

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

<b>IN THE MATTER OF THE COMPLAINT</b>	)	
<b>FILED BY SPRINT COMMUNICATIONS</b>	)	
<b>COMPANY, LP AGAINST NATIVE</b>	)	<b>Docket No. TC10-026</b>
<b>AMERICAN TELECOM, LLC</b>	)	
<b>REGARDING TELECOMMUNICATIONS</b>	)	
<b>SERVICES</b>	)	

**Respondent Native American Telecom LLC's Brief in Support of Motion to Dismiss**

**STATEMENT OF THE ISSUE**

The issue before the South Dakota Public Utilities Commission (SDPUC or Commission) is whether Defendant Native American Telecom, LLC's (NAT) Motion to Dismiss should be granted.

**STATEMENT OF THE CASE**

NAT respectfully requests that the Commission dismiss all proceedings in this action because proper regulatory jurisdiction and adjudicatory jurisdiction rests with the Crow Creek Tribal Court (Tribal Court).

**STATEMENT OF FACTS**

**A. The Structure and Purpose of NAT**

NAT is a full-service, tribally-owned limited liability company organized under the laws of the State of South Dakota. NAT's ownership structure consists of the Crow Creek Sioux Tribe (51%) (Tribe), Native American Telecom Enterprise, LLC (25%) (NAT ENTERPRISE), and WideVoice Communications, Inc. (24%) (WideVoice).<sup>1</sup> Affidavit of Gene DeJordy ¶ 2 (hereinafter DeJordy Affidavit ¶ -).

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<sup>1</sup> For sake of clarity, it should be noted that NAT ENTERPRISE is a telecommunications development company and is a *separate and distinct entity* from NAT. The Tribe is a federally

NAT provides high-speed Internet access, basic telephone, and long-distance services on and within the Crow Creek Sioux Tribe Reservation (Reservation). NAT's services take place exclusively within the exterior boundaries of the Reservation. NAT *does not* provide services within the State of South Dakota outside the exterior boundaries of the Reservation. As a result of its efforts, NAT has created jobs and provided much-needed economic opportunities on the Reservation.<sup>2</sup> DeJordy Affidavit ¶ 4.

B. NAT's Efforts on the Crow Creek Sioux Tribe Reservation and Sprint's Refusal to Pay the Crow Creek Sioux Tribal Utility Authority's Lawfully-Imposed Access Tariffs

In 1997, the Crow Creek Sioux Tribal Council established the Crow Creek Sioux Tribe Utility Authority (Tribal Utility Authority) for the purpose of planning and overseeing utility services on the Reservation and to promote the use of these services "to improve the health and welfare of the residents." DeJordy Affidavit ¶ 5.

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recognized Indian tribe with its tribal headquarters located on the Crow Creek Sioux Tribe Reservation in Fort Thompson, South Dakota. WideVoice is a Competitive Local Exchange Carrier (CLEC). DeJordy Affidavit ¶ 3.

<sup>2</sup> The lack of sufficient telephone and other telecommunications services upon Native American reservations has been a long-standing problem. While 94% of all Americans have at least one telephone in their home, the Federal Communications Commission (FCC) has found that only 47% of Native Americans living on reservations or other tribal lands have telephone service. The FCC has determined that this lower telephone subscribership is "largely due to the lack of access to and/or affordability of telecommunications services in these areas" *Federal-State Joint Board on Universal Services: Promoting Development and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas, Twelfth Report and Order*, 15 FCC Red. 12208 (2000), at ¶¶ 20, 26 (2000 FCC Report). The FCC has also found that "by enhancing tribal communities' access to telecommunications, including access to interexchange services, advanced telecommunications, and information services, we increase tribal communities' access to education, commerce, government and public services." *Id.* at ¶ 23. See Tracey A. LeBeau, *Reclaiming Reservation Infrastructure: Regulatory and Economic Opportunities for Tribal Development*, 12 Stan. L & Pol'y Rev. 237, 238 (2001) ("Reservation infrastructures, including basic services such as water, electricity, gas and telecommunications, are currently incapable of supporting tribal populations").

On August 19, 2008, the Tribe issued its “Crow Creek Indian Reservation - Telecommunications Plan to Further Business, Economic, Social, and Educational Development” (Telecommunications Plan).<sup>3</sup> DeJordy Affidavit ¶ 6.

On October 28, 2008, the Tribal Utility Authority entered its “Order Granting Approval to Provide Telecommunications Service” (Approval Order).<sup>4</sup> Under this Approval Order, NAT was “granted authority to provide telecommunications service on the Crow Creek Reservation subject to the jurisdiction of the laws of the Crow Creek Sioux Tribe.”<sup>5</sup> DeJordy Affidavit ¶ 7.

As a result of the Approval Order, NAT properly filed two Access Service Tariffs (Access Tariff) governing termination of telephone traffic on the Reservation. One Access Tariff was filed with the Federal Communications Commission (FCC) for interstate traffic. A second Access Tariff was filed with the Tribal Utility Authority.<sup>6</sup> DeJordy Affidavit ¶ 8.

In September 2009, pursuant to the Approval Order, and after over one year of planning and infrastructure development, NAT launched one of the first new tribally-owned telephone systems in the United States.<sup>7</sup> NAT provides telephone and advanced broadband service to residential and business customers on the Reservation. DeJordy Affidavit ¶ 9.

