BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN RE:

SPRINT COMMUNICATIONS COMPANY L.P.,

Complainant,

v.

NATIVE AMERICAN TELECOM, LLC,

Respondent.

Docket No. TC10-026

SUPPLEMENTAL REPLY BRIEF OF SPRINT COMMUNICATIONS COMPANY L.P.

INTRODUCTION

Sprint Communications Company L.P. ("Sprint") submits this supplemental reply brief to address the arguments NAT made in response to Sprint's Reply Brief dated December 6, 2010. As discussed in Sprint's briefs in support of its successful motion for a preliminary injunction,[1] the United States Supreme Court has addressed the exhaustion issue in holdings that expanded the exceptions to exhaustion of tribal remedies, a federal judge-made rule based on comity. *See Nevada v. Hicks*, 533 U.S. 353, 369 (2001) ("we added a broader exception in *Strate*"). In the absence of a congressional grant of jurisdiction, a tribal court has no jurisdiction over non-members. *Hicks* held that tribal courts could not enforce § 1983 claims against state game wardens even for conduct on the reservation. Here Congress has gone even further, and *explicitly* enacted a statute that mandates *only* a federal forum for claims based on the Federal Communications Act.

[1] Copies of Sprint's federal briefs are attached to the Affidavit of Scott G. Knudson dated December 10, 2020 as Exhibits AA and BB.

NAT now argues that notwithstanding Judge Schreier's order enjoining NAT's tribal court action the tribal court still has jurisdiction to entertain NAT's allegations about its intrastate traffic. NAT Reply Brief at 2. This argument is simply wrong for several reasons.

Sprint moved to enjoin NAT from pursuing with its tribal court complaint and the tribal court and judge from further proceedings with NAT's complaint. Knudson 12/10/10 Aff. Ex. Z. The district court granted Sprint's motion in total. *See* District Court Order at 18. NAT's effort now to carve out a state law claim for the tribal court to address rings hollow. In sum and substance, NAT's tribal court complaint was premised on the Federal Communications Act, and the federal district court properly enjoined the tribal action in full. Hence, even if the Commission were inclined to defer to that tribal court, the tribal court would violate the federal court order if it acted on NAT's complaint.

NAT also ignores that Sprint initiated its PUC action weeks before NAT filed in tribal court. In these circumstances, the comity considerations that underlie the federal exhaustion rule should give way to the comity considerations that underlie the first-to-file rule. *See United States Fire Ins. Co. v. Goodyear Tire & Rubber Co.*, 920 F.2d 487, 488-89 (8th Cir. 1999). Nor does NAT cite a *single* case where a state court or regulatory agency applied the exhaustion rule in any circumstance, let alone where the state action was started first.

NAT cites several cases in its response to Sprint to assert that off reservation conduct does not deprive a tribal court of jurisdiction if "the genesis of a dispute lays on-

reservation." NAT Brief at 4. This assertion is belied by the fact that the two invoices that Sprint paid were generated in Texas and sent to Sprint in Kansas, which sent its checks to the Texas billing agent. NAT itself is in Sioux Falls, and the decision not to pay NAT was made in Kansas. Moreover, the traffic pumping business NAT wants to be paid for does not involve tribal members on the Crow Creek Reservation.

The authorities NAT cites do not give the Crow Creek Tribal Court any jurisdiction over Sprint. The *Nigret* decision involved a contract dispute between a construction company and the tribe's housing authority, which the court held made it a tribal affair for exhaustion purposes, allowing the tribal court to determine the validity of the contract's arbitration provision. *Nigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 32-33 (1st Cir. 2000). *Bank of Oklahoma v. Muscogee (Creek) Nation*, 972 F.2d 466 (10th Cir. 1992), presented a dispute over a gaming contract with the tribe for a bingo hall on tribal land, which the federal courts determined should first be decided in tribal court. *Id.* at 1171. *Stock West Corp. v. Taylor*, 964 F.2d 912 (9th Cir. 1992), presented a legal malpractice action against an Indian tribe's in-house counsel. Because the attorney did all his work for his allegedly mistaken opinion in his on-reservation office, there was a basis requiring the plaintiff to sue the attorney in tribal court. *Id.* at 918. None of these cases is persuasive authority for concluding that the Crow Creek Tribal Court has jurisdiction over Sprint, which is uncontestibly handing off its Fort Thompson exchange traffic to South Dakota Network

at its switch in Sioux Falls.[2] There is no federal grant permitting the tribal court to assert jurisdiction; there likewise is no state law grant of jurisdiction.

NAT does not even mention, much less address, the South Dakota's Supreme Court decision in *Cheyenne River Sioux Tribe Telephone Authority v. Public Utilities Commission of South Dakota*, 1999 SD 60, 595 N.W.2d 605. In that case, involving the sale of a telephone exchange on the Pine Ridge Reservation, the Supreme Court held that the Commission had "authority and jurisdiction over intrastate facilities" even within that reservation, and that the Commission's authority was "extensive and crucial to the overall regulatory scheme." *Id.* at ¶ 21, 595 N.W.2d at 610. The Supreme Court has thus determined the Commission has jurisdiction in these circumstances. Because the Commission has the legislative mandate to act *now* on Sprint's complaint, it should not take the unprecedented step of refusing to use the authority in deference to Crow Creek Tribal Court.[3]

NAT also disputes Sprint's position on whether *Montana v. United States*, 450 U.S. 544 (1981), provides the tribal court with jurisdiction over Sprint. NAT Reply Brief at 6. As shown in Sprint's federal court reply brief, NAT's litany of alleged injuries to

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[2] Nor does *Wells v. Wells*, 451 N.W.2d 402 (S.D. 1990), which NAT cites at page 4, confer tribal court jurisdiction. That case held that a state trial court could determine whether a tribal court divorce decree was entitled to recognition under SDCL 1-1-25. Because the tribal court lacked personal jurisdiction over the wife, who had moved off the reservation, the state circuit court could hear her divorce action. *Id.* at 405.

[3] The tribal court action was at a standstill even before Judge Schreier's order. At an October 13 scheduling conference, the recent specially appointed tribal court judge, B.J. Jones, raised questions about the validity of his appointment. He also orally set out a briefing schedule and a deadline for the tribe to intervene. The parties agreed to stay the briefing schedule, while the date for intervention came and went without the tribe intervening. Affidavit of Stanley E. Whiting dated December 10, 2010, at ¶¶ 2-3.

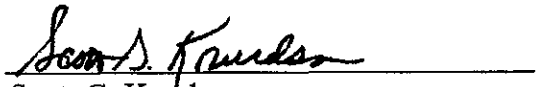
the Crow Creek Tribe's sovereignty is a fiction. Knudson 12/10/10 Aff. Ex. BB at 23-31. The arbitration provisions of NAT's agreement with its non-tribal partners, which rely on South Dakota law, eviscerate NAT's tribal sovereignty concerns. *See* Swier Declaration, dated October 25, 2010 at Ex. 7 (Joint Venture Agreement §§ 16.07, 16.12).

CONCLUSION

Very simply, there is no reason to delay further action on Sprint's complaint. The Commission should take up the mandate the legislature has given it and act.

Dated: December 13, 2010

BRIGGS AND MORGAN, P.A.



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BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN RE:	Docket No. TC10-026
SPRINT COMMUNICATIONS COMPANY L.P.,	
Complainant,	**THIRD AFFIDAVIT OF**
v.	**SCOTT G. KNUDSON**
NATIVE AMERICAN TELECOM, LLC,	
Respondent.	

COUNTY OF HENNEPIN)
) S.S.
STATE OF MINNESOTA)

Scott G. Knudson, being duly sworn, states under oath as follows:

1. My name is Scott G. Knudson. I am an attorney licensed to practice in Minnesota and representing the Complainant, Sprint Communications Company, L.P. ("Sprint"), in this action. I provide this third affidavit in support of Sprint's Supplemental Reply Brief.

2. Attached as Exhibit Z is a copy of Sprint Communications Company L.P.'s Motion for a Preliminary Injunction and Request for Oral Argument, Case No. 10-4110.

3. Attached as Exhibit AA is a copy Sprint Communications Company L.P.'s Memorandum in Support of its Motion for a Preliminary Injunction.

4. Attached as Exhibit BB is a copy of Sprint's Reply Memorandum in Support of its Motion for a Preliminary Injunction.

This concludes my affidavit.

By : _____
Scott G. Knudson

Subscribed and sworn to before
me this 13th day of December, 2010.

_____
Notary Public

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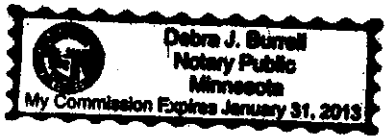

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

SPRINT COMMUNICATIONS COMPANY L.P.,

Plaintiff,

v.

THERESA MAULE IN HER OFFICIAL CAPACITY AS JUDGE OF TRIBAL COURT, CROW CREEK SIOUX TRIBAL COURT, AND NATIVE AMERICAN TELECOM, LLC.,

Defendants.

Civil No. 10-4110

SPRINT COMMUNICATIONS COMPANY L.P.'S MOTION FOR A PRELIMINARY INJUNCTION AND REQUEST FOR ORAL ARGUMENT

PLEASE TAKE NOTICE that, pursuant to Fed. R. Civ. P. 65, Plaintiff Sprint Communications Company L.P. ("Sprint") hereby moves for a preliminary injunction enjoining Defendants Crow Creek Sioux Tribal Court ("Tribal Court") and Tribal Court Judge Theresa Maule from any further proceedings in the case Defendant Native American Telecom LLC brought against Plaintiff Sprint in Tribal Court. Sprint also seeks an injunction against Defendant Native American Telecom to prevent it from pursuing its action against Sprint in Tribal Court. This motion is based on the Memorandum in Support of Sprint's Motion for a Preliminary Injunction, supporting affidavits, all of the pleadings on file with the

Court in this action, and any oral argument made at any hearing on this motion.

Pursuant to Local Rule 7.1, Sprint also hereby requests the opportunity for oral argument on its motion.

Dated: September 28, 2010

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFF SPRINT COMMUNICATIONS COMPANY, L.P.

Exhibit Z
947

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on September 28, 2010, the foregoing *Sprint Communications Company L.P.'s Motion for A Preliminary Injunction and Request for Oral Argument* was filed and served on all counsel of record via the Court's CM/ECF system.

/s/ Stanley E. Whiting

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UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

SPRINT COMMUNICATIONS COMPANY L.P.,

Plaintiff,

v.

THERESA MAULE IN HER OFFICIAL CAPACITY AS JUDGE OF TRIBAL COURT, CROW CREEK SIOUX TRIBAL COURT, AND NATIVE AMERICAN TELECOM, LLC.,

Defendants.

Civil No. 10-4110

SPRINT COMMUNICATIONS COMPANY L.P.'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR A PRELIMINARY INJUNCTION

INTRODUCTION

Sprint Communications Company L.P. ("Sprint") started this action to enjoin Native American Telecom, LLC ("NAT") from pursing a claim it brought against Sprint in the Crow Creek Sioux Tribal Court ("Tribal Court"). In its tribal complaint, NAT alleged Sprint has refused to pay for what NAT claims are switched access charges due it under tariffs it has on file with the Federal Communications Commission ("FCC") and the Crow Creek Sioux Tribal Utility Authority ("Tribal Utility Authority"). But Sprint does *not* interconnect with NAT on the Crow Creek Sioux Reservation ("Reservation") or anywhere else, and Sprint in fact is not directly connected to NAT for switched access services. *All* of Sprint's

Exhibit AA
949

long distance traffic at issue in this case is directed to and handed off in Sioux Falls, South Dakota, at a switch owned by South Dakota Network, LLC. In addition, Sprint has no physical presence on the Reservation. Thus, there is no constitutionally lawful basis to compel Sprint to defend NAT's allegations in Tribal Court. Requiring it to do so would violate its due process rights.

