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THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

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IN THE MATTER OF THE COMPLAINT FILED TC10-026
BY SPRINT COMMUNICATIONS COMPANY, LP
AGAINST NATIVE AMERICAN TELECOM, LLC
REGARDING TELECOMMUNICATIONS SERVICES

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Transcript of Proceedings
August 27, 2013

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BEFORE THE PUBLIC UTILITIES COMMISSION,
GARY HANSON, CHAIRMAN
CHRIS NELSON, VICE CHAIRMAN
KRISTIE FIEGEN, COMMISSIONER

COMMISSION STAFF
Rolayne Ailts Wiest
Karen Cremer
Greg Rislov
Patrick Steffensen
Robin Meyerink
Darren Kearney
Eric Paulson
Deb Gregg
Sherry Dickerson

APPEARANCES
Scott Swier, Native American Telecom
Scott Knudson, Sprint Communications
Tom Tobin, Sprint Communications
William Van Camp, AT&T

Reported By Cheri McComsey Wittler, RPR, CRR

1 TRANSCRIPT OF PROCEEDINGS, via the internet,
2 held in the above-entitled matter, at the South Dakota
3 State Capitol Building, 500 East Capitol Avenue, Pierre,
4 South Dakota, on the 27th day of August, 2013, commencing
5 at 9:30 a.m.

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1 CHAIRMAN HANSON: TC10-026, In the matter of a
2 Complaint filed by Sprint Communications Company, LP
3 against Native American Telecom, LLC regarding
4 telecommunications services. This is docket TC10-026.

5 The questions before the Commission are shall
6 the Commission grant NAT's Motion to Reopen Discovery?
7 Shall the Commission stay Sprint's Motion for Summary
8 Judgment due to new information that has recently come to
9 light? Shall the Commission grant NAT's Motion to
10 Dismiss? Shall the Commission grant NAT's Motion to
11 Dismiss for Mootness? Shall the Commission grant
12 Sprint's Motion for Summary Judgment?

13 As Chair, I will rule regarding NAT's Motion to
14 Reopen Discovery and Stay Print's Motion for Summary
15 Judgment. I would first note that there has been no
16 order closing discovery so there is nothing to reopen.

17 Regarding NAT's request for a stay, I will move
18 that the Commission deny NAT's Motion to Stay Sprint's
19 Motion -- excuse me.

20 COMMISSIONER FIEGEN: Are we going to take
21 these --

22 CHAIRMAN HANSON: We're going to take them in an
23 order. But I had written what I was going to say, and
24 I'm not going to say it in that fashion. I'm just going
25 to rule that unless I'm challenged by the -- unless the

1 Chair is challenged, simply that NAT's Motion to Reopen
2 Discovery is out of order because it was never closed.

3 Is the Chair -- do you wish to have a motion on
4 that, or are the members satisfied?

5 Discussion? Apparently there's some questions.

6 COMMISSIONER FIEGEN: Yeah. Mr. Chairman, do
7 you mind? I haven't heard from the parties on that yet
8 or have had -- and I don't know if that's the first item
9 we want to take today anyway because there is a Motion to
10 Dismiss that I think is the oldest item.

11 CHAIRMAN HANSON: It is the oldest item and that
12 will be the first one that we discuss but there's no
13 point in having a -- the purpose of eliminating any
14 discussion and going through an extended process is that
15 NAT made a Motion to Reopen Discovery, and it was never
16 closed so I'm just ruling that there's no point in having
17 it.

18 COMMISSIONER FIEGEN: All right.

19 CHAIRMAN HANSON: If you would need to have a
20 motion, that's fine.

21 COMMISSIONER NELSON: I would prefer to have a
22 motion.

23 CHAIRMAN HANSON: All right. I'll entertain a
24 motion. I'll even make the motion.

25 I move that the Commission deny NAT's Motion to

1 Reopen Discovery.

2 Any discussion on that motion?

3 COMMISSIONER NELSON: Do we need to take
4 arguments from the parties on that?

5 CHAIRMAN HANSON: There's been -- I can.
6 There's been extensive writing on it that we've received
7 already, and it's basically -- I don't know that there's
8 anything further to argue. But if you wish to. I will
9 acquiesce to any Commissioner who feels they need to have
10 more information on it.

11 The third item that we will be entertaining is
12 to --

13 MR. SWIER: Mr. Chair, I'm sorry. I don't mean
14 to interrupt. This is Mr. Swier.

15 CHAIRMAN HANSON: Yes.

16 MR. SWIER: Just to clarify the record, you are
17 not going to let NAT make any presentation or argue on
18 its Motion to Reopen; is that correct?

19 CHAIRMAN HANSON: That's correct. You will have
20 an opportunity to discuss Stay Sprint's Motion for
21 Summary Judgment.

22 You have a compound motion. You have a compound
23 motion before us. It grant's NAT's Motion to Reopen
24 Discovery and to stay Sprint's Motion for Summary
25 Judgment due to new information. Those are two motions,

1 and I'm separating them. I'm dividing the question. And
2 it appears to have created some confusion.

3 COMMISSIONER NELSON: Mr. Chairman, if I might,
4 I agree with you with your statement that discovery has
5 never been closed, and so, yes, frankly I'm confused as
6 to why the motion is here.

7 But I would like to hear from the party to find
8 out why it is here.

9 COMMISSIONER FIEGEN: Do you mind, Mr. Chairman,
10 if we keep that on the third item?

11 CHAIRMAN HANSON: As I said, if any Commissioner
12 feels they need additional information to what has
13 already been provided in extensive writings to us on this
14 item, you're certainly welcome to have additional
15 information.

16 Obviously that is a desire. It is, however, two
17 distinct motions, and we need to have them presented to
18 us separately.

19 So I will start today with NAT's Motion to
20 Dismiss because that is the oldest motion. And I will
21 allow the parties to argue this motion because it has not
22 had oral arguments yet.

23 So the first item before us is NAT's Motion to
24 Dismiss. Mr. Swier, I assume you're still the lead for
25 NAT?

1 MR. SWIER: Yes, Mr. Chair.

2 CHAIRMAN HANSON: Then you may present your oral
3 arguments.

4 MR. SWIER: Thank you. Mr. Chair, we're
5 proceeding on the Motion to Dismiss based on mootness; is
6 that correct?

7 CHAIRMAN HANSON: The motion that is before us
8 at this time and for you to argue is your Motion to
9 Dismiss.

10 MR. SWIER: And I believe that that Motion to
11 Dismiss, which was filed way back in June of 2010, that
12 Motion to Dismiss was based on the jurisdictional issue
13 of tribal exhaustion. And we went through that tribal
14 exhaustion process both in front of the PUC and on appeal
15 to the Circuit Court.

16 And the Circuit Court affirmed the PUC's ruling
17 that the Doctrine of Tribal Exhaustion did not apply in
18 this case. Therefore, I'm not sure on the Motion to
19 Dismiss what else is really remaining. The decision has
20 already been made on tribal exhaustion.

21 CHAIRMAN HANSON: Does that complete your
22 argument?

23 MR. SWIER: Yes.

24 CHAIRMAN HANSON: Then I'll turn to Sprint for
25 their oral argument on Motion to Dismiss.

1 MR. KNUDSON: Thank you, Mr. Chairman.

2 In light of what counsel for NAT has just said,
3 I can be very brief.

4 CHAIRMAN HANSON: And please identify yourself
5 for the court reporter. We know who you are.

6 MR. KNUDSON: This is Scott Knudson on behalf of
7 Sprint Communications, and with me at counsel table is
8 Tom Tobin, also on behalf of Sprint Communications.

9 The Motion to Dismiss that NAT filed in June of
10 2010 should be denied. The question of the Commission's
11 jurisdiction, as Mr. Swier pointed out, was largely
12 resolved when the Commission denied's NAT's Motion to
13 Stay.

14 The Motion to Dismiss on jurisdictional grounds
15 was premised primarily on NAT's assertion that one of
16 the two Montana exceptions applied and that the
17 Commission did not have jurisdiction to address Sprint's
18 Complaint.

19 Now the Montana exceptions were enunciated by
20 the U.S. Supreme Court. And there are exceptions to the
21 general rule, that an effort by an Indian tribe to
22 regulate the activities of a non-Indian even within the
23 boundaries of the reservation is presumptively invalid.