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<sup>3</sup> The Telecommunications Plan is attached as “Exhibit 1” to NAT’s Brief in Support of Motion to Dismiss.

<sup>4</sup> The Approval Order is attached as “Exhibit 2” to NAT’s Brief in Support of Motion to Dismiss. The Approval Order was signed by then-Crow Creek Tribal Chairman Brandon Sazue.

<sup>5</sup> The Approval Order “is akin to competitive local exchange (CLEC) approval provided to carriers outside of reservations.”

<sup>6</sup> The Approval Order requires that the basic telephone service offered by NAT must be “consistent with the federal universal service requirements of 47 U.S.C. § 214(e) and the rules of the Federal Communications Commission.” NAT has always complied with this portion of the Approval Order. DeJordy Affidavit ¶ 8.

<sup>7</sup> NAT has physical offices, telecommunications equipment, and telecommunications towers on the Reservation. NAT also provides a computer training facility with free Internet and telephone

The telephone and advanced broadband network system on the Reservation enables the Tribe to pursue new economic development opportunities. The Tribe describes its advanced telecommunications system as a vehicle for “paving the way for much-needed business, economic, social and educational development on the Crow Creek Reservation.” Specifically, the broadband network supports high-speed broadband services, voice service, data and Internet access, and multimedia.<sup>8</sup> DeJordy Affidavit ¶ 12.

Shortly after NAT launched its tribally-owned telephone system, Sprint Communications Company L.P. (Sprint) improperly refused to pay NAT’s lawfully-imposed Access Tariff.<sup>9</sup> In March 2010, NAT filed a complaint with the Tribal Utility Authority seeking enforcement of its Access Tariff. Specifically, NAT alleged that Sprint was not paying the required Access Tariff for services NAT rendered on the Reservation.<sup>10</sup> DeJordy Affidavit ¶¶ 14, 16.

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service to tribal members. In September 2010, NAT will be opening a new stand-alone Internet Library and Training Facility, which will include Internet stations and educational facilities for classes. DeJordy Affidavit ¶ 10. The Tribe’s press release announcing the launch of its tribally-owned telephone and advanced broadband telecommunications system is attached as “Exhibit 3” to NAT’s Brief in Support of Motion to Dismiss.

<sup>8</sup> The broadband network uses WiMax (Worldwide Interoperability for Microwave Access) technology operating in the 3.65 GHz licensed spectrum, providing service to residential, small business, hospitality, and public safety customers. WiMax is a Broadband Wireless Access technology based on the IEEE 802.16 standard that enables the delivery of high-speed personal, business, and enterprise class broadband services to subscribers anytime, anywhere. Through the use of advanced antenna and radio technology with OFDM/OFDMA (Orthogonal Frequency Division Multiplexing), NAT delivers wireless IP (Internet Protocol) voice and data communications. WiMax was selected because this technology offers flexible, scalable, and economically viable solutions that are key components to deploying in vast rural environments, such as the Reservation. DeJordy Affidavit ¶ 13.

<sup>9</sup> Sprint is a limited partnership that provides interexchange services on the Reservation. It should be noted that Sprint initially paid NAT its lawfully-imposed Access Tariffs. However, shortly after making these initial payments, Sprint engaged in the improper “self-help” actions that have resulted in this (and other) lawsuits. DeJordy Affidavit ¶ 15.

<sup>10</sup> Sprint has taken the position, despite its earlier Access Tariff payments and the applicability of lawful tariffs in effect, that the termination of traffic by NAT on the Reservation is not subject to

On March 29, 2010, the Tribal Utility Authority entered an Order agreeing with NAT and finding that Sprint's "self-help" in refusing to pay NAT's Access Tariff violated the "filed rate doctrine."<sup>11</sup> DeJordy Affidavit ¶ 17. Specifically, the Tribal Utility Authority found that "[Sprint's] self-help actions could jeopardize the ability of a carrier, like [NAT], to serve the essential telecommunications needs of the residents of the Crow Creek reservation." The Tribal Utility Authority also held "[NAT] commenced providing essential telecommunications services . . . to the residents of the Crow Creek reservation pursuant to [the Tribal Utility Authority's Approval Order]. . . . It is also a matter of public record that [NAT] has commenced offering new and critically needed services on the reservation." DeJordy Affidavit ¶ 17.

The Tribal Utility Authority's Order concluded by stating:

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 [NAT], to support operations. . . . 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 carries like [NAT], but would also put at risk the services relied upon by, and in some cases essential to[,] the health and safety of, consumers."

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compensation, even though NAT incurs costs to terminate Sprint's traffic. DeJordy Affidavit ¶ 16.

<sup>11</sup> The Tribal Utility Authority's Order is attached as "Exhibit 4" to NAT's Brief in Support of Motion to Dismiss. The Order was signed by then-Crow Creek Tribal Chairman Brandon Sazue. The "filed rate doctrine" requires all customers, such as Sprint, who avail themselves of tariffed services, to pay lawfully-imposed tariff rates. The "filed rate 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). The doctrine has been consistently applied to a variety of regulated industries and 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. *See, e.g. Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 117 (1990). The doctrine is premised on two tenets – (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. *Marcus v. AT&T Corp.*, 138 F.3d 46, 58 (2<sup>nd</sup> Cir. 1998).

