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'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION TO COMPEL**

Sprint Communications Company L.P. ("Sprint") respectfully submits its reply in support of its motion to compel Native American Telecom, LLC ("NAT") to respond to Sprint's discovery requests.

A. <u>The Commission's Rules Do Not Prohibit Sprint from Serving Discovery</u>

NAT contends that the Commission's rules prohibit Sprint from serving discovery because the Commission rules permit only the Commission to seek additional information from an applicant, and such a rule directly conflicts with and supersedes the South Dakota Rules of Civil Procedure relied on by Sprint. NAT Mem. in Opp., p. 9-10. This contention is erroneous for several reasons.

First, the Commission's rules are not in conflict with the rules of civil procedure. The two rules relied upon by NAT require an applicant to submit along with its application a list of specific items and any "[o]ther information requested by the commission needed to demonstrate that the applicant has sufficient technical, financial, and managerial capabilities" to provide the services it intends to offer. ARSD 20:10:24:02; ARSD 20:10:32:03. These rules essentially reserve for the Commission the

ability to request further information from an applicant. They do not, however, explicitly or implicitly supersede the discovery rules articulated in the South Dakota Rules of Civil Procedure.

Significantly, the Commission's rules explicitly provide that "[a] party may obtain discovery from another party without commission approval" and "[t]he taking and use of discovery shall be in the same manner as in the circuit courts of this state." ARSD 20:10:01:22.01 (further directing that the Commission "may issue an order to compel discovery"). Sprint, having been granted leave by the Commission to participate as an intervenor, is a party. ARSD 20:10:01:15.05 ("A person granted leave to intervene in whole or in part is an intervener and is a party to the proceeding."); *see also* ARSD 20:10:01:01.01(5) (defining party to include persons admitted to the proceeding by the Commission). As an intervenor, Sprint is entitled to the numerous rights "granted to parties by statute or this chapter," ARSD 20:10:01:15.05, which include the right to pursue discovery in accordance with Administrative Rule 20:10:01:22.01 and the state rules of civil procedure. This explicit right under the Commission's rules is not obviated by the Commission's ability to request that additional information be provided from an applicant.

Second, the Commission's previous orders, which NAT did not oppose, provide for discovery by intervenors. The Amended Order For And Notice Of Procedural Schedule And Hearing dated April 5, 2012, includes a revised procedural schedule to which the parties have agreed. The schedule provides that on February 24, 2012, "Intervenors/NAT Serve Discovery" and on March 9, 2012, "Discovery Responses Due."

At no time before its response to this motion to compel did NAT object to the inclusion of discovery by intervenors in the procedural schedule or contend that such discovery was impermissible. Similarly, the Confidentiality Agreement approved in this case contemplates discovery by the parties. *See* Motion For A Protective Order Requiring The Parties And Intervenors To Comply With A Confidentiality Agreement, Exhibit A (Feb. 10, 2012). Because NAT agreed to the matters addressed by these Orders and failed to object to the intervenors' right to obtain discovery, its new argument that discovery is not permitted is waived.

NAT is also wrong in suggesting that the Commission has not historically allowed intervenors to obtain discovery or move to compel. As an example, WWC License sought certification as an eligible telecommunications carrier in South Dakota in 2003 in docket No. TC03-191. The Commission granted impacted carriers leave to intervene and established a procedural schedule that provided for discovery to be served by those intervenors. When the applicant challenged the intervenors' discovery requests, the Commission considered and acted on a motion to compel the applicant to provide additional information. Order Granting Motion To Expand Procedural Schedule; Order Granting In Part And Denying In Part Motion To Compel Discovery; Order Granting Motion To Withdraw, *In re Filing by WWC License, LLC d/b/a Cellularone for Designation as an Eligible Telecommunications Carrier in Other Rural Areas*, TC03-191 (Mar. 25, 2004). With respect to several of the discovery requests, the Commission found that good cause existed and the information requested was relevant, and therefore

compelled the applicant to provide the requested information to the intervenors. *Id.* Such a motion is not novel and similar treatment is warranted here.

A significant flaw in NAT's analysis is its continued assertion that the Commission's Staff's decision to deem NAT's application "complete" somehow binds the Commission and limits intervenors' discovery rights. NAT Mem. in Opp., pp. 2, 8, 10, 13, 16, 28, 41. The Commission acts by taking votes at open meetings, not through its Staff's procedural decisions. *See* SDCL § 49-1-12 ("Every vote and official action of the Public Utilities Commission shall be entered of record and its proceedings shall be open to the public."); SDCL § 1-25-1 ("The official meeting of . . . any public body of the state or its political subdivisions are open to the public."). Moreover, a Staff decision regarding the completeness of an application bears only on the obligation of the Commission to outright reject an application that is "incomplete" regardless of the underlying merits. *See* ARSD 20:10:24:03; ARSD 20:10:32:06. The Commission should reject the argument that the Staff's actions in this case somehow preclude any further requests for information by the Commission or the intervenors, or foreclosed the Commission's careful and critical analysis of the information presented in testimony.