24 And the Supreme Court has made clear in Atkinson
25 v. Strate and most recently in Plains Commerce Bank that

1 that general rule is important, and that the exceptions
2 should not be interpreted to swallow the general rule.

3 The two exceptions to that general rule are if
4 the non-Indian has consented to the jurisdiction of the
5 tribe -- in this case Sprint has made very clear it has
6 never consented to be regulated by the Crow Creek Sioux
7 Tribal Utility Authority.

8 The second exception is the one that says that
9 it's so important to the survival of the existence of the
10 tribe itself that it must be able to regulate the
11 activities of the non-Indian within the confines of the
12 reservation.

13 That, again, the Supreme Court has made very
14 clear is a very high standard to meet. It can be
15 resolved now. This Commission can simply determine as it
16 did in the Cheyenne River case and as the Federal
17 Communications Commission did in the Western Wireless
18 cases we cited to the Commission before that in these
19 circumstances the Commission's exercise of the
20 jurisdiction over Sprint's complaint does not imperil the
21 very existence of the Crow Creek Sioux Tribe.

22 For those reasons I believe the Commission can
23 deny the June 2010 Motion to Dismiss on the merits.

24 That's all I have to say. Thank you.

25 CHAIRMAN HANSON: Thank you.

1 Do the Interveners -- I see a number of
2 Interveners present, and we have possibly some folks on
3 the phone.

4 Is there anyone, first of all, on the phone who
5 is an Intervener to this docket?

6 I am not hearing any. You may have your phone
7 on mute if you are.

8 Is there anyone in the audience present today
9 who wishes to address the Commission on this item?

10 If not, questions by the Commissioners?

11 I will move in regards to NAT's Motion to
12 Dismiss that the Commission deny NAT's Motion to Dismiss.
13 Sprint is requesting a declaratory ruling regarding, in
14 part, the extent to which the Commission regulates
15 Sprint's interexchange service as well as declaratory
16 rulings regarding issues relating to Certificate of
17 Authority requirements as set forth under South Dakota
18 Law. I believe that the Commission may move forward to
19 consider these issues.

20 Discussion on the motion?

21 Hearing none, Commissioner Nelson.

22 COMMISSIONER NELSON: Aye.

23 CHAIRMAN HANSON: Commissioner Fiegen.

24 COMMISSIONER FIEGEN: Fiegen votes aye.

25 CHAIRMAN HANSON: Hanson votes aye.

1 The motion carries.

2 The next motion before us is NAT's Motion to
3 Dismiss for Mootness. This motion has been argued so I
4 think any further arguments could be limited to
5 discussing any situations that have changed since the
6 motion was argued to the extent the changes affect the
7 motion.

8 Mr. Swier.

9 MR. SWIER: Thank you, Mr. Chair.

10 We'll just reiterate what we've already argued
11 in our Briefs. We think based on what Sprint asked for
12 in its Amended Complaint, it has already received the
13 relief that it sought.

14 It first sought that the Commission had sole
15 authority to regulate Sprint's interexchange services
16 within South Dakota. That decision, of course, was made
17 back in 2010 and 2011 by the Commission and the Circuit
18 Court.

19 Next they want a declaration that NAT has to
20 seek a Certificate of Service from the Commission and
21 file a lawful tariff. As the Commission is aware, NAT
22 has had a pending Certificate of Authority application
23 pending since 2011. And, of course, Sprint has been the
24 one who has been contesting that Certificate of
25 Authority. So we've already sought a Certificate of

1 Authority.

2 The last thing they asked for was an award of
3 money damages. As the Commission is aware, the money
4 damages in this case it's been stipulated were \$281
5 approximately. We have -- NAT has provided a refund of
6 that \$281. Sprint has refused for whatever reason to
7 cash that check. But they agree that the amount is
8 \$281.

9 So when you look at what's happened here, when
10 you look at what Sprint's relief request was, they've
11 been provided with everything that they want. Therefore,
12 the matter is moot because there's nothing else the
13 Commission can provide them in relief based on their
14 Amended Complaint.

15 So we think that's a pretty straightforward
16 argument. There's nothing here anymore that the
17 Commission can do.

18 CHAIRMAN HANSON: Thank you, Sprint.

19 MR. KNUDSON: I'm mindful of the Chair's
20 admonition not to reargue what was argued before. I'll
21 be very brief.

22 I think the new developments since this was
23 argued in July of 2012 have been in NAT's efforts to
24 amend its application for a Certificate of Authority and
25 its assertion now that it continues to provide local

1 exchange services within the reservation without a
2 Certificate of Authority.

3 I think what Sprint is seeking in its Amended
4 Complaint is still alive before the Commission. We
5 assert -- have stated a number of reasons why in our
6 Briefs.

7 The very simple fact is that we brought an
8 action for declaratory relief. We haven't received a
9 ruling on the merits for that declaratory relief. There
10 have been developments along the way in this case. To
11 make a law of the case such that part of our request has
12 already been answered doesn't mean that the Commission is
13 without jurisdiction to issue a definitive order on our
14 request for declaratory relief. And we would urge the
15 Commission to do so through our Motion for Summary
16 Judgment.

17 The question about the Commission's exclusive
18 jurisdiction over Sprint has not been precisely answered.
19 I think the Order on Stay should be extended to make
20 clear to declare that only the Commission has regulatory
21 jurisdiction over Sprint within this state.

22 I think you can use that May 2010 Order as the
23 basis for reaching that determination. Of course, by
24 extension then, the Commission should state that the
25 Crow Creek Sioux Tribal Utility Authority does not have

1 regulatory jurisdiction over Sprint. It operates
2 interexchange activities within the state of
3 South Dakota. And it's pretty clear from our arguments
4 on summary judgment that the Commission must declare that
5 NAT must have a Certificate of Authority before it begins
6 operating within the State of South Dakota.

7 It's important that the Commission take that
8 opportunity to clarify what are the consequences of
9 operating without a lawfully issued Certificate of
10 Authority, that the invoices that NAT has issued are
11 void. They can't hide behind the filed rate doctrine to
12 try to collect on those invoices, and it's engaged in
13 unreasonable practices inside this state.

14 Now NAT's argument that you've heard earlier
15 here is that, well, we have now applied for a Certificate
16 of Authority and that should cure any problems of
17 mootness in Sprint's action. I disagree.

18 First of all, you may recall that NAT initially
19 filed a Certificate of Authority and ran into some
20 opposition not from Sprint or the IXCs or Interveners
21 that were some of the local providers who intervened in
22 that application.

23 Then NAT withdrew its application for a
24 Certificate of Authority, and the Commission allowed it
25 to do so without any discussion of the merits of whether

1 or not it was appropriate. It was just sort of a
2 procedural issue.

3 The law says that you have to have a certificate
4 before you can offer services. NAT now has an
5 application before the Commission but is offering
6 services but it doesn't have a certificate. It could
7 withdraw that certificate again.

8 Indeed, the latest filings in 11-087 suggest
9 that it might do that again because it's running into
10 significant opposition this time from Sprint and
11 CenturyLink.

12 As we stated in our Briefs -- and I think this
13 ties back to what Sprint did with its 2008 application --
14 merely voluntarily ceasing illegal conduct does not moot
15 a case. Now they continue to operate illegally but by
16 saying that we filed for a Certificate of Authority we're
17 now in compliance with the spirit of the law doesn't cut
18 it.

19 We have cited cases from tribal law, which I
20 think are applicable to be followed by the South Dakota
21 Supreme Court. We have the Laidlaw case, which was an
22 environmental enforcement action. And the violators
23 said, well, we're now in compliance with our discharge
24 permit, and the Supreme Court reversed the Fourth
25 Circuit saying just because they're in compliance now

1 doesn't mean that they might not be in compliance later
2 so the issue is still ripe and ready to be cited.

3 We also had another case we cited was the
4 Kidder Peabody case. That involved some securities
5 violations. There again, they said we're in compliance
6 with the rules. The court said that doesn't change. You
7 can't moot the case by our own voluntary conduct.

8 So, again, we urge the Commission to deny the
9 Motion to Dismiss on mootness grounds. We think we have
10 an active controversy here. We think we're entitled to
11 declaratory relief. We've set forth the basis for such
12 relief in our Motion for Summary Judgment.