Sprint believes that NAT is operating a scheme to fraudulently bill Sprint for telephone calls that are made to appear as legitimate telephone calls to end users on the Reservation. The scheme NAT has concocted exploits a weakness in the federal regulatory regime. Long distance carriers like Sprint must rely on local exchange carriers to originate or terminate long distance calls. Here, what NAT purports to bill Sprint for is a charge for terminating access. An entity like NAT prepares the necessary paperwork to operate as a "competitive local exchange carrier," purportedly to provide local telephone services. It then obtains a block of telephone numbers, files a "tariff" with the FCC, and starts billing Sprint and other long-distance carriers under the ruse of providing terminating access to the new "local exchange."

But NAT is not offering the typical terminating access service. For example, in July 2010, Sprint determined that 99.98% of the calls reported as terminating on a NAT phone number were calls to conference

call bridge numbers, terminating instead on equipment Sprint believes is located in Los Angeles, California. Federal law requires that NAT's tariff enforcement action be filed before the FCC or in federal court, which is one more compelling reason why the Tribal Court lacks jurisdiction over Sprint. In naming the Tribal Court and its judge as defendants in its declaratory judgment action, Sprint has simply followed a well-established path for challenging the jurisdiction of the Tribal Court in federal court. *See, e.g., Strate v. A-1 Contractors*, 520 U.S. 438 (1997); *Christian Children's Fund, Inc. v. Crow Creek Sioux Tribal Court*, 103 F. Supp. 2d 1161 (D.S.D. 2000).

The United States Supreme Court has recognized that tribal courts possess little, if any, adjudicatory authority over non-tribal members, such as Sprint, subject only to two narrow exceptions. *See Montana v. United States*, 450 U.S. 544 (1981). Where, as in this case, the exceptions are inapplicable and jurisdiction has clearly been vested in other entities, tribal exhaustion would serve no purpose other than delay and need not be followed. *See Strate v. A-1 Contractors*, 520 U.S. 438, 459 n.14 (1997). Sprint thus moves for a preliminary injunction.

FACTUAL BACKGROUND

A. The Parties

1. NAT

According to public records available at the South Dakota Secretary of State, NAT is a limited liability company organized in 2008 under the laws of South Dakota with its principal place of business in Sioux Falls, South Dakota. Affidavit of Scott G. Knudson ("Knudson Aff.") at ¶ 2 and Ex. A. Gene DeJordy and Tom Reiman are NAT's founders and the members personally liable for NAT's debts pursuant to SDCL § 47-34A-303(c). *Id.* [1] Neither Reiman nor DeJordy are enrolled members of the Crow Creek Sioux Tribe ("Tribe") or any other tribe. Answer of NAT ¶ 13. Neither DeJordy nor Reiman live on the Reservation, DeJordy resides now in Connecticut,[2] while Reiman lives in Sioux Falls. In September 2009 NAT filed its annual report with the Secretary of State listing Reiman as NAT's president and registered agent. Knudson Aff. at ¶ 3 and Ex. B. NAT purports to operate as a competitive local exchange

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[1] NAT's public filings can be found on the Secretary of State's corporate database www.sdsos.gov.

[2] According to federal court documents in the Eastern District of Arkansas, DeJordy is a defendant in a lawsuit brought by Alltel Communications, L.L.C. An Affidavit of Service in that file discloses DeJordy lives in Fairfield, Connecticut. Knudson Aff. ¶ 6 and Ex. E.

carrier on the Reservation under tariffs filed with the FCC and the Tribal Utility Authority.[3]

In its brief in support of its motion to stay filed with this Court, NAT claims, without providing any supporting documentation, that NAT is in fact 51% owned by the Tribe, with Widevoice Communications, Inc. and Native American Telecom Enterprises LLC ("NAT Enterprise") as the other owners. [Docket No. 15] Documents on file with the Secretary of State show Reiman and DeJordy are the organizers of NAT Enterprise, and both remain personally liable under SDCL § 47-34A-303(c) for the debts of NAT Enterprise. Knudson Aff. ¶ 4 and Ex. C. Reiman is the president and registered agent of NAT Enterprise. *Id.* at ¶ 5 and Ex. D.

In an affidavit filed with the Court [Docket No. 14], DeJordy describes the technology NAT allegedly employs to provide its services. NAT is using WiMax (World Interoperability for Microwave Access) technology. Affidavit of Gene DeJordy dated September 3, 2010 ("DeJordy Aff.") at ¶ 13. The WiMax technology NAT has employs "advanced antenna and radio technology." *Id.* With this technology, NAT "delivers wireless IP (Internet Protocol) voice and data communications." *Id.* DeJordy also claims that NAT has eschewed applying for Universal Service Funds ("USF") or other federal or state funding source to install

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[3] Please find these tariffs attached to Sprint's Complaint as Exs. A and B, respectively.

its equipment. *Id.* ¶ 11.[4] NAT, however, has sought and received a license from the FCC to operate its WiMax technology. Knudson Aff. ¶ 16 and Ex. O.

2. The Tribal Court

The Crow Creek Tribal Court is the tribal court for the Crow Creek Sioux Tribe and has its chambers in Fort Thompson, South Dakota. Answer of Tribal Court ¶ 14.

3. The Tribal Judge

When Sprint initiated this action the Honorable Theresa Maule was the Judge of the Crow Creek Tribal Court. *See* Answer of Tribal Court ¶ 15.

4. Sprint

Sprint is a telecommunications company that provides telecommunications services nationwide and in the context of the issues addressed in this case operates as an interexchange carrier ("IXC"). Affidavit of Amy S. Clouser dated September 28, 2010 ("Clouser Aff.") ¶ 2.

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[4] It is odd that NAT protests Sprint's refusal to pay NAT's fraudulent bills as hurting the Tribe, while refusing to take part in a generous and legal subsidy scheme. The goal of the USF is to ensure that basic telephone services are available in all areas, by providing funding to companies operating with traditionally hard to serve areas. But to receive a USF subsidy, NAT would have to submit to FCC oversight of the subsidy, which would have brought its traffic pumping under regulatory scrutiny. Hence, the only plausible reason not to seek USF or other governmental assistance was to avoid having its traffic pumping scheme subject to regulatory oversight.

Exhibit AA

954

Sprint is qualified to do business within the State of South Dakota and is certificated by the South Dakota Public Utilities Commission to provide intrastate interexchange services in South Dakota. *Id.* The FCC has also authorized Sprint to provide interstate interexchange services. *Id.*

B. Sprint's role as an IXC subjects it to traffic pumping

As an interexchange carrier ("IXC") Sprint offers long-distance services to its customers around the country. Long-distance calls are those that are made from one local calling area to another. For example, in a typical situation (unlike in this case), a long-distance call may be made from an end user customer in Massachusetts to a called party, or "end user," in South Dakota. The call is delivered to Sprint's long distance network, and Sprint carries the call to the network of the local exchange carrier ("LEC") serving the called customer. *Id.* ¶ 3. In some cases, there is a third carrier between Sprint's long distance network and the LEC network serving the called customer. *Id.* at ¶¶ 3, 16-22.

The facilities used to complete the last leg of these calls are typically provided by the called party's own LEC. Because Sprint does not generally own the facilities that physically connect to end users, it must pay local carriers for access to them. The charge that Sprint pays for access to the called party is known as a "terminating access" charge because the call "terminates" with the party that is called. *Id.* ¶ 5.

Sprint (like other long-distance carriers) purchases terminating access service under a tariff required to be published by the local carrier that contains charges for terminating access (along with other offered services). Pursuant to the terms of that tariff, Sprint and other long-distance carriers have purchased access services under the tariff whenever they hand off a call to the local carrier that has properly defined "terminating access" service. *Id.* Because LECs have an effective monopoly over local telephone service in their service areas, the long distance carriers have no choice but to purchase the service defined in the tariff when the calls are made from one of their customers to an end user in the calling area of the local exchange carrier. *Id.* ¶¶ 5-6; s*ee In re Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exch. Carriers*, FCC Docket No. 96-262, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd. 9923, T 30 (2001). For that reason, it is important that tariffed services are defined precisely. For that reason, too, tariffs are construed narrowly – only services expressly set out in the tariff are "deemed" to be purchased. *See In re Theodore Allen Commc'ns, Inc. v. MCI Telecomms. Corp.*, 12 FCC Rcd. 6623, ¶ 22 (1997).

C. Sprint seeks to enjoin NAT's practice of traffic pumping

Traffic pumping is a scheme where a LEC partners with free conference call centers or chat rooms to artificially stimulate telephone call volume. NAT purports to operate local exchange carrier operations on the Reservation but with respect to what NAT wants to bill Sprint, exists only to operate a fraudulent scheme called traffic pumping. *See* Clouser Aff. ¶¶ 9-15. Traffic pumping occurs when a LEC, such as NAT, partners with a second company (a "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 terminating access charges, hoping that IXCs unwittingly pay those bills. If the IXC does so, the LEC and Call Connection Company share the revenues. *Id.* ¶ 9. Sprint has seen these traffic pumping schemes target areas where switched access rates are the highest, which tend to be in rural areas. *Id.*

The FCC and the Iowa Utilities Board have ruled that 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.[5] Numerous other cases involving the legality of traffic pumping are pending before federal courts throughout the United States.[6]

D. NAT purports to operate under FCC and tribal tariffs that are improper

NAT has two tariffs it purports to enforce in tribal court. One is NAT's tariff that it filed with the FCC on September 14, 2009, with an effective date of September 15, 2009. A copy of NAT's initial FCC tariff

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[5] *See In the Matter of Qwest Commc'ns Corp. v. Farmers and Merchants Mut. Tel. Co.*, File No. EB-07-MD-001, Second Order on Reconsideration (Nov. 25, 2009); *In re Qwest Commc'ns Corp. v. Superior Tel. Co.*, No. FCU-07-2, Final Order, (Iowa Utilities Board, Sept. 21, 2009).

[6] *See, e.g., Sprint Commc'ns Co., L. P. v. Superior Tel. Coop.*, No. 4:07-CV-00194 (S.D. Iowa); *Qwest Commc's Corp. v. Superior Telephone Coop.*, No. 4:07-CV-0078 (S.D. Iowa), *AT&T Corp. v. Superior Tel. Coop.*, No. 4:07-CV-0043 (S.D. Iowa); *AT&T Corp. v. Reasnor Tel. Co., LLC*, No. 4:07-CV-00117 (S.D. Iowa). There are also several similar suits pending in South Dakota, including three suits involving Sprint. *See Sancom, Inc. v. Sprint Commc'ns Co., L.P.*, No. CIV 07-4107 (D.S.D.); *Northern Valley Commc'ns, LLC v. Sprint Commc'ns Co., L.P.*, No. CIV. 08-1003 (D.S.D.); *Splitrock Prop., Inc. v. Sprint Commc'ns Co., L.P.*, No. CIV 09-4075 (D.S.D.). Two other cases brought in the District of Minnesota involving a Minnesota LEC and Sprint and Qwest have been referred to the FCC and stayed pending the outcome of related proceedings at the Minnesota Public Utilities Commission. *See Tekstar Commc's, Inc. v. Sprint Commc'ns Co., L.P.*, No. 08-CV-01130-JNE-RLE (D. Minn.); *Qwest Commc'ns Co. LLC v. Tekstar Commc'ns, Inc.* No. 10-CV-00490 (MJD/SCN). Other cases include *North Country Commc'ns Corp. v. Sprint Commc'ns Co., L.P.*, 09-CV-2685 (S.D. Iowa); *Beehive Tel. Co. Inc. Nevada v. Sprint Commc'ns Co., L.P.*, 08-CV-00380 (D. Ut.); and *Bluegrass Tel. Co., Inc. v. Sprint Commc'ns Co, L.P.*, 410-CV-104 (W.D. Ky).

