

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

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

INTRODUCTION

Sprint Communications Company L.P. (“Sprint”) submits this memorandum in support of its Amended Third Motion to Compel. As originally filed, Sprint’s Third Motion to Compel asked the Commission to 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. At that time, NAT had failed to respond, in any way, to those discovery requests. On August 5, NAT provided some responses. Sprint has now amended its motion to identify the responses that remain deficient.

FACTS

NAT’s Amended Application in this docket (“Amended Application”), which was dated May 31, 2013, sought 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 two weeks after receipt of the requests.

Sprint served its Discovery Requests on NAT's Amended Application on June 25. July 26 Schenkenberg Aff. ¶ 2. A copy of those requests was attached 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 Shultz, 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.

On August 5, NAT served written responses and documents Bates stamped 000422-000548. August 21, 2013 Affidavit of Philip R. Schenkenberg ¶ 2. The written responses are attached as Exhibit A to the August 21 Schenkenberg Affidavit. On August 9, counsel for Sprint and NAT met and conferred about a number of responses that Sprint deemed to be deficient. A few small items were resolved on that call, and NAT's counsel committed to responding the following week on remaining open issues. August 21 Schenkenberg Aff. ¶ 3. Now, nearly two weeks later, NAT has failed to

follow up in any way. Intervenor testimony is due on August 30, and the hearing is rapidly approaching. The Commission should grant Sprint's motion and require NAT to respond to the requested discovery.

ARGUMENT

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.

A. NAT’S OBJECTIONS SHOULD BE OVERRULED

To begin, the Commission must overrule the myriad objections that accompany NAT’s partial responses. Those objections were served more than three weeks after they were due, and the law is clear that the objections that could have been made on July 10 have now 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.”).

Even if not waived, NAT’s objections are baseless. In particular, NAT’s objection based on sovereign immunity should be overruled. It alleges (but provides no proof) that NAT has merged into a tribally-chartered LLC, and summarily concludes that the LLC is

immune from discovery. NAT's conclusory statement cannot be simply accepted. First, NAT is the applicant, and thus has opened itself up to whatever discovery is necessary for the Commission to render a decision. Second, the South Dakota Supreme Court has established a multi-part test to evaluate the issue of whether a tribally owned entity is entitled to be treated as a part of the tribe. That will depend on whether:

- (a) The entity is organized under tribal law;
- (b) the entity's purpose is similar or serves the interest of tribal government;
- (c) the entity's governing body is comprised mainly of tribal officials;
- (d) the tribe has legal title to the property the entity uses;
- (e) tribal officials control administration and accounting functions of the entity;
- (f) the tribe's governing body can dismiss members of the entity's governing body.

Wright v. Prairie Chicken, 579 N.W.2d 7, 9-10 (S.D. 1988). There is no record to support a finding that these factors are met.

B. SPECIFIC RESPONSES THAT ARE DEFICIENT

- 1. Interrogatory No. 55: With respect to your statement about the provision of 911 service (page 9 of the Amended Application), do you route 911 calls to a PSAP? If so, identify the PSAP and its PSAP ID number on file with the FCC.**

NAT's Response/Objections: Pursuant to the laws of the Crow Creek Sioux Tribe, NAT has merged into a tribally-chartered Limited Liability Corporation – Crow Creek Telecom, LLC – which is majority-owned and controlled by the Crow Creek Sioux Tribe, and is an arm of the Crow Creek Sioux Tribe. As a result of this merger, all of the rights and assets of NAT, including any rights formerly held by NAT in these proceedings, are now held by Crow Creek Telecom LLC. As an arm of the Crow Creek Sioux Tribe, Crow Telecom LLC is bestowed with all of the rights, privileges and immunities of the Crow Creek Sioux Tribe, including tribal sovereign immunity from civil and regulatory proceedings, including this proceeding. As such, Crow Creek Telecom LLC/NAT objects to these discovery requests on the grounds of tribal sovereign immunity and lack of subject matter jurisdiction. Crow Creek