As such, the Tribal Utility Authority found "Sprint's non-payment of [NAT's] access tariff charges to be a violation of the laws of the Crow Creek Sioux Tribe."<sup>12</sup> DeJordy Affidavit ¶ 18.

As of today's date, Sprint continues to entirely ignore this Order and refuses to pay the Tribal Utility Authority's lawfully-imposed Access Tariff. DeJordy Affidavit ¶ 20.

## DISCUSSION OF LAW

### I. THE COMMISSION SHOULD GRANT NAT'S MOTION TO DISMISS BECAUSE THE CROW CREEK SIOUX TRIBE HAS REGULATORY JURISDICTION AND ADJUDICATORY AUTHORITY IN THIS MATTER

#### A. Tribal Regulatory Jurisdiction and Adjudicatory Jurisdiction

Among the most vexing issues in Indian law is the scope of federal, tribal, and state civil *regulatory jurisdiction* and *adjudicatory jurisdiction* in Indian country. Since *Worcester v. Georgia*, 31 U.S. 515 (1832), the United States Supreme Court has struggled to articulate general principles to resolve these issues. Analysis of civil regulatory authority in Indian country invariably begins with identifying relevant codified statutes, and in some instances, pertinent treaty provisions. When Congress has directly spoken, its wishes must be honored. In most cases, however, no federal statute or treaty authorizes or prohibits explicit assertion of state or tribal regulatory power in a particular situation, and the issue will become whether, under general judge-made principles, states or tribes (or both), have that power.

The basic standards are summarized easily enough: (1) Congress possesses broad authority to establish the range of state, federal, and tribal authority in Indian country, including the power to delegate federal authority to tribes and the power to restore inherent tribal authority lost through application of federal policies; (2) tribes possess a substantial measure of inherent,

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<sup>12</sup> The Tribal Utility Authority's Order also provided Sprint with an invitation to address Sprint's concerns. However, Sprint has also entirely ignored this part of the Order. DeJordy Affidavit ¶ 19.

or non-congressionally conferred, authority over their members but somewhat limited power over nonmembers; (3) states may regulate nonmembers engaged in Indian country transactions with the resident tribe or its members unless the balance of federal, state, and tribal interests emanating from applicable federal statutes, regulations, treaties, or tribal self-government rights counsels preemption; (4) states may regulate purely nonmember activities within Indian country absent express congressional direction to the contrary; and (5) states generally may not regulate the Indian country activities of the resident tribe or its members absent exceptional circumstances or congressional authorization. *See generally, American Indian Law Deskbook (Fourth Edition)*, Conference of Western Attorneys General, Chapter 5 (2008).

In other words, it is a fundamental principle of Indian law and United States federal policy that, absent Congressional authorization, state jurisdiction over the actions of American Indians and of Tribal Governments, *especially for actions arising on and within the exterior boundaries and on lands reserved in trust for American Indians*, is prohibited. In *Worcester*, the Supreme Court found that Indian tribes have the inherent right to regulate their internal affairs and state officials may only intervene through congressional consent. Indeed, the exercise of state jurisdiction over Indians (in Indian country), “would interfere with tribal sovereignty and self-government,” and is preempted “as a matter of federal law.” *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 15 (1987).

A state court’s *adjudicatory jurisdiction* regarding Indian country-related disputes is generally subject to those same standards used to determine state *regulatory jurisdiction*. *Williams v. Lee*, 358 U.S. 217 (1959). Therefore, a “particularized inquiry” must be undertaken to determine the nature of the involved state, federal, and tribal interests and whether exercise of

such authority would, on balance, interfere more with federal and tribal interests than further state interests.

B. The Tribe Has Regulatory Jurisdiction In This Matter

The Supreme Court has made it clear that a state may enforce its laws without congressional consent only if two factors are satisfied - (1) federal preemption and (2) infringement. *See generally, Williams*, 358 U.S. at 217; *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980). In this case, both of these factors weigh in favor of tribal jurisdiction.

First, the application of South Dakota state law is *preempted* as a matter of fundamental Indian law. The Tribe is undoubtedly endowed with the inherent regulatory jurisdiction to establish the Tribal Utility Authority. The Tribal Utility Authority's purpose is to plan and oversee utility services on the Reservation and to promote the use of these services "to improve the health and welfare of the residents."

In furtherance of this purpose, the Tribe issued its Telecommunications Plan. The Tribal Utility Authority then issued its Order granting NAT the ability to provide telecommunications service on the Reservation subject to the jurisdiction of the laws of the Tribe. NAT properly filed two Access Service Tariffs (Access Tariff) governing termination of telephone traffic on the Reservation. One Access Tariff was filed with the Federal Communications Commission (FCC) for interstate traffic. A second Access Tariff was filed with the Tribal Utility Authority.

The Tribal Utility Authority created a legal and administrative process by which to administer complaints. Sprint refused to pay the lawfully-imposed Access Tariff for services rendered by NAT on the Reservation. As such, NAT invoked the Tribal Utility Authority's legal and administrative processes. The Tribal Utility Authority then properly entered an Order



finding that Sprint's self-help actions "could jeopardize the ability of a carrier, like [NAT], to serve the essential telecommunications needs of the residents of the Crow Creek reservation." As such, application of South Dakota law is *preempted* and the SDPUC should not accept jurisdiction.

