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November 15, 2010

via Electronic Filing

Ms. Patty Van Gerpen
Executive Director
SD Public Utilities Commission
500 E. Capitol Avenue
Pierre, SD 57501

RE: Staff's Brief in Response to Native American Telecom's Motion to Stay and Motion to Dismiss.

Dear Ms. Van Gerpen:

Please find attached Staff's Brief in Response to Native American Telecom's Motion to Stay and Motion to Dismiss and the Certificate of Service.

Sincerely,

Karen E. Cremer
Staff Attorney

Enclosure

Cc: Service List

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

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

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**STAFF'S BRIEF IN
RESPONSE TO NATIVE
AMERICAN TELECOM'S
MOTION TO STAY AND
MOTION TO DISMISS**

TC10-026

STATEMENT OF THE CASE

On May 4, 2010, the Public Utilities Commission (Commission) received a complaint from Sprint Communications Company, LP (Sprint) against Native American Telecom, LLC (NAT). On May 5, 2010, Sprint filed an amended complaint. Petitions to Intervene were filed by South Dakota Telecommunications Association (SDTA), South Dakota Network, LLC (SDN), Midstate Communications (Midstate) and AT&T Communications of the Midwest, Inc., (AT&T). On June 1, 2010, NAT filed a Motion to Dismiss pursuant to SDCL 15-6-12(b).

On June 4, 2010, Sprint filed its Response to Crow Creek Sioux Tribe Utility Authority's Motion to Dismiss, or in the Alternative, Petition to Intervene. On June 7, 2010, Crow Creek Sioux Tribe Utility Authority (CCSTUA) filed a Motion to Dismiss or in the Alternative, Petition to Intervene. On June 10, 2010, Sprint filed its Response to NAT's Motion to Establish Briefing Schedule for its Motion to Dismiss.

On June 15, 2010, the Commission granted intervention to SDN, SDTA, Midstate, AT&T, and CCSTUA. On July 27, 2010, NAT filed a Notice of Tribal Court Litigation. On July 29, 2010, NAT filed a Motion to Stay. On August 3, 2010, Sprint filed an Opposition to NAT's Motion to Stay and Sprint's Motion to Establish Briefing Schedule. On August 5, 2010, AT&T, SDN, SDTA, and Midstate filed its Opposition to the Motion to Stay. On August 6, 2010, NAT filed a Response to Sprint's Opposition to Stay and Motion to Establish Briefing Schedule. On August 9, 2010, CCSTUA filed a Support of the Motion to Stay. On August 10, 2010, the Commission ordered the Motion

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to Dismiss and Motion to Stay be briefed during the same briefing schedule (Chairman Johnson, dissenting).

On September 7, 2010, NAT filed its Brief in Support of Motion to Stay and its Brief in Support of Motion to Dismiss. On September 28, 2010, Intervening Parties filed their Brief in Opposition to Motion for Stay and Motion to Dismiss. On September 28, 2010, Sprint filed its Memorandum in Opposition to NAT's Motions to Stay or to Dismiss. On October 25, 2010, NAT filed its Reply Brief in Support of Motion to Stay/Motion to Dismiss.

Commission Staff (Staff) submits this brief in response to the parties' briefs.

OVERVIEW OF THE PARTIES' POSITIONS

NAT has requested that this Commission stay all proceedings in this docket until the Crow Creek Tribal Court has a full and fair opportunity to determine its jurisdiction over Sprint and the subject matter of NAT's action, and if it finds such jurisdiction to exist, to adjudicate the parties' dispute on the merits. In the alternative, NAT requests that its motion to dismiss be granted because this Commission does not have jurisdiction over NAT's activities on the Reservation. Sprint's position in this matter is that based upon federal and state telecommunications law and the doctrine of tribal exhaustion, the Tribal Court has no adjudicatory authority over this case and the Commission has authority to adjudicate Sprint's complaint before it. The Intervening Parties' position is that the Commission has exclusive jurisdiction of not only Sprint but NAT, with respect to the access services being provided, and that it should adjudicate this claim.

ARGUMENT AND AUTHORITIES

Currently there is a complaint filed by NAT against Sprint in Crow Creek Tribal Court, there is a complaint filed by Sprint against NAT in the South Dakota Federal District Court (Central Division), and a complaint filed by Sprint against NAT at the South Dakota Public Utilities Commission. In a broad sense, all three complaints arise from the same set of facts, that is, NAT assessing Sprint for switched access charges.



NAT does not have a certificate of authority from the Commission. On September 9, 2008, NAT filed an application with the Commission for a certificate of authority to provide local exchange services on the Crow Creek Indian Reservation. Subsequently NAT filed a motion to dismiss the application and the Commission granted the motion. See *Order Granting Motion to Dismiss and Closing Docket*, dated February 5, 2009, TC08-110.

It is Staff's position that the Commission should grant NAT's Motion to Stay thereby permitting either the tribal court or the federal district court to resolve questions of its jurisdiction regarding Sprint first. Staff would further recommend that the Commission deny the Motion to Dismiss.