Exhibit AA

was attached as Exhibit A to Sprint's Complaint. NAT also claims a tariff it filed with the Tribal Utility Authority on September 1, 2009, ostensibly effective that very day. A copy of NAT's tribal tariff was attached to Sprint's Complaint as Exhibit B. Since the filing of its Complaint, Sprint has determined that NAT amended its FCC tariff on October 21, 2009. *See* Knudson Aff. ¶ 7 and Ex. F.[7] These two tariffs are for all practical purposes the same.

While NAT purports to operate under these tariffs, it actually operates in South Dakota without a state certificate of authority. On September 8, 2008, NAT applied with the South Dakota Public Utilities Commission ("SD PUC") for a state Certificate of Authority to provide competitive local exchange service on the Crow Creek Reservation pursuant to ARSD 20:10:32:03 and 20:10:32:15. In NAT's application to the SD PUC, NAT described its application as "a joint venture with the Crow Creek Sioux Tribe," to "provide service only within the exterior boundaries of the Crow Creek Indian Reservation." Knudson Aff. ¶ 8 and Ex. G at 1, 3. NAT provided "the biographies of the principal owners" of NAT – Reiman and DeJordy. *Id.* at 3, Ex. B.

While NAT's SD PUC application was pending, NAT obtained authorization from the Tribal Utility Authority on October 28, 2008, to

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[7] The changes NAT made do not affect the Commission's jurisdiction. If anything, the changes made NAT's tariff even more one-sided.

provide LEC services within the Crow Creek Reservation. Knudson Aff. ¶ 12 and Ex. K. In response, on December 1, 2008, NAT moved to dismiss its application pending before the SD PUC. The Tribe itself filed comments with the SD PUC in support of NAT's motion to dismiss. Nowhere in its comments did the Tribe describe itself as the majority owner of NAT. Rather, it described the Tribe as having "entered into an agreement," with NAT to develop a telecommunications system on the Reservation. Knudson Aff. ¶ 9 and Ex. H. The SD PUC granted NAT's motion as a matter of right, without addressing the merits, on February 5, 2009. *See* Knudson Aff. ¶ 10 and Ex. I. As a result, NAT is operating within the State of South Dakota, purportedly as a local exchange carrier and seeks to assess switched access charges *without* a certificate of authority from the SD PUC.

E. NAT bills Sprint for switched access charges based on traffic pumping

NAT has devised a scheme to inflate call volumes artificially to phone numbers assigned to NAT's local calling area, in order to bill Sprint for what NAT wrongly characterizes as tariffed "terminating access" service. But under this scheme, Sprint is *not* connecting a call with a called party on the Reservation that is a customer of NAT. Sprint only connects the calls NAT bills Sprint to South Dakota Network, LLC. Clouser Aff. ¶ 22. Moreover, NAT's scheme with its Call Connection

Company partners involves advertising "conference call," or similar services that allow callers who do not reside on the Reservation to talk to one another. *See* Clouser Aff. ¶¶ 11-15.

In his affidavit, DeJordy proclaims "NAT's services take place exclusively within the exterior boundaries of the Reservation." DeJordy Aff. ¶ 4. This misleading statement is very carefully worded, for the word "services" is not a defined term in NAT's tariffs. NAT may have a telephone switch in Fort Thompson, within Reservation boundaries, but virtually none of the traffic South Dakota Network LLC delivers to that switch stays on the Reservation.

Sprint has determined that virtually all of the calls NAT has or wants to bill Sprint for are routed to a telephone switch located in Los Angeles, California. Clouser Aff. ¶¶ 10, 19-21. The calls at issue in this dispute are delivered to conference bridge equipment which is typically located at the switch. *Id.* at ¶ 21. Other LECs and Call Connection Companies involved in traffic pumping schemes normally locate conference bridge equipment at or near the switch used for the traffic. Whether the equipment is located in California or elsewhere, it is certainly not located at an end user's premises on the Reservation, and few, if any, of the parties so communicating reside on the Reservation. Clouser Aff. ¶¶ 15-21. In this case, 99.98% of the traffic for which NAT

is seeking compensation was to these conference bridge services. *Id.* at ¶ 15.

In December 2009, Sprint received its first bill from NAT, which used a Texas billing firm called CABS Agent (with whom Sprint is familiar) to prepare and send the bill. A preliminary review of the bill revealed that the charges seemed legitimate, and thus a check was made payable to CABS Agent and sent to its Texas address in the ordinary course of business. This occurred the next month as well. When Sprint received a third bill totaling more than $75,000, however, Sprint investigated NAT's activities and identified its use of traffic pumping. Sprint has requested return of its funds from NAT, which has refused. Clouser Aff. ¶ 8

F. Sprint does not do business with NAT on the Reservation

Sprint has investigated the factual basis by which NAT claims a right to bill Sprint for switched access services allegedly on the Reservation. NAT's DeJordy claims Sprint provides interexchange services *on* the Reservation. DeJordy Aff. ¶ 15. That is simply *not* the case. Sprint has no physical property on the Reservation so it cannot be doing business on that basis with NAT. Clouser Aff ¶ 16. In fact, Sprint does not have any facilities on the Reservation, and does not interconnect with any NAT equipment on the Reservation. *Id.* ¶¶ 16-22.

All of Sprint's long distance calls into South Dakota that are at issue here interconnect with South Dakota Network, LLC, a wholly independent entity unrelated to Sprint, which maintains a tandem telephone switch in Sioux Falls. *Id.* It is South Dakota Network, LLC and its equipment that actually interconnect with NAT. *Id.* Sprint simply does not connect any of its long distance calls directly with NAT. Likewise, if NAT actually has local phone service on the Reservation, Sprint has nothing to do with that service, and any long distance calls from those customers (if they actually exist) would travel over the facilities of South Dakota Network, LLC before reaching Sprint's facilities. *Id.* ¶ 22.

Sprint's investigation also revealed that after South Dakota Network routes a call to NAT's equipment, ostensibly located in Fort Thompson on the Reservation, those calls are then sent to a telephone switch located in Los Angeles, California. Clouser Aff. ¶ 21. This switch is operated by Widevoice Communications, a company Sprint has seen before in traffic pumping cases.[8] *Id.*

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[8] If, as NAT now claims, Widevoice Communications is a part owner of NAT, that fact only makes the traffic pumping scheme more obvious and NAT's connection to legitimate reservation services even more attenuated. *See* Clouser Aff. ¶¶ 19-22.

Exhibit AA

G. NAT improperly involves the Tribal Utility Authority and the Tribal Court

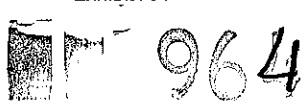
On March 26, 2010, NAT contacted the Tribal Utility Authority about Sprint's position that traffic pumping is not a legitimate access service. This communication took place without Sprint's knowledge. On March 29, 2010, the Tribal Utility Authority issued an *ex parte* order stating that Sprint was required to pay the access charges, based on the tariff on file with the FCC and the Tribal Utility Authority:

> [T]his Utility Authority finds Sprint's non-payment of Native American Telecom-Crow Creek's access tariff charges to be in 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.

Tribal Utility Authority Order, at 4 (Mar. 29, 2010) (emphasis added). Knudson Aff. ¶ 11 and Ex. J.

The Tribal Utility Authority's Order is premised on Sprint's alleged nonpayment of what are claimed to be terminating access charges that an entity called CABS Agent billed Sprint, purportedly pursuant to NAT's FCC and tribal tariffs. But in its Order, the Tribal Utility Authority identified the complainant as "Native American Telecom-Crow Creek"; the entity, however, to whom the Tribal Utility Authority granted telecommunications authority on the Reservation is Native American Telecom, LLC. *Compare* Knudson Aff. Ex. K *with* Ex. J. Thus, even

Exhibit AA



though NAT has billed Sprint and sued it in Tribal Court, there may be as yet another entity purportedly offering on-Reservation telecommunication services.

In response, Sprint initiated an action against NAT before the SD PUC to stop NAT's scheme with respect to intra-state traffic. NAT refuses to acknowledge the SD PUC's jurisdiction over NAT, even though at one time NAT had a tariff on file with the SD PUC. The Tribal Utility Authority intervened in the PUC action. The parties in that proceeding are currently briefing the PUC's jurisdiction over NAT. Knudson Aff. ¶ 13 and Ex. L.

On July 12, 2010, NAT sued Sprint in Tribal Court. Knudson Aff. ¶ 14 and Ex. M. As the facts underlying this case did not take place on the Reservation, involve a federal tariff the Tribal Court cannot enforce and a nominal tribal tariff that exceeds the tribe's regulatory authority, Sprint moved in Tribal Court by special appearance to dismiss NAT's Complaint. Nevertheless, on August 30, 2010, NAT moved the Tribal Court to establish a scheduling order. Knudson Aff. ¶ 15 and Ex N.

Because the Tribal Court and the Tribal Utility Authority clearly lack jurisdiction over Sprint, Sprint concurrently filed a complaint with this Court to enjoin further proceedings in the Tribal Court. Because NAT is using its Tribal Court action to argue to this Court and the SD

Exhibit AA

965

PUC that both forums must defer to the Tribal Court, Sprint now seeks a preliminary injunction from this Court to ensure that no further action is taken by NAT or the Tribal Court.

SUMMARY OF ARGUMENT

As a threshold issue, tribal court exhaustion does not apply to this case. The Eighth Circuit Court of Appeals made clear in *Hornell Brewing Co. v. Rosebud Sioux Tribal Court*, 133 F.3d 1087 (8th Cir. 1998), that the power of Indian tribes with respect to civil jurisdiction over non-Indians is limited to activities "on their reservations." *Id.* at 1091.

The United States Supreme Court has held that where exhaustion would serve no purpose other than delay, exhaustion of tribal court remedies is not a prerequisite to federal court action, especially when, as here, the Tribal Court clearly lacks jurisdiction in this case. There is no congressional grant of jurisdiction to the Tribal Court. In fact, Congress stated the opposite in the Federal Communications Act, clearly requiring that NAT's claims against Sprint be heard only in federal court or before the FCC. Put very simply, Sprint has no physical presence on the Reservation and has not consented to Tribal Court jurisdiction. The Tribal Court is thus without authority to act in this case.

Sprint has demonstrated its entitlement to a preliminary injunction. First, and perhaps most importantly, Sprint has

demonstrated that it will succeed on the underlying merits of this case. The Tribal Court indisputably lacks jurisdiction over Sprint and the complaint filed there. As this jurisdiction is so clearly lacking, Sprint will be harmed it if is forced to continue to defend itself in an improper forum. This Court must step in to protect Sprint's due process rights. Additionally, given the large number of traffic pumping cases pending across the county, including those cases before this Court, the public interest will be served by restraining the tribal court action and ensuring uniform application of the Federal Communications Act.

