

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA**

IN THE MATTER OF THE PETITION BY)
NORTH AMERICAN LOCAL LLC FOR)
RECLASSIFICATION AS A FACILITIES BASED) **TC23-046**
ELIGIBLE TELECOMMUNICATIONS CARRIER)
)

**SDTA RESPONSE TO NORTH AMERICAN LOCAL REGARDING MOTION TO
COMPEL DISCOVERY**

On January 22, 2024, the South Dakota Telecommunications Association (SDTA), pursuant to ARSD 20:10:01:22.01 and SDCL 15-6-37(a), filed a Motion to Compel Discovery from North American Local, LLC (NAL). On January 31, 2024, the Commission issued an Order for and Notice of Motion Hearing. The Order established February 26, 2024, as the deadline for NAL to answer the Motion to Compel. On March 8, NAL filed a reply. The reply was eleven days late.

SDTA disagrees with most of what NAL argues in its introductory remarks to its March 8 reply. While many of NAL’s arguments are procedurally irrelevant for purposes of this discovery dispute, two specific arguments may impact the scope of discovery. Specifically, SDTA believes the following points are relevant for Commission consideration in this Motions hearing:

- (i) NAL argues it acted in “good faith” in seeking designation as a facilities-based eligible telecommunications carrier.¹ However, the filings show otherwise. The filings demonstrate a history of NAL’s attempts to skirt the rules with wordplay.
- (ii) NAL requests the Commission invent a “reclassification process” arguing that, “the issue in this docket...is whether NAL meets the requirements for designation as a

¹ Comments of North American Local and Opposition to south Dakota Telecommunications Association’s Motion to Dismiss and Compel Responses to Discovery, Filed March 8, 2024, Page 1

facilities-based ETC in its proposed ETC service area.²” However, the law indicates otherwise. NAL is required to prove that it meets all the federal and state law ETC requirements based upon the specific facts as they now exist.

NAL has not provided answers responsive to four separate SDTA discovery requests. Specifically, SDTA has not received answers to (i) Request 2 - a copy of documents filed as Confidential with the Commission, (ii) Request 3 – documents and communications provided to USAC, (iii) Request 4 – information on NAL owned facilities in other states, (iv) Request 7 – a list of all NAL ACP customers. NAL addresses only three of the four disputed requests in its March 8 filing. NAL does not address Request 2 (a copy of documents filed as Confidential with the Commission) and as a result, SDTA relies upon its initial Motion and Brief to support its position. In addition, regarding all four disputed discovery items, SDTA reasserts and incorporates the arguments it made in response to Commission Staff’s filing.

SDTA REQUEST 3: Provide a copy of all documents and communications provided to or received from USAC with respect to the provision of ACP services in South Dakota. This request includes, but is not limited to:

- b. A copy of all documents filed as a part of the annual ACP certification process.**
- c. A copy of all documents submitted to USAC through the Affordable Connectivity Claims System.**

NAL Response: *NAL objects to this request for “all documents” as being overly broad and unduly burdensome. Without waiving this objection, attached is a copy of FCC’s Broadband Benefit Program Carrier Participation Approval for South Dakota dated September 16, 2021.*

SDTA Response:

SDTA does not desire to “step in the shoes of USAC.”³ Rather, SDTA argues that USAC’s findings, requests and concerns (if any) are what is relevant. The ACP program did not

² Id.

³ Id at 8

involve or require action by the Commission. However, the Commission has an important role regarding requests for ETC designation. The Commission must, among other things, ascertain whether NAL has the ability to provide Lifeline services.⁴ NAL's managerial capacity will impact its ability to provide Lifeline services. Regulatory compliance history is indicative of managerial capacity. SDTA recognizes this Commission has no jurisdiction to review or change USAC findings. However, this Commission must consider NAL's ability to responsibly and effectively perform the duties of a Lifeline provider. Any difficulty complying with ACP regulation could be indicative of managerial trouble and/or incompetency. NAL's USAC history is therefore relevant for purposes of ARSD 20:10:32:43.07.

SDTA's request is appropriate under the three distinct purposes of discovery. Those purposes being to: (1) narrow the issues; (2) obtain evidence for use at trial; (3) secure information that may lead to admissible evidence at trial.⁵ SDTA requests the Commission order NAL to produce answers.

REQUEST 4: List and describe all NAL owned facilities in other states. In your answer, specify the state in which the facilities are located.

NAL Response: *NAL objects to this request as it seeks information that is not relevant to NAL's request with respect to its South Dakota facilities.*

SDTA Response:

Contrary to what NAL wrote in its March 8 filing, SDTA does not believe, "NAL is prevented from deploying network facilities in South Dakota."⁶ Rather, SDTA argues there is no

⁴ ARSD 20:10:32:43.07

⁵ Kaarup v. St. Paul Fire and Marine Ins. Co., 436 N. W.2d 16, 19 (S. Dakota, 1989).