13 Thank you.

14 CHAIRMAN HANSON: Thank you.

15 Are there any Interveners who would like to
16 address the Commission.

17 Mr. Van Camp.

18 MR. VAN CAMP: Thank you, Mr. Chairman. Bill
19 Van Camp on behalf of AT&T Corp.

20 AT&T in this case has filed a Motion to Support
21 Sprint's Summary Judgment Relief. And on the issue of
22 mootness I think Sprint's counsel has pointed it out and
23 I don't want to belabor the fact but the nature of the
24 request that we support is still alive and that is for
25 declarations of this Commission as provided by rule and

1 statute.

2 And so to walk away from those requests and
3 dismiss on a basis of mootness seems to be inappropriate,
4 and so we would support Sprint in this matter.

5 Thank you.

6 CHAIRMAN HANSON: Thank you.

7 Are there any further Interveners who wish to
8 address the Commission?

9 Mr. Swier, do you have a rebuttal on this item?

10 MR. SWIER: I do.

11 On May 4 of 2011 the Commission issued its Order
12 Denying the Motion to Stay. Here's what the Order said.
13 It said that "The Commission has clear jurisdiction over
14 intrastate telecommunications."

15 The Order further stated "The Commission's
16 jurisdiction over intrastate telecommunications services
17 is extensive." That's pretty clear.

18 The appeal was taken, and the Buffalo County
19 Circuit Court was even more clear. The Circuit Court
20 said "The issue presented in this case is whether or not
21 the PUC or the Tribal Utility Authority has jurisdiction
22 over this matter with respect to intrastate
23 telecommunications."

24 The Circuit Court answered the question like
25 this: "It is quite clear that South Dakota Law provides

1 the PUC substantial and broad authority to regulate
2 telecommunications throughout South Dakota. The
3 South Dakota Supreme Court has reviewed this
4 jurisdictional dispute and has found the Tribe does not
5 have jurisdiction."

6 I don't know how much clearer either the
7 Commission or the Court can be when it finds that the PUC
8 has jurisdiction over intrastate matters. This was
9 decided way back in 2010 or 2011. It's very clear what
10 was decided here. I don't see how this issue is out
11 there anymore.

12 The Commission, the Court have made its
13 decision. NAT is no longer providing intrastate
14 telecommunications services. We're waiting to get our
15 Certificate of Authority to do that.

16 So we're not providing those services anymore.
17 So we simply think -- again, I don't want to belabor it,
18 but we think it's clear this matter is moot. What are
19 the issues the Commission's going to decide anymore that
20 have not been decided?

21 Thank you.

22 CHAIRMAN HANSON: Thank you.

23 Are there any questions by the Commissioners?

24 Is there a motion?

25 COMMISSIONER FIEGEN: Mr. Chairman, I move that

1 the Commission deny NAT Motion to Dismiss for Mootness.
2 I believe NAT has actually failed to show the issues in
3 the Sprint Complaint and that they have been rendered
4 moot.

5 CHAIRMAN HANSON: Thank you.

6 Discussion on the motion?

7 Hearing none, Commissioner Nelson.

8 COMMISSIONER NELSON: Aye.

9 CHAIRMAN HANSON: Commissioner Fiegen.

10 COMMISSIONER FIEGEN: Fiegen votes aye.

11 CHAIRMAN HANSON: Hanson votes aye.

12 The motion carries.

13 The next item before us is the compound motion
14 from NAT regarding the Motion to Reopen Discovery and
15 Stay Sprint's Motion for Summary Judgment. I'll make
16 another attempt here to explain why I was dividing it.

17 Any member may divide a compound motion at any
18 time, and the Chair will recognize that and divide the
19 question.

20 There has not been an order closing discovery so
21 there's nothing to reopen. And that's what I was
22 attempting to forego is the time. I was trying to save
23 time, but obviously it has taken a lot more time to go
24 through that process.

25 So at this juncture I'll entertain NAT's Motion

1 to Reopen Discovery. If anyone here wishes to listen to
2 arguments regarding the Motion to Reopen Discovery, we
3 will still go into -- after disposing of this we will
4 still look at NAT's Motion to Stay Sprint's Motion for
5 Summary Judgment.

6 COMMISSIONER FIEGEN: I do agree with you,
7 Chairman, that it can be brief, though, because there are
8 several documents that we have read on this too.

9 CHAIRMAN HANSON: Yes. It has been briefed. Is
10 there anything --

11 COMMISSIONER FIEGEN: It can be short. The
12 testimony can be short. I'm sorry.

13 CHAIRMAN HANSON: Okay. Brief as opposed to
14 oral argument. So you'd like to hear some oral argument.

15 So, Mr. Swier, on your Motion to Reopen
16 Discovery, you're aware that it is not closed.

17 MR. SWIER: Mr. Chair, when you look at a
18 Summary Judgment Motion under 15-6-56, there are
19 requirements that have to be met in order to combat a
20 party's Motion for Summary Judgment.

21 We have had -- new life has come to bear after
22 those dates that we could file to oppose summary
23 judgment. So the South Dakota Statutes actually do
24 impose a deadline in which NAT can contest that summary
25 judgment.

1 Therefore, the proper procedure is what NAT has
2 followed. It asked the Commission for the authority to
3 reopen discovery so that it can file additional documents
4 in opposition to Sprint's Motion for Summary Judgment.

5 That's a very, I guess, well-known motion in
6 both the State Courts and the Federal Courts on how
7 procedurally this type of matter with summary judgment is
8 handled. So that is why the Motion to Reopen Discovery
9 regarding the summary judgment was filed.

10 As a procedural matter, NAT had to do that to
11 get this matter in front of the Commission because of the
12 summary judgment requirements. So that from a procedural
13 standpoint is why the motion was filed.

14 Now substantively, again, I'm not going to
15 belabor what we already have in our submissions, but the
16 last time that we got together we indicated that we
17 simply want to take the deposition of Randy Farrar.
18 Randy Farrar is the only expert witness that Sprint has
19 propounded in either of these two cases, 10-026 or
20 11-087.

21 They now at the last minute have decided to
22 withdraw Mr. Farrar's testimony. They're running from
23 their own expert now. We want to find out by taking a
24 deposition of Mr. Farrar why that is. Because 11-087 and
25 this case, 10-026, are intertwined. And Sprint has

1 admitted that these cases are intertwined.

2 As we said during the last hearing, we
3 anticipated this would take a week or two to get this
4 scheduled. We could take Mr. Farrar's deposition. We
5 could file any later summary judgment opposition
6 documents that are required.

7 Sprint has refused to let us take Mr. Farrar's
8 deposition. Mr. Shultz on behalf of NAT has been trying
9 to get this deposition of Mr. Farrar scheduled. He's run
10 into nothing but roadblocks. Not only is Sprint running
11 from Farrar, but they refuse to let NAT take his
12 deposition.

13 Farrar is Sprint's own expert. It's absolutely
14 unprecedented where one party cannot take the deposition
15 of another party's expert. But there has been continual
16 roadblocks put up. We could have had this issue decided
17 a week or two ago if they just would have let us take his
18 deposition.

19 We think that he has information that's relevant
20 to this summary judgment matter. So because of that,
21 Mr. Chair, that's why the motion was filed. It's a
22 proper procedural motion, and substantively we simply
23 want to take Farrar's deposition so that the Commission
24 has a full and fair opportunity to review all the facts
25 regarding this summary judgment motion.

1 Thank you.

2 CHAIRMAN HANSON: Mr. Knudson, I allowed
3 Mr. Swier to stray from just the reopening discovery
4 into the summary judgment arena so you may have your
5 rebuttal.

6 MR. KNUDSON: Thank you, Mr. Chairman. I would
7 agree with your observation that the part of the motion
8 seeking to reopen the discovery is technically
9 procedurally unnecessary and can be denied on that basis
10 as you pointed out.

11 There is no discovery schedule closing discovery
12 in 10-026. What Mr. Swier was referring to has to do
13 with what NAT's obligations were to oppose Sprint's
14 Motion for Summary Judgment under the South Dakota Rules
15 of Civil Procedure which are applicable here before the
16 Commission.

17 I'd like to explain why Mr. Farrar, first of
18 all, is not withdrawing his testimony but very similar
19 Sprint has determined that it would not offer his
20 prefiled testimony in 11-087 when that goes to hearing.

21 The reason was is, as the Commission knows, that
22 NAT has been amending its application for a Certificate
23 of Authority, 11-087, and, therefore, it would be
24 appropriate for Mr. Farrar to give his expert opinion
25 testimony on the most recent application before the

1 Commission because that's what's going to be decided when
2 the Commission finally goes to hearing on that
3 application.

