

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE APPLICATION
OF NATIVE AMERICAN TELECOM, LLC
FOR A CERTIFICATE OF AUTHORITY
TO PROVIDE LOCAL EXCHANGE
SERVICE WITHIN THE STUDY AREA OF
MIDSTATE COMMUNICATIONS, INC.

Docket No. TC11-087

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

Sprint Communications Company L.P. ("Sprint") requests the Public Utilities Commission of the State of South Dakota ("Commission") grant Sprint's Motion to Compel the applicant, Native American Telecom, LLC ("NAT"), to respond to discovery requests designed to 1) test NAT's statements in its Application and testimony, and 2) ensure that statutory standards for certification are met. The Commission should reject NAT's position that NAT's limited factual representations should be taken as true, without being subject to discovery, and that NAT's Application should simply be rubber-stamped.

I. STANDARD FOR MOTION TO COMPEL

SDCL § 15-6-26(b)(1) establishes that relevant evidence is within the scope of discovery:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

SDCL § 15-6-26(b)(1). In addition, under South Dakota Administrative Rules, the Commission must find there is “good cause” to order the production of the relevant information requested. ARSD 20:10:01:22.01. This good cause standard is met because the evidence Sprint seeks bears on matters that must be analyzed before a certificate can issue, and is necessary to determine whether NAT has met its burden of proof on all aspects of its Application. *See* SDCL § 49-31-3 (applicant bears burden of proof); ARSD 20:10:32:05 (same). In addition, ARSD 20:10:32:03 explicitly allows the Commission to require the production of any “additional information” beyond that called for by the rules that is deemed necessary to determine whether a certificate should issue.

As described below, the information Sprint seeks is either directly related to the legal standards that apply in this certification case, or is calculated to obtain information that may be used to test the affirmative statements NAT has made in its Application and testimony. This information is necessary for the case to be properly litigated, and the production of that information will ensure the Commission has before it that which it needs to properly protect the public interest.

II. STANDARDS FOR CERTIFICATION

The Commission has jurisdiction to authorize the provision of intrastate telecommunication services. SDCL § 49-31-3. By law, an applicant for such authority has the burden to prove that it has “sufficient technical, financial and managerial capabilities to offer the telecommunications services described in its application before the commission may grant a certificate of authority.” SDCL § 49-31-3. The

Commission's rules impose this same burden on the applicant, which, in this case, is NAT. ARSD 20:10:32:05. *See also* SDCL § 49-31-71.

The Commission's rules establish certain specific information the Commission must examine to determine whether an applicant has "sufficient technical, financial and managerial capabilities" to obtain the requested authority. *See* ARSD 20:10:32:03 (standards for application for local service authority); ARSD 20:10:24:02 (standards for applicant for interexchange service authority). The Commission is then charged with examining the information under the followings standards:

Rejection of incomplete application -- Decision criteria for granting a certificate of authority. A certificate of authority to provide local exchange service may not be granted unless the applicant establishes sufficient technical, financial, and managerial ability to provide the local exchange services described in its application consistent with the requirements of this chapter and other applicable laws, rules, and commission orders. If an application is incomplete, inaccurate, false, or misleading, the commission shall reject the application. In determining if an applicant has sufficient technical, financial, and managerial capabilities and whether to grant a certificate of authority for local exchange services the commission shall consider:

- (1) If the applicant has an actual intent to provide local exchange services in South Dakota;
- (2) Prior experience of the applicant or the applicant's principals or employees in providing telecommunications services or related services in South Dakota or other jurisdictions, including the extent to which that experience relates to and is comparable to service plans outlined in the filed application;
- (3) The applicant's personnel, staffing, equipment, and procedures, including the extent to which these are adequate to ensure compliance with the commission's rules and orders relating to service obligations, service quality, customer service, and other relevant areas;