ARGUMENT

I. EXHAUSTION OF TRIBAL REMEDIES IS NOT REQUIRED IN THIS CASE

The question of exhaustion of tribal remedies is a threshold matter that can be promptly resolved in this case. Sprint is not exchanging traffic directly with NAT on the Reservation or anywhere else. This lack of presence on the Reservation is critical. The Eighth Circuit Court of Appeals stated in *Hornell Brewing*:

> Neither *Montana* nor its progeny purports to allow Indian tribes to exercise civil jurisdiction over activities or conduct of non-Indians occurring *outside their reservations* .... 133 F.3d at 1091(emphasis in original).
>
> ...because the conduct and activities at issue here did not occur on the Rosebud Sioux Reservation, we do not believe *Montana's* discussion of activities of non-Indians on fee land within a reservation is relevant to the facts of this case. More importantly, the parties fail to cite a case in which the

Exhibit AA

> adjudicatory power of the tribal court vested over activity occurring outside the confines of a reservation .... *Id.*
>
> ...we think it plain that the Breweries' conduct outside the Rosebud Sioux Reservation does not fall within the Tribe's inherent sovereign authority .... *Id.* at 1093.
>
> ...the Rosebud Sioux Tribal Court lacks adjudicatory authority over the dispute arising from the Breweries' use of the Crazy Horse name in the manufacturing, sale and distribution of Crazy Horse Malt Liquor outside the Rosebud Sioux Reservation.

Id. at 1093-1094; *see also Christian Children's Fund,* 103 F. Supp. 2d at 1166 (D.S.D. 2000) (no tribal court jurisdiction because activity was off-reservation.)

Hornell establishes that the Tribal Court lacks jurisdiction over NAT's claims because the Sprint calls at issue interconnect to South Dakota Network, *not* to NAT. Clouser Aff. ¶ 22. Moreover, analysis of the actual traffic pumping scheme NAT has devised shows that – contrary to what NAT's principal DeJordy professes – virtually all calls to NAT's exchange do not terminate to an end user premises on the Reservation. Instead, the telephone switch where the calls were routed is physically located in Los Angeles, where calls were directed to conference bridge equipment rather than terminating to an end user located on the Reservation. *Id.* ¶ 21.

Simply a prudential rule, the Supreme Court has carved out some very significant limitations to the tribal exhaustion of remedies doctrine.

> When, as in this case, it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by *Montana's* main rule, it will be equally evident that tribal courts lack adjudicatory authority over disputes arising from such conduct. As in criminal proceedings, state or federal courts will be the only forums competent to adjudicate those disputes. Therefore, when tribal-court jurisdiction over an action such as this one is challenged in federal court, the otherwise applicable exhaustion requirement, see *supra*, at 1410-1411, must give way, for it would serve no purpose other than delay.

Strate, 520 U.S. at 459 n.14 (citations omitted). "In some cases not falling within the Tribe's inherent sovereign authority, there is no exhaustion requirement because the tribal court simply lacks authority to adjudicate disputes arising from such conduct." *Christian Children's Fund*, 103 F. Supp. 2d at 1163 (citing *Hornell*). This is one of those cases.

In *Nevada v. Hicks*, 533 U.S. 353 (2001), the Supreme Court discussed the role of federal statutes in this process:

> It is true that some statutes proclaim tribal-court jurisdiction over certain questions of federal law. ... But no provision in federal law provides for tribal-court jurisdiction over § 1983 actions.

Id. at 367. The same is true in this case, as the Federal Communications Act does not provide for tribal court jurisdiction. Without any statutory authority for tribal court adjudication of NAT's claims, exhaustion of tribal court remedies would serve no purpose other than delay and, thus, not required in this case. *See Strate*, 520 U.S. at 459 n.14; *see also*

Hicks, 533 U.S. at 369 (recognizing this same exception). The timing of NAT's Tribal Court complaint – coming after Sprint started the SD PUC action – shows how NAT brought the Tribal Court action in an effort to keep this controversy out of state or federal hands. *See* Knudson Aff. Ex. M.

NAT's tribal law suit clearly does not fall within the Tribal Court's jurisdiction because NAT's claims are pre-empted by federal law. NAT seeks damages in Tribal Court under sections 201, 203, and 206 of the Federal Communications Act, 47 U.S.C. §§ 201, 203, 206. *See* Tribal Court Complaint ¶¶ 34-54 (Knudson Aff. ¶ 14 and Ex. M). Yet section 207 of the Act, which gives NAT a cause of action to pursue such remedies, expressly requires that those claims only be pursued in federal court or before the FCC:

> Any person claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to [the FCC]...or may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies.

47 U.S.C. § 207 (emphasis added). "By its express language, [the FCA] established concurrent jurisdiction in the FCC and federal district courts only, leaving no room for adjudication in any other forum – be it state, tribal or otherwise." *Alltel Commc'ns v. Oglala Sioux Tribe*, No. CIV.10-

Exhibit AA

5011, 2010 WL 1999315, at *12 (D.S.D. May 18, 2010) (quoting *AT&T Corp. v. Coeur D'Alene Tribe*, 295 F.3d 899, 905 (9th Cir. 2002)); *Cf. Phillip Morris USA, Inc. v. King Mountain Tobacco Co.*, 569 F.3d 932 (9th Cir. 2009) (no exhaustion required where defendants sued in tribal court after federal action initiated; tribal court had no colorable jurisdiction).

As revealed by the DeJordy affidavit, the technology NAT proposes to use presents a serious question of federal law whether there is exclusive federal authority over the technology and whether how NAT can employ a tariff to bill for access. The WiMax technology NAT is using is a form of wireless technology. NAT describes it as licensed, and indeed, NAT has obtained a radio-spectrum license from the FCC. Knudson Aff. Ex. O. Radio-based service can readily extend off the Reservation, something NAT represented to the SD PUC that it would not do when it applied for authority to operate within South Dakota. Knudson Aff. Ex. G at 1, 3.

Congress has determined that the regulatory regime depends on whether the service is telecommunications or information services. The former is:

> the transmission, between or among points specified by the user, of information of the user's choosing, *without change in the form of content of the information as sent and received.*

47 U.S.C. § 153(43) (emphasis added).

Alternatively, the provision of information service means:

> the offering of a capacity for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any capability of the management, control, or operation of a telecommunications system or the management of a telecommunications service.

47 U.S.C. § 153(20). Services that involve a change in protocol are information services. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 977 (2005).

NAT claims it is providing "wireless IP (Internet Protocol) voice and data services." DeJordy Aff. ¶ 13. In the event this service were deemed CMRS (Commercial Mobile Radio Service), NAT could not lawfully use a tariff to bill Sprint – it would have to negotiate with Sprint for a contractual right to do so. *See In re Petitions of Sprint PCS and AT&T Corp. for Declaratory Ruling Regarding CMRS Access Charges*, 17 FCC Rcd. 13192 (2002); *In re Implementation of Sections 3(N) and 332 of the Communications Act Regulatory Treatment of Mobile Services*, 9 FCC Rcd 1411, ¶ 178 (1994) ("To avoid the introduction of these anticompetitive practices, to protect consumers and the public interest, and because continued voluntary filing of tariffs is an unreasonable practice for commercial mobile radio services under Section 201(b) of the Act, we will not accept the tariff filings of CMRS providers."). If NAT's service were

deemed a version of VoIP service (Voice over Internet Protocol), which DeJordy's affidavit suggests is the case, as a matter of federal law, NAT could not assess access charges to such traffic. *PAETEC Commc'ns, Inc. v. CommPartners LLC*, Civ. No. 08-0397, 2010 WL 1767193, at *2 (D.D.C. Feb. 18, 2010) ("Information services are not subject to the access charges regime."); *Southwestern Bell Telephone, L.P. v. Missouri Public Service Commission*, 461 F. Supp. 2d 1055, 1081-82 (E.D. Mo. 2006) ("federal access charges are inapplicable to an "information service" like IP-originated traffic); *Vonage Holdings Corp. v. Minn. Pub. Utils. Comm'n*, 290 F. Supp. 2d 993, 1001 (D. Minn. 2003) (VoIP traffic subject to regulation as an information service not as a telecommunications service). And, if NAT's service is deemed information service of any type, Congress has ruled that it would not be subject to access tariff pricing. *See PAETEC*, 2010 WL 1767193, at *2. In short, what NAT appears to be providing may be something that under section 207, only federal courts or the FCC can address.

The same section 207 analysis holds for any of NAT's claims premised on Sprint's alleged violation of NAT's tribal tariff. On its face, the tribal tariff purports to regulate long distance calls in a manner very

similar to NAT's FCC tariff.[9] But the Tribal Utility Authority can only regulate, if at all, a tribal tariff by which NAT provides only local exchange services on the Reservation to tribal members.[10]

It is obvious that NAT has tried to manufacture Tribal Court jurisdiction and filed its complaint in Tribal Court in order to use the tribal exhaustion doctrine to delay proceedings in this Court and before

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[9] For example, section 1.1 of the tribal tariff proclaims it applies to "Intrastate Access Services . . . into, out of and within the State of South Dakota." Complaint [Docket 1] Ex. B, at 14. In the definitional provisions of each of NAT's tariffs, the terms "End User" and "Terminating Access" are identical. (The FCC tariff is Ex. A to the Complaint.) Moreover, there is nothing in the tribal tariff's definition of End User that restricts the location of an end user (who ultimately receives the call) to the Reservation. This drafting is artful legerdemain to create a tariff that addresses decisions like *In re Qwest Comm'cns. Corp. v. Superior Tel. Corp.*, Dk. No. FCU-07-02 (IUB Sept. 21, 2009), where the Iowa Utilities Board held a LEC's intrastate access charges for calls to conference bridges, chat rooms and the like were not within a tariff's provisions defining access service. Here both of NAT's tariffs include conference bridges in chat rooms located anywhere.

[10] Available federal census data and state tax information demonstrates that a significant portion of those living on the Reservation are non-tribal members and that a significant portion of the land encompassing the Reservation is owned by non-tribal members. Census data show a significant percentage of residents on the Reservation – about 13% – are not of American Indian descent. *See* Knudson Aff. Ex. P. The most recent census data available demonstrates that of the 2,225 residents of the Reservation, only 1,936 are classified as being of American Indian descent. *Id.* This figure demonstrates that a significant portion of the population within the Reservation boundaries are not tribal members.

Additionally, a substantial part of the Reservation has consequently become fee land, and much of that fee land is owned by non-Indians. *See* Knudson Aff. ¶¶ 18-19 and Ex. Q (60 percent of Reservation land in Buffalo County is fee land) and Ex R (over 40 percent of Reservation land in Hughes County is taxable, i.e. , fee land).

the SD PUC. NAT was formed in 2008 by two non-Indians who remain personally liable for NAT's debts. Knudson Aff. Ex. A One of those, Thomas Reiman, is NAT's president and registered agent with an office in Sioux Falls, not on the Reservation. Knudson Aff. Exs. A and B. NAT offers no record support that now, in 2010, the Tribe owns 51% of NAT or how the Tribe actually funded that investment. Indeed, NAT Enterprise, one of the purported owners of NAT, discloses that in 2010 it, too, was owned by the founders of NAT. Knudson Aff. Exs. C and D. NAT and NAT Enterprise have the same president and registered agent. *Compare* Knudson Aff. Exs. A and B with Exs. C and D. Where the creators of NAT are non-Indian entrepreneurs, they cannot claim tribal identity for NAT by allegedly offering the Tribe a 51% share of NAT. Because only non-Indians remain liable for NAT's debts, it cannot be deemed a tribal entity.

Finally, federal law completely preempts the Tribal Court's jurisdiction. As there is no room for tribal court adjudication of NAT's claims, exhaustion of tribal court remedies would serve no purpose other than delay and thus is not required in this case. *See Strate, supra,* 520 U.S. at 459 n.14. Because the lack of tribal authority is clear, there is no need for Sprint to exhaust the jurisdictional issue in Tribal Court. *See Hicks*, 533 U.S. at 374.