Telecom LLC/NAT also objects to this interrogatory because it requests information that is beyond the scope of discovery as set forth in SDCL 15-6-26(b)(1), which provides in part that “[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . or reasonably calculated to lead to the discovery of admissible evidence.” Without waiving said objections, consistent with its operation and provision of service exclusively on the Crow Creek Reservation, Crow Creek Telecom, LLC/NAT routes 911 calls to the Crow Creek Sioux tribal public safety and police authorities, who receives all 911 calls from customers of communications companies providing service on the Crow Creek Reservation.

NAT’s response does not state whether the entity to which 911 calls are sent is a PSAP, and, if so, what the PSAP ID number is. As such it is non-responsive. This information goes to NAT’s managerial and technical capabilities to provide the services for which it seeks certification.

2. Interrogatory No. 56: Identify NAT’s total number of terminating minutes of use, by carrier, for each month from January 2012 to the present.

NAT’s Response/Objections: Pursuant to the laws of the Crow Creek Sioux Tribe, NAT has merged into a tribally-chartered Limited Liability Corporation – Crow Creek Telecom, LLC – which is majority-owned and controlled by the Crow Creek Sioux Tribe, and is an arm of the Crow Creek Sioux Tribe. As a result of this merger, all of the rights and assets of NAT, including any rights formerly held by NAT in these proceedings, are now held by Crow Creek Telecom LLC. As an arm of the Crow Creek Sioux Tribe, Crow Telecom LLC is bestowed with all of the rights, privileges and immunities of the Crow Creek Sioux Tribe, including tribal sovereign immunity from civil and regulatory proceedings, including this proceeding. As such, Crow Creek Telecom LLC/NAT objects to these discovery requests on the grounds of tribal sovereign immunity and lack of subject matter jurisdiction. Crow Creek Telecom LLC/NAT also objects to this interrogatory because it requests information that is beyond the scope of discovery as set forth in SDCL 15-6-26(b)(1), which provides in part that “[p]arties may obtain discovery regarding any matter, not privileged, which is

relevant to the subject matter involved in the pending action . . . or reasonably calculated to lead to the discovery of admissible evidence.”

NAT has provided no response to Interrogatory No. 56, just an objection. Sprint needs this information to help evaluate NAT’s business model because it will allow Sprint to determine total revenues that NAT could generate if its bills were paid. If, as Sprint suspects, NAT cannot generate a profit, that will show that the entity is being run in the short term to benefit Free Conferencing and David Erickson, not the Tribe. That will bear on whether the Commission should award NAT a certificate. In addition, NAT has raised no valid objections.

3. Interrogatory No. 59: With respect to your supplemental response to Sprint’s IR 15, is it correct that [BEGIN CONFIDENTIAL]

[REDACTED]

[END CONFIDENTIAL]

NAT’s Response/Objections: Pursuant to the laws of the Crow Creek Sioux Tribe, NAT has merged into a tribally-chartered Limited Liability Corporation – Crow Creek Telecom, LLC – which is majority-owned and controlled by the Crow Creek Sioux Tribe, and is an arm of the Crow Creek Sioux Tribe. As a result of this merger, all of the rights and assets of NAT, including any rights formerly held by NAT in these proceedings, are now held by Crow Creek Telecom LLC. As an arm of the Crow Creek Sioux Tribe, Crow Telecom LLC is bestowed with all of the rights, privileges and immunities of the Crow Creek Sioux Tribe, including tribal sovereign immunity from civil and regulatory proceedings, including this proceeding. As such, Crow Creek Telecom LLC/NAT objects to these discovery requests on the grounds of tribal sovereign immunity and lack of subject matter jurisdiction. Crow Creek Telecom LLC/NAT also objects to this interrogatory because it

requests information that is beyond the scope of discovery as set forth in SDCL 15-6-26(b)(1), which provides in part that “[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . or reasonably calculated to lead to the discovery of admissible evidence.” Crow Creek Telecom LLC/NAT also objects to this interrogatory as being vague and a misstatement of the information provided by Crow Creek Telecom LLC/NAT.