Second, the application of South Dakota state law *infringes* upon substantial Tribal interests. After over one year of planning and infrastructure development, NAT launched one of the first new tribally-owned telephone systems in the United States. NAT provides telephone and advanced broadband service to residential and business customers on the Reservation. NAT has physical offices, telecommunications equipment, and telecommunications towers on the Reservation. NAT also provides a computer training facility with free Internet and telephone service to tribal members. In September 2010, NAT will be opening a new stand-alone Internet Library and Training Facility, which will include Internet stations and educational facilities for classes.

The telephone and advanced broadband network system on the Reservation enables the Tribe to pursue new economic development opportunities. The broadband network supports high-speed broadband services, voice service, data and Internet access, and multimedia. This telecommunications system is the Tribe's new vehicle for "paving the way for much-needed business, economic, social and educational development on the . . . Reservation."

In this case, both the *preemption* and *infringement* factors weigh in favor of tribal regulatory jurisdiction. As such, the Commission should not accept regulatory jurisdiction in this case.

C. The Tribe Has Adjudicatory Jurisdiction In This Matter

The seminal United States Supreme Court decision concerning state adjudicatory

jurisdiction in Indian country is *Williams v. Lee*, 358 U.S. 217 (1959). Under the *Williams* case and its progeny, a state's adjudicatory jurisdiction cannot exceed its regulatory jurisdiction. In this case, however, as outlined above, since the Tribe has proper regulatory jurisdiction, it also has proper adjudicatory jurisdiction.

The Supreme Court's decision in *Montana v. U.S.*, 450 U.S. 544 (1981), also weighs in favor of tribal adjudicatory jurisdiction. In *Montana*, the Supreme Court found two exceptions that allow for tribal adjudicatory jurisdiction – (1) the consensual relationship exception and (2) the substantial tribal interest exception when the activities of the non-Indian “threatens or has some direct effect on the political integrity, political security or the health and welfare of the tribes.” *Id.* at 565-66.

Sprint has entered into a consensual relationship by providing telecommunications services on the Reservation through its business dealings with NAT. The access charges at issue in this case were even paid to NAT by Sprint for a period of time. Clearly, Sprint has been in a consensual relationship with NAT, the Tribe, and the Tribe's members within the exterior boundaries of the Reservation. The application of tribal adjudicatory jurisdiction in this case is applicable under the first *Montana* exception.

Second, Sprint's actions directly threaten and have direct effects on the political integrity, political security, health, and welfare of the Tribe. By filing this SDPUC action, Sprint has attacked the Tribe's ability to regulate and administer telecommunications services on the Reservation. In sum, Sprint is denying the Tribe the ability to obtain modern telecommunications services in a rural, high-cost area where the lack of sufficient services has been a long-standing problem of epidemic proportions.

Sprint's actions beg the question – why does Sprint want to prevent the Tribe from enhancing its members' access to telecommunications services? Is it simply because Sprint does not want advanced telecommunications and informational services to prosper on the Reservation? Or is it because Sprint finds it economically advantageous to erect barriers to increased educational, commercial, health care, and public safety opportunities for the Tribe?

Whatever the answer, Sprint has never attempted to provide these opportunities despite the FCC's determination that the Tribe's unfortunate circumstances are "largely due to the lack of access to and/or affordability of telecommunications services in these areas." Conversely, NAT's efforts unquestionably enhance the Tribe's access to high-quality telecommunications services. NAT provides these critically-needed educational, commercial, health care, and public safety opportunities for the Tribe on the Reservation. Where Sprint has strenuously labored to prevent progress, NAT has succeeded in leading the way to growth and technological advancement.

The application of tribal adjudicatory jurisdiction in this case is also applicable under the second *Montana* exception. Sprint's actions directly threaten and have direct effects on the political integrity, political security, health, and welfare of the Tribe.

### CONCLUSION

This dispute involves, (1) NAT (a tribally-owned company), (2) NAT's actions on and within the exterior boundaries of the Reservation, (3) the Tribe's and Tribal Utility Authority's regulatory authority, (4) the Tribal Court's adjudicatory authority, (5) the Tribe's financial stability, (6) the Tribe's economic development efforts, (7) employment opportunities for the Tribe's members, and (8) the Tribe's sovereign immunity. Defendant NAT's Motion to Dismiss

should be granted because proper regulatory jurisdiction and adjudicatory jurisdiction rests with the Tribe, the Tribal Utility Authority, and the Tribal Court.

Dated this 6<sup>th</sup> day of September, 2010.