II. STANDARDS FOR A PRELIMINARY INJUNCTION

Pursuant to Rule 65, the Court may issue a preliminary injunction when it clearly appears from specific facts that immediate and irreparable injury will result to the moving party. Fed. R. Civ. P. 65(b).

In this circuit, federal district courts consider the well-known *Dataphase* factors when determining whether to issue a preliminarily injunction:

(1) the probability that the movant will succeed on the merits of its claim;

(2) the threat of irreparable harm to the movant;

(3) the balance between the harm to the movant if injunctive relief is denied and the injury that will result if such relief is granted; and

(4) the public interest.

Dataphase Sys., Inc. v. C L Sys., Inc., 640 F.2d 109, 114 (8th Cir. 1981); *Yankton Sioux Tribe v. Kempthorne*, 442 F. Supp. 2d 774 (D.S.D. 2006). No single factor in itself is dispositive – rather, all of the factors must be considered to determine whether, on balance, they weigh in favor of granting the injunction. *Calvin Klein Cosmetics Corp. v. Lenox Labs., Inc.*, 815 F.2d 500, 503 (8th Cir. 1987). However, the Eighth Circuit has held that: "[t]he two most critical factors for a district court to consider in determining whether to grant a preliminary injunction are (1) the probability that plaintiff will succeed on the merits and (2) whether the

Exhibit AA

976

plaintiff will suffer irreparable harm if an injunction is not granted." *Chicago Stadium*, 530 F.2d at 206. Each of these factors weighs strongly in Sprint's favor.

III. SPRINT IS LIKELY TO SUCCEED ON THE MERITS OF ITS CLAIMS

The "probability of success" on the merits factor does not require the party seeking relief to prove a greater than fifty percent likelihood that he will prevail, saying "the court ordinarily is not required at an early stage to draw the fine line between a mathematical probability and a substantial possibility of success." *Dataphase*, 640 F.2d at 113. "The focus in determining probable success should not be to apply the probability language with mathematical precision." *Lenox Labs., Inc.*, 815 F.2d at 503. The case law is clear that plaintiffs do not have to show a greater than fifty percent chance of success on the merits. Sprint can readily demonstrate that level of probability here.

A. The Tribal Court lacks jurisdiction to hear Federal Communications Act claims

By its express terms, the statute under which NAT proceeds precludes NAT's claims from being heard in Tribal Court. NAT seeks relief under Section 201, 203, and 206 of the Federal Communications Act, 47 U.S.C. §§ 201, 203, 206, as well as a declaratory judgment based upon the Federal Communications Act. *See* Tribal Court Complaint ¶¶

Exhibit AA

977

34-54 (Knudson Aff. Ex. M). The Federal Communications Act, however, only allows such claims for relief as provided for under Section 207.[11]

As noted above, *supra* at 20-21, the plain language of Section 207 is beyond dispute – only the FCC or a federal district court may award relief under the Federal Communications Act. A tribal court is not authorized to do so. *See AT&T Corp.*, 295 F.3d at 905 ("§ 207 establishes concurrent jurisdiction in the FCC and federal district courts only, leaving no room for adjudication in any other forum – be it state, tribal or otherwise."); *see also Alltel Commc'ns*, 2010 WL 1999315, at *12 (quoting *AT&T Corp.*).

The WiMax technology NAT is employing raises a serious question whether it is lawful to charge anyone even for legitimate access services. This question is one the FCC has ruled is governed by federal law. Charging for tariffed services proscribed by federal law is a question that under section 207 is to be decided in a federal forum.

NAT's so-called tribal tariff is hardly that. Both NAT and the Tribe represented to the SD PUC that NAT would provide services only *within* the Reservation. But the tribal tariff defines its scope as providing "Intrastate Access Services . . . by Native American Telecom, LLC into, out of and within the State of South Dakota." (Complaint Ex. B at 11).

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[11] Among its other deficiencies, NAT's tribal complaint fails to cite to this specific provision.

Exhibit AA

978

On its face the tribal tariff applies outside the Reservation within South Dakota and even outside the State of South Dakota. And critical provisions of the so-called tribal tariff – Access Charges, Customer, End User, Switched Access Services, Terminating Access – are essentially the same as the FCC tariff.[12] The traffic pumping that CABS Agent invoiced Sprint for could have been billed under either tariff, as both include conference bridge users as permitted Customers and End Users, while and the tribal tariff does not even require the Customer and End User to be on the Reservation. And by using the radio technology of WiMax, NAT's services will not stop at the Reservation boundary.[13]

Because the tribal tariff purports to regulate interstate long distance calls as well, which is plainly outside the tribe's regulatory authority, the tribal tariff must likewise be enforced in federal court or by the FCC. Therefore, any relief that NAT seeks under the Federal Communications Act cannot be provided by the Tribal Court. *See Strate*, 520 U.S. at 459 n.14 ("When, as in this case, it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land

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[12] These terms are found in the definitions part of the tariffs, at pages 9-12 of both tariffs.

[13] Also, if NAT's services truly only impact the Reservation, NAT is still serving a significant number of non-tribal members residing on the Reservation. *See* Knudson Aff. Exs. P-R and Footnote 9, *supra* at 24-25.

Exhibit AA

covered by *Montana's* main rule, it will be equally evident that tribal courts lack adjudicatory authority.").

B. *Montana* does not confer jurisdiction over NAT's complaint

Even if there are some reservation contacts, tribal courts exercise very limited jurisdiction over the activities of non-members. In *Montana*, the Supreme Court established that a tribe's powers do *not* extend to the activities of nonmembers of the tribe, except in two limited circumstances. 450 U.S. 544 (1981). The test under which tribal court jurisdiction over non-members is measured is as follows:

> (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 that 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.

Justice Souter said it well in *Hicks*:

> We said that the passage "scarcely supports the view that the *Montana* rule does not bear on tribal-court adjudicatory authority in cases involving nonmember defendants," 520 U.S., at 451-452, and stressed the "three informative citations" accompanying the statement, which mark the true contours of inherent tribal authority over nonmembers ... Accordingly, in explaining and distinguishing *Iowa Mutual*, we confirmed in *Strate* what we had indicated in *Montana*: that

Exhibit AA

980

> as a general matter, a tribe's civil jurisdiction does not extend to the "activities of non-Indians on reservation lands,"...

Hicks, 533 U.S. at 381 (Souter, J., concurring.)

Other subsequent Supreme Court cases have likewise demonstrated that the *Montana* exceptions are to be *narrowly* construed, and NAT bears the burden of demonstrating jurisdiction. *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 659 (2001) (tax on non-member on fee land presumptively invalid); *see Progressive Specialty Ins. Co. v. Burnette*, 489 F. Supp. 2d 955, 958 (D.S.D. 2007) ("tribal jurisdiction over non-members is 'presumptively invalid'") (quoting *Atkinson*, 532 U.S. at 659).

1. Neither NAT nor Sprint is a tribal member

Under the first *Montana* exception, tribal court jurisdiction may only be exercised where a non-tribal member enters into a consensual relationship with a tribe or a tribal member. 450 U.S. at 565. In this case, however, NAT is a limited-liability company, organized under the laws of the State of South Dakota. Knudson Aff. Exs. A-B. This South Dakota company was founded by two individuals who do not reside on the Reservation, each of whom, and only they, remain personally liable for NAT's debts. *Id.* In documents filed with the South Dakota Secretary of State, NAT's principal executive office is located in Sioux Falls. Based on these facts NAT cannot claim to be a tribal entity. *Id.* Defendant

Sprint is obviously not a tribal member, being a limited partnership with its principal place of business in Overland Park, Kansas. Clouser Aff. ¶ 2.

The recent, as yet unsubstantiated, claim that NAT is now 51 percent owned by the Tribe does not confer tribal court jurisdiction over Sprint. In *Plains Commerce Bank*, the Court held the tribal court lacked the power to hear a claim of discrimination asserted by two tribal members against a non-tribal bank which had foreclosed on their land within the reservation and sold that land over their protest to a non-Indian. *Plains Commerce Bank v. Long Family Land and Cattle Co.*, __ U.S. __, 128 S. Ct. 2709, 2720 (2008). Likewise, here, it matters not whether NAT's non-tribal organizers have engaged in some type of shell game to create the appearance of NAT being a tribal entity. *Plains Commerce Bank* strips the Tribal Court here of *any* adjudicatory power over Sprint.

2. No consensual relationship exists that would support jurisdiction

In addition to NAT's tribal lawsuit not involving a tribal member, no consensual relationship has been established that would support tribal jurisdiction or regulation under *Montana* and its progeny. Sprint is a telecommunications provider. Providing telecommunications services on a reservation "as a matter of law does *not* create a 'consensual

Exhibit AA

relationship' with the tribe or its members." *Reservation Tel. Coop. v. Henry*, 278 F. Supp. 2d 1015, 1023 (D.N.D. 2003) (tribe had no authority to tax utility's property within reservation). Because "[a]n individual has no organic, economic or political right to service by a particular utility merely because he deems it advantageous to himself, . . . it is inaccurate to view a request for service by a potential electric customer from an electric supplier as forming a consensual relationship similar to that which occurs in other commercial contexts." *In re Application of Otter Tail Power Co.*, 451 N.W.2d 95, 105 (N.D. 1990) (internal quotations omitted). Instead, the provision of telecommunications services is regulated by the FCC or the SD PUC. *See* 47 U.S.C. § 151 *et seq.*; *Cheyenne River Sioux Tribe Tel. Auth. v. Public Utils. Comm'n of S. D.*, 1999 SD 60 ¶ 30, 595 N.W.2d 604, 611 (holding that the SD PUC had authority over the sale of a telephone exchange located on a reservation).

In addition to requiring a consensual relationship, the Supreme Court has also held that the proposed regulation must bear a nexus to any such relationship. "*Montana* limits tribal jurisdiction under the first exception to the regulation of the activities of nonmembers." *Plains Commerce*, 128 S. Ct. at 2721 (internal quotations omitted); *see also Atkinson*, 532 U.S. at 656 (holding that the tribal regulation must bear some nexus to the consensual relationship). "Even then, the regulation

Exhibit AA

must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations." *Plains Commerce Bank*, 128 S. Ct. at 2724. In this case, Sprint's alleged activities, *i.e.*, nonpayment of access charges, likewise lack a sufficient regulatory nexus, because Sprint has no consensual relationship with a South Dakota limited liability company, owned or operated by non-members of the Crow Creek Sioux Tribe. Similarly, if Sprint has no physical presence or interconnection with NAT on the Reservation, there is no basis to hold the Tribal Court has adjudicatory jurisdiction over NAT.

Nor would it matter even if the Tribe in fact owns part of NAT. As noted above, *supra* at 32, in *Plains Commerce Bank*, the borrower was a South Dakota LLC owned by members of the Cheyenne River Sioux Tribe. The fact the bank in *Plains Commerce* chose to do business with tribal members involving fee land on a reservation did not confer adjudicatory jurisdiction over the bank. 128 S. Ct. at 2720.

3. No conduct supports an exercise of inherent jurisdiction

The second *Montana* exception recognizes that tribes also may retain inherent jurisdiction 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

Exhibit AA

984

welfare of the tribe." *Montana*, 450 U.S. at 566. This second *Montana* exception is also narrowly applied. As the Supreme Court observed in *Atkinson*:

> *Montana's* second exception "can be misperceived." The exception is only triggered by *non-member conduct* that threatens the Indian tribe; it does not broadly permit the exercise of civil authority wherever it might be considered "necessary" to self-government. Thus, unless the drain of the non-member's conduct upon tribal services and resources is so severe that it actually 'imperils' the political integrity of the Indian tribe, there can be no assertion of civil authority beyond tribal lands.