NAT has provided no response to Interrogatory No. 59, just an objection. Interrogatory 59 seeks information about Free Conferencing’s payment history. NAT relies on testimony of Mr. Holoubek that Free Conferencing “pays NAT ‘end-user’ customer fees in accordance with NAT’s tariffs.” July 26, 2013 Holoubek Test. at 21.

[BEGIN CONFIDENTIAL] [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] **[END**

CONFIDENTIAL] See *Qwest Communications Co. v. Sancom, Inc.*, File No. ED-10-MD-004, DA 13-321, Memorandum Opinion & Order (Mar. 5, 2013) (attached as Exhibit B to Sprint’s April 3, 2013 Notice of Supplemental Authority in Docket No. TC10-026). The Commission should order NAT to answer the questions Sprint has asked.

4. Interrogatory Nos. 62-64

Interrogatory No. 62: Sprint has been provided with two different 2011 Form 499-A filings (reporting 2010 calendar year). *Compare* Doc. 131-3, pp. 2-9 in Case No. 10-cv-4110) with 00387-394. Explain why there are two such documents, when either was actually filed, and identify and provide signature pages and/or electronic filing receipts. Explain why amounts on lines 304.1 and 305.1 were transposed.

NAT's Response/Objections: Pursuant to the laws of the Crow Creek Sioux Tribe, NAT has merged into a tribally-chartered Limited Liability Corporation – Crow Creek Telecom, LLC – which is majority-owned and controlled by the Crow Creek Sioux Tribe, and is an arm of the Crow Creek Sioux Tribe. As a result of this merger, all of the rights and assets of NAT, including any rights formerly held by NAT in these proceedings, are now held by Crow Creek Telecom, LLC. As an arm of the Crow Creek Sioux Tribe, Crow Telecom LLC is bestowed with all of the rights, privileges and immunities of the Crow Creek Sioux Tribe, including tribal sovereign immunity from civil and regulatory proceedings, including this proceeding. As such, Crow Creek Telecom LLC/NAT objects to these discovery requests on the grounds of tribal sovereign immunity and lack of subject matter jurisdiction. Crow Creek Telecom LLC/NAT also objects to this interrogatory because it requests information that is beyond the scope of discovery as set forth in SDCL 15-6-26(b)(1), which provides in part that “[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . or reasonably calculated to lead to the discovery of admissible evidence.” Without waiving said objections, there are two documents because a second, corrective filing was submitted by the Company. The initial filing inadvertently left out billed interstate End User revenue. The second filing added the End User revenue that had been billed and collected by the Company. The Company subsequently paid its USF obligations associated with this revenue. Regarding lines 304.1 and 305.1, it appears that for various NAT filings, switched access revenue was incorrectly placed on row 305.1 (special access). This error, however, had no impact on the Company’s assessable revenue. See also attached Statement of Carey Roesel in Response to Interrogatory 62, 63, and 64.

Interrogatory No. 63: Sprint has been provided with two different 2012 Form 499-A filings (reporting 2011 calendar year). *Compare 00396-403 with 00405-412.* Explain why there are two such documents, when either was actually filed, and identify and provide signature pages and/or electronic filing receipts. Explain why amounts on lines 304.1 and 304.2, 405, 418.1, 419, 420, 241, 423, and 514 differ between the two documents.