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*/s/ Scott R. Swier*

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*Attorney for Defendant Native American  
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**CERTIFICATE OF SERVICE**

I, *Scott R. Swier*, certify that on *September 6<sup>th</sup>, 2010*, *Respondent Native American Telecom LLC's Brief in Support of Motion to Dismiss*, was served via *electronic mail* upon the following:

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*/s/ Scott R. Swier*  
\_\_\_\_\_  
Scott R. Swier

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

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

Docket No. TC10-026

**AFFIDAVIT OF GENE DEJORDY**

Gene DeJordy, being first duly sworn upon his oath deposes and states as follows:

1. I am the Chief Executive Officer of Native American Telecom Enterprise, LLC (NAT ENTERPRISE), a limited liability company organized under the laws of the State of South Dakota.
2. Native American Telecom, LLC (NAT) is a full-service, tribally-owned limited liability company organized under the laws of the State of South Dakota. NAT's ownership structure consists of the Crow Creek Sioux Tribe (51%) (Tribe), NAT ENTERPRISE (25%), and WideVoice Communications, Inc. (24%) (WideVoice).
3. NAT ENTERPRISE is a telecommunications development company and is a *separate and distinct entity* from NAT. WideVoice is a Competitive Local Exchange Carrier (CLEC).
4. NAT provides high-speed Internet access, basic telephone, and long-distance services on and within the Crow Creek Sioux Tribe Reservation (Reservation). NAT's services take place exclusively within the exterior boundaries of the Reservation. NAT *does not* provide services within the State of South Dakota outside the exterior

boundaries of the Reservation. As a result of its efforts, NAT has created jobs and provided much-needed economic opportunities on the Reservation.

5. In 1997, the Crow Creek Sioux Tribal Council established the Crow Creek Sioux Tribe Utility Authority (Tribal Utility Authority) for the purpose of planning and overseeing utility services on the Reservation and to promote the use of these services “to improve the health and welfare of the residents.”
6. On August 19, 2008, the Tribe issued its “Crow Creek Indian Reservation – Telecommunications Plan to Further Business, Economic, Social, and Educational Development.”
7. On October 28, 2008, the Tribal Utility Authority entered its “Order Granting Approval to Provide Telecommunications Service” (Approval Order). Under this Approval Order, NAT was “granted authority to provide telecommunications service on the Crow Creek Reservation subject to the jurisdiction of the laws of the Crow Creek Sioux Tribe.”
8. As a result of the Approval Order, NAT properly filed two Access Service Tariffs (Access Tariff) governing termination of telephone traffic on the Reservation. One Access Tariff was filed with the Federal Communications Commission (FCC) for interstate traffic. A second Access Tariff was filed with the Tribal Utility Authority. The Approval Order requires that the basic telephone service offered by NAT must be “consistent with the federal universal service requirements of 47 U.S.C. § 214(e) and the rules of the Federal Communications Commission.” NAT has always complied with this portion of the Approval Order.



9. In September 2009, pursuant to the Approval Order, and after over one year of planning and infrastructure development, NAT launched one of the first new tribally-owned telephone systems in the United States. NAT provides telephone and advanced broadband service to residential and business customers on the Reservation.
10. NAT has physical offices, telecommunications equipment, and telecommunications towers on the Reservation. NAT also provides a computer training facility with free Internet and telephone service to tribal members. In September 2010, NAT will be opening a new stand-alone Internet Library and Training Facility, which will include Internet stations and educational facilities for classes.
11. NAT has never applied for, nor received, federal stimulus funding, Universal Service Funds (USF), or any other federal or state funding mechanisms relating to its tribally-owned telephone company.
12. The telephone and advanced broadband network system on the Reservation enables the Tribe to pursue new economic development opportunities. The Tribe describes its advanced telecommunications system as a vehicle for "paving the way for much-needed business, economic, social and educational development on the Crow Creek Reservation." Specifically, the broadband network supports high-speed broadband services, voice service, data and Internet access, and multimedia.
13. The broadband network uses WiMax (Worldwide Interoperability for Microwave Access) technology operating in the 3.65 GHz licensed spectrum, providing service to residential, small business, hospitality, and public safety customers. WiMax is a Broadband Wireless Access technology based on the IEEE 802.16 standard that enables the delivery of high-speed personal, business, and enterprise class broadband

services to subscribers anytime, anywhere. Through the use of advanced antenna and radio technology with OFDM/OFDMA (Orthogonal Frequency Division Multiplexing), NAT delivers wireless IP (Internet Protocol) voice and data communications. WiMax was selected because this technology offers flexible, scalable, and economically viable solutions that are key components to deploying in vast rural environments, such as the Reservation.

14. Shortly after NAT launched its tribally-owned telephone system, Sprint Communications Company L.P. (Sprint) improperly refused to pay NAT's lawfully-imposed Access Tariff.
15. Sprint is a limited partnership that provides interexchange services on the Reservation. It should be noted that Sprint initially paid NAT its lawfully-imposed Access Tariffs. However, shortly after making these initial payments, Sprint engaged in the improper "self-help" actions that have resulted in this (and other) lawsuits.
16. In March 2010, NAT filed a complaint with the Tribal Utility Authority seeking enforcement of its Access Tariff. Specifically, NAT alleged that Sprint was not paying the required Access Tariff for services NAT rendered on the Reservation. Sprint has taken the position, despite its earlier Access Tariff payments and the applicability of lawful tariffs in effect, that the termination of traffic by NAT on the Reservation is not subject to compensation, even though NAT incurs costs to terminate Sprint's traffic.
17. On March 29, 2010, the Tribal Utility Authority entered an Order agreeing with NAT and finding that Sprint's "self-help" in refusing to pay NAT's Access Tariff violated the "filed rate doctrine." Specifically, the Tribal Utility Authority found that

“[Sprint’s] self-help actions could jeopardize the ability of a carrier, like [NAT], to serve the essential telecommunications needs of the residents of the Crow Creek reservation.” The Tribal Utility Authority also held “[NAT] commenced providing essential telecommunications services . . . to the residents of the Crow Creek reservation pursuant to [the Tribal Utility Authority’s Approval Order]. . . . It is also a matter of public record that [NAT] has commenced offering new and critically needed services on the reservation.”

