

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA

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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.

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Docket No. TC11-087

**SPRINT COMMUNICATIONS  
COMPANY L.P.'S  
MEMORANDUM IN SUPPORT  
OF ITS THIRD MOTION TO  
COMPEL**

**INTRODUCTION**

Sprint Communications Company L.P. (“Sprint”) submits this memorandum in support of its Third Motion to Compel. Sprint respectfully requests that the Commission once again order Native American Telecom, LLC (“NAT”) to provide complete responses to Sprint’s discovery served on June 25, 2013, and to award Sprint its fees in bringing this motion.

**FACTS**

On June 3, 2013, NAT filed an Amended Application in this docket (“Amended Application”). In the Amended Application, NAT requested the authority to provide “intrastate interexchange access service” and not, as in the prior applications, to provide “local exchange service.” Amended Application at 1. The parties negotiated an amended procedural schedule, which was entered on July 3 and required parties to serve responses to discovery in two weeks.

Sprint served its Discovery Requests on NAT’s Amended Application on June 25, 2013. July 26 Schenkenberg Aff. ¶ 2. A copy of those requests is attached as Exhibit A to the July 26 Schenkenberg Affidavit. Sprint set a July 10 return date, which allowed

for the two weeks set in the parties' stipulated procedural schedule, plus an extra day to account for the July 4 holiday. July 26 Schenkenberg Aff. ¶ 2.

NAT served neither objections nor responses on July 10. July 26 Schenkenberg Aff. ¶ 3. On July 15, Jay Schultz, a lawyer with the third law firm to appear for NAT in this case, requested an extension to July 25. July 26 Schenkenberg Aff. ¶ 4 and Ex. B. Sprint declined to provide the requested extension, but did agree to delay the filing of any motion to compel in consideration of the promise to email responses by that date. July 26 Schenkenberg Aff. ¶ 4 and Ex. B.

NAT provided no responses on July 25, and no explanation as to why responses were not provided. July 26 Schenkenberg Aff. ¶ 5.

### **ARGUMENT**

The Commission should grant Sprint's Third 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). 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.

This motion is supported by good cause, as Sprint continues to seek relevant discovery in this long and drawn out proceeding. Whatever objections NAT might have

had to the requests have long been waived. SDCL § 14-6-33(a) (“Any ground not stated in a timely objection is waived unless the party's failure to object is excused by the court for good cause shown.”). NAT continues to ignore the rules and delay, presumably so it make as much money as possible operating illegally before it is shut down. NAT has no justifiable reason for its failure to respond. Accordingly, the Commission should issue an order compelling NAT to provide full and complete answers to Sprint’s Interrogatories attached as Exhibit A to July 26 Schenkenberg Affidavit.

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).<sup>1</sup>

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

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<sup>1</sup> This Rule is applicable to Commission proceedings. A.R.S.D. 20:10:01:01.02.

justified.” To the contrary, this motion is being made after NAT failed to respond in any way on the initial due date, and then failed to meet its own proposed deadline for responses. The Commission has twice had motions to compel before it, and has declined to order fees. Respectfully, it is time for the Commission to give NAT a reason to start following the rules.

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.

## **CONCLUSION**

Sprint respectfully requests that the Commission grant its Third Motion to Compel.

Dated: July 26, 2013

**BRIGGS AND MORGAN, P.A.**

*s/Philip R. Schenkenberg*

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