4 There is a scheduling order in 11-087, and
5 Mr. Farrar's testimony will be filed with the Commission
6 pursuant to that schedule and he will be filing new
7 testimony to be used at the hearing at 11-087 on Friday,
8 August 30.

9 And so the effort to secure discovery by
10 Mr. Farrar, first of all, is premature because his
11 testimony isn't due yet.

12 Second, it is not the rule in South Dakota that
13 you get automatic deposition discovery of an expert
14 witness. You can propound Interrogatories to the party
15 offering the expert and get his expert report or -- that
16 is the basis for his opinion that way. That's all that's
17 allowed under the rules.

18 If the parties don't agree to deposition
19 testimony, then it behooves the party seeking the
20 deposition to move the Commission for an order allowing
21 discovery. We have moved to quash those deposition
22 notices. That has been briefed by Sprint. We hope it
23 can be heard by the Commission at the first hearing in
24 September.

25 And so, again, it's just putting up a roadblock

1 to try to prevent the Commission from getting to the
2 merits in 10-026.

3 The issue in 11-087, as the Commission pointed
4 out in its Order on Discovery of May 4, 2012, is that in
5 11-087 it's NAT's fitness to get a Certificate of
6 Authority. It doesn't go to what Sprint's practices are
7 as an interexchange carrier in South Dakota.

8 So Farrar's testimony in 11-087 is legally
9 distinct from the issues in 10-026. He will be opining
10 as to the fitness for NAT to receive a Certificate of
11 Authority.

12 The issues before the Commission in 10-026 as
13 they are presented to the Commission in our Motion for
14 Summary Judgment are very clearly legal issues which
15 there are no material facts in dispute. They do not
16 merit on 11-087.

17 So what we're asking for in 10-026 is our
18 request for declaratory relief. The Commission is
19 well-aware of what we're seeking here. We'll talk about
20 that shortly. Nothing that NAT can learn from what
21 Mr. Farrar would say could bear on that issues.
22 Therefore, as we pointed out, they are not entitled to
23 discovery of Mr. Farrar under the rules.

24 Then I'd like to address Mr. Swier's Affidavit.
25 He talked about that they have brought this Motion to

1 continue or to stay the ruling on Sprint's Motion for
2 Summary Judgment because they expected to learn something
3 from Mr. Farrar in his deposition.

4 The first time they made that argument they made
5 it by motion without a supporting Affidavit and the
6 Affidavit has been tendered to -- just last week. The
7 Affidavit would be under Rule 56(f). And I think I've
8 indicated in my papers that -- what that Affidavit has to
9 show.

10 And if you review the Affidavit, it's that we
11 think we'll learn something from Mr. Farrar that will
12 bear on the issues in 10-026. Well, what we think is not
13 enough to secure a continuance of this Summary Judgment
14 Motion.

15 The party opposing the Motion for Summary
16 Judgment has an obligation to come up with material facts
17 that would put the issues in dispute. That Affidavit
18 has to show how further discovery will allow the
19 parties --

20 CHAIRMAN HANSON: Would you speak closer to the
21 mic too.

22 MR. KNUDSON: Allow the party opposing the
23 motion to defeat summary judgment. It must show what
24 facts are expected to be learned through that discovery.
25 That Affidavit doesn't meet that threshold. That is

1 clear from the Dakota Industries v. Cabela's case that we
2 cite to the Commission. And the Eighth Circuit case, the
3 Carnahan case.

4 Very specifically, you've got to come up with
5 specific things. If you're trying to stop a party from
6 getting summary judgment, you've got to show how
7 discovery will allow you to oppose summary judgment.

8 That hasn't happened. So I would simply say
9 there is no need for any further discovery of Mr. Farrar.
10 There is no need to continue. The Commission can go
11 forward and hear argument on Sprint's Motion for Summary
12 Judgment. It's teed up and ready to go. So I urge the
13 Commission to deny the motion.

14 CHAIRMAN HANSON: Thank you.

15 Are there any Interveners in the audience who
16 would like to address the Commission at this time?

17 Mr. Van Camp.

18 MR. VAN CAMP: Bill Van Camp again for AT&T
19 Corp.

20 We would simply stand by Sprint and say that the
21 issues requested in 10-026 on the Motion for Summary
22 Judgment are ripe and that the Commission can rule on
23 those requests.

24 Thank you.

25 CHAIRMAN HANSON: Thank you.

1 Is there anyone else wishing to address the
2 Commission on the question before us?

3 If not, Commissioner questions?

4 MR. SWIER: Commissioner Hanson, this is
5 Mr. Swier. Could I have an opportunity to respond?

6 CHAIRMAN HANSON: Thank you for reminding me.
7 Yes, you have the opportunity to provide a rebuttal.

8 MR. SWIER: Thank you.

9 First of all, Mr. Knudson was absolutely
10 incorrect when he said that Sprint had not withdrawn
11 Mr. Farrar's testimony in 11-087. They very specifically
12 indicated to NAT that they are withdrawing their own
13 expert's testimony.

14 Secondly, NAT did nothing here procedurally
15 wrong. Again, it's unprecedented that one party would
16 not have an opportunity to depose another party's expert
17 witness. That's the entire reason of discovery.

18 Next, Sprint's already admitted -- they've
19 incorporated discovery from 11-087 into their Summary
20 Judgment Motion in this case. They're relying primarily
21 on discovery provided in 11-087.

22 For Sprint to be allowed to incorporate that
23 discovery from 11-087 and then say that 11-087 is not
24 relevant to this Summary Judgment Motion is absolutely
25 incorrect. They've made it, through their

1 submissions, part of this case. They've intertwined the
2 two cases.

3 We should be entitled also to the discovery. We
4 don't know what we're going to get from Mr. Farrar
5 because we simply don't know what he's going to say. But
6 what we have to do is be given a fair opportunity to
7 combat this summary judgment.

8 And by them saying we can -- Sprint can submit
9 all of their information regarding 11-087 but, NAT, you
10 can't do anything with Farrar because 11-087's not
11 relevant, they can't have it both ways. They absolutely
12 cannot have it both ways.

13 Either 11-087 is in play or it's not in play.
14 But to deny us the ability when they made a last-minute
15 withdrawal of their expert -- to deny us the
16 opportunity to follow up on that is fundamentally unfair
17 for NAT.

18 And, again, this isn't delaying things very
19 long. All we want to do is take his deposition. But to
20 allow them to have 11-087 in play and not have NAT do the
21 exact same thing is fundamentally -- again, it's unfair
22 to NAT. NAT should be given this opportunity.

23 CHAIRMAN HANSON: Questions by the
24 Commissioners?

25 Seeing none, is there a motion?

1 Regarding NAT's Motion to Reopen Discovery and
2 Stay Sprint's Motion for Summary Judgment, excuse me, I
3 first note that there has been no order closing discovery
4 so there's nothing to reopen. And I do understand
5 Mr. Swier's argument regarding state law before Circuit
6 Court.

7 Regarding NAT's request for a stay, I move that
8 the Commission deny NAT's Motion to Stay Sprint's Motion
9 for Summary Judgment. I believe the Commission can
10 proceed to rule on Sprint's Motion for Summary Judgment,
11 and just to make sure that all of the knots are tied and
12 the wounds are sewed up, I will move that along with
13 that, that -- to deny the Motion to Reopen Discovery.

14 Any discussion on the motion?

15 COMMISSIONER NELSON: Mr. Chairman, if I might
16 simply make a statement. I don't find that the Farrar
17 matter is of any consequence or involved in any way in
18 this docket.

19 There may have been statements by Sprint trying
20 to tie these two together, but the way I'm looking at it,
21 the Farrar matter is not part of this docket, and so I
22 will be supporting your motion.

23 CHAIRMAN HANSON: Thank you. And I agree
24 entirely with you.

25 Any further discussion on the motion?

1 Hearing none, Commissioner Nelson.

2 COMMISSIONER NELSON: Aye.

3 CHAIRMAN HANSON: Commissioner Fiegen.

4 COMMISSIONER FIEGEN: Fiegen votes aye.

5 CHAIRMAN HANSON: Hanson votes aye.

6 The motion carries.

7 The next item before us is Sprint's Motion for
8 Summary Judgment. This motion was argued previously so
9 the only thing left to argue would be the supplemental
10 authority that had been put into the record by Sprint.