NAT's Response/Objections: Pursuant to the laws of the Crow Creek Sioux Tribe, NAT has merged into a tribally-chartered Limited Liability Corporation – Crow Creek Telecom, LLC – which is majority-owned and controlled by the Crow Creek Sioux Tribe, and is an arm of the Crow Creek Sioux Tribe. As a result of this merger, all of the rights and assets of NAT, including any rights formerly held by NAT in these proceedings, are now held by Crow Creek Telecom, LLC. As an arm of the Crow Creek Sioux Tribe, Crow Telecom LLC is bestowed with all of the rights, privileges and immunities of the Crow Creek Sioux Tribe, including tribal sovereign immunity from civil and regulatory proceedings, including this proceeding. As such, Crow Creek Telecom LLC/NAT objects to these discovery requests on the grounds of tribal sovereign immunity and lack of subject matter jurisdiction. Crow Creek Telecom LLC/NAT also objects to this interrogatory because it requests information that is beyond the scope of discovery as set forth in SDCL 15-6-26(b)(1), which provides in part that “[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . or reasonably calculated to lead to the discovery of admissible evidence.” Without waiving said objections, there are two documents because a corrective filing was submitted by the company. As in 2011, the initial filing inadvertently left out billed interstate End User revenue. Additionally, the initial filing reported *billed* rather than *collected* revenue on line 304.1.

The differences in lines 419, 420, 421, 423, and 514 are all driven by the differences described above. As in 2011, the Company was assessed by USAC based on the corrected filings, and the Company has paid these assessments. See also attached Statement of Carey Roesel in Response to Interrogatory 62, 63, and 64.

Interrogatory No. 64: Sprint has been provided with two different 2013 Form 499-A filings (reporting 2012 calendar

year). Compare 00382-385 with 00413-420. Identify and provide the missing pages within 00382-385. Explain why there are two such documents, when either was actually filed, and identify and provide signature pages and/or electronic filing receipts. Explain any differences between 00382-385 (when fully produced) and 00413-420.

NAT's Response/Objections: Pursuant to the laws of the Crow Creek Sioux Tribe, NAT has merged into a tribally-chartered Limited Liability Corporation – Crow Creek Telecom, LLC – which is majority-owned and controlled by the Crow Creek Sioux Tribe, and is an arm of the Crow Creek Sioux Tribe. As a result of this merger, all of the rights and assets of NAT, including any rights formerly held by NAT in these proceedings, are now held by Crow Creek Telecom, LLC. As an arm of the Crow Creek Sioux Tribe, Crow Telecom LLC is bestowed with all of the rights, privileges and immunities of the Crow Creek Sioux Tribe, including tribal sovereign immunity from civil and regulatory proceedings, including this proceeding. As such, Crow Creek Telecom LLC/NAT objects to these discovery requests on the grounds of tribal sovereign immunity and lack of subject matter jurisdiction. Crow Creek Telecom LLC/NAT also objects to this interrogatory because it requests information that is beyond the scope of discovery as set forth in SDCL 15-6-26(b)(1), which provides in part that “[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . or reasonably calculated to lead to the discovery of admissible evidence.” Without waiving said objections, there are two documents because a corrective filing was submitted by the Company. As in 2011 and 2012, the initial filing inadvertently left out billed interstate End User revenue. Additionally, the initial filing reported *billed* rather than *collected* revenue on line 304.1. The Company’s 499-Q filings in 2012, however, did include assessable End User revenue. These quarterly filings created a USF obligation that was billed by USAC and paid by the Company. The corrected 499-A prevented USAC from erroneously issuing true-up credits to the Company as if it had no assessable revenue in 2012. See also attached Statement of Carey Roesel in Response to Interrogatory 62, 63, and 64.

Interrogatories 62-64 relate to FCC Form 499 filings that NAT has submitted (under penalty of perjury) to the Universal Service Administrative Corp. in order to

report its revenues and remit the appropriate contributions. Such filings should represent a true and correct statement of a carrier's local service and interstate revenues, which can bear on whether a LEC and a conference company are engaged in a lawful relationship or a sham relationship. Previously, NAT provided two separate Form 499s for years 2010, 2011, and 2012, and the filings all look different. Sprint served Interrogatory Nos. 62-64 in an attempt to understand what was filed, and when each filing was made. In addition, if NAT has misreported information to the federal government, that will bear on NAT's fitness to obtain a certificate.