ISSUE 1

WHETHER NAT'S MOTION TO STAY SHOULD BE GRANTED?

The fundamental question to be answered by the Commission for purposes of the Motion for Stay is not whether the Tribal Court has jurisdiction; rather the issue is which forum (tribal court, federal court or the Public Utilities Commission) should be permitted to first address the issue of jurisdiction **before** the matter is heard on its merits.

The United States Supreme Court in *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985), addressed the issue of the right of one court to resolve questions of its jurisdiction without interference from another court.

In *National Farmers Union* a member of the Crow Tribe obtained a default judgment against the insurance company. The insurance company sought in federal district court to enjoin enforcement of that default judgment. The district court granted such relief and the court of appeals reversed on the basis that the insurance company's claim did not constitute a federal question under 28 U.S.C. ¶ 1331. The Supreme Court held that section 1331 jurisdiction did exist but found that the exercise of such jurisdiction should be deferred until the tribal court ruled on the insurance company's jurisdictional challenge.



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The Court stated:

Thus, we conclude that the answer to the question whether a tribal court has the power to exercise civil subject-matter jurisdiction over non-Indians in a case of this kind is not automatically foreclosed, as an extension of *Oliphant* would require. Rather, the existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions.

We believe that examination should be conducted in the first instance in the Tribal Court itself. Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination. That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge. Moreover the orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed. The risks of the kind of "procedural nightmare" that has allegedly developed in this case will be minimized if the federal court stays its hand until after the Tribal Court has had a full opportunity to determine its own jurisdiction and to rectify any errors it may have made. Exhaustion of tribal court remedies, moreover, will encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review.

National Farmers Union, 471 U.S. at 855-857 (citations omitted) (emphasis added).

The Court proceeded to point out in Footnote 21 three situations wherein exhaustion of tribal remedies would not be necessary:

We do not suggest that exhaustion would be required where an assertion of tribal jurisdiction "is motivated by a desire to harass or is conducted in bad faith," or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction.

Id. at 857.

The three exceptions to tribal exhaustion do not apply in this matter as no party is alleging that NAT is asserting that the tribal court be permitted to determine the issue of jurisdiction first due to a "desire to harass or is conducted in bad faith" or that exhaustion is futile because of a lack of adequate opportunity to challenge the tribal court's jurisdiction. Sprint does however argue that the tribal court clearly lacks jurisdiction and

therefore, the exhaustion doctrine does not apply. See Sprint's brief, page 25. Based on the sheer number of pleadings regarding which court has jurisdiction of this matter, the argument that the "tribal court's lack of jurisdiction is clear" appears questionable and should not be entertained by this Commission as a basis for denying the Motion to Stay.

Finally, the Court in *Nation Farmers Union* stated that on remand the district court must determine "[w]hether the federal action should be dismissed, or merely held in abeyance pending the development of further Tribal Court proceedings." *Id.* Based upon that directive, Staff would recommend granting the Motion to Stay in this proceeding.

A few years later the Supreme Court again addressed the issue of whether a federal court may exercise jurisdiction before the tribal court system has an opportunity to determine its own jurisdiction. In *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987), the petitioner, an Iowa insurance company, brought an action in Federal District Court against members Montana's Blackfeet Indian Tribe. The asserted basis for federal jurisdiction was diversity of citizenship. At the time the action was initiated, proceedings involving the same parties and based on the same dispute were pending before the Blackfeet Tribal Court. *Id.* at 11. The District Court dismissed the action for lack of subject-matter jurisdiction, and the Federal Court of Appeals affirmed, concluding that the Tribal Court system should be permitted to initially determine its own jurisdiction, which determination could be reviewed later in federal court with the benefit of Tribal Court expertise in such matters. *Id.* at 13-14.

The Supreme Court agreed that exercise of diversity jurisdiction was inappropriate but it reached its holding for different reasons. The Court began its analysis by stating:

We have repeatedly recognized the Federal Government's longstanding policy of encouraging tribal self-government. This policy reflects the fact that Indian tribes retain "attributes of sovereignty over both their members and their territory," to the extent that sovereignty has not been withdrawn by federal statute or treaty. The federal policy favoring tribal self-government operates even in areas where state control has not been affirmatively pre-empted by federal statute. "[A]bsent governing Acts of Congress, the question has always been whether the state action



infringed on the right of reservation Indians to make their own laws and be ruled by them.”

Tribal courts play a vital role in tribal self-government, and the Federal Government has consistently encouraged their development. Although the criminal jurisdiction of the tribal courts is subject to substantial federal limitation, their civil jurisdiction is not similarly restricted. If the state-court jurisdiction over Indians or activities on Indian lands would interfere with tribal sovereignty and self-government, the state courts are generally divested of jurisdiction as a matter of federal law.

Iowa Mutual, 480 U.S. at 14-15 (citations omitted).

The Court reiterated its position taken in *National Farmers Union* regarding a federal court's exercise of jurisdiction stating that “[a] federal court's exercise of jurisdiction over matters relating to reservation affairs can also impair the authority of tribal courts.” *Id.* at 15.