11 Also to the extent circumstances that have
12 changed, then those changes of circumstances can be
13 referenced to the extent that it changes the effect the
14 motion.

15 Mr. Swier. Excuse me. That's Sprint's motion.

16 Mr. Knudson.

17 MR. KNUDSON: Yes. Thank you, Your Honor --
18 Mr. Chairman.

19 We brought before the Commission two matters
20 that bear generally on what the issues are before the
21 Commission with respect to our Motion for Summary
22 Judgment. One was the All American decision, which was a
23 Federal Communications decision issued in a traffic
24 pumping case involving two entities operating -- claiming
25 to operate as CLECS and the Commission found that these

1 two entities had engaged in unjust and unreasonable
2 conduct.

3 In particular we brought this to the
4 Commission's attention because one of the CLECS had not
5 complied with the legal requirements to operate in Utah
6 and that the Utah Public Service Commission ordered --
7 issued a Certificate of Public Continuance and Necessity
8 but revoked it when it became clear that they were
9 operating in violation of state law and had made certain
10 misrepresentations to the Commission.

11 And that was material to the FCC's determination
12 that the CLEC could not enforce its invoices issued under
13 the tariff it had before the FCC.

14 The other case was the SanCom case, and that's
15 involving Qwest Communications and, again, it was an
16 interpretation involving whether or not -- again by the
17 Federal Communications Commission whether Qwest would owe
18 access charges to Sancom. And, again, this was involving
19 Free Conferencing Corporation, and we thought this would
20 be of some general applicability to the issues before the
21 Commission in 10-026.

22 Since our motion was filed, I think that again
23 there have been some discovery in 11-087. I know that
24 this raises the issue as to whether the two are
25 intertwined. Again, I think we've concluded that the

1 legal issues before the Commission in 10-026 are distinct
2 from what's before the Commission in 11-087. But I would
3 like to point out that in those materials they say that
4 they are providing local exchange services to Free
5 Conferencing Corporation, and that, again, I think bears
6 directly on the issue is that they're operating illegally
7 within the State of South Dakota.

8 Otherwise, I think we've fully briefed and
9 argued the issues before the Commission on our Motion for
10 Summary Judgment. Again, we'd urge the Commission to
11 grant our Motion for Declaratory Relief.

12 We think it would be important for the
13 Commission to make a statement as to the importance of
14 applying -- following the legislation -- legislature's
15 directive that you have to get the certificate before you
16 operate. That determination has legal consequences. It
17 will also set precedent that could be important in the
18 future Commission proceedings.

19 So, again, I'd urge you to grant our motion.

20 Thank you.

21 CHAIRMAN HANSON: Thank you. Mr. Swier.

22 Mr. Swier, if you're speaking, your mute is on.

23 MR. SWIER: Sorry.

24 Mr. Chair, as the Commission is aware, the
25 South Dakota Supreme Court has found that summary

1 judgment is a drastic remedy and can't be granted unless
2 the moving party has established a right to a judgment
3 with such clarity as to leave no room for controversy.

4 We have here a series of material facts that
5 preclude the Commission from granting Sprint's Motion for
6 Summary Judgment.

7 The first is that the burden is on Sprint here
8 to prove each and every material fact. There has been no
9 evidence presented by Sprint showing that NAT has
10 provided intrastate services to anyone outside the
11 reservation. As a fundamental matter, you cannot grant
12 summary judgment on conjecture.

13 There is absolutely no evidence in this summary
14 judgment that NAT provides services to residents outside
15 the reservation.

16 Meaning, if calls are within the boundaries of
17 the reservation, those calls continue to be under the
18 jurisdiction of the tribe. It's when those calls either
19 come from somewhere in the state to the reservation or
20 someone on the reservation calls out to someone let's say
21 in Sioux Falls. That's when the Commission's intrastate
22 jurisdiction applies.

23 There is no showing by Sprint that NAT has done
24 anything but provide services to tribal members on the
25 reservation.

1 What NAT has done in its Certificate of
2 Application is to ask the Commission, look, if we want to
3 provide telecom services outside of the reservation,
4 that's what we're asking for under the Certificate of
5 Authority application. That's what we're asking for in
6 that case.

7 Also, regarding Free Conferencing that
8 Mr. Knudson brought up, Free Conferencing Corporation,
9 that company is not domiciled in South Dakota. It only
10 operates within the boundaries of the reservation. It's
11 just like Vonage or Google Plus or Skype. Those
12 companies don't need state authority to operate. Free
13 Conferencing is the exact same type of entity.

14 So, number one, there are no material facts
15 showing that NAT provides services outside the
16 reservation boundaries. That issue right there precludes
17 summary judgment.

18 Next is paragraph 5 of Mr. Knudson's statement
19 of undisputed material facts. The routing -- the call
20 routing system that Ms. Clouser testifies to in Statement
21 of Material Fact No. 5 is wrong. We have provided Sprint
22 in 11-087 with the correct routing information.
23 Therefore, paragraph 5 also creates a disputed genuine
24 issue of material fact. That alone precludes summary
25 judgment.

1 Next is Statement of Material Fact No. 8 from
2 Sprint. That is an absolute incorrect reading of
3 Mr. Holoubek's Affidavit. Mr. Holoubek's Affidavit says
4 that NAT "intends to serve our customers." And that's
5 exactly right.

6 When the Certificate of Authority is hopefully
7 granted by this Commission NAT does intend to serve our
8 customers. But, as I indicated before, there's no
9 evidence in the record that shows that NAT is doing
10 anything but providing interstate services and services
11 within the boundaries of the reservation.

12 They're only serving tribal members on the
13 reservation. And that information is also in the record
14 that we have provided.

15 Paragraph No. 9 under the statement of
16 undisputed material facts. Receivers are required for
17 anyone on the reservation to receive NAT's services.
18 It's an actual box. It's a receiver that each of NAT's
19 customers have to obtain services.

20 NAT is only providing those services -- excuse
21 me. Those receivers to tribal members on the
22 reservation. Again, Sprint has not proven any fact that
23 would combat that particular statement. Again, that fact
24 alone precludes summary judgment.

25 Statement of Material Fact No. 25. The quote

1 that Sprint provides in that undisputed material fact is
2 taken out of context. The intercarrier compensation
3 order eliminates interstate access charges for all calls.
4 Not only access stimulation. The Order is intended to go
5 to a bill and keep system for all calls. Not just access
6 stimulation.

7 What that presumes with that quote and with that
8 submission by Sprint, it either presumes, number one,
9 that the Commission hasn't read the intercarrier
10 compensation order, which I know is not true, or Sprint's
11 presuming that the Commission doesn't understand the
12 Order and what the Order actually applies to, and I know
13 that's not true either. So that Statement of Material
14 Fact No. 25 is taken entirely out of context.

15 And, finally, Statement of Material Fact No. 31
16 where Sprint alleges that the Crow Creek Sioux Tribe has
17 received nothing from NAT. If you look at the Holoubek
18 Affidavit, which was filed on January 11 of 2013, you
19 will find in paragraph 17, 18, 19, 23, 28, and 29 all of
20 the benefits that the Crow Creek Sioux Tribe has gained
21 from NAT. Those facts from our perspective are
22 undisputed.

23 So for Sprint to say that the Crow Creek Sioux
24 Tribe has received nothing from NAT, not only is that
25 wrong but there is a genuine issue of material fact as to

1 whether that is true. That fact alone is enough to
2 preclude summary judgment in this case.

3 So when you look at what the Commission has to
4 decide here under the summary judgment standard, NAT has
5 just pointed out six statements of material fact that are
6 contested.

7 Now when this matter would go to trial and the
8 Commission has to make factual determinations, that's a
9 different story. But on summary judgment there cannot be
10 one genuine issue of material fact. Otherwise, if there
11 is a genuine issue of material fact, the summary judgment
12 has to be denied.

13 Not only has NAT showed one, but NAT's now shown
14 six genuine issues of fact. And because of that, summary
15 judgment should not be granted in this case, and the case
16 should proceed on to a fact-finding area.

17 Thank you.

18 CHAIRMAN HANSON: Thank you.

19 Are there any Interveners who wish to address
20 the Commission?

21 Mr. Van Camp.

22 MR. VAN CAMP: Thank you, Mr. Chairman. Bill
23 Van Camp again on behalf of AT&T.

24 I would like to offer that the Commission could
25 certainly decline the invitation of NAT to confuse the

1 requested relief in the Motion for Summary Judgment.
2 AT&T filed in support of what Sprint is really asking
3 here, and that is, one, that NAT cannot provide a
4 declaration of the Commission, not as to the activities
5 of NAT as they relate to 11-087 and what they're
6 currently conducting but a declaration of the Commission
7 that NAT cannot provide telecommunications services
8 within South Dakota without a Certificate of Authority
9 from the Commission. They've asked for that. They've
10 made a summary judgment request to that, and we've joined
11 that.