18. The Tribal Utility Authority’s Order concluded by stating “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 [NAT], to support operations. . . . 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 carries like [NAT], but would also put at risk the services relied upon by, and in some cases essential to[,] the health and safety of . . . consumers.” As such, the Tribal Utility Authority found “Sprint’s non-payment of

[NAT's] access tariff charges to be a violation of the laws of the Crow Creek Sioux Tribe."


19. The Tribal Utility Authority's Order also provided Sprint with an invitation to address Sprint's concerns. However, Sprint has also entirely ignored this part of the Order.

20. As of today's date, Sprint continues to entirely ignore this Order and refuses to pay the Tribal Utility Authority's lawfully-imposed Access Tariff.

Dated this 3 day of September, 2010.

  
Gene Delordy

Subscribed and sworn to before me this 3 day of September, 2010.

  
Notary Public

(SEAL)

**GINA VOLPACCHIO**  
Notary Public

My Commission Expires: My Commission Expires Feb. 28, 2011

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AMERICAN TELECOM, LLC )  
REGARDING TELECOMMUNICATIONS )  
SERVICES )**

**Declaration of Scott R. Swier in Support of  
Defendant Native American Telecom, LLC's Motion to Dismiss**

Scott R. Swier declares that the attached are true and correct copies of the following documents:

1. Crow Creek Indian Reservation – Telecommunications Plan to Further Business, Social, and Educational Development (August 19, 2008).
2. Order Granting Approval to Provide Telecommunications Service (October 28, 2008).
3. Crow Creek Sioux Tribe – Press Release (February 8, 2010).
4. Tribal Utility Authority Order (March 29, 2010).

I DECLARE UNDER PENALTY OF PERJURY that the foregoing statements are true and correct

Respectfully submitted this 6<sup>th</sup> day of September, 2010.

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/s/ Scott R. Swier

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*Attorney for Defendant Native American*

*Telecom, LLC*

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on *September 6<sup>th</sup>, 2010*, the foregoing *Declaration of Scott R. Swier in Support of Defendant Native American Telecom LLC's Motion to Dismiss*, was served *via electronic mail* upon the following:

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*/s/ Scott R. Swier*  
\_\_\_\_\_  
Scott R. Swier





**CROW CREEK SIOUX TRIBE**  
FORT THOMPSON, SOUTH DAKOTA 57339

**Crow Creek Indian Reservation**

**Telecommunications Plan**

**To Further Business, Economic, Social, and Educational Development**

August 19, 2008 – Fort Thompson, South Dakota. The Crow Creek Indian Reservation is home to the Crow Creek Sioux Tribe which lies mostly in Buffalo County in South Dakota. The Crow Creek reservation is the nation's poorest Indian Reservation; more than 97% of the 3,000 residents are unemployed, compared to the rest of American who fret over a recession that has driven unemployment from 4% up to 6%,--and it's been that way for as long as anyone can remember.

With the poverty come staggering rates of homelessness, alcoholism, disease, drug abuse, murders, suicide, infant mortality, teen-age pregnancy and school dropouts.

To address these issues and more, the Crow Creek Indian Reservation has developed a Telecommunications Plan for the establishment of a telecommunication infrastructure on the reservation that will enable business, economic, social and educational development.

- The Crow Creek Sioux Tribe will supplement the wireless and wire line services available on the reservation with advanced broadband services through the establishment of a new competitive local exchange carrier ("CLEC") utilizing state-of-the-art advanced fixed wireless technology on the reservation. The CLEC, Native American Telecom LLC, will initially provide broadband internet access to critical tribal government locations, schools, and other educational or medical locations, and then will expand service to other businesses and residents on the reservation.

- The Crow Creek Sioux Tribe will use its telecommunications infrastructure to attract new businesses to generate economic development, employment opportunities, and revenue. The tribe will take advantage of its telecommunications infrastructure to (i) develop private sector incentive programs, such as the Minority Business Enterprise Program, (ii) take advantage of its tribal sovereignty in engaging in business, and (iii) apply for status as a foreign trade zone.
- The Crow Creek Sioux Tribe will use its access to information and services to position the tribe to take advantage of programs and services aimed at addressing the social needs of the reservation. Each year, the tribe will establish goals and objectives, and programs aimed at achieving these goals and objectives, to address social and economic development issues, such as poverty, medical needs, unemployment, dependencies, and education.

The Crow Creek Sioux Tribe Chairman's Office can be reached at 605-245-2221.

**Crow Creek Sioux Tribe**

**Crow Creek Utility Authority**

In the Matter of }  
Native American Telecom, LLC }  
Request To Provide Telecommunications }  
Service Within The Exterior Boundaries }  
of the Crow Creek Reservation }

**Order Granting Approval To Provide Telecommunications Service**

Native American Telecom, LLC ("Native Telecom") is hereby granted authority to provide telecommunications service on the Crow Creek reservation.