⁶ Comments of North American Local and Opposition to south Dakota Telecommunications Association's Motion to Dismiss and Compel Responses to Discovery, Filed March 8, 2024, Page 7

process in law to “reclassify” NAL as facilities based for ETC designation purposes. Instead, NAL’s application must be reviewed and judged as a new ETC application to determine compliance with all applicable federal and state law. One such requirement the Commission must judge is whether NAL has the technical ability to provide the supported Lifeline services.⁷ SDTA’s February 29, 2024, SDTA response to Commission Staff addresses argument regarding information relevant for purposes of judging “technical ability” and is also fully responsive to NAL’s relevant arguments.

In summary, NAL is currently designated by the Commission as a “reseller.” As a reseller, NAL can rely upon other companies to provide the underlying services.⁸ However, now NAL intends to operate, maintain and deliver facility-based services. Customers served by the alleged NAL “facilities” in SD will rely upon the proper operation and maintenance of the NAL facilities. Without the ability to do so, customers are at risk of falling victim to the unreliable provision of service. NAL’s experience in the operation of facilities in other states may help to narrow the issues, it may be evidence for use at trial or it may aid in securing information that may lead to admissible evidence at trial.⁹ Therefore, NAL facilities in other states are relevant for purposes of this docket. SDTA requests the Commission order NAL to produce answers.

REQUEST 7: Provide a list of all South Dakota ACP customers. Include the customer’s name, address and phone number.

NAL Response: NAL objects to this request as it seeks highly confidential business sensitive and consumer proprietary information.

⁷ 47 CFR §54.201(h)

⁸ NAL has not, however, provided Lifeline services in SD because the FCC has not approved its compliance plan. FCC approval is a prerequisite to the provision of Lifeline services.

⁹ Kaarup v. St. Paul Fire and Marine Ins. Co., 436 N. W.2d 16, 19 (S. Dakota, 1989).

SDTA's Position:

SDTA appreciates the importance of Customer Proprietary Network Information (CPNI) laws and intent. CPNI restricts carriers' use and disclosure of their customers' proprietary information and requires that telecommunications carriers protect the confidentiality of that information.¹⁰ Given that "protecting consumers" is its purpose, it is logical that there is an exception to protect consumers from unlawful behavior. Specifically,

A telecommunications carrier may use, disclose or permit access to CPNI to protect ...users of those services and other carriers from fraudulent, abusive or unlawful use of or subscription to such services. 47 CFR 64.2005(d)

If NAL is ordered to produce the information, SDTA is prepared to protect it. SDTA's purpose in requesting the information is to determine whether customers were unlawfully subscribed to NAL's service by NAL.

SDTA member companies heard from customers that received a "free phone" but did not understand and/or were not told the consequences of receiving the phone. Along with that "free phone" came the termination of ACP services at their home and, in some cases, the cumbersome process of trying to restore home services. SDTA acknowledges that at this time it does not have "proof" that NAL engaged in the prohibited behavior. However, SDTA company experience with its own customers and the way NAL advertised its services (See Exhibit A) causes SDTA to believe the requested information may narrow the issues and/or secure information that may lead to admissible evidence at trial.¹¹ The requested information is, therefore, relevant and NAL is not prevented by CPNI law from producing it.

¹⁰ 47 CFR 64.201 et seq.

¹¹ Kaarup v. St. Paul Fire and Marine Ins. Co., 436 N. W.2d 16, 19 (S. Dakota, 1989).

REQUEST FOR RELIEF

SDTA maintains that all discovery requests it made are relevant and either (1) narrow the issues; (2) seek evidence for use at PUC hearing; (3) secure information that may lead to admissible evidence at PUC hearing. Therefore, the Commission should compel NAL to answer the following discovery requests:

SDTA REQUEST 2: Provide a copy of all documents marked “Confidential” that were filed with the PUC or provided to the PUC Staff.

SDTA REQUEST 3: Provide a copy of all documents and communications provided to or received from USAC with respect to the provision of ACP services in South Dakota. This request includes, but is not limited to:

- a. The election notice sent to USAC, to enable participation in the ACP program.
- b. A copy of all documents filed as a part of the annual ACP certification process.
- c. A copy of all documents submitted to USAC through the Affordable Connectivity Claims System.

REQUEST 4: List and describe all NAL owned facilities in other states. In your answer, specify the state in which the facilities are located.

REQUEST 7: Provide a list of all South Dakota ACP customers. Include the customer’s name, address and phone number.

Dated this 19 day of March 2024.

Respectfully submitted:

/s/ Kara Semmler
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CERTIFICATE OF SERVICE

I hereby certify that: SDTA RESPONSE TO NAL REGARDING MOTION TO COMPEL DISCOVERY in PUC Docket TC23-046, and served upon the following parties electronically:

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Dated this 19 day of March, 2024

/s/ Kara Semmler

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