12 They've asked that NAT cannot invoice for
13 intrastate telephone communications until it has a lawful
14 tariff on file with the Commission. They've asked that,
15 and we have joined that and think that that issue is
16 before the Commission and can be decided.

17 To offer material facts that are in dispute that
18 don't go to the issues before the Commission on the
19 summary judgment request I think is attempting to lead
20 astray not only the standard on summary judgment but the
21 issues that are being requested today by Sprint.

22 Sprint is asking -- has asked that NAT invoices
23 to it, and we would ask for a similar ruling that those
24 that were issued before the Certificate of Authority was
25 filed are invalid and void.

1 They've further asked that the Commission
2 determine under state law and the cases cited by Sprint
3 that the Commission itself has the ability to regulate
4 Sprint interexchange services within the State of South
5 Dakota, and conversely as a similarly situated IXC that
6 they have the same authority over us.

7 So I just would offer that we could go down a
8 path of arguing every fact in a lengthy briefing and
9 arguing the case. That doesn't mean that those material
10 facts that are in dispute go to the issues that are
11 before the Commission today.

12 Thank you.

13 CHAIRMAN HANSON: Thank you, Mr. Van Camp.

14 Are there any other Interveners wishing to
15 address the Commission?

16 Rebuttal opportunity, Mr. Knudson.

17 MR. KNUDSON: Thank you, Mr. Chairman.

18 The procedural setting here is one of a Motion
19 for Summary Judgment which Sprint has brought. It's our
20 obligation to demonstrate that there are no material
21 facts in dispute and that we're entitled to judgment as a
22 matter of law.

23 Once we make that motion and meet that initial
24 threshold burden, then it becomes the obligation of NAT
25 in opposing that motion to demonstrate that there are

1 material facts in dispute.

2 As Mr. Van Camp has so rightly pointed out, what
3 NAT has tried to demonstrate as material facts in dispute
4 do not go to the legal issues before the Commission
5 raised on our Motion for Summary Judgment.

6 And, thus, they are trying to sort of misdirect
7 the Commission in terms of its inquiry as to whether or
8 not the motion is ready for determination and ruling as a
9 matter of law.

10 With respect to the issue of whether NAT has
11 been providing intrastate services, we demonstrated that,
12 in fact, Sprint was billed and paid for intrastate
13 services and then continued to be billed for intrastate
14 services after we stopped paying for intrastate
15 services.

16 So in some way the -- the way that -- NAT is
17 providing and billing for intrastate services, and that's
18 been really undisputed. Now there's a claim now that
19 they're not providing intrastate services to anybody
20 who's not a tribal member. But I think we have to
21 look -- they just filed this morning in 11 -- excuse me.
22 In 10-026 the objections and responses to Staff's third
23 data requests that were propounded in 11-087.

24 And on page 9 this here quote "is providing
25 telecommunications services to tribal members on the

1 reservation as well as to customers who agree to be
2 subject to the jurisdiction and authority of the Crow
3 Creek Sioux Tribe." So that "as well as" indicates that
4 they are currently -- and this is sworn to by the current
5 president of NAT -- providing services to customers who
6 agreed to be subject to the jurisdiction of the Crow
7 Creek Sioux Tribe.

8 And that's consensual, but that doesn't divest
9 the Commission of jurisdiction. The customers who are
10 nontribal members cannot agree by being subject to the
11 tribal jurisdiction that the Commission has no such
12 jurisdiction.

13 The Commission's jurisdiction has been
14 determined to be extensive. At the most this would be
15 concurrent jurisdiction.

16 But I think the record before the Commission on
17 our motion is undisputed that there were intrastate
18 services being provided when we brought the Complaint and
19 continue to be billed to Sprint for a long time after.
20 All they're saying now is we won't ask you to pay for
21 those invoices.

22 So then what of these paragraphs here that they
23 say are material and disputing? Paragraph 5 of our
24 Statement of Undisputed Material Facts is that Sprint
25 does not have a physical presence on the reservation.

1 And then it talks about the routing sequence and how
2 traffic gets to be exchanged with NAT.

3 Now NAT is saying that the routing of these
4 calls is different than it was initially. Well,
5 regardless, that doesn't -- that's not a material fact in
6 dispute as it bears on what we are seeking in our Request
7 for Declaratory Relief.

8 And paragraph 8 says here NAT stated it intends
9 to serve all customers within the Crow Creek Reservation
10 without discriminating between whether the members are --
11 individual and businesses it serves are members or owned
12 by members of Crow Creek Sioux Tribe or not.

13 Now that ties in with what I just quoted in
14 their responses to Staff discovery. The intent to
15 provide services irrespective of tribal membership or
16 ownership is precisely the issue -- that, of course,
17 brings into play the Commission's jurisdiction to
18 regulate intrastate services.

19 And so that is not a material fact in dispute.
20 If their intent is to do so, it implicates Commission
21 jurisdiction. And they haven't disputed that. Their
22 simply saying they -- intend to isn't enough, but I
23 disagree. I think if you're intending to provide these
24 services, implicates Commission jurisdiction.

25 Then they say that there is -- on paragraph 9

1 this is dealing with the Crow Creek Sioux Tribal Utility
2 Authority when it issued an order granting that authority
3 to operate on the reservation. The Order did not limit
4 its grant of authority to provide services over the
5 tribal members. They don't dispute that.

6 The only thing they talk about is you have to
7 have a box or some type of receiver to operate. But the
8 point is the Order itself authorizing NAT to operate was
9 not confined solely to tribal members or the boundaries
10 of the reservation. That fact is not disputed.

11 Then in paragraph 25 that has the Intercarrier
12 Compensation Order and the bill and keep regime, which is
13 saying it was taken out of context. Our point to this is
14 what the future holds here for NAT.

15 But that really isn't material to what we're
16 seeking in terms of our Request for Declaratory Relief.
17 So whether they say we take it out of context, that is
18 irrelevant to what's before the Commission on our Motion
19 for Summary Judgment.

20 And finally, and apparently this was the most
21 important fact in dispute, is somehow that there have
22 been benefits to the tribe. I think at the time that
23 this was drafted it was clear from the record before
24 Sprint that there had been no cash distributions to the
25 Tribe, that the internet library and those other services

1 were not what is encompassed here with paragraph 31.

2 But the point really is whether there are some
3 incidental benefits or small cash distributions to the
4 tribe as being an owner of NAT is irrelevant to the
5 issues again before the Commission on our Motion for
6 Summary Judgment, which is they've got to have a
7 Certificate of Authority before they begin to operate.

8 They don't have one. And the consequence of not
9 having one is that only the Commission can regulate
10 Sprint and not the Crow Creek Sioux Tribe. Those are the
11 issues we've raised in our Motion for Summary Judgment.
12 There are no material facts disputing what we are seeking
13 here.

14 So I would urge the Commission to grant our
15 motion. I think the record is clear and undisputed.

16 Thank you.

17 CHAIRMAN HANSON: Thank you.

18 MR. SWIER: Mr. Commissioner, this is Mr. Swier.
19 Because of the importance of this issue, would you be
20 willing to give me an opportunity to respond?

21 CHAIRMAN HANSON: Without objection from the
22 other Commissioners, I will.

23 MR. SWIER: Thank you.

24 CHAIRMAN HANSON: Is there an objection?

25 No objection. You may proceed.

1 MR. SWIER: Thank you. First of all --

2 CHAIRMAN HANSON: Mr. Swier, understanding that
3 I will give Mr. Knudson an opportunity to refute what you
4 say.

5 MR. SWIER: Absolutely, that's fine, Mr. Chair.

6 First of all, again, the Commission has to make
7 a decision based on the record in front of it for summary
8 judgment.

9 Sprint in its summary judgment submitted a
10 number of what they thought were undisputed material
11 facts that at the time it was submitted Sprint obviously
12 thought that those facts were extremely relevant to its
13 Summary Judgment Motion or they would not have included
14 those facts in its filings.

15 So for Sprint to say, well, this material fact
16 that we proposed really isn't important and, yeah,
17 there's a genuine issue about that but really the
18 Commission can overlook that because it's not important,
19 you can't submit those precise statements of fact, have
20 them combatted with NAT's facts, and now come back to the
21 Commission and say, well, Commission, I think you should
22 just ignore those material facts that we've propounded.
23 The rules don't allow that.

24 Number two, the Commission has to look at the
25 current dispute. There is no evidence -- in fact, the

1 evidence shows that NAT is not providing intrastate
2 telecommunications services. It is limited in the
3 services it's providing to interstate services and
4 services that have -- that occur within the boundaries of
5 the reservation.

6 And this Commission has never found -- as I
7 think you know, you can't -- if there's activity that
8 occurs within the boundaries of the reservation, it has
9 never been found that this Commission has jurisdiction
10 over those telecommunication activities.

11 Otherwise, we're in a whole different area of
12 legal jurisdiction that this Commission has not taken up
13 yet.

14 Also the facts show that NAT, not only is it not
15 providing those intrastate services, but it's not billing
16 anybody for any intrastate services. The reason being
17 NAT's not providing them. They're only providing
18 services within the boundaries of the reservation.

19 So, again, the burden here is not on NAT. The
20 burden is on Sprint to prove each and every material
21 fact, and they have -- they have failed entirely to prove
22 probably the most important fact in this entire case, is
23 NAT providing intrastate services. And the answer is not
24 only no but Sprint's failed to make any showing that NAT
25 is doing that.

1 So, again, based on that, Mr. Chair, this case
2 is not ripe for summary judgment. There are facts in
3 dispute that have to be decided by the fact finders. But
4 this is not a case that summary judgment can be granted.
5 There are multiple issues of material fact here.

6 Thank you.

7 CHAIRMAN HANSON: Mr. Knudson.

8 MR. KNUDSON: Thank you, Mr. Chair.

9 And believe the record before the Commission is
10 fully adequate to grant Sprint's Motion for Summary
11 Judgment on the points it's seeking in its Motion -- or
12 its Complaint for declaratory relief.

13 One thing that you're not hearing from NAT is
14 what NAT's burden here is once we've met our initial
15 threshold showing, that they have to come up with
16 specific -- specific admissible evidence disputing the
17 material facts that --

18 CHAIRMAN HANSON: Could you place your phone on
19 mute, please. Thank you.

20 MR. KNUDSON: Sprint is relying on for its
21 Motion for Summary Judgment. That the statement of
22 undisputed material facts that Sprint filed may be
23 broader than narrow material facts doesn't change the
24 basis or the ability of the Commission to go forward and
25 grant our Motion for Summary Judgment.

1 Again, when I say that they have a burden here
2 to come forward with specific material facts in dispute,
3 let's turn to Native American Telecom's response to
4 Sprint's Statement of Material Facts.

5 They said paragraph 5. That has to do with
6 Sprint's presence in the operation and how the calls are
7 routed. They don't -- they simply deny it, and they
8 don't offer any evidence in response. The mere denial I
9 think it's well established is inadequate to oppose a
10 Motion for Summary Judgment.

11 Paragraph 8 is a denial. There is no -- and,
12 again, that doesn't relate to anything material to the
13 motion.

14 Paragraph 9 they admit that there was this
15 order, but they deny the legal conclusion. They deny --
16 basically no material facts offered up in dispute on that
17 particular point.

18 The same with 25. NAT has to -- to reargue what
19 we say about the intercarrier compensation order. And,
20 again, paragraph 31 the same thing. They deny it because
21 it's our legal conclusions about -- and also about the
22 benefits the Tribe has received.

23 So, again, I go back to the pleading position
24 here. NAT opposed Sprint's Motion for Summary Judgment
25 saying that they needed discovery from Randy Farrar.

1 They didn't say they needed discovery on any other issue.
2 They just wanted to hear what he had to say.

3 And so if we look at that as an admission, then
4 everything else was ready to go. And so I think the
5 record before the Commission is ready. It's sufficient
6 to conclude that there are no material facts in dispute,
7 and Sprint is entitled to summary judgment as a matter of
8 law on the points raised in its Motion for Summary
9 Judgment.

10 Thank you.

11 CHAIRMAN HANSON: Thank you.

12 We'll go to questions from the Commission. And
13 I have to say that I'm struggling with this. It was
14 interesting listening to your argument at the end when
15 you said granting the Motion for Summary Judgment on the
16 points that you brought forth. You're not asking for
17 summary judgment then on the entirety of the --

18 When you're moving your phone around it's making
19 a lot of noise. So if you could keep it on mute until
20 you need to speak, I'd appreciate it.

21 So you're not asking for summary judgment on the
22 entirety of this docket?

23 MR. KNUDSON: We are. The declaratory relief we
24 seek would be sufficient to conclude this case.

25 CHAIRMAN HANSON: It's interesting. In looking

1 at summary judgment, whether it's proper, the burden is
2 on your shoulders to prove that there isn't any issue of
3 material fact.

4 I have a couple of questions -- well, a few
5 questions for Mr. Swier. Then I may get back to
6 Mr. Knudson.

7 Mr. Swier, in Sprint's Motion for Summary
8 Judgment they are seeking a declaration that NAT cannot
9 provide telecommunications anywhere within the State of
10 South Dakota without a COA from the Commission.

11 Do you agree with that? I believe you've agreed
12 with that in your arguments.

13 MR. SWIER: I agree to the extent that if NAT
14 were providing services that started on the reservation
15 and terminated somewhere in South Dakota off the
16 reservation, that that would require a Certificate of
17 Authority.

18 I agree that if a call were made from
19 Sioux Falls to the reservation, that NAT would need a
20 Certificate of Authority. That's what it's asking for in
21 the Certificate of Authority action.

22 However, if the telecommunications activity is
23 limited to the boundaries of the reservation, then the --
24 then the Commission -- we don't believe -- and this
25 hasn't been briefed by anybody. It's our position that a

1 Certificate of Authority from the PUC is not necessary if
2 those activities are relegated to the reservation
3 boundaries.

4 And, again, there's been no showing by Sprint
5 that any of these telecom services are anything but
6 within the reservation. And, in fact, our submissions
7 show that indeed this is all limited to interstate
8 activity and to activity within the reservation
9 boundaries.

10 So that's where we have a dichotomy here of
11 genuine facts. And as the Chair said, it's Sprint's duty
12 to show that indeed NAT is providing services at this
13 time beyond the reservation boundaries. And they have
14 not done it.

15 CHAIRMAN HANSON: Would you agree that NAT
16 cannot invoice for intrastate telecommunication services
17 until it has a lawful tariff on file with the
18 Commission?

19 MR. SWIER: Can you repeat that question,
20 Mr. Chair? I'm sorry.

21 CHAIRMAN HANSON: It's the second issue of the
22 Motion for Summary Judgment stating that NAT cannot
23 invoice for interstate telecommunications services until
24 it has lawful tariff on file with the Commission.

25 MR. SWIER: Yeah. And NAT is not doing that, as

1 our submission showed. So that would be simply a
2 theoretical decision by the Commission because NAT is not
3 doing that.

4 CHAIRMAN HANSON: Well --

5 MR. SWIER: That's why the Certificate of
6 Authority application is pending.

7 CHAIRMAN HANSON: Mr. Swier, it's not
8 theoretical. It's a question of whether you can or
9 cannot do it. It's not theoretical as to whether or not
10 a person can drive their car over the speed limit. They
11 can. They simply -- it's against the law, whether they
12 are doing it at the present time or not.

13 MR. SWIER: Well, we agree that we need a
14 Certificate of Authority for intrastate activity. And if
15 it's intrastate, then you can't bill without the
16 Certificate of Authority. Which is what NAT has been
17 trying to do for the last three years.

18 But, again, there's been no showing that NAT is
19 providing those services.

20 CHAIRMAN HANSON: However, you are in agreement
21 that you cannot do it unless you have a lawful tariff on
22 file with the Commission; correct?

23 MR. SWIER: Right. And, yeah, we're in
24 agreement that we're not doing that.

25 CHAIRMAN HANSON: On their item 3 they state in

1 request for summary judgment, NAT's invoices to Sprint
2 for interstate services that NAT has issued without a
3 Certificate of Authority and lawful tariff on file with
4 the Commission are void.

5 MR. SWIER: NAT has already refunded those \$281
6 in intrastate activity.

7 CHAIRMAN HANSON: Exactly. So --

8 MR. SWIER: And that's undisputed.

9 CHAIRMAN HANSON: So you agree with item 3 on
10 their Motion for Summary Judgment.

11 On item No. 4 they are asking for summary
12 judgment on -- stating the Commission has sole authority
13 to regulate Sprint's interexchange, that's interexchange
14 services, within the State of South Dakota and conversely
15 the Crow Creek Sioux Tribal Utility Authority cannot
16 regulate Sprint's activities in this state.

17 Do you agree or disagree with that?

18 MR. SWIER: I think that's an imprecise
19 question, and I disagree. Because Sprint is not
20 recognizing the dichotomy between activities that are
21 occurring exclusively on the reservation, which is in the
22 record, and items that take place somewhere outside the
23 reservation within the state.

24 So I can't give an answer to that because their
25 request is not -- it's not straightforward. And it also

1 is not precise. Because the Commission has to look at
2 those two slivers of jurisdiction. And, again, there's
3 been no showing that NAT is doing anything off the
4 reservation that would be considered intrastate.

5 CHAIRMAN HANSON: In a previous Commission
6 meeting -- I don't have the date before me. I just have
7 my notes. You used the word okay, stating that NAT is
8 okay with declaring that the Commission has sole
9 authority to regulate Sprint's interexchange services
10 within the State of South Dakota and declaring that
11 Crow Creek Sioux Tribal Authority lacks jurisdiction over
12 Sprint.

13 That is when we were discussing the fact that
14 Sprint's Summary Judgment Motion set forth issues that
15 were different than Sprint's Amended Complaint.

16 MR. SWIER: My answer to that would be I don't
17 agree. It seems to be that you could argue that that's
18 what the Commission and the court's decision was, and we
19 obviously disagree with that.

20 So, no, I'm not willing to admit that. We think
21 the ruling is wrong. But, I mean, ultimately the court
22 will decide.

23 But, again, they're asking for summary judgment
24 here on each and every one of their motions for relief.
25 And, again, there are genuine facts that preclude this

1 summary judgment.

2 CHAIRMAN HANSON: Just out of curiosity, should
3 we be referring -- does NAT exist any longer? Should we
4 be referring to Crow Creek Telecom proceedings?

5 MR. SWIER: We did provide a notice, of course,
6 that the corporate structure has now changed, but I think
7 in terms of this summary judgment I think it would just
8 be as easy to continue to use NAT because that would be
9 consistent with what we've used for the last four years,
10 three, four years.

11 But the notice is in the file that the corporate
12 structure has now changed, and it is a tribally organized
13 LLC.

14 CHAIRMAN HANSON: Thank you.

15 Any other questions from the other
16 Commissioners?

17 In preparing a motion for this item I have
18 really struggled because I think it's a very, very close
19 situation.

20 The summary judgment, the law does state that if
21 the pleadings, depositions, Answers to Interrogatories
22 and admissions on file together with the Affidavit, if
23 any, show that there is no genuine issue as to any
24 material fact, that the moving party is entitled to a
25 judgment as a matter of law and that the moving party

1 must clearly demonstrate an absence of any genuine issue
2 of material fact and that it is on their shoulders, the
3 moving party, to make that very -- to clearly
4 demonstrate.

5 I struggle with that because I think this is --
6 if this were requesting partial summary judgment on some
7 of the issues, that we could issue that. However, I feel
8 that we do need to have -- simply because it's so
9 black-and-white that I just don't see that I can support
10 summary judgment.

11 Any other discussion? I haven't made a motion
12 but --

13 If not, I really want to get this concluded. I
14 really -- and I know that everyone wants to get this done
15 expeditiously. I've chatted with counsel in regards to
16 how we can accomplish that quickly, and I'm going to make
17 a motion that will include that.

18 I move that the Commission deny Sprint's Motion
19 for Summary Judgment. I believe that Sprint has failed
20 to demonstrate the absence of any genuine issue of
21 material fact.

22 I believe that an evidentiary hearing is
23 necessary to determine those facts. And in the interest
24 of moving this proceeding along, I direct that the
25 Commission hold the evidentiary hearing as soon as

1 possible and instruct Staff to work with the parties
2 to determine the date for the hearing as soon as
3 possible.

4 Also I do not believe that any prefiled
5 testimony is needed. So there would be no need to
6 account for prefiled testimony when determining a date
7 for the hearing. And I'd look for any friendly
8 amendment, any additions to that motion.

9 If there aren't -- if there aren't any, then I
10 will look to discussion on the motion.

11 Commissioner Nelson.

12 COMMISSIONER NELSON: Mr. Chairman, I intend to
13 support your motion today for several reasons.

14 First of all, this issue of are there disputes
15 to material facts, there's certainly disputes here to
16 facts that are not material. I grant that. But there
17 are some disputes to facts that I believe are material
18 and a couple that have been mentioned today are the exact
19 routing of the calls and this issue of are we providing
20 service to nontribal members or not? Those are certainly
21 material.

22 But perhaps more importantly, I believe that
23 there are a lot of pertinent facts that are not yet on
24 the record. Why do I feel that that's so important to
25 get those facts in the record?

1 There's probably nothing that we will ever deal
2 with that is as tricky as this issue of Tribal versus
3 State jurisdiction. I want to get this exactly right
4 because I believe that what we do here today is not going
5 to have an impact just on NAT or whatever NAT has become
6 or whatever the activities going on in Crow Creek, but
7 will have an impact on other reservations in other
8 situations down the line.

9 And so I am absolutely adamant that we get this
10 exactly right. And I don't believe we've got all the
11 facts on the table in order to do this.

12 There are a lot of different permutations as to
13 how telecommunications flows, who interacts with who,
14 where those interactions take place, and I think the
15 answers to all of those questions ultimately get at who
16 has jurisdiction and, again, I don't think we've got all
17 the facts on the table to make that decision, much as I
18 would like to today. But I don't think we can and do
19 this justice.

20 The final thing I would say, and I think
21 Commissioner Hanson hinted at this, is that the four
22 items that Sprint has asked for summary judgment on,
23 they're fairly broad. If they were narrower, we might be
24 able to go there today, but they're not. They're pretty
25 broad, and there are some things that I don't think we

1 can deal with today because of how broad they are and the
2 fact that we don't have the facts to answer those.

3 And so for all of those reasons I'm going to
4 support this motion. But I also wanted to reiterate what
5 Commissioner Hanson said. I'm going to say this as
6 strongly as I can to both sides involved in this. We
7 will not be delaying this any longer than we have to.

8 We intend to hold this hearing as quickly as
9 possible. We intend to resolve this matter, and, you
10 know, if either side attempts to delay our efforts to
11 bring this to hearing quickly, it will not be looked upon
12 favorably.

13 So with that, Mr. Chairman, I will support your
14 motion.

15 CHAIRMAN HANSON: Thank you.

16 Any further discussion?

17 COMMISSIONER FIEGEN: I actually agree with the
18 comments, and I wanted to talk about as soon as possible.
19 Any time we say that in a motion everybody can interpret
20 that differently. But, you know, you've heard it from
21 all three Commissioners that we would certainly like this
22 to come to hearing very quickly.

23 CHAIRMAN HANSON: Thank you. Good points.
24 Appreciate that.

25 Then on the motion, Commissioner Nelson.

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COMMISSIONER NELSON: Aye.

CHAIRMAN HANSON: Commissioner Fiegen.

COMMISSIONER FIEGEN: Fiegen votes aye.

CHAIRMAN HANSON: Hanson votes aye.

The motion carries.

(The proceeding is concluded at 10:57 a.m.)

1 STATE OF SOUTH DAKOTA)

2 :SS

CERTIFICATE

3 COUNTY OF SULLY)

4

5 I, CHERI MCCOMSEY WITTLER, a Registered
6 Professional Reporter, Certified Realtime Reporter and
7 Notary Public in and for the State of South Dakota:

8 DO HEREBY CERTIFY that as the duly-appointed
9 shorthand reporter, I took in shorthand the proceedings
10 had in the above-entitled matter on the 27th day of
11 August, 2013, and that the attached is a true and correct
12 transcription of the proceedings so taken.

13 Dated at Onida, South Dakota this 4th day of
14 September, 2013.

15

16

17

18

Cheri McComsey Wittler,
Notary Public and
Registered Professional Reporter
Certified Realtime Reporter

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