- (4) The nature and location of any proposed or existing facilities which the applicant intends to use in providing local exchange services;
- (5) If the applicant intends to resell local exchange services or enter into facility arrangements with other telecommunications carriers, when the necessary arrangements will be in place;
- (6) The applicant's marketing plans and its plan and resources for receiving and responding to customer inquiries and complaints;
- (7) If the applicant has sufficient financial resources to support the provisioning of local exchange service in a manner that ensures the continued quality of telecommunications services and safeguards consumer and public interests;
- (8) If the applicant, in providing its local exchange services, will be able to provide all customers with access to interexchange services, operator services, directory assistance, directory listings, and emergency services such as 911 and enhanced 911;
- (9) If the applicant is seeking authority to provide local exchange services in the service area of a rural telephone company, if the applicant's plans for meeting the additional service obligations imposed in rural telephone company service areas pursuant to § 20:10:32:15 are adequate and demonstrate that the applicant will in fact meet such obligations;
- (10) The extent to which the applicant, applicant's affiliates, or applicant's principals have been subject to any civil, criminal, or administrative action in connection with the provisioning of telecommunications services; and
- (11) Any other factors relevant to determining the applicant's technical, financial, and managerial capability to provide the services described in the application consistent with the requirements of this chapter and other applicable laws, rules, and commission orders.

ARSD 20:10:32:06 (emphasis added).

This requires a critical analysis of facts, not, as NAT perceives, a simple rubber stamping of an application that has been deemed complete by the Staff.

III. SPRINT'S DISCOVERY REQUESTS ARE DESIGNED TO EITHER TEST STATEMENTS IN NAT'S APPLICATION OR ENSURE NAT MEETS THE STANDARDS FOR CERTIFICATION

Sprint has requested information from NAT that Sprint believes is necessary to either test statements in NAT's Application and testimony, or to ensure that NAT meets the standards in ARSD 20:10:32:03, ARSD 20:10:32:06, and ARSD 20:10:24:02. NAT provided very little by way of substantive response to these questions, and instead objected on relevance grounds.¹ For the Commission's convenience, Sprint has broken down the disputed discovery into five categories, and will address each category in turn.

A. Sprint is Entitled to Discovery Designed to Determine Whether NAT Has Been Operating Without A Certificate in Violation of South Dakota Law

It appears to Sprint that NAT has been providing regulated intrastate telecommunications services to Free Conferencing Corporation ("Free Conferencing"), without a certificate, since 2009. Direct Testimony of Randy Farrar ("Farrar Test."), pp. 7-9. It also appears to Sprint that NAT is willfully violating the law since it decided in 2011 to file this Application. *Id.* Once it decided it needed a certificate, NAT did not cease providing service to Free Conferencing while its application was pending, but instead kept doing that which was unauthorized.

¹ Sprint's requests, and NAT's responses, are attached as Exhibit A hereto.

Sprint asserts that a company with a proven track record of engaging in blatant and intentional ongoing violations of state law does not have sufficient and appropriate managerial ability to provide local exchange services “consistent with the requirements of this chapter and other applicable laws, rules, and commission orders.” ARSD 20:10:32:06. Moreover, the provision of service without a certificate is a misdemeanor (SDCL § 49-31-3), and, since the Commission has the authority to revoke a certificate for a willful violation of law (SDCL § 49-31-75), it certainly has the authority to deny an application for that reason.

Sprint has asked a number of discovery questions designed to allow it to prove that NAT has been violating state law by providing service to Free Conferencing:

SPRINT’S REQUEST	NAT’S RESPONSE	REASON FOR RELEVANCE
<p>INTERROGATORY NO. 2: Identify and describe the services, goods, or products you have provided to Free Conferencing Corporation, including all features and practices associated with the provision of each service, the specific tariff or contract provision(s) pursuant to which each service, good, or product has been provided.</p>	<p>Subject to and notwithstanding the aforementioned general objections, NAT also objects that the terms in this interrogatory (“services,” “goods,” “product”) are vague, overbroad, and ambiguous. Moreover, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter.</p>	<p>If NAT has provided jurisdictional services to Free Conferencing without a certificate, it has violated state law, which can be considered by the Commission under ARSD 20:10:32:06(2) (prior experience of applicant’s management), ARSD 10:10:32:06(10) (extent to which applicant’s management have been subject to enforcement actions), and ARSD 20:10:32:06:11) (other information relevant to managerial qualifications).</p>