Under the Constitution and By Laws of the Crow Creek Sioux Tribe, the Tribal Council is empowered and authorized to enact resolutions and ordinances governing the management of all economic and educational affairs and enterprises of the Tribe. The Crow Creek Utility Authority Ordinance was amended in September 1997 to establish the Crow Creek Utility Authority. Under the Crow Creek Utility Authority Plan of Operation, the stated purpose of the Crow Creek Utility Authority is to "plan for, provide, and furnish utility services in all areas of the Crow Creek Sioux Reservation" (Section 3.A.1.).

Native Telecom proposes to: (i) provide basic telephone and advanced broadband services, which are "utility services" essential to the health and welfare of the tribe; and (ii) provide these services in "all areas of the Crow Creek Sioux Reservation." Furthermore, Native Telecom proposes to provide basic telephone service, consistent with the federal universal service requirements of 47 U.S.C. § 214(e) and the rules of the Federal Communications Commission ("FCC"). In addition, Native Telecom commits to work with the Crow Creek Sioux Tribe to identify and pursue economic development opportunities and make basic telephone and advanced broadband services readily available and affordable to residents of the reservation.

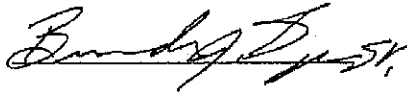
The Crow Creek Utility Authority concludes that Native Telecom's proposal to provide basic telephone and advanced broadband services on the reservation is consistent with the "Crow Creek Indian Reservation Telecommunications Plan To Further Business, Economic, Social, and Educational Development" on the reservation.<sup>2</sup> Based upon

<sup>1</sup> This approval is akin to competitive local exchange carrier (CLEC) approval provided to carriers outside of reservations.

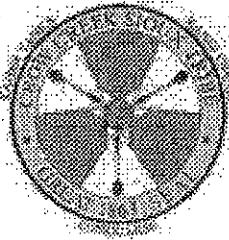
<sup>2</sup> On August 19, 2008, the Crow Creek Sioux Tribe released its Telecommunications Plan To Further Business, Economic, Social, and Educational Development on the reservation.

Native Telecom's proposal and commitments, Native Telecom is hereby granted authority to provide telecommunications services on the Crow Creek Reservation subject to the jurisdiction of the laws of the Crow Creek Sioux Tribe.

Dated: October 28, 2008



Brandon Sazue  
Crow Creek Tribal Chairman



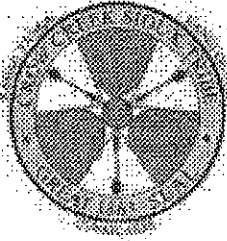
**CROW CREEK SIOUX TRIBE**  
FORT THOMPSON, SOUTH DAKOTA 57339

**Crow Creek Sioux Tribe Launches New  
Tribally Owned Telephone and Advanced Broadband  
Telecommunications System**

February 8, 2010 -- Fort Thompson, South Dakota: The Crow Creek Sioux Tribe has launched one of the first new tribally-owned telephone systems in the United States, paving the way for much-needed business, economic, social and educational development on the Crow Creek reservation. In September 2009, Native American Telecom -- Crow Creek, a tribally-owned local exchange carrier providing telephone and advanced broadband service on the Crow Creek reservation, launched service to residential and business customers. Brandon Sazue, Chairman of the Crow Creek Sioux Tribe, stated:

"The Crow Creek Sioux Tribe is a sovereign Nation that has endured its share of heartache and challenges, but it is also a Tribe with much pride that has persevered over the years with the Will of a warrior Nation intent on righting the injustices of the past and present. We must take our destiny into our own hands, which we have done with the establishment of Native American Telecom -- Crow Creek, a new tribally-owned telephone and broadband service provider. Native American Telecom -- Crow Creek, however, is not just a service provider, like non-tribally-owned service providers, but is structured to serve the needs of the Tribe and its people by providing jobs, opportunities for economic development, and affordable access to essential services, like the Internet, that is necessary for self-sufficiency, prosperity, and tribal independence."

The deployment of an advanced broadband network on the reservation by Native American Telecom -- Crow Creek has enabled the Tribe to pursue new economic development opportunities, such as the recently announced EcoTech Fuels waste project. According to Brandon Sazue, "The Tribe's plans for a fuel production plant were made



**CROW CREEK SIOUX TRIBE**  
FORT THOMPSON, SOUTH DAKOTA 57339

possible, in part, by the tribal infrastructure on the reservation, such as the new advanced broadband telecommunications network deployed by Native American Telecom - Crow Creek."

Vice Chairman, Randy Shields, further stated:

"One small step for Indian Country, one large step for the Crow Creek Sioux Nation. The importance of establishing a new enterprise on the Crow Creek reservation needs to be considered in light of the poor economic and social conditions that exists on the reservation. Native American Telecom - Crow Creek will not only fill up and provide hope and opportunities for our people, but will hopefully serve as an example for all of Indian Country."

