

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN RE:

Docket No. _____

SPRINT COMMUNICATIONS
COMPANY L.P.,

Complainant,

COMPLAINT

v.

NATIVE AMERICAN TELECOM, LLC,

Respondent.

INTRODUCTION

Sprint Communications Company L.P. ("Sprint") brings this action against Native American Telecom, LLC ("NAT") to bring to an end NAT's efforts to establish traffic pumping operations in South Dakota in violation of state law. NAT claims the right to charge Sprint terminating switched access services for calls allegedly made to the Crow Creek Reservation under a tariff allegedly on file with the Crow Creek Sioux Tribe Utility Authority ("Authority"). NAT's claim that it provides competitive local exchange services to the Crow Creek Reservation is a sham: all or virtually all of NAT's traffic billed to Sprint terminates to conference/chat lines operated by non-tribal members likely not located on tribal lands. NAT has engaged in secret, *ex parte* communications with the Authority, which has inappropriately attempted to assert jurisdiction over Sprint and ordered it to pay NAT pursuant to NAT's tariff on file with the Authority.

With this action, Sprint seeks a determination that the Public Utilities Commission of the State of South Dakota ("Commission" or "PUC") has the sole authority to regulate Sprint's intrastate interexchange services and that NAT lacks authority to bill Sprint for switched access services without a Certificate of Authority and valid tariff on file with the Commission. Concomitantly, Sprint seeks a declaration that because the Commission has the sole authority over Sprint's intrastate interexchange services, the Authority is without jurisdiction over Sprint. Finally, Sprint seeks a determination that NAT must repay Sprint the amounts it inadvertently paid NAT for unauthorized and illegal switched access charges.

THE PARTIES

1. Complainant Sprint is a limited partnership with its principal place of business at 6200 Sprint Parkway, Overland Park, Kansas. It is authorized to do business in South Dakota.

2. Respondent NAT is a limited liability company organized under the laws of South Dakota with its principal place of business in Sioux Falls. According to a filing NAT made with the Commission, Gene DeJordy and Tom Reiman are the principal owners of NAT. On information and belief, neither DeJordy nor Reiman is a Native American.

JURISDICTION

3. The Commission has jurisdiction over this Complaint pursuant to SDCL 1-20-19, 15-6-14(a), 49-13-1, 49-13-13 and 49-31-3, as well as ARSD 20:10:01:01 and 20:10:01:34.

BACKGROUND

4. The Commission has issued Sprint a certificate to provide intrastate interexchange service within South Dakota. When providing intrastate interexchange services, Sprint purchases intrastate switched access services from originating carriers, intermediary carriers and terminating carriers in accordance with tariffs filed with and approved by the Commission.

5. The rates for intrastate switched access services are regulated by the Commission pursuant to SDCL Chapter 49-31 and ARSD Chapter 20:10:27.

6. Under South Dakota law, intrastate switched access charges can only be assessed pursuant to a filed and approved tariff. In the absence of tariff authority to bill for a call, intrastate switched access charges cannot be billed, and no payment is due on any invoices illegally sent out by a local exchange carrier ("LEC").

7. On September 8, 2008, NAT filed with the Commission an application for a Certificate of Authority to provide competitive local exchange service on the Crow Creek Indian Reservation pursuant to ARSD 20:10:32:03 and 20:10:32:15. (Midstate Communications and Venture Communications Cooperative are the local exchange services with Certificates of Authority to provide service in areas encompassing the Crow Creek Reservation.) On October 28, 2008, the Crow Creek Sioux Tribe Utility Authority authorized NAT to provide LEC services with the Crow Creek Reservation. In response, on December 1, 2008, NAT moved to dismiss its application pending before the Commission. On February 5, 2009, the Commission granted the motion to dismiss

without prejudice. As a result NAT provides CLEC service within the State of South Dakota without a Certificate of Authority from the Commission.

8. NAT began invoicing Sprint in December 2009. Sprint paid the first two invoices NAT sent to Sprint. When Sprint determined that NAT existed simply to pump traffic, Sprint disputed on-going invoices and sought to recover those amounts mistakenly paid. Sprint had limited success in doing so, and NAT owes Sprint over \$28,000 for the illegal charges NAT collected from Sprint.

9. NAT has proclaimed its intent to provide telecommunications services to an underserved area. NAT's telecommunications services, however, amount to fraudulent pumping services designed to exploit FCC policies intended to promote the competitive provision of telecommunications services in remote areas, without actually providing such services to residents within those remote areas.

10. Traffic pumping occurs when a LEC partners with a second company ("Call Connection Company") that has established free or nearly free conference calling, chat-line, or similar services that callers use to connect to other callers or recordings. The Call Connection Company generates large call volumes to numbers assigned to the LEC. The LEC in turn unlawfully bills those calls as if they are subject to access charges, hoping that interexchange carriers ("IXCs") unwittingly pay those bills. If the IXC does so, the LEC and Call Connection Company share the revenues.