While NAT has provided some explanation for the differences in these documents, it has not provided signature pages and/or electronic filing receipts. Aug. 21 Schenkenberg Aff. ¶ 6. Such pages will allow Sprint to confirm that the filings were actually made and understand the order of the filings. NCC has already provided what it claims are valid documents, it just has not provided sufficient information to allow one to determine what was signed, and what was filed (and when). The documents are available, relevant, and objections have been waived.

5. Document Requests 13-16

Document Request 13: Produce any documents identified in your response to Interrogatory No. 51.

NAT's Response/Objections: Pursuant to the laws of the Crow Creek Sioux Tribe, NAT has merged into a tribally-chartered Limited Liability Corporation – Crow Creek Telecom, LLC – which is majority-owned and controlled by the Crow Creek Sioux Tribe, and is an arm of the Crow Creek Sioux Tribe. As a result of this merger, all of the rights and assets of NAT, including any rights formerly held by NAT in these proceedings, are now held by Crow Creek Telecom,

LLC. As an arm of the Crow Creek Sioux Tribe, Crow Telecom LLC is bestowed with all of the rights, privileges and immunities of the Crow Creek Sioux Tribe, including tribal sovereign immunity from civil and regulatory proceedings, including this proceeding. As such, Crow Creek Telecom LLC/NAT objects to these discovery requests on the grounds of tribal sovereign immunity and lack of subject matter jurisdiction. Crow Creek Telecom LLC/NAT also objects to this interrogatory because it requests information that is beyond the scope of discovery as set forth in SDCL 15-6-26(b)(1), which provides in part that “[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . or reasonably calculated to lead to the discovery of admissible evidence.” Crow Creek Telecom LLC/NAT further objects to this Document Request on the basis of attorney-client privilege. Without waiving the foregoing objection, Crow Creek Telecom, LLC/NAT will provide all responsive and non-privileged documents at a time and place that is mutually agreed to by the parties.

Document Request 14: Produce any documents identified in your response to Interrogatory No. 52.

NAT’s Response/Objections: Pursuant to the laws of the Crow Creek Sioux Tribe, NAT has merged into a tribally-chartered Limited Liability Corporation – Crow Creek Telecom, LLC – which is majority-owned and controlled by the Crow Creek Sioux Tribe, and is an arm of the Crow Creek Sioux Tribe. As a result of this merger, all of the rights and assets of NAT, including any rights formerly held by NAT in these proceedings, are now held by Crow Creek Telecom, LLC. As an arm of the Crow Creek Sioux Tribe, Crow Telecom LLC is bestowed with all of the rights, privileges and immunities of the Crow Creek Sioux Tribe, including tribal sovereign immunity from civil and regulatory proceedings, including this proceeding. As such, Crow Creek Telecom LLC/NAT objects to these discovery requests on the grounds of tribal sovereign immunity and lack of subject matter jurisdiction. Crow Creek Telecom LLC/NAT also objects to this interrogatory because it requests information that is beyond the scope of discovery as set forth in SDCL 15-6-26(b)(1), which provides in part that “[p]arties may obtain

discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . or reasonably calculated to lead to the discovery of admissible evidence.” Crow Creek Telecom LLC/NAT further objects to this Document Request on the basis of attorney-client privilege. Without waiving the foregoing objection, Crow Creek Telecom LLC/NAT will provide all responsive and non-privileged documents at a time and place that is mutually agreed to by the parties.

Document Request 15: Produce any documents that evidence the statement referred to Interrogatory No. 52.