B. Sprint's Discovery is Focused on Matters to be Investigated per the Commission's Rules

In its initial memorandum, Sprint identified every deficient discovery response, and tied each of its requests to 1) a Commission Rule, 2) representations by NAT in its Application or Testimony, or 3) positions taken by Mr. Farrar that would justify denial of the application. Sprint Mem. in Supp., pp. 6-25. Sprint stands by its analysis, and asserts

that all its interrogatories and document requests are relevant to matters before the Commission and necessary to ensure NAT meets all applicable standards to receive a certificate of authority.

NAT attempts to defend against discovery regarding its illegal provision of service without a certificate by representing that it "has agreed not to 'bill' Sprint or CenturyLink for any intrastate access fees until this certification matter is decided by the Commission." NAT Mem. in Opp., p. 29. While that is perhaps an appropriate billing practice, it does not excuse the unlawful provision of service without a certificate, which very much remains an issue in this case. SDCL § 49-31-3 (establishing that it is a misdemeanor to provide such telecommunication services without a certificate of authority); *see also* ARSD 20:10:32:06 (placing burden on the applicant for a certificate of authority to establish that it has sufficient managerial ability to provide local exchange services "consistent with the requirements of this chapter and other applicable laws, rules, and commission orders") (emphasis added).

C. Sprint's Financial and Business Information is Not Relevant.

In an attempt to sidestep the fact that this case is focused on NAT's technical, financial, and managerial abilities, NAT attempts to defend this motion by pointing to irrelevant litigation in Virginia involving Sprint, and to report on Sprint's financial information. As Sprint briefed in opposition to NAT's motion to compel, the substantive standards the Commission must utilize in considering NAT's application for a certificate of authority are contained in ARSD 20:10:24:02, ARSD 20:10:32:03, and ARSD 20:10:32:06. There is nothing in any of these rules that in any way implicates or makes

relevant to this case Sprint's financial information or business practices. All of the standards to be applied by the Commission in its determination are focused on the applicant, which is NAT, not the intervenors. Sprint's activities in other forums and its general financial information is relevant to neither the pending motion or the case.

In addition, NAT's attempt to use the Eastern District of Virginia's decision in *Central Telephone Co. of Virginia v. Sprint Communications Co. of Virginia* as "evidence" that Sprint is a bad actor must fail. In that opinion the court found Sprint had breached interconnection agreements with various ILECs with respect to whether access charges applied to VoIP-originated calls. The issues in this certification case are entirely distinct from those in *Central Telephone Co*. Sprint's position on the legality of NAT's scheme, NAT's operation of a sham entity, and NAT's violation of state law, has been unequivocal and unwavering before this Commission and the Federal District Court.

NAT apparently wants the Commission to "import" the findings from the Virginia decision here. However, there is no evidentiary rule that would allow this to be done. The findings of the Virginia court are not adjudicative facts of which this Court may take judicial notice under South Dakota Rule of Evidence 201. Judicial notice applies to facts "not subject to reasonable dispute" and "whose accuracy cannot reasonably be questioned." S. Dak. R. Evid. 201(b); *see also State v. Cody*, 322 N.W.2d 11, 12 n.2 (S.D. 1982) (noting that "[a] court may generally take judicial notice of its own records or *prior proceedings in the same case*") (emphasis added); *cf. Holloway v. Lockhart*, 813 F.2d 874, 879 (8th Cir. 1987) (in litigation over the same event, prior finding that use of tear gas was "reasonable" was not a fact of which judicial notice could be taken).

Sprint's putative motives in a breach of contract case litigated in Virginia, and currently on appeal, do not fall within that definition.

Nor does the doctrine of collateral estoppel apply to *Central Telephone Co.* The doctrine applies, if at all, only if the issue previously litigated is identical to the issue in the current case. *See*, *e.g.*, *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979); *Arkla Exploration Co. v. Tex. Oil & Gas Corp.*, 734 F.2d 347, 356 (8th Cir. 1984). The Virginia decision is simply a one-off breach of interconnection action case involving VoIP traffic. Whether Sprint breached any contracts in that case is irrelevant to the dispute at hand, which is focused on whether NAT has met its burden to demonstrate its entitlement to a certificate of authority.[1]

[1] Setting aside the evidentiary issues, to the extent NAT believes it can prove it is a "good actor" by proving Sprint is a "bad actor," that is a complete non-sequitur. NAT Mem. in Opp., p. 39.

CONCLUSION

For the above reasons as well as those stated in its opening brief, Sprint respectfully requests that the Commission grant Sprint's motion to compel.

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BRIGGS AND MORGAN, P.A.

s/Philip R. Schenkenberg

Philip R. Schenkenberg
Scott G. Knudson
80 South Eighth Street
2200 IDS Center
Minneapolis, MN 55402
(612) 977-8400
(612) 977-8650 – fax
pschenkenberg@briggs.com
sknudson@briggs.com

WHITING LAW OFFICE
Stanley E. Whiting
142 E. 3rd Street
Winner, SD 57580
(605) 842-3373

Counsel for Sprint Communications Company L.P.