11. For many reasons, LECs do not provide switched access services to IXCs for calls delivered to Call Connection Companies. For example, the Iowa Utilities Board ("IUB") decided on September 21, 2009, in its docket FCU 07-02, that intrastate

switched access charges do not apply to calls delivered to Call Connection Companies because 1) Call Connection Companies are not end users of local exchange service, 2) such calls are not terminated to an end user's premises, and 3) such calls do not terminate in the LEC's certificated local exchange area. The IUB ordered LECs to refund improperly billed intrastate switched access charges billed to IXCs, including Sprint.

12. Similarly, the FCC decided on November 25, 2009, that Call Connection Companies served by a LEC in Iowa were not end users under the LEC's tariff, and thus calls to those Call Connection Companies did not impose access charge liability on the delivering interexchange carrier. *In the Matter of Qwest Communications Corp. v. Farmers and Merchants Mutual Tel. Co.*, File No. EB-07-MD-001, Second Order On Reconsideration (Nov. 25, 2009).

13. For reasons identified by the IUB and the FCC, and for other reasons, calls delivered to Call Connection Companies are not subject to switched access charges under intrastate switched access tariffs. Sprint is presently involved in litigation with South Dakota Network, LLC, Sancom, Inc., Splitrock Properties, Inc., Capital Telephone Company, and Northern Valley Communications, Inc. – other LECs operating within the State – in which Sprint has alleged that those exchange carriers have wrongfully billed Sprint intrastate (and interstate) switched access charges for traffic delivered to Call Connection Companies. Those cases remain pending.

14. NAT has tried to exploit what it perceives as a regulatory void by, first, designing its intrastate tariff in an effort to legitimize traffic pumping, and to have that tariff "approved" by the Authority. That effort is of no avail before the Commission,

because the Crow Creek Reservation is an open reservation, with non-tribal members receiving telecommunications services within reservation boundaries. In order to serve non-tribal members, NAT must have a Certificate of Authority from the Commission.

15. Even with a Certificate of Authority, NAT would not be providing services within the Crow Creek Reservation because, on information and belief, NAT's customers' non-tribal members are located outside the reservation. For example, certain telephone numbers assigned to NAT are being utilized by FreeConferenceCall.com, a conference calling company based in Long Beach, California, that has been implicated in numerous traffic pumping cases.

16. On March 26, 2010, NAT moved *ex parte* for an order from the Authority ordering Sprint to pay NAT's billed switched access charges for calls allegedly terminating on the Crow Creek Reservation. On March 29, 2010, the Authority issued an order asserting jurisdiction over both interstate and intrastate calls. The Authority ordered Sprint to pay NAT interstate switched access charges billed under NAT's interstate tariff filed with the FCC, and intrastate switched access charges billed under NAT's intrastate tariff purportedly filed with the Authority. A copy of that order is attached as Exhibit A.

17. The Authority mistakenly claims jurisdiction to regulate Sprint's interstate interexchange services. In fact, the FCC has exclusive jurisdiction to regulate Sprint's interstate interexchange services.

18. The Authority also mistakenly claims jurisdiction to regulate Sprint's intrastate interexchange services. As the Commission made clear and the South Dakota

Supreme Court affirmed in *Cheyenne River Sioux Tribe Telephone Authority v. Public Util. Comm'n of South Dakota*, 1999 SD 60, 595 N.W.2d 604, the PUC has jurisdiction to regulate Sprint's intrastate interexchange services. As the United States Supreme Court recently reaffirmed in *Plains Commerce Bank v. Long Company*, ___ U.S. ___, 128 S. Ct. 2709 (2008), tribes lack jurisdiction to regulate the activities of non-members within a reservation absent the non-members' consent, and Sprint has not consented to that jurisdiction. The two narrow exceptions to this sound rule of law, set out in *Montana v. United States*, 450 U.S. 544 (1980), do not apply here. The Crow Creek Sioux Tribal Authority lacks any jurisdiction over Sprint, or over the interstate or intrastate access services utilized by Sprint to as an interexchange carrier.

**COUNT I
DECLARATORY RULING**

19. Sprint restates and realleges its prior allegations.
20. There is an actual controversy between Sprint and NAT with respect to whether NAT provides intrastate switched access services for calls to Call Connection Companies. The resolution of this controversy is necessary to determine whether NAT has properly billed intrastate switched access charges for those calls.
21. Sprint is entitled to a declaration that the Commission has sole authority to regulate Sprint's intrastate interexchange services in South Dakota, and conversely, the Crow Creek Sioux Tribe Utility Authority lacks jurisdiction over Sprint.
22. Sprint is entitled to a declaration pursuant to ARSD 20:10:01:34 and SDCL 21-24-1 that NAT cannot assess intrastate switched access charges unless it has a

Certificate of Authority from the Commission and valid tariffs on file with the Commission and therefore, Sprint has no access charge liability to NAT.