Crow Creek Housing Authority Executive Director Joe Sazue U stated:

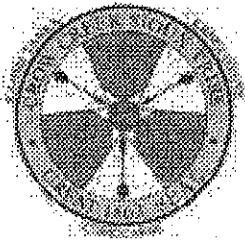
"It will definitely benefit our people. At Housing, we are in the process of developing a web site that will keep our residents informed of things that are going on with the reservation. With Native American Telecom - Crow Creek's initiatives to provide residents having Internet access and educate people on the value of this service, we have much hope for the future. It's good that the Tribe has taken the steps necessary to move forward with this technology."

Peter Lengkeek, Tree of Life Construction Supervisor, who is also affiliated with Can-Do.org, stated:

"This service is long over-due. Our people have been in the dark when it comes to modern technologies that are available elsewhere. This will get us up to speed with the outside world and it will make things easier for the residents of the Crow Creek Reservation. Having internet access available will further our people in their ability to learn."

Crow Creek Ambulance Director Larry Blaine emphasized:

"Wow, is this Internet fast. We are able to download information quickly and easily. Many of the residents of the Crow Creek Reservation do not have computers or the know-how to access the Internet, but now with the Internet Library open to the residents of Crow Creek they have a place to go and learn about the Internet and computers. Native American Telecom-Crow Creek understands our people and our needs, and is working to help us through education, resources and empowerment."

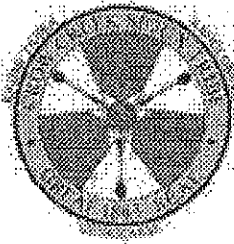


**CROW CREEK SIOUX TRIBE**  
FORT THOMPSON, SOUTH DAKOTA 57339

The Tribe has been diligently working with Native American Telecom Enterprise, LLC ("NATE"), a telecommunications service and economic development company, to (i) construct and operate the wireless broadband network on the reservation using advanced WIMAX technology; (ii) attract companies to locate on the reservation and take advantage of the capabilities of the new broadband network; (iii) work with tribal members to establish new Internet-based businesses on the reservation, taking advantage of the capabilities of the new broadband network; and (iv) establish a state-of-the-art Internet Library, providing free computer and Internet access to tribal members. In September 2009, after months of work, Native American Telecom -- Crow Creek commenced operations by providing broadband and local telephone service to residential and tribal locations on the reservation. According to Gene Delondy, Chief Executive Officer of NATE, "After more than one year of working closely with Crow Creek Sioux tribal officials and other tribal members, it is very satisfying to see our collective vision for the Tribe come to fruition. We have established an enterprise, not just a service provider, that is building a foundation for the future of the Tribe."

The network will support high-speed broadband services, voice service, data and Internet access, and multimedia. Most significantly, according to Tom Reiman, President of NATE, "an Internet Library has been established that provides free computer and Internet access to tribal members. For over one year, the Tribe has been planning and putting in place the necessary infrastructure for the Internet Library and now all of the hard work and dedication of many Tribal members involved in this project has come together in a uniquely tribal way with the Crow Creek Yes We Can Foundation, a non-profit organization responsible for managing the Internet Library."

"Native American Telecom -- Crow Creek is using WIMAX technology operating in the 3.65 GHz licensed spectrum providing service to residential, small business, hospitality



**CROW CREEK SIOUX TRIBE**  
FORT THOMPSON, SOUTH DAKOTA 57339

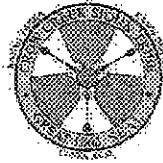
and public safety", according to Benjamin Martello, Chief Operating Officer of WireFree Communications, Inc. ("WFC"). WFC was selected by Native American Telecom -- Crow Creek as the wireless turnkey firm responsible for EP&I (Engineer, Purchase and Install) on the reservation based on the company's vast technical and operational experience in rural deployments. WiMAX (Worldwide Interoperability for Microwave Access) is a Broadband Wireless Access technology based on the IEEE 802.16 standard that enables the delivery of high-speed personal, business and enterprise class broadband services to subscribers anytime, anywhere. Through the use of advanced antenna and radio technology with OFDM/ OFDMA (Orthogonal Frequency Division Multiplexing), Native American Telecom -- Crow Creek is able to deliver wireless IP (Internet Protocol) voice and data communications. WiMAX was selected because this 4G technology offers flexible, scalable and economically viable solutions that are key components to deploying in vast rural environments, such as the Crow Creek reservation.

The Crow Creek Sioux Tribe Chairman's Office can be reached at 605-245-2221; E-Mail: [Brandon@NativeAmericanTelecom.com](mailto:Brandon@NativeAmericanTelecom.com).

Native American Telecom Enterprise, LLC can be reached at 605-379-8052; E-Mail: [jim@nativeamericantelecom.com](mailto:jim@nativeamericantelecom.com); Web site: [www.nativeamericantelecom.com](http://www.nativeamericantelecom.com).

WireFree Communications, Inc. can be reached at (702) 473-5800; E-Mail: [bmartello@wfc-us.com](mailto:bmartello@wfc-us.com); Web site: [www.wirefreecomunication.com](http://www.wirefreecomunication.com).





**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:<sup>1</sup>

"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](mailto: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

<sup>1</sup> 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.<sup>2</sup> 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."<sup>3</sup>

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<sup>2</sup> *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).

<sup>3</sup> *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.<sup>4</sup> 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.<sup>5</sup>

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:

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

<sup>5</sup> 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