532 U.S. at 657 n.12 (emphasis in original). The tribe's inherent jurisdiction is not triggered in this case because Sprint's allegedly wrongful conduct has not occurred on non-fee lands within the Reservation, nor has it directly affected the political integrity, economic security, health, or welfare of the tribe. Sprint has no property on the Reservation and does not in fact interconnect with NAT.

NAT alleges in tribal court that Sprint improperly failed to pay NAT's invoices. *See* Knudson Aff. Ex. M. Sprint's decision not to pay the invoices, however, did not take place on the Reservation; instead it took place in the state of Kansas, the location of Sprint's headquarters. *See* Clouser Aff. ¶ 2. Nor did NAT receive payment on the Reservation; payment went instead to an unrelated billing agent in Texas. *Id.* at ¶ 8. Similarly, the calls were sent to a telephone switch in California and

Exhibit AA

985

delivered to conference bridge equipment rather than end user premises on the Reservation. Clouser Aff. ¶ 12. Thus, if NAT's tribal tariff were truly confined to boundaries of the Reservation, that tariff would not even be implicated in this case.

Not only has it not committed any wrongful conduct on the Reservation, but Sprint's conduct does not directly imperil the political integrity, economic security, health or welfare of the tribe. The business NAT attributed to Sprint does not affect tribal members because calls delivered to a Call Connection Company have no direct affect on the tribe. The second *Montana* exception is designed to allow a tribe to do only "what is necessary to protect tribal self-government or to control internal relations." *Strate*, 520 U.S. at 458-59. "The conduct must do more than injure the tribe, it 'must imperil the subsistence' of the tribal community.'" *Plains Commerce Bank*, 128 S. Ct. at 2726 (quoting *Montana*, 450 U.S. at 566); *see* Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW § 4.02[3][C], at 231 n.220 (2005) (the "elevated threshold for application of the second *Montana* exception suggests that tribal power must be necessary to avert catastrophic consequences."). Therefore, as neither NAT nor Sprint is a tribal member, and no allegedly wrongful conduct has occurred within the Reservation, the Tribal Court cannot assert jurisdiction under *Montana*.

Courts and the FCC have rejected NAT's argument that the second *Montana* exception applies. In *Reservation Telecom Coop. v. Henry*, the court held:

> The Defendants have wholly failed to establish that *Montana's* second exception applies and justifies the imposition of a possessory interest tax. The Cooperative's actions of providing telecommunication services, and the related sales and service of telephone equipment, do not endanger the tribe's political integrity, the economic security, or the health or welfare of the tribe.

278 F. Supp. 2d at 1024; *see also Cheyenne River*, 1999 SD 60, ¶¶ 18-23, 595 N.W.2d at 608-09 (PUC's exercise of authority over tribe's agreement to purchase on-reservation portion of telephone exchange did not infringe on exercise of tribal self-government). The FCC likewise rejected Western Wireless' assertion that the second *Montana* exception applied to its services on the Pine Ridge Reservation:

> We are not persuaded that, in the circumstances of this case, tribal regulation of the relationship between non-members and Western Wireless is so crucial to Indian sovereignty interests that it meets the Supreme Court's exacting standard. Insofar as the State asserts authority to regulate Western Wireless' provision of service to non-tribal members, therefore, we believe it may do so.

Western Wireless, at ¶ 23.

As NAT and, certainly, Sprint are not tribal members, and no allegedly wrongful conduct has occurred within the Reservation, the Tribal Court cannot assert jurisdiction under *Montana*. *See Hornell*

Brewing, 133 F. 3d at 1093 (where complained-of activities are off the reservation, tribal court lacked any adjudicatory authority over non-member). Sprint has thus demonstrated a likelihood of success of the merits.

IV. SPRINT WILL BE IRREPARABLY HARMED

Although this Court must consider all the *Dataphase* factors, the most crucial one – the one described as the "threshold inquiry," is whether the plaintiff has shown a possibility of irreparable harm in the absence of injunctive relief. *See Glenwood Bridge, Inc. v. City of Minneapolis*, 940 F.2d 367, 371 (8th Cir. 1991) (stating that, "in any case" involving a motion for preliminary injunction, "the threshold inquiry is whether the movant has shown the threat of irreparable injury" ... and that a "movant's failure to sustain its burden of proving irreparable harm ends the inquiry" (quotation omitted)); s*ee also* 11A Charles Wright, Alan Miller & Mary Kane, FEDERAL PRACTICE AND PROCEDURE § 2948.1, p. 139 ("Perhaps the single most important prerequisite for the issuance of a preliminary injunction is a demonstration that if it is not granted the applicant is likely to suffer irreparable harm before a decision on the merits can be rendered.").

The Eighth Circuit has held that a district court may presume irreparable harm from a finding of probable success on the merits.

Exhibit AA

Lenox Labs., Inc., 815 F.2d at 505; *see also Bio-Tech. Gen. Corp. v. Genentech Inc.*, 80 F.3d 1553, 1558 (Fed. Cir. 1996). As evidenced above, Sprint is likely to succeed on the merits. To prevail on a motion for a preliminary injunction, Sprint must only establish a threat of irreparable harm, not actual irreparable harm. *Diamontiney v. Borg*, 918 F.2d 793, 795 (9th Cir. 1990) ("Requiring a showing of actual injury would defeat the purpose of the preliminary injunction, which is to prevent an injury from occurring."); *see United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953) ("The purpose of an injunction is to prevent future violations ... and, of course, it can be utilized even without a showing of past wrongs."); *Baker Elec. Coop., Inc. v. Chaske*, 28 F.3d 1466, 1472-73 (8th Cir. 1994) (preliminary injunction was justified based on a showing of a threat of irreparable harm); 11A Charles Wright, Alan Miller & Mary Kane, FEDERAL PRACTICE AND PROCEDURE § 2948.1, at 155 ("the injury need not have been inflicted when application is made or be certain to occur").

In this case, if the Tribal Court action continues, Sprint faces the irreparable harm of a violation of its due process rights. This invasion of Sprint's rights is sufficient to warrant a preliminary junction. "A plaintiff is required to make only a prima facie showing that there has been an invasion of its rights and that a preliminary injunction is essential to the

assertion and preservation of those rights." *Livestock Mktg. Ass'n v. U.S. Dep't of Agric.*, 132 F. Supp. 2d 817, 824 (D.S.D. 2001).

The exercise of jurisdiction is rooted in due process. The Supreme Court has long recognized that a court improperly exercising jurisdiction over a party violates the Due Process Clause of the Fourteenth Amendment. *Pennoyer v. Neff*, 95 U.S. 714, 732 (1877). NAT's seeking to hale Sprint into this tribal court is a violation of Sprint's due process rights.

> The ability of nonmembers to know where tribal jurisdiction begins and ends, it should be stressed, is a matter of real, practical consequence given '[t]he special nature of [Indian] tribunals,' *Duro v. Reina*, 495 U.S. 676, 693 (1990), which differ from traditional American courts in a number of significant respects.

Hicks, 533 U.S. at 383 (Souter, J., concurring).

Additionally, in this case, NAT seeks to have the Tribal Court, a court without jurisdiction in this case, issue an order holding Sprint liable for hundreds of thousands of dollars, and more going forward, funds that are Sprint's property. Sprint's property cannot "be taken away without that procedural due process required by the Fourteenth Amendment." *Bell v. Burson*, 402 U.S. 535, 539 (1971). This threat is real, as NAT surreptitiously obtained an *ex parte* order from the Tribal Utility Authority that held Sprint's refusal to pay these unlawful charges

Exhibit AA

990

under *both* the tribal and FCC tariffs was a violation of tribal law. (Order at 4, Knudson Aff. Ex. J.)[14]

Loss of constitutional rights or freedom constitutes irreparable harm. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Walker v. Wegner*, 477 F. Supp. 648 (D.S.D. 1979), *aff'd*, 624 F.2d 60 (8th Cir. 1980). The irreparable harm Sprint faces, the loss of its constitutional rights, cannot be adequately redressed by other legal remedies. *See Gelco Corp. v. Coniston Partners*, 811 F.2d 414, 418 (8th Cir. 1987). The irreparable harm to Sprint's due process rights thus warrants a preliminary injunction in this case.

V. A BALANCE OF THE HARM WEIGHS IN FAVOR OF RESTRAINING THE TRIBAL COURT

The third *Dataphase* factor also supports the issuance of a temporary restraining order. As explained above, the harm to Sprint will be severe should the injunction not issue, but the harm to NAT, the Tribal Court, and Judge Maule will be minimal should the injunction issue. Judge Maule and the Tribal Court will be able to focus their time

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[14] A fundamental precept to due process is the right to an impartial tribunal. Whether the Crow Creek Sioux Tribal Court would be impartial in Sprint's case is a fair question. The Tribal Court has hired the *same* lawyer to represent it in this case as the Tribal Utility Authority hired to represent it in Sprint's SD PUC proceeding. As NAT's tribal complaint is based in part on the Tribal Utility Authority March 29 order (issued *ex parte*), there is an intolerable risk of systemic bias in the Tribal Court. The Tribal Judge is also not independent, serving at the pleasure of the Tribal Council.

Exhibit AA

991

on cases over which the Tribal Court actually has jurisdiction, better serving the needs of the Tribe and its members. Additionally, now that Sprint has instituted this action in federal court, NAT will be able to present its claims in the proper forum. While Sprint denies that NAT is entitled to any remedy, federal law requires that NAT pursue its remedies in federal court. *See* 47 U.S.C. § 207 ("any person claiming to be damaged by any common carrier subject to the provision of this chapter may make complaint to [*the FCC*] ... or may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any *district court of the United States* of competent jurisdiction") (emphasis added).

VI. RESTRAINING FURTHER ACTION IN THE TRIBAL COURT IS IN THE PUBLIC INTEREST

The multitude of traffic pumping cases pending in federal district courts across the country (*see* notes 3 and 4, *supra*) illustrates that these issues are of national import that must be uniformly resolved. By filing its case in Tribal Court, NAT is seeking to circumvent the national debate over traffic pumping and instead obtain monies to which it is not entitled. By issuing a preliminary injunction, this Court can align this case with those currently venued in South Dakota and across the country. Such an injunction is in the public interest.

Additionally, enjoining further action in the Tribal Court also favors the interests of justice. NAT is using its Tribal Court action to delay a decision in this matter. In the process, NAT is seeking to obtain a remedy from a tribunal that does not have jurisdiction. In doing so, NAT is attempting to leverage its close relationship with the Tribe (it obtained an order *ex parte* from the Tribal Utility Authority) and force the Tribal Court to spend its time resolving this case, to the detriment of those cases properly before the Tribal Court. Federal law requires that NAT seek its remedies before the FCC or in federal court. Enjoining NAT from circumventing federal law favors the public interest.

South Dakota law will also be served by issuing the injunction. In its current form, NAT operates in South Dakota without a Certificate of Authority from the SD PUC. NAT is attempting to ignore its obligations under state and federal law to obtain such a certificate by purporting to operate solely within the bounds of the Reservation. NAT's technology does not necessarily stop at Reservation boundaries, and NAT's tariffs demonstrate that NAT is seeking compensation for calls that do not terminate to end users located on the Reservation. If even eligible for such compensation, NAT must comply with state and federal law. Therefore, issuing an injunction favors the public interest.

CONCLUSION

This Court should issue a preliminary injunction that enjoins NAT, the Tribal Court, and Judge Maule from advancing in Tribal Court the case that NAT has improperly brought against Sprint in that forum. That injunction meets the *Dataphase* factors. An injunction will also favor the larger regulatory telecommunications framework implicating both state and federal law.