COUNT II
LIABILITY FOR AMOUNTS BILLED BY NAT

23. Sprint restates and realleges its prior allegations.

24. NAT has generated traffic to Call Connection Companies without a Certificate of Authority in violation of law, and by entering into arrangements that violate South Dakota Statutes and the Commission's Rules. These violations of law have caused damage to Sprint as NAT has billed Sprint intrastate switched access charges, which Sprint inadvertently paid and which NAT refuses to refund.

PRAYER FOR RELIEF

For the foregoing reasons, Sprint is entitled to judgment:

1. Declaring that the Commission has sole authority to regulate Sprint's interexchange services within the State of South Dakota;
2. Declaring that the Crow Creek Sioux Tribe Utility Authority lacks jurisdiction over Sprint;
3. Declaring that NAT must seek a Certificate of Authority from the Commission and file a lawful tariff with the Commission before it can assess charges for switched access service;
4. Awarding money damages in an amount to be determined at a hearing; and
5. Awarding Sprint such other and further relief as the Commission deems just and equitable.

Dated: May 4, 2010

By: 

Kathryn E. Ford

DAVENPORT EVANS HURWITZ
& SMITH, LLP

206 West 14th Street

P.O. Box 1030

Sioux Falls, SD 57104

605.357.1246 (telephone)

605.251-2605 (facsimile)

CERTIFICATE OF SERVICE

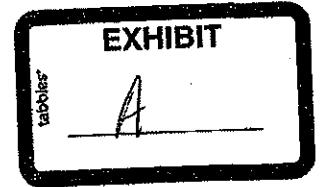
The undersigned, one of the attorneys for Complainant Sprint Communications Company L.P., hereby certifies that a true and correct copy of the foregoing Complaint was served by certified mail upon Respondent at the following address:

Thomas J. Reiman
Native American Telecom, LLC
6710 E. Split Rock Circle
Sioux Falls, SD 57110

on this 4th day of May, 2010.



2502174v2



Crow Creek Sioux Tribe Utility Authority
P.O. BOX 497
Fort Thompson, SD 57339-0497
605-245-2544 Telephone
605-245-2752 Facsimile

Order

Before the Crow Creek Sioux Tribe Utility Authority ("Utility Authority") is a Complaint filed by Native American Telecom, LLC ("Native American Telecom – Crow Creek") seeking enforcement of its Access Service Tariff, filed with the Utility Authority and in effect as of September 1, 2009. Native American Telecom – Crow Creek contends that Sprint is not paying for services rendered on the Crow Creek reservation. In particular, Native American Telecom – Crow Creek states that Sprint has provided the following response to its recent access services invoice:¹

"Sprint objects to the nature of certain traffic for which Cabs Agents/Native American Telecom is billing access charges and Sprint disputes the terminating charges in full. It is Sprint's position that traffic volumes associated with, but not limited to; artificially stimulated usage, chat lines, free conferencing, and revenue sharing are not subject to access charges. If you have any questions please call Julie Walker at 913-762-6442 or email at julie.a.walker@sprint.com.

On March 26, 2010, Native American Telecom – Crow Creek provided this Utility Authority with a copy of the billing dispute by Sprint. While normally this Utility Authority would not intervene in a billing dispute that involves factual issues to be addressed by the parties, this situation involves a legal issue that requires the intervention of the Utility Authority. By taking the position the termination of traffic by Native American Telecom – Crow Creek on the reservation is "not subject to access charges," even though Native American Telecom – Crow

¹ Email from Candice Clark, billing agent of Native American Telecom – Crow Creek, to Gene DeJordy, CEO of Native American Telecom – Crow Creek.

Creek has a lawful tariff in effect at the Utility Authority, Sprint appears to be challenging the jurisdiction and laws of the Crow Creek Sioux Nation and this Utility Authority.

Sprint's self-help in refusing to pay Native American Telecom – Crow Creek's tariffed rates violates the "filed rate doctrine," which require all customers, such as Sprint, who avail themselves of tariffed services, to pay the rates contained in effective tariffs. The filed rate doctrine, also known as the filed tariff doctrine, is a common law construct that originated in judicial and regulatory interpretations of the Interstate Commerce Act, and was later applied to the Communications Act of 1934, as amended. It has been applied consistently to a variety of regulated industries for almost a century. The filed rate doctrine stands for the principle that a validly filed tariff has the force of law, and may not be challenged in the courts for unreasonableness, except upon direct review of an agency's endorsement of the rate.² This Utility Authority looks to common law practices to guide its decisions and be precedent for future actions.