In Footnote 8 of that decision the Court stated:

As the Court's directions on remand in *National Farmers Union* indicate, the exhaustion rule enunciated in *National Farmers Union* did not deprive the federal courts of subject-matter jurisdiction. Exhaustion is required as a matter of comity, not as a jurisdiction prerequisite. In this respect, the rule is analogous to principles of abstention articulated in *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976): even where there is concurrent jurisdiction in both the state and federal courts, deference to state proceedings renders it appropriate for the federal courts to decline jurisdiction in certain circumstances. In *Colorado River*, as here, strong federal policy concerns favored resolution in the nonfederal forum. See *id.*, at 819, 96 S.Ct. at 1247.

Iowa Mutual, 480 U.S. at 16.

The Court concluded its analysis by finding that under *National Farmers Union* principles any tribal court determination of its jurisdiction under federal law principles would be subject to challenge in an action maintained under section 1331 upon proper exhaustion but that, “[u]nless a federal court determines that the Tribal Court lacked jurisdiction, however, proper deference to the tribal court system precludes relitigation of issues raised by the [tribal court plaintiffs'] bad-faith claim and resolved in the Tribal Courts.” *Id.* at 19.

As shown by a number of Supreme Court cases, the Court favors a doctrine of respect for the right of one court to resolve questions of its jurisdiction without interference from another court. For the reasoning articulated in these cases, Staff recommends that the Commission grant NAT's Motion to Stay thereby permitting either the tribal court or the federal district court to resolve questions of its jurisdiction regarding Sprint first.

ISSUE 2

SHALL THE COMMISSION GRANT NAT'S MOTION TO DISMISS?

NAT filed a Motion to Dismiss in this matter based upon the *Montana* exceptions to tribal court jurisdiction. However NAT also noted that *at this time* it believes it is inappropriate for the Commission to grant the Motion to Dismiss. NAT Reply brief, pg. 35.

Sprint argues that even if NAT is correct that the Commission's regulatory jurisdiction is lacking as to "Tribal members *solely* within the exterior boundaries of the Reservation," the Commission may still "regulate NAT's provisions of telecommunications services outside the Reservation boundaries and to non-members within those boundaries." Sprint brief, pg. 32.

Staff recommends that the Commission deny the Motion to Dismiss. The Commission will, at some juncture, hear the Sprint complaint as it relates to intrastate services, if there are in fact intrastate services being provided. For this reason, dismissal is unnecessary.

Montana v. U.S., 450 U.S. 544 (1981), is known as the "pathmarking" case in a line of Supreme Court decisions pertaining to the exercise of tribal regulatory authority over nonmembers. In *Montana* the Crow Tribe and the federal government claimed that the Tribe possessed exclusive jurisdiction within its reservation boundaries to regulate nonmember hunting and fishing on nonmember-owned fee lands. The Court found no express treaty or statutory right to such regulatory authority. The Court did, however, announce two possible exceptions to "the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe."



- (1) "a tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter into consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements"; and
- (2) "a tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when the conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."

450 U.S. at 565-66.

In the matter currently before this Commission, the facts are highly disputed therefore it is not possible for the Commission to determine if either of the above exceptions apply. Dismissal of this matter in light of all the lingering factual questions would be too harsh a remedy. On this basis, Staff recommends that the Commission deny the Motion to Dismiss.

CONCLUSION

The Commission should take a pragmatic approach to this matter as it relates to the tribal exhaustion doctrine and grant NAT's Motion to Stay thereby permitting either the tribal court or the federal district court to resolve questions of its jurisdiction regarding Sprint first. Staff would further recommend that the Commission deny the Motion to Dismiss.

Finally, Staff would note that Sprint has requested in its amended complaint's prayer for relief, an award for money damages. SDCL § 49-13-1.1 states as follows:

49-13-1.1. Complaint to commission or suit by private person--
Election of remedies. Any person claiming to be damaged by any telecommunications company or motor carrier may either make complaint to the commission or may bring suit on his own behalf for the recovery of damages in any court of competent jurisdiction in this state, but no person may pursue both remedies at the same time.

None of their parties addressed this statute in their filings. The parties may wish to do so in their reply briefs.



Dated this 15th day of November, 2010.

Karen E. Cremer

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**IN THE MATTER OF A COMPLAINT FILED
BY SPRINT COMMUNICATIONS COMPANY,
LP AGAINST NATIVE AMERICAN TELECOM,
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SERVICES**

) **CERTIFICATE OF SERVICE**
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) **TC10-026**
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I, Karen E. Cremer, hereby certify that true and correct copy of Staff's Brief in Response to Native American's Motion to Stay and Motion to Dismiss was served electronically on the 15th day of November, 2010, addressed to:

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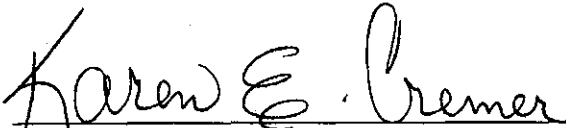
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