Dated: September 28, 2010

By: /s/ Stanley E. Whiting
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Exhibit AA
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on September 28, 2010, the foregoing *Sprint Communications Company L.P.'s Memorandum in Support of Its Motion for A Preliminary Injunction* was filed and served on all counsel of record via the Court's CM/ECF system.

/s/ Stanley E. Whiting

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Exhibit AA

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

SPRINT COMMUNICATIONS COMPANY L.P.,

Plaintiff,

v.

THERESA MAULE IN HER OFFICIAL CAPACITY AS JUDGE OF TRIBAL COURT, CROW CREEK SIOUX TRIBAL COURT, AND NATIVE AMERICAN TELECOM, LLC.,

Defendants.

File No. 4:10-cv-04110-KES

REPLY MEMORANDUM OF PLAINTIFF SPRINT COMMUNICATIONS COMPANY L.P. IN SUPPORT OF ITS MOTION FOR A PRELIMINARY INJUNCTION

INTRODUCTION

Sprint Communications Company L.P. ("Sprint") has moved for a preliminary injunction because under *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), and *Nevada v. Hicks*, 533 U.S. 353 (2001), Sprint is undeniably entitled to a federal forum to decide its dispute with Native American Telecom, LLC ("NAT"). *Montana v. United States*, 450 U.S. 544 (1981), establishes that a tribe's regulatory and its tribal court's adjudicatory jurisdiction over non-members extends only to conduct on the reservation. But the undisputed evidence before the court is that Sprint's involvement with NAT ends in Sioux Falls, South Dakota, and all acts relating to its decision not to pay CABS Agent for the invoices it sent

Sprint on NAT's behalf occurred off the Crow Creek Sioux Reservation ("Reservation").

The Supreme Court in *Strate* stated that where a tribal court's lack of jurisdiction is clear, tribal court exhaustion must give way, for the opposite would only lead to delay. 520 U.S. at 459 n. 14. Here, Congress unequivocally established in 47 U.S.C. § 207 that NAT's claims against Sprint for claims involving NAT's tariffs *must* be decided by a federal tribunal. As a result, this Court must enjoin NAT and the Tribal Court and any Tribal Judge hearing NAT's claims from proceeding further.

SUPPLEMENTAL BACKGROUND

A. The Services Sprint is Alleged to Provide NAT are Entirely off the Reservation.

The testimony of WideVoice employee Kevin Williams corroborates what Amy Clouser testified to in her first affidavit – that Sprint's role as an interexchange carrier ("IXC") ends at the switch that South Dakota Network operates in Sioux Falls. (Hearing Transcript ("Tr.") at 30.) Williams' testimony and NAT's Exhibit 41 show that South Dakota Network (*not* Sprint) then sends the calls destined to NAT's 477 exchange as a TDM voice connection (*i.e.*, a traditional long distance call) to WideVoice, a Nevada limited liability company, which operates a switching center in Los Angeles, California. (Tr. 17-18.) WideVoice

converts the TDM voice signal to a Voice over Internet Protocol ("VoIP"), which is then sent over dedicated internet access provided by AT&T back to South Dakota Network, which then routes WideVoice's VoIP signal to NAT's WiMax base in Fort Thompson. (Tr. 18-20.)

Williams' testimony relating his holograph Exhibit 41a similarly shows Sprint's absence from the Reservation. This exhibit illustrates that a call from Fargo, North Dakota (Grandmother) (Tr. 15) to a called person in Fort Thompson (Granddaughter) (Tr. 21) follows the same path illustrated in Exhibit 41 – the convoluted route through WideVoice's Los Angeles switch. Exhibit 41a also shows how three callers from New York, Florida and Texas all talk to each other on NAT's conference call equipment (by dialing 605-477-1112), with none of the three callers being on the Reservation. Exhibit 41 shows that NAT's voice application service is separate and apart from its WiMax service. Indeed, as a piece of "geodiverse" technology, NAT's voice application service equipment could be anywhere on the Internet, as no user of NAT's conference bridge service needs to be on the Reservation, or as Exhibit 41a shows, even anywhere close to the Reservation.

B. NAT Provides Information Services to its Subscribers on the Reservation.

Both Williams and NAT President Tom Reiman testified that the VoIP signal coming from WideVoice's Los Angeles switch and ending up

at NAT's Fort Thompson radio hut is an information service. (Tr. 18-20, 40-41, 91-92.) When enacting the Telecommunications Act of 1996, Congress intended to bring competitive telecommunications to all areas of the country. *See* H.R. Rep. No. 104-458, at 126 (1996) (Conf. Rep.) (section 254(a) preempts barriers to both interstate and intrastate service). The VoIP Service NAT uses is outside the tariff regime, as Sprint noted in its opening brief. Thus, as an information service provider, NAT cannot employ the tariff rate regime available now only to legacy telecommunications services. Instead, NAT must negotiate contracts with interexchange carriers like Sprint in order to bill them for an information service.

C. NAT's Services are Interstate in Nature.

The testimony of Williams and Exhibits 41 and 41a establish the essential interstate nature of the services NAT is offering. All calls to NAT's equipment in Fort Thompson go from South Dakota to Los Angeles and back to South Dakota. Exhibit 41 does not illustrate where a call from one of NAT's subscribers on the Reservation would go if the called party was an End User on the Reservation. But if the called party were outside the WiMax range of NAT's tower, the call, if it is to be completed, would have to find a call path that goes outside the Reservation. Calls from a NAT subscriber on the Reservation to another Reservation

resident (tribal member or not) who uses an incumbent LEC would, in the case of MidState (an incumbent LEC), go off the Reservation. NAT has not shown that any of its calls remain entirely within the Reservation (much less only on non-fee land).

D. NAT is not a Tribal Company.

NAT repeatedly calls itself a tribal entity, but critical facts contradict that assertion:

- NAT was formed under South Dakota law as a limited liability company. Knudson Aff. Ex. A.
- NAT was formed by two non-Indians, Gene DeJordy and Tom Reiman. Knudson Aff. Ex. A; Tr. 82.
- DeJordy, NAT's CEO, lives in Connecticut. Knudson Aff. Ex. E; Tr. 82-83.
- Reiman, NAT's President, lives in Sioux Falls. Knudson Aff. Ex. D; Tr. 82.
- Only DeJordy and Reiman are responsible for NAT's debts. Knudson Aff. Ex. A; Tr. 81-82.
- No tribal member manages NAT; DeJordy and Reiman do. (Joint Venture [Swier Aff. Ex. 1, Dkt. No. 45] § 1.04, § 6.01(b)).
- A majority of NAT's Board are non-members (DeJordy/Reiman 1/3, WideVoice 1/3, Tribe 1/3). (Joint Venture § 8.01).
- NAT is governed by state or federal law. (Joint Venture § 16.07).
- Disputes among NAT's partners are resolved under binding arbitration. (Joint Venture § 16.12).

NAT offers no proof that the land on which the equipment sits – the leases and permits constituting the consideration the Tribe gave for its equity in NAT – is tribal land. If tribal land, title is held in trust by the United States, and special rules and federal government approval is required to record an interest in trust land. *See* 25 C.F.R. Part 162.[1]

E. Sprint does not profit from NAT.

Reiman testified in his affidavit and in court that Sprint is profiting from NAT's traffic pumping scheme. (Tr. 99-101.) That assertion was made without foundation and is simply untrue. As explained by Randy Farrar in his affidavit, "Sprint (or any other IXC) is not authorized to bill switched access termination charges, nor does it bill or pass on to its end-user customers such switched access termination charges." Affidavit of Randy G. Farrar dated October 26, 2010, at ¶ 9. Thus, Sprint does not charge back to its customers who have these plans any of the terminating access charges a local exchange carrier charges Sprint. This would include NAT.

[1] At the hearing Reiman testified NAT erected its radio tower without digging into the ground. (Tr. 54.) That construction technique enabled NAT to avoid disturbing an undisclosed burial site or archeological resources. Federal law imposes strict standards to follow if potential Native American remains are encountered or an archeological site disturbed. *See* Native American Graves Protection and Repatriation Act, 25 U.S.C. § 2001 *et seq.*, and the Archeological Resources Protection Act, 16 U.S.C. §§ 470aa-470mm.

The traffic pumping business model NAT employs works only if the vast majority of the users of the service have no incentive to monitor call usage. Sprint has call plans which provide its customers with unlimited calling anytime or during non-peak times. Farrar Aff. ¶¶ 13-16. These plans simply do not produce incremental revenue to Sprint from traffic pumpers like NAT. *Id.* In short, any possible incremental revenue to Sprint from its end users would be from a miniscule number of callers paying Sprint per minute who call one of NAT's conference bridge numbers. Farrar Aff. ¶ 20.[2]

F. Sprint does not compete with NAT.

Reiman also claimed, again without foundation, that Sprint competes with NAT for conference call services. (Tr. 78.) This assertion is irrelevant to the question before the Court, but in any event, Reiman is simply incorrect. Sprint does *not* offer conference calling services. *See* Affidavit of Jack Buettner dated October 27, 2010, at ¶ 2. Sprint provides a means for its customers to obtain conferencing services from a company called InterCall, but Sprint does not receive any compensation for its customers' use of InterCall's service. *Id.* ¶ 3.

[2] On a relevant point, in response to a leading question, the Tribal Treasurer testified that NAT had cost millions. (Tr. 148.) This individual never testified as to the basis for that assertion, but as far as what CABS Agent and WideVoice have invoiced Sprint, the amount invoiced adds up to approximately $425,000, which is not millions of dollars. Second Affidavit of Amy Clouser dated October 27, 2010 at ¶ 3 and Ex. A.

ARGUMENT

I. THE SUPREME COURT DECISIONS IN *STRATE* AND *HICKS* AUTHORIZE AN INJUNCTION AGAINST FURTHER TRIBAL COURT PROCEEDINGS.

NAT'S response to Sprint is to declare the tribal exhaustion rule an "inflexible bar" to a federal court exercising jurisdiction. NAT Brief at 18. NAT asserts that the federal courts are unanimous that a party cannot litigate the same issues in federal court if one of the parties has won the race to the courthouse by filing first in tribal court. Because it has filed a complaint in tribal court that raises the very issues before this Court, NAT also claims federal courts have uniformly held that exhaustion is required. This argument overlooks what the Supreme Court said in *Hicks*:

> [W]e added a broader exception in *Strate*: "[w]hen . . . it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by *Montana's* main rule," so the exhaustion requirement "would serve no purpose other than delay."

533 U.S. at 369 (quoting *Strate*, 520 U.S. at 459-60 and n. 14).

Judge Murphy, writing for the panel in the Eighth Circuit decision in *Plains Commerce Bank*, said that when the *Strate* exception applies, the non-member could go immediately to federal court:

> If the bank was convinced that it was defending against a federal claim over which the tribal court had no jurisdiction, it could have gone immediately to federal court to seek a declaratory

> judgment that the tribal courts lacked authority to hear the case. *See Hicks*, 533 U.S. at 369, 374 ... (holding exhaustion requirement inapplicable where jurisdiction already lacking).

Plains Commerce Bank v. Long Family Land & Cattle Co., 491 F.3d 878, 892 n. 11 (8th Cir. 2007). As Judge Murphy explained, the process for invoking the *Strate* exception is to do what Sprint has done; in fact, it is the only way to avoid the delay *Strate* said is unnecessary.