SPRINT'S REQUEST	NAT'S RESPONSE	REASON FOR RELEVANCE
<p>INTERROGATORY NO. 9: With respect to the voice services you have been providing, identify the taxes, assessments and surcharges that apply, including USF surcharges, TRS, and 911 assessments. Has NAT been collecting and/or remitting such amounts? If so, explain how amounts have been calculated, if not, why not? In doing so you should explain the calculations that resulted in NAT's remittance of \$10,665 to USAC for the 2012 calendar year.</p>	<p>Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter.</p>	<p>This information is necessary to help Sprint understand the scope of NAT's current operations, and thus prove NAT has been illegally providing service without a certificate. In addition, to the extent NAT has provided service without collecting or remitting the applicable federal and state assessments, those would be additional ongoing violations of law, relevant to show NAT lacks sufficient managerial qualifications.</p>
<p>INTERROGATORY NO. 15: With respect to the "End User Fee Income" of \$166,629 listed on your 2011 Profit and Loss, please describe all of the expenses included in this line item, identify the payment dates and amounts, and identify the payor(s).</p>	<p>Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter.</p>	<p>This information is necessary to help Sprint understand the scope of NAT's current operations, and thus prove NAT has been illegally providing service without a certificate.</p>

The Commission should order NAT to answer these interrogatories.

B. Sprint is Entitled to Find Out Whether NAT is a Sham Entity

As documented in the testimony of Mr. Farrar, Sprint is requesting the Commission find that NAT was established, and is being operated, as a sham entity designed to provide benefits primarily to David Erickson's companies, Wide Voice and

Free Conferencing. NAT’s Application and testimony claim NAT was established to benefit the Crow Creek Tribe. *See* NAT’s Revised Application, pp. 4-6. If Sprint proves NAT is a sham entity, that will bear on whether NAT’s Application is inaccurate or misleading (ARSD 20:10:32:06), and whether NAT really intends to provide local exchange services in South Dakota. ARSD 20:10:32:06(1). It will also provide other relevant evidence with respect to NAT’s managerial qualifications. ARSD 20:10:32:06(11).

Sprint has asked a number of discovery questions designed to allow it to obtain evidence that NAT is a sham entity:

SPRINT’S REQUEST	NAT’S RESPONSE	REASON FOR RELEVANCE
<p>INTERROGATORY NO. 22: Identify by name the members of the Tribal Utility Authority who voted to approve NAT’s application for authority to provide service on the Reservation.</p>	<p>Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter.</p>	<p>Sprint has been provided no evidence that would show NAT’s original authorization was issued by a duly formed and constituted Tribal Utility Authority. This is especially suspicious given the proven corruption that was occurring within the Tribe at that time. <i>See</i> Ex. B (Aberdeen news story on federal corruption investigation and trial).</p>

SPRINT'S REQUEST	NAT'S RESPONSE	REASON FOR RELEVANCE
<p>INTERROGATORY NO. 27: Who maintains NAT's financial records? Where are NAT's financial records kept?</p>	<p>Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter.</p>	<p>If, as Sprint expects, NAT's financial records are kept and controlled by Mr. David Erickson or his companies, that will help prove NAT is a sham entity.</p>
<p>INTERROGATORY NO. 30: Identify the employees and officers of Free Conferencing who provide services to NAT or perform functions for NAT.</p>	<p>Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter.</p>	<p>The extent to which Free Conferencing employees perform functions for NAT will tend to prove NAT is a sham entity.</p>
<p>INTERROGATORY NO. 31: When did NAT first approach Free Conferencing to enter into a contract with NAT?</p>	<p>Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter.</p>	<p>The timing of this arrangement may help show NAT was created as a sham entity to facilitate Free Conferencing's conference call services.</p>

SPRINT'S REQUEST	NAT'S RESPONSE	REASON FOR RELEVANCE
<p>INTERROGATORY NO. 36: Please describe and identify, in detail, all cash transactions and payments from NAT to NAT Enterprise in 2010 and 2011. This should include, but not limited to, professional or consulting fees, interest payments, shareholder distributions, and percent of gross revenues per Section 6.06 of the Joint Venture Agreement.</p>	<p>Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter.</p>	<p>NAT's payments and transfers to NAT Enterprise may help prove Mr. Farrar's conclusion that NAT was established to benefit NAT Enterprise and Mr. Erickson's companies.</p>
<p>INTERROGATORY NO. 38: Please describe and identify, in detail, all cash transactions and payments from NAT to Wide Voice in 2010 and 2011. This should include, but not limited to, professional or consulting fees, interest payment, shareholder distributions, and percent of gross revenues per Section 6.06 of the Joint Venture Agreement.</p>	<p>Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter.</p>	<p>NAT's payments and transfers to NAT Enterprise may help prove Mr. Farrar's conclusion that NAT was established to benefit NAT Enterprise and Mr. Erickson's companies.</p>

SPRINT'S REQUEST	NAT'S RESPONSE	REASON FOR RELEVANCE
DOCUMENT REQUEST NO. 5: Produce all documents that reflect NAT's Board of Directors' minutes, meetings, and resolutions, and NAT's bylaws.	Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter.	Whether NAT has had board meetings and maintained corporate form may tend to prove NAT is being operated as a sham entity.

The Commission should require NAT to respond fully to the above discovery requests.

C. Sprint is Entitled to Find Out Whether NAT Has the Financial Capabilities to Provide Local Exchange Service

As documented in the testimony of Mr. Farrar, based on the information that has been provided, NAT operates at a loss, will not provide any long-term benefits to the Tribe, and its business model is not sustainable over time. Farrar Test. pp. 19-34.² NAT's current and future financial capabilities to provide local exchange services are directly relevant to this case. See ARSD 20:10:32:06(7) (Commission shall consider whether applicant has "sufficient financial resources to support the provisioning of local exchange service in a manner that ensures the continued quality of telecommunications service and safeguards consumer and public interests."). NAT has affirmatively represented that "NAT has the financial . . . qualification to provide the telecommunications services as outlined in NAT's [Application]." Direct Testimony of

² As Mr. Farrar noted, he had to make certain assumptions because NAT refused to provide detail behind its numbers. See, e.g., Farrar Test. p. 26.

Corey Roesel (“Roesel Test.”), p. 10. It has further committed that it is “prepared to allocate the necessary resources to provide high quality telecommunications service to its customers.” Direct Testimony of Jeff Holoubek (“Holoubek Test.”), p. 14. Nothing stands behind those statements other than superficial balance sheets and profit and loss statements that are not self-explanatory, do not provide a complete picture, and may not be true. Sprint is entitled to discovery on these financial representations, and what is behind the financial information disclosed.

Sprint has asked a number of discovery questions designed to allow it to investigate these issues of financial capability:

SPRINT’S REQUEST	NAT’S RESPONSE	REASON FOR RELEVANCE
<p>INTERROGATORY NO. 11: You list “Wi-Max Equipment” as an asset valued at \$216,086.81 on December 31, 2011 Balance Sheet. What makes up that category, how did you determine the value of that asset, and what is its depreciation rate?</p>	<p>Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter.</p>	<p>This information will be analyzed to determine whether NAT has the financial capability to provide local exchange service, and whether the information contained in NAT’s application is incomplete, inaccurate, false, or misleading.</p>
<p>INTERROGATORY NO. 12: With respect to the “Marketing Expense” of \$170,097.75 listed on your 2011 Profit and Loss statement, please identify all of the expenses included in this line item, including amounts NAT paid to Free Conferencing Corporation.</p>	<p>Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter.</p>	<p>This information will be analyzed to determine whether NAT has the financial capability to provide local exchange service, and whether the information contained in NAT’s application is incomplete, inaccurate, false, or misleading.</p>

SPRINT'S REQUEST	NAT'S RESPONSE	REASON FOR RELEVANCE
<p>INTERROGATORY NO. 13: With respect to the "Telephone and Circuit Expenses" of \$132,101 listed on your 2011 Profit and Loss, please identify the facilities covered by this line item, and identify the parties to whom you paid this expense and the amount paid to each party.</p>	<p>Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter.</p>	<p>This information will be analyzed to determine whether NAT has the financial capability to provide local exchange service, and whether the information contained in NAT's application is incomplete, inaccurate, false, or misleading.</p>
<p>INTERROGATORY NO. 14: With respect to the "Professional Fees" of \$87,710 listed on your 2011 Profit and Loss, please identify the parties to whom you paid this expense, the services they provided, and the amount paid to each party.</p>	<p>Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter.</p>	<p>This information will be analyzed to determine whether NAT has the financial capability to provide local exchange service, and whether the information contained in NAT's application is incomplete, inaccurate, false, or misleading.</p>
<p>INTERROGATORY NO. 15: With respect to the "End User Fee Income" of \$166,629 listed on your 2011 Profit and Loss, please describe all of the expenses included in this line item, identify the payment dates and amounts, and identify the payor(s).</p>	<p>Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter.</p>	<p>This information will be analyzed to determine whether NAT has the financial capability to provide local exchange service, and whether the information contained in NAT's application is incomplete, inaccurate, false, or misleading.</p>

SPRINT'S REQUEST	NAT'S RESPONSE	REASON FOR RELEVANCE
<p>INTERROGATORY NO. 16: With respect to the “Access Termination Fee Income” of \$91,814 listed on your 2011 Profit and Loss, please describe the sources of revenue within this account, and identify the payor(s) including the amount paid by each payor(s).</p>	<p>Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter.</p>	<p>This information will be analyzed to determine whether NAT has the financial capability to provide local exchange service, and whether the information contained in NAT’s application is incomplete, inaccurate, false, or misleading.</p>
<p>INTERROGATORY NO. 17: With respect to the “CABS Collection Fee Income” of \$157,983 listed on your 2011 Profit and Loss, please describe the sources of revenue within this account, and identify the payor(s) including the amount paid by each payor(s).</p>	<p>Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter. Such information also constitutes confidential financial information and trade secrets.</p>	<p>This information will be analyzed to determine whether NAT has the financial capability to provide local exchange service, and whether the information contained in NAT’s application is incomplete, inaccurate, false, or misleading.</p>
<p>INTERROGATORY NO. 28: Identify all of NAT’s bank accounts.</p>	<p>Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter.</p>	<p>This information will be analyzed to determine whether NAT has the financial capability to provide local exchange service, and whether the information contained in NAT’s application is incomplete, inaccurate, false or misleading.</p>

SPRINT'S REQUEST	NAT'S RESPONSE	REASON FOR RELEVANCE
<p>INTERROGATORY NO. 33: If NAT's revenues do not exceed expenses, where will NAT obtain the necessary resources to continue to provide high quality telecommunication services to its customers?</p>	<p>Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter. Without waiving said objections, NAT maintains that its revenues will exceed expenses. Also, following the Federal Communications Commission's recent USF/ICC Order, and consistent with this Order, more IXCs now recognize their legal duty to pay these tariffs and are doing so.</p>	<p>NAT failed to answer the question, and should be required to disclose how it will provide high-quality services if its revenues do not exceed its expenses.</p>
<p>DOCUMENT REQUEST NO. 1: Provide all documentation, including general ledger journal entries or other accounting records of NAT reflecting NAT's long term liabilities to Widevoice as listed on your December 31, 2011 Balance Sheet.</p>	<p>Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter.</p>	<p>Those documents may lead to admissible evidence showing that NAT lacks financial capabilities, or that NAT's Application was inaccurate or misleading.</p>

SPRINT'S REQUEST	NAT'S RESPONSE	REASON FOR RELEVANCE
<p>DOCUMENT REQUEST NO. 2: Provide any documents that evidence commitments for future financing of NAT's operations.</p>	<p>Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter.</p>	<p>If NAT has no commitments of future financing, that bears on its intention and capability to provide high quality service.</p>
<p>DOCUMENT REQUEST NO. 3: Provide 2011 bank statements, general ledger and journal entries and any other financial records that identify the detail for NAT's income and expenses.</p>	<p>Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in. this Certificate for Authority matter.</p>	<p>Those documents may lead to admissible evidence showing that NAT lacks financial capabilities, or that NAT's Application was inaccurate or misleading.</p>
<p>DOCUMENT REQUEST NO. 7: Provide all general ledger journal entries or other accounting records of NAT that support NAT's balance sheets and profit and loss statements for 2009, 2010 and 2011.</p>	<p>Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter.</p>	<p>Those documents may lead to admissible evidence showing that NAT lacks financial capabilities, or that NAT's Application was inaccurate or misleading.</p>

SPRINT'S REQUEST	NAT'S RESPONSE	REASON FOR RELEVANCE
<p>DOCUMENT REQUEST NO. 8: Provide all documents reflecting NAT'S loan from Widevoice.</p>	<p>Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter.</p>	<p>Those documents may lead to admissible evidence showing that NAT lacks financial capabilities, or that NAT's Application was inaccurate or misleading.</p>
<p>DOCUMENT REQUEST NO. 9: Please provide any cost studies or similar analyses that you have performed or had prepared on your behalf by any consultant or other third party for access services and high volume access services.</p>	<p>Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter.</p>	<p>If any such studies exist, they should be provided to allow Sprint to evaluate NAT's claims that it expects its revenues to exceed expenses going forward.</p>

The Commission should order NAT to respond fully to the above discovery requests.

D. Sprint is Entitled to Test the Validity and Completeness of Statements Made in NAT's Application and Testimony

NAT asserts that the facts represented in its Application and testimony are sufficient to entitle it to a certificate. *See* NAT's Motion for Summary Judgment. At the very least, NAT should be obligated to answer questions designed to determine whether those statements are, in fact, true. If those statements are not true, or if the discovery demonstrates that NAT's Application is incomplete or misleading, that will be relevant under ARSD 20:10:32:06.

Sprint has asked the following discovery questions designed to allow it to test the validity and completeness of statements made in NAT's Application and testimony:

SPRINT'S REQUEST	NAT'S RESPONSE	REASON FOR RELEVANCE
<p>INTERROGATORY NO. 5: In the federal court case between NAT and Sprint, Mr. Keith Williams testified on October 14, 2010 that calls to NAT numbers were switched by a Widevoice switch in Los Angeles, before being routed in IP back to NAT router in Ft. Thompson. October 14 Hearing Tr. Pp. 18-19. Is that true today? If so, where is that reflected in NAT'S response to Staff Request 1-2. Regardless of switch location, provide detail (make, model, capacity, cost, date of purchase, ownership information, location) with respect to the switch now being used.</p>	<p>Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter.</p>	<p>ARSD 20:10:32:03(8)(c) requires NAT to identify <u>all</u> facilities that will be used in providing service. NAT's application does not describe how or where calls will be switched, nor is that addressed in testimony. This is basic information that should have been in the Application, and it should be provided in response to a discovery request.</p>

SPRINT'S REQUEST	NAT'S RESPONSE	REASON FOR RELEVANCE
<p>INTERROGATORY NO. 6: Describe the equipment to be used to provide NAT's Inbound Calling Service to those receiving it.</p>	<p>Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter.</p>	<p>ARSD 20:10:32:03(8)(c) requires NAT to identify <u>all</u> facilities that will be used in providing service. NAT's application does not describe all equipment that will be used to provide inbound calling service, nor is that addressed in testimony. This is basic information that should have been in the Application, and it should be provided in response to a discovery request.</p>
<p>INTERROGATORY NO. 7: Identify the location of the cell towers and WiMax equipment you claim allows you to provide service throughout the reservation. Provide coverage maps that demonstrate the signals being generated can reach throughout the reservation.</p>	<p>Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter.</p>	<p>ARSD 20:10:32:03(8)(c) requires NAT to identify <u>all</u> facilities that will be used in providing service. NAT's application does not identify the location of the cell towers and WiMax equipment, nor is that addressed in testimony. This is basic information that should have been in the Application, and it should be provided in response to a discovery request.</p> <p>In addition, this information is necessary to test NAT's statement in response to Staff's Data Request 1-1 that it can currently provide service throughout the requested service area, and does not need phased deployment.</p>

SPRINT'S REQUEST	NAT'S RESPONSE	REASON FOR RELEVANCE
<p>INTERROGATORY NO. 18: Explain from a technical standpoint how NAT proposes to provide intrastate interexchange service. Identify the rates and terms that will apply to the intrastate interexchange service NAT proposes to provide.</p>	<p>Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter. Without waiving said objection, a copy of NAT's tariff can be found at http://nativeamericantelecom.com. NAT's intrastate rates mirror interstate rates (even though NAT could legally charge more for intrastate service).</p>	<p>NAT's response relates to <u>access</u> service, not end user interexchange service. There appears to be nothing in the Application or testimony explaining how NAT will provide intrastate interexchange service, even though it has asked for that authority. <i>See Revised Application p. 1.</i></p>
<p>INTERROGATORY NO. 23: What carriers besides MidState has NAT interconnected with for the exchange of telecommunications?</p>	<p>Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter. This interrogatory is also vague and ambiguous as to "interconnected with for the exchange of telecommunications" and requests proprietary information.</p>	<p>ARSD 20:10:32:03(8)(c) requires NAT to identify <u>all</u> facilities that will be used in providing service. NAT's application does not describe which other carriers it is interconnected with, nor is that addressed in testimony. This is basic information that should have been in the Application, and it should be provided in response to a discovery request.</p> <p>In addition, NAT represented in its Application that it was interconnected with "Mid State and other Carriers." Revised Application, p. 6.</p>

SPRINT'S REQUEST	NAT'S RESPONSE	REASON FOR RELEVANCE
<p>INTERROGATORY NO. 24: Identify the manufacturer(s) of the WiMax technology NAT uses, including the model and serial numbers of each piece of technology (hardware) NAT proposes to use to provide services under its Application.</p>	<p>Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter.</p>	<p>ARSD 20:10:32:03(8)(c) requires NAT to identify <u>all</u> facilities that will be used in providing service. NAT's application does not describe the WiMax equipment with particularity, nor is that addressed in testimony. This is basic information that should have been in the Application, and it should be provided in response to a discovery request.</p>
<p>INTERROGATORY NO. 29: Identify by name the employees and work locations of all of NAT's employees.</p>	<p>Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter.</p>	<p>NAT has affirmatively represented that NAT has created three full-time and four part-time jobs, and asked that this be considered in evaluating the application. <i>See</i> revised Application, p. 3; Holoubek Test., pp. 4, 7. Having done so, it must provide information that will either back this up or show the representations to be inaccurate or misleading.</p>

SPRINT'S REQUEST	NAT'S RESPONSE	REASON FOR RELEVANCE
<p>INTERROGATORY NO. 41: Please provide the number of NAT employees as of year-end 2010 and 2011.</p>	<p>Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter.</p>	<p>NAT has affirmatively represented that NAT has created three full-time and four part-time jobs, and asked that this be considered in evaluating the application. <i>See</i> revised Application, p. 3; Holoubek Test., pp. 4, 7. Having done so, it must provide information that will either back this up or show the representations to be inaccurate or misleading.</p>
<p>INTERROGATORY NO. 42: Please provide an organization chart showing all NAT employees as of year-end 2011.</p>	<p>Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter.</p>	<p>NAT has affirmatively represented that NAT has created three full-time and four part-time jobs, and asked that this be considered in evaluating the application. <i>See</i> revised Application, p. 3; Holoubek Test., pp. 4, 7. Having done so, it must provide information that will either back this up or show the representations to be inaccurate or misleading.</p>
<p>INTERROGATORY NO. 43: Please provide a detailed diagram showing the call path through NAT-owned or controlled equipment for traffic terminating to any and all Conference Call Company-owned or controlled conference bridge equipment.</p>	<p>Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter.</p>	<p>ARSD 20:10:32:03(8)(c) requires NAT to identify <u>all</u> facilities that will be used in providing service. NAT's application does not describe the call path in detail, nor is that addressed in testimony. This is basic information that should have been in the Application, and it should be provided in response to a discovery request.</p>

SPRINT'S REQUEST	NAT'S RESPONSE	REASON FOR RELEVANCE
INTERROGATORY NO. 44: Please provide a detailed diagram showing the call path through NAT-owned or controlled equipment for traffic terminating to a traditional residential or business end-user (non-Conference Call Company).	Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter.	ARSD 20:10:32:03(8)(c) requires NAT to identify <u>all</u> facilities that will be used in providing service. NAT's application does not describe the call path in detail, nor is that addressed in testimony. This is basic information that should have been in the Application, and it should be provided in response to a discovery request.

E. Sprint is Entitled to Expert Discovery

NAT has relied on the purported expert testimony of Mr. Carey Roesel. Under South Dakota law, a litigant relying on expert testimony must always “identify each person with whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.” SDCL § 15-6-26(b)(4)(A)(i). Sprint is entitled to ask for and receive this information, as well as information that is relevant to these matters and the case at hand. SDCL § 15-6-26(b)(1) & 15-6-26(b)(4)(A). In addition, trial preparation protection for communication between a party’s expert and a party’s attorney does not protect NAT from disclosing the facts, data, or assumptions provided by NAT’s attorney to Mr. Roesel and used by Mr. Roesel to formulate his opinion. SDCL § 15-6-26(b)(4)(C)(ii)-(iii).

Further, this information is relevant because it will help establish the credibility of Mr. Roesel and, in particular, the reliability of the grounds on which he bases his opinion. SDCL § 19-15-2. This information is necessary because it will allow Sprint to properly prepare its case, including the cross examination of Mr. Roesel.

Sprint has asked a number of discovery questions designed to allow it to litigate this issue:

SPRINT'S REQUEST	NAT'S RESPONSE	REASON FOR RELEVANCE
INTERROGATORY NO. 19: Identify any factual information provided to Mr. Roesel by NAT or its representatives.	Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter. This interrogatory is also vague, ambiguous, overbroad, and constitutes confidential financial and proprietary information and trade secrets.	This information is relevant to the reliability and completeness of Mr. Roesel's testimony, as well as the credibility of the substance of the facts and opinions to which he testified, and the summary of the grounds for each of his opinions.
INTERROGATORY NO. 20: Identify the cases in which Mr. Roesel has testified or prefiled testimony over the last four years.	Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter.	Sprint is entitled to this information so that it can prepare its case, particularly the cross examination of Mr. Roesel.

SPRINT'S REQUEST	NAT'S RESPONSE	REASON FOR RELEVANCE
INTERROGATORY NO. 21: What documents has Mr. Roesel relied on to conclude NAT has the financial capability to provide the services covered by its application?	Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter. This interrogatory is also vague, ambiguous, overbroad, and constitutes confidential financial and proprietary information, and trade secrets.	This information is relevant to the reliability and completeness of Mr. Roesel's testimony, as well as the credibility of the substance of the facts and opinions to which he testified, and the summary of the grounds for each of his opinions.
DOCUMENT REQUEST NO. 4: Provide any documents (other than what was attached to the application, amended application, or responses to staff discovery requests) that were provided to Mr. Roesel.	Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter.	This information is relevant to the reliability and completeness of Mr. Roesel's testimony, as well as the credibility of the substance of the facts and opinions to which he testified and the summary of the grounds for each of his opinions.

The Commission should order NAT to provide this expert discovery.

CONCLUSION

For the above reasons, the Commission should grant Sprint's Motion to Compel.

Dated: April 2, 2012

BRIGGS AND MORGAN, P.A.

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