NAT’s Response/Objections: Pursuant to the laws of the Crow Creek Sioux Tribe, NAT has merged into a tribally-chartered Limited Liability Corporation – Crow Creek Telecom, LLC – which is majority-owned and controlled by the Crow Creek Sioux Tribe, and is an arm of the Crow Creek Sioux Tribe. As a result of this merger, all of the rights and assets of NAT, including any rights formerly held by NAT in these proceedings, are now held by Crow Creek Telecom, LLC. As an arm of the Crow Creek Sioux Tribe, Crow Telecom LLC is bestowed with all of the rights, privileges and immunities of the Crow Creek Sioux Tribe, including tribal sovereign immunity from civil and regulatory proceedings, including this proceeding. As such, Crow Creek Telecom LLC/NAT objects to these discovery requests on the grounds of tribal sovereign immunity and lack of subject matter jurisdiction. Crow Creek Telecom LLC/NAT also objects to this interrogatory because it requests information that is beyond the scope of discovery as set forth in SDCL 15-6-26(b)(1), which provides in part that “[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . or reasonably calculated to lead to the discovery of admissible evidence.” Without waiving said objections, Crow Creek Telecom LLC/NAT will provide all responsive and non-privileged documents at a time and place that is mutually agreed to by the parties.

Document Request 16: Produce any documents identified in Interrogatories 62-64.

NAT's Response/Objections: Pursuant to the laws of the Crow Creek Sioux Tribe, NAT has merged into a tribally-chartered Limited Liability Corporation – Crow Creek Telecom, LLC – which is majority-owned and controlled by the Crow Creek Sioux Tribe, and is an arm of the Crow Creek Sioux Tribe. As a result of this merger, all of the rights and assets of NAT, including any rights formerly held by NAT in these proceedings, are now held by Crow Creek Telecom, LLC. As an arm of the Crow Creek Sioux Tribe, Crow Telecom LLC is bestowed with all of the rights, privileges and immunities of the Crow Creek Sioux Tribe, including tribal sovereign immunity from civil and regulatory proceedings, including this proceeding. As such, Crow Creek Telecom LLC/NAT objects to these discovery requests on the grounds of tribal sovereign immunity and lack of subject matter jurisdiction. Crow Creek Telecom LLC/NAT also objects to this interrogatory because it requests information that is beyond the scope of discovery as set forth in SDCL 15-6-26(b)(1), which provides in part that “[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . or reasonably calculated to lead to the discovery of admissible evidence.” Without waiving said objections, Crow Creek Telecom LLC/NAT will provide all responsive and non-privileged documents at a time and place that is mutually agreed to by the parties.

For each of these document requests, NAT has promised to provide responsive documents “at a time and place that is mutually agreed to by the parties.” It has not, however, produced those documents, nor has it explained why it did not produce them when they were due at the offices of Sprint’s attorneys. Aug. 21 Schenkenberg Aff. ¶ 7. The Commission should order NAT to produce these documents.

6. Document Request 17

Document Request 17: Produce a copy of the amended Joint Venture Agreement identified in NAT's response to Staff's Data Request 2-1.

NAT's Response/Objections: Pursuant to the laws of the Crow Creek Sioux Tribe, NAT has merged into a tribally-chartered Limited Liability Corporation – Crow Creek Telecom, LLC – which is majority-owned and controlled by the Crow Creek Sioux Tribe, and is an arm of the Crow Creek Sioux Tribe. As a result of this merger, all of the rights and assets of NAT, including any rights formerly held by NAT in these proceedings, are now held by Crow Creek Telecom, LLC. As an arm of the Crow Creek Sioux Tribe, Crow Telecom LLC is bestowed with all of the rights, privileges and immunities of the Crow Creek Sioux Tribe, including tribal sovereign immunity from civil and regulatory proceedings, including this proceeding. As such, Crow Creek Telecom LLC/NAT objects to these discovery requests on the grounds of tribal sovereign immunity and lack of subject matter jurisdiction. Crow Creek Telecom LLC/NAT also objects to this interrogatory because it requests information that is beyond the scope of discovery as set forth in SDCL 15-6-26(b)(1), which provides in part that “[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . or reasonably calculated to lead to the discovery of admissible evidence.” Without waiving said objections, this information has already been provided to Sprint.