As Sprint pointed out in its brief in opposition to NAT's motion to stay, NAT's primary reliance on *Gaming World Int'l, Ltd. v. White Earth Band of Chippewa Indians*, 317 F.3d 840 (8th Cir. 2003), and *Bruce H. Lien Co. v. Three Affiliated Tribes of the Fort Berthold Reservation*, 93 F.3d 1412 (8th Cir. 1996), another case NAT cites, is misguided. NAT Brief at 10. Both of these cases involved the enforceability of arbitration clauses in gaming contracts with a tribe. The non-tribal entity had entered into a written agreement with the tribe – a fact absent here. But just as significant, neither *Lien* nor *Gaming World* addressed the Supreme Court's decisions in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), or *Nevada v. Hicks*, 533 U.S. 353 (2001).[3]

[3] *Lien* predates *Strate*, so the omission is understandable. *Gaming World's* failure to address *Strate* or *Hicks* can be explained by the litigants' failure to cite those decisions to the court of appeals. Sprint Brief at 18 n. 4.

NAT's briefs exalts tribal court exhaustion, citing a number of decisions from around the country upholding that rule in different circumstances. One of these, *Duncan Energy Co. v. Three Affiliated Tribes of the Fort Berthold Reservation*, 27 F.3d 1294 (8th Cir. 1994), involved a challenge to a tax imposed on oil companies operating within the reservation, significant parts of which were owned in fee by non-tribal members. One oil company sued to enjoin the imposition of the tax on oil leases on fee land owned by non-members. *Id.* at 1296. *Duncan Energy* predates *Strate* and *Hicks*. *See* AMERICAN INDIAN LAW DESKBOOK at 241 n. 93 (4th ed. 2008) ("The case presents a situation where *Strate's* footnote 14 would now likely control, changing not only the result but also eliminating the need to determine whether the exhaustive doctrine applies in the absence of an ongoing tribal proceeding.").

Another case NAT cites for exhaustion, *Bowen v. Doyle*, 230 F.3d 525 (2d Cir. 2000), is wholly inapplicable. *Bowen* involved litigation in tribal, state and federal courts over issues of tribal governance. The appellate court held that tribal exhaustion was not required, but under the circumstance of the case, the federal district court could enjoin the state court from proceeding to rule on the tribal governance issues. The

only comparison to this case is the presence of three forums. Otherwise *Bowen* is simply irrelevant to this case.

NAT cites *Ninigret Development Corp. v. Narragansett Indian Wetuomuck Housing Authority*, 207 F.3d 21 (1st Cir. 2000), to support the "application of the exhaustion doctrine," even when off-reservation contacts are involved. NAT Reply Brief on Stay at 5. NAT neglects to mention that the court in *Ninigret* was squarely presented with a "forum selection clause" agreed to by the parties, including the housing authority and the construction company in which a tribal member was a principal.

There is no forum selection clause at issue in the instant case. As a result, the fact that the forum selection clause prompted the court in *Ninigret* to find exhaustion appropriate is probative of nothing. This is especially so because other circuits have disagreed with even this conclusion, including, importantly, the Eighth Circuit. As explained in *Larson v. Martin*, 386 F. Supp. 2d 1083, 1088 (D.N.D. 2005):

> [T]he answer in the Eighth Circuit appears rather clear: when the negotiating parties have agreed to an appropriate forum, exhaustion of tribal remedies is not required. *See FGS Constructors, Inc. v. Carlow*, 64 F.3d 1230, 1233 (8th Cir. 1995).

Ninigret's reasoning is further flawed because it never discussed *Montana's* general rule that tribal court jurisdiction over non-members

anywhere is presumptively invalid. Moreover, *Ninigret* predates *Hicks*, which further expanded the exception to tribal court exhaustion. Of course, the Eighth Circuit was unmistakable in *Hornell* – no tribal court jurisdiction exists over conduct off the reservation. *Hornell Brewing Co. v. Rosebud Sioux Tribal Court*, 133 F.3d 1087, 1093-94 (8th. Cir. 1998). Finally, as the Supreme Court held in *Plains Commerce Bank*, even disputes involving Indian-owned land within the reservation will not confer tribal court jurisdiction. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, ___ U.S. ___, 128 S. Ct. 2709, 2720 (2008).

NAT also cites *Calumet Gaming Group – Kansas, Inc. v. The Kickapoo Tribe of Kansas*, 987 F. Supp. 1321 (D. Kan. 1997), which involved a dispute over enforcement of an arbitration clause in a tribal gaming contract. The non-tribal management company sued in federal district court to compel arbitration as specified in the gaming contract. The district court required tribal court exhaustion. *Id.* at 1330 (staying case pending exhaustion). The court rejected the company's argument that *Strate* controlled. Although *Calumet* does not address *Strate's* footnote 14, unlike this case, the gaming company could point to nothing divesting the tribal court of jurisdiction.

Another case NAT cites is *Navajo Nation v. Intermountain Steel Bldgs., Inc.*, 42 F. Supp. 2d 1222 (D.N.M. 1999). There, the tribe sued a

contractor for negligently erecting a structure on tribal land that later burned down. *Id.* at 1225. All parties stipulated to federal court jurisdiction, *id.*, but because several key legal issues would involve Navajo law, the district court elected to refer the entire case to tribal court under exhaustion, rather than refer discrete questions of Navajo law. While the district court held tribal exhaustion non-waivable, that proposition is not at issue here, nor has the Eighth Circuit so held. In any case, *Navajo Nation* did not address *Strate* and pre-dates *Hicks*, so it is of little relevance here.

In the end, NAT's failure to cite either *Strate* or *Hicks* is telling. That oversight must be deliberate, for both decisions eviscerate NAT's exhaustion argument. As Sprint pointed out in its opening brief at 31-32, in the absence of a federal grant, under *Montana's* main rule, a tribal court has no adjudicatory authority over non-members. Justice Ginsberg, writing for a unanimous court in *Strate*, expanded the exceptions to the exhaustion rule when she wrote: "[T]he otherwise applicable exhaustion requirement . . . must give way, or it would serve no purpose other than delay." 520 U.S. at 459 n. 14.[4]

[4] NAT also mistakenly relies on *Reservation Tel. Coop. v. Three Affiliated Tribes of the Fort Berthold Reservation*, 76 F.3d 181 (8th Cir. 1996). That case also predated *Strate*, and the precise question at issue in *Strate*, the non-reservation status of a state highway right-of-way, was decided in *Strate* in a way that not only was the tribe's authority to tax

The issue of exhaustion must be analyzed based on the teachings of *Strate* and *Hicks*. Tribal exhaustion has a firm place in Indian law jurisprudence, but the Supreme Court has made it plain that the doctrine does not apply where it would only cause delay. Neither NAT's case law nor its legal analysis of the doctrine refutes the conclusion that the Tribal Court here has no jurisdiction over non-members like Sprint off the Reservation. Likewise, it lacks jurisdiction to decide questions of federal communications law.

II. CONGRESS HAS DIRECTED IN 47 U.S.C. SECTION 207 THAT NAT'S DISPUTE MUST BE ADJUDICATED IN A FEDERAL FORUM.

In its response to Sprint's opening brief, NAT wholly ignores what Congress set out in 47 U.S.C. § 207: "Any person claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the Commission . . . or may bring suit . . . in any district court of the United States . . . but such person shall not have the right to pursue both such remedies."

On its face, the provision applies to NAT's claims against Sprint. NAT is a South Dakota limited liability company: it cites no authority that such an entity is not a "person" under Section 207. NAT is

the utility's right of way eliminated, but the exhaustion requirement was also reversed. *Reservation Tel. Coop.* would come out differently today. *See* AMERICAN INDIAN LAW DESKBOOK at 242 n. 98 (4th ed. 2008) (footnote 14 of *Strate* would govern).

asserting a claim that it was "damaged" by Sprint, which unquestionably is a common carrier subject to the provisions of Chapter 5 of Title 47. NAT cites nothing in any of its briefs to this Court to contradict that Section 207 applies to its claims against Sprint.

The only appellate authority to squarely address this issue was the Ninth Circuit in *AT&T Corp. v. Coeur D'Alene Tribe*, 295 F.3d 899 (9th Cir. 2002), which held unequivocally:

> By its express language, § 207 establishes concurrent jurisdiction in the FCC and federal courts only, leaving no room for adjudication in any other forum – be it state, tribal or otherwise.

295 F.3d at 905 (emphasis added). NAT does not address the *Coeur D'Alene* decision in any of its brief. But *Coeur D'Alene* gave full force to the intent of Congress in Section 207. This Court should do likewise.

Where applicable, *Alltel* unequivocally supports Sprint's position in this proceeding. Judge Viken recognized and clearly relied upon the preemptive scope of the FCA, as well as the leading case recognizing this aspect of the Act.

> The Federal Communications Act ("FCA"), 47 U.S.C. § 151 *et seq.*, established the nationwide system for the regulation of the electromagnetic spectrum for radio transmissions. Congress delegated the authority, solely and exclusively, to the FCC, to license the use of radio transmissions. 47 U.S.C. § 301. "The Tribe has *no recourse to its own courts* for vindication of its [Federal Communication Act] based claim and-like any

> other plaintiff-*could choose only* between filing a complaint with the FCC or suing [Alltel] in federal district court." *AT&T Corporation v. Coeur D'Alene Tribe*, 295 F.3d 899, 905 (9th Cir.2002). "By its express language, [the FCA] established concurrent jurisdiction in the FCC and federal district courts *only*, leaving no room for adjudication in any other forum-be it *state*, *tribal* or *otherwise*." *Id.*

Alltel Communications, LLC v. Oglala Sioux Tribe, 2010 WL 1999315, at *12 (D.S.D. 2010) (emphasis added).

Moreover, the fact that a formal "Service Agreement" was signed by WWC License LLC ("WWC LCC") with the Tribe and the "Service Agreement" resulted in a history of reservation activities that was acknowledged by the parties, prompted Judge Viken to also recognize the very *limited* role for the Tribal Court.

> This court must respect the Tribal Court, and the right of that court to issues decisions *within* the scope of its authority. This court must also recognize and give judicial comity to the action and decision of the federal district court for the District of Columbia as expressed in the Consent Decree ... Authority to mandate arbitration is and remains a decision *solely* within the jurisdiction of the federal district court in this instance ... Chief Judge Lee asserted the Tribal Court has "ancillary jurisdiction over tribal interests that are subject *exclusively* to Tribal jurisdiction." ... Because the Tribal Court has expressed its intent to assume *limited* jurisdiction over specific issues, this federal court will not interfere with that process.

Id. at 12-13 (emphasis added).

In this light, the court was clearly correct in concluding that arbitration should proceed forthwith (without the delay that unlimited exhaustion would otherwise have caused). "The court, therefore, has the authority to compel the parties to participate in arbitration as dictated by the Service Agreement." *Id.* at 14. The tribal court was allowed to proceed to address a limited set of undisclosed tribal questions involving a non member which had entered into consensual relations with the tribe.

NAT tries to avoid the sweep of Section 207 by arguing that the use of the word "may" in Section 207 indicates that Congress did not intend to preclude tribal court jurisdiction. This interpretation is simply untenable. Section 207 addresses claims involving interstate telecommunications and information services – where Congress has intended federal law to control. Section 207 mandates only a federal forum for claims against interstate common carriers like Sprint. The use of the term "may" in Section 207 simply indicates that a party seeking damages has the choice of two federal forums – it may file *either* with the FCC or with a federal court – but not *both*. *See, e.g., Mexiport, Inc. v. Frontier Commc'ns Servs, Inc.* 253 F.3d 573 (11th Cir. 2001) (appellant could not file in federal court after having filed informal complaint with FCC).

In its reply brief, NAT now attempts to vaunt *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473 (1999), a case cited but not discussed in its opposition brief at 25, as the example of how Congress must divest tribal courts of jurisdiction over claims of federