, including but not limited to providing local or long distance service to residents of the Reservation, having or using facilities for the origination or termination of telecommunications traffic on the Reservation, and originating or terminating wireless or long distance telecommunications traffic on the Reservation.**

NAT's Document Request 7 has nothing to do with NAT's ability to meet the conditions necessary to obtain a certificate. They are comparable to NAT's 2012 Data Requests 1.22, 1.29, and 1.30 (relating to Sprint's services in South Dakota), and 2012 Document Request 1, 2, 4, 5, and 7 (asking for financial information), which the Commission previously deemed improper when it denied NAT's motion to compel.

Furthermore, document Request 7 is vague. If limited to Sprint's provisions of service on the reservation, the answer would be "none," but the question could be read to extend to all documents related to any facilities used to originate traffic delivered to NAT. This would extend the scope of the request nationwide to facilities not possibly relevant to this case.

In addition, NAT's Document Request 6 improperly extends to interstate revenues, and its production would impose an undue burden on Sprint. As explained by Hellwig, Sprint does not track revenue information at this level, and simply could not respond without great cost and expense. Aug. 20 Schenkenberg Aff. Ex. D. Given that the information has nothing to do with NAT's ability to meet the requirements for a certificate, the burden of responding outweighs any legitimate benefits.

> **Document Request 8. All documents related to payments made by Sprint of other local exchange carriers' access rates for the termination of conferencing traffic, including:**
>
> > **(a) Identifying the local exchange carriers whose access rates for the termination of conferencing traffic is paid by Sprint.**
> >
> > **(b) Identifying the access rates paid by Sprint to local exchange carriers for the termination of conferencing traffic.**
> >
> > **(c) An explanation of Sprint's rationale for paying non-Indian owned local exchange carriers' access rates for terminating conferencing traffic, but not paying NAT's access rates.**

As noted above, Document Request 8 seeks information identical to that which the Commission found irrelevant when it denied NAT's motion to compel Sprint to respond to NAT's 2012 Data Request 1.24. The Commission deemed NAT's 2012 Data Requests 1.1-1.4 (seeking information regarding calls to conferencing lines); NAT's 2012 Data

Requests 1.25, 1.23, and 1.29 (requesting business plans); and NAT's 2012 Document Requests 1, 2, 4, 5, and 7 (demanding financial information) irrelevant. The same result is warranted here.

NAT's Document Request 8 is also overbroad and unduly burdensome. The request seeks information not regularly compiled by Sprint and is not limited as to time. As explained by Ms. Roach, because Sprint does not compile data that relates exclusively to "conferencing traffic," it is likely impossible for Sprint to respond to the request as worded. Affidavit of Regina Roach ("Roach Affidavit") ¶ 4. In addition, Document Request 8 seeks documents from an extremely extended historical time period: gathering all the data going back to the beginning of identified pumping periods for all LECs would require extracting years of invoice data to determine each carrier's rates by months and, for older periods, Sprint would need to retrieve paper invoices. Roach Affidavit ¶ 9. If Sprint were ordered to produce all information about all payments it has made to carriers it has identified as pumpers, it is estimated that it would take more than 150 hours to compile estimated data and, ultimately, 300 man-hours to respond to NAT's request. Roach Affidavit ¶ 10. Given that the information has nothing to do with NAT's ability to meet the requirements for a certificate, the burden of responding outweighs the benefits.

> **Document Request 9. All documents related to or evidencing contacts that Sprint has had with the Crow Creek Sioux Tribe and its tribal officials, including the date and time of all phone calls, emails, personal conversations, meetings, and any other contacts – concerning due diligence undertaken in order to formulate Sprint's opinions about NAT and the benefits to the Tribe of a tribally owned telecommunications systems, like the one deployed by NAT.**

Document Request 10. All documents related to contacts or discussions that Sprint has had with other Indian tribes or the tribal officials, in order to formulate its opinion regarding how a tribe may or may not benefit from a tribally owned telecommunications systems, like the one deployed by NAT.

Document Request 11. All documents related to Sprint's compliance with the tribal consultation requirements of 47 C.F.R. Section 54.313(a)(9).