Contrary to the final sentence of NAT's response, the amended Joint Venture Agreement has not been previously produced. Aug. 21 Schenkenberg Aff. ¶ 8. Sprint's counsel has asked NAT's counsel via email and by phone to identify Bates numbers (if already produced) or produce the document, and NAT has not responded.

7. Document Requests 20-21

Document Request 20: Provide 2012-2013 bank statements, profit and loss statements, general ledger detail and journal entries, and any other financial records

that identify the detail for NAT's income and expenses. Financials for 1Q13 should be included, and financials for 2Q13 should be produced when they are available.

NAT's Response/Objections: Pursuant to the laws of the Crow Creek Sioux Tribe, NAT has merged into a tribally-chartered Limited Liability Corporation – Crow Creek Telecom, LLC – which is majority-owned and controlled by the Crow Creek Sioux Tribe, and is an arm of the Crow Creek Sioux Tribe. As a result of this merger, all of the rights and assets of NAT, including any rights formerly held by NAT in these proceedings, are now held by Crow Creek Telecom, LLC. As an arm of the Crow Creek Sioux Tribe, Crow Telecom LLC is bestowed with all of the rights, privileges and immunities of the Crow Creek Sioux Tribe, including tribal sovereign immunity from civil and regulatory proceedings, including this proceeding. As such, Crow Creek Telecom LLC/NAT objects to these discovery requests on the grounds of tribal sovereign immunity and lack of subject matter jurisdiction. Crow Creek Telecom LLC/NAT also objects to this interrogatory because it requests information that is beyond the scope of discovery as set forth in SDCL 15-6-26(b)(1), which provides in part that “[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . or reasonably calculated to lead to the discovery of admissible evidence.” Without waiving said objections, see attached Crow Creek Telecom LLC/NAT's Response to Sprint DR No. 20.

Document Request 21: Provide any 2013 financial projections.

NAT's Response/Objections: Pursuant to the laws of the Crow Creek Sioux Tribe, NAT has merged into a tribally-chartered Limited Liability Corporation – Crow Creek Telecom, LLC – which is majority-owned and controlled by the Crow Creek Sioux Tribe, and is an arm of the Crow Creek Sioux Tribe. As a result of this merger, all of the rights and assets of NAT, including any rights formerly held by NAT in these proceedings, are now held by Crow Creek Telecom, LLC. As an arm of the Crow Creek Sioux Tribe, Crow Telecom LLC is bestowed with all of the rights, privileges

and immunities of the Crow Creek Sioux Tribe, including tribal sovereign immunity from civil and regulatory proceedings, including this proceeding. As such, Crow Creek Telecom LLC/NAT objects to these discovery requests on the grounds of tribal sovereign immunity and lack of subject matter jurisdiction. Crow Creek Telecom LLC/NAT also objects to this interrogatory because it requests information that is beyond the scope of discovery as set forth in SDCL 15-6-26(b)(1), which provides in part that “[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . or reasonably calculated to lead to the discovery of admissible evidence.” Without waiving said objections, Crow Creek Telecom LLC/NAT has or will submit, as part of its application with the Commission, all necessary documentation demonstrating its financial capabilities to provide intrastate interexchange service on the Crow Creek Reservation.

While NAT has provided some new financial information, it has not provided the 2013 General Ledger, a June 30, 2013 Balance Sheet, or any future financial projections. Aug. 21 Schenkenberg Aff. ¶ 9. Those documents are necessary to allow Sprint to fully analyze NAT’s claims that it can be profitable going forward. Those documents have been requested, objections have been waived, they are relevant, and they should be provided.

C. REQUEST FOR 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).¹

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 failed to respond in any way on the initial due date, failed to meet its own proposed deadline for responses, failed to provide complete responses, and then failed to follow through on meet and confer promises. 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.

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

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 Amended Third Motion to Compel.

Dated: August 21, 2013

BRIGGS AND MORGAN, P.A.

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