The FCC has reaffirmed the filed rate doctrine in its *CLEC Access Charge Order* and expressly applied it to access charges, like those imposed by Native American Telecom – Crow Creek through its tariff in effect with the Utility Authority. The FCC stated "[t]ariffs require IXCs to pay the published rate for tariffed CLEC access services, absent an agreement to the contrary or a finding by the Commission that the rate is unreasonable."³

² E.g., *Maislin Industries, U.S. v. Primary Steel, Inc.*, 497 U.S. 116, 117 (1990); *Telecom International America, Ltd. v. AT&T Corp.*, 67 F. Supp. 2d 189, 216-17 (S.D.N.Y.1999); *MCI Telecommunications Corp. v. Dominican Communications Corp.*, 984 F.Supp.185, 189 (S.D.N.Y.1997).

³ *CLEC Access Charge Order*, 16 FCC Rcd 9923 ¶28. It should be noted that Native American Telecom – Crow Creek's intrastate tariffed rates mirror its interstate tariffed rates, which are based upon the interstate access rates of MidState Communications, who is the incumbent local exchange carrier.

The filed rate doctrine is motivated by two principles: (1) it prevents carriers from engaging in price discrimination between ratepayers; and (2) it preserves the exclusive role of authorities in approving “reasonable” rates for telecommunications services by keeping courts out of the rate-making process.⁴ Thus, if a carrier acquires services under a filed tariff, only the rate contained in the tariff for that service would apply. The filed rate doctrine is applied strictly, and it requires a party that receives tariffed services to pay the filed rates, even if that party is dissatisfied with the rates or alleges fraud. Rather, a party seeking to challenge a tariffed rate must pay the rate in the tariff and then file a complaint with this Utility Authority challenging the rate. Sprint’s has not filed a complaint with this Utility Authority and its self-help actions could jeopardize the ability of a carrier, like Native American Telecom – Crow Creek, to serve the essential telecommunications needs of the residents of the Crow Creek reservation. In fact, this Utility Authority takes notice that Native American Telecom – Crow Creek commenced providing essential telecommunications services, including local exchange telephone service and high-speed broadband service, to residents of the Crow Creek reservation pursuant to an *Order Granting Approval To Provide Telecommunications Service* by this Utility Authority on October 28, 2008. It is also a matter of public record that Native American Telecom – Crow Creek has commenced offering new and critically needed services on the reservation.⁵

In approving Native American Telecom – Crow Creek’s provision of service on the reservation, the Utility Authority relied on Native American Telecom – Crow Creek’s commitments to:

⁴ *Marcus v. AT&T Corp.*, 138 F.3d 46, 58 (2nd Cir. 1998).

⁵ See Crow Creek Sioux Tribe Notice dated February 8, 2010, *Crow Creek Sioux Tribe Launches New Tribally Owned Telephone and Advanced Broadband Telecommunications System*.

- (i) “provide basic telephone and advanced broadband services . . . essential to the health and welfare of the tribe;”
- (ii) “provide these services in “all areas of the Crow Creek Sioux Reservation;”
- (iii) “provide basic telephone service, consistent with the federal universal service requirements of 47 C.F.R. § 214(e) and the rules of the Federal Communications Commission (“FCC”);” and
- (iv) “make basic telephone and advanced broadband services readily available and affordable to residents of the reservation.”

Order Granting Approval To Provide Telecommunications Service at page 1. The Crow Creek reservation is a rural, high-cost service area. Access service revenue has historically been a critically important source of revenue for rural carriers, like Native American Telecom – Crow Creek, to support operations. Native American Telecom – Crow Creek’s commitments, which are now obligations, are significant and justify its access service tariff for the termination of traffic, including conference calling traffic, on the Crow Creek reservation. If carriers, like Sprint, are able to take self-help actions and not pay for services rendered subject to a lawful tariff, it would not only put at risk the continued operation of carriers like Native American Telecom – Crow Creek, but would also put at risk the services relied upon by, and in some cases essential to the health and safety of, consumers.

For the foregoing reasons, this Utility Authority finds Sprint’s non-payment of Native American Telecom – Crow Creek’s access tariff charges to be a violation of the laws of the Crow Creek Sioux Tribe. This finding applies to both the intrastate access services subject to the tariff in effect at this Utility Authority and the interstate access services subject to the tariff in effect at the FCC. To the extent Sprint believes that Native American Telecom – Crow Creek’s

access rates are unreasonable or not applicable, it should file a Complaint with this Utility Authority and not take matters into its own hands by not paying for services provided by Native American Telecom – Crow Creek.

Dated: March 29, 2010

/s/ Brandon Sazue
Brandon Sazue, Chairman
Crow Creek Sioux Tribe Utility Authority