Document Requests 9, 10, and 11 have nothing to do with NAT's application or its request for a certificate. As such, Sprint should not be required to produce responsive documents (if they exist) or provide a witness to prepare for and discuss these matters.

Document Request 12. All documents related to Sprint's wholesale transport and/or call termination services offered to NAT, including:

(a) Sprint's rate to the NAT exchange, as listed in its wholesale rate deck.

(b) Sprint receipt of payments by minute of use or any other method from other carriers, including, but not limited to, large and small unassociated telephone companies and middle or transport carriers for delivery of this traffic to the NAT exchange.

(c) Sprint's profits from this traffic to the NAT exchange by employing methods such as non-payment to NAT for the termination of this traffic.

Document Request 12 seeks information about wholesale services provided by Sprint that result in calls being delivered to NAT. This is duplicative of Document Request 2. As such, for the reasons set forth above, the information is irrelevant, and production would be unduly burdensome.

Document Request 13. All documents related to Sprint's payments to LECs for access stimulation traffic.

Document Request 13 seeks information about Sprint's payments to LECs for so-called "access stimulation traffic." This is duplicative of Document Request 8. As such, for the reasons set forth above, the information is irrelevant and production would be unduly burdensome.

> **Document Request 14. All documents or written statements signed or otherwise adopted or approved by the person making it, pertaining to NAT's Application (or amended application) for Certificate of Authority to provide Local Exchange Service within the study area of Midstate Communications, Inc.**

Document Request 14 is vague and seeks information that is irrelevant. First, it is not clear what documents NAT desires. One would normally think of written statements being given by fact witnesses (for example, people who witnessed a car accident). This is not that kind of case. It is not clear that any such documents exist, and there is no reason for Sprint to be compelled to make a witness available to testify on this topic.[7]

> **Document Request 15. All documents comprising Sprint's document retention and/or destruction policy in effect at any time between 2007 and the present.**

NAT's Document Request 15 is irrelevant because 1) the documents it seeks lack relevance, and 2) how documents have been maintained in the course of Sprint's business cannot affect the issues before the Commission. Sprint should not have to produce documents or offer a witness regarding these irrelevant matters.

[7] To the extent Mr. Farrar's testimony would be deemed a statement, NAT has that statement, and can only obtain an expert deposition by motion.

VI. OBJECTIONS TO SPECIFIC DEPOSITION TOPICS

NAT's specific deposition topics on which it seeks testimony are as follows:

1. **The existence of the documents requested below pursuant to SDCL § 15-6-34;**

2. **The electronic creation, duplication and/or storage of the documents requested below pursuant to SDCL § 15-6-34;**

3. **Any and all document retention/destruction policies that would relate to any of the documents requested below pursuant to SDCL § 15-6-34;**

4. **The location of the documents requested below pursuant to SDCL § 15-6-34;**

5. **The organization, indexing and/or filing of the documents requested below pursuant to SDCL § 15-6-34;**

6. **The method of search for the documents requested below pursuant to SDCL § 15-6-34;**

7. **The completeness of the documents produced pursuant to SDCL § 15-6-34; and**

8. **The authenticity of the documents produced pursuant to SDCL § 15-6-34.**

Sprint's arguments and evidence on relevance and burden are set forth above, and will not be repeated here. All of NAT's deposition topics track the document requests. That means NAT wants to depose witnesses knowledgeable on the creation, location, meaning, and retention of documents that have nothing to do with this case. The Commission should find such a deposition to be a waste of time and resources, an undue burden, and unnecessary to bring this case to disposition.

VII. REQUEST FOR FEES

If the Commission grants this motion, it should also find that Sprint is entitled to its fees. SDCL § 15-6-26(c) incorporates the provisions of SDCL § 15.6.37(a)(4) for use on a motion for protective order. That provision provides:

> 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).[8]

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, NAT has served discovery in blatant disregard of Commission precedent in this case, and in violation of the South Dakota Rules of Civil Procedure. Following a meet and confer, NAT recognized these issues but re-served the deposition notices, thereby putting the burden on Sprint to bring this motion. Aug. 20,

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

2013 Schenkenberg Aff. ¶¶ 3-4. An award of fees under these circumstances is just and appropriate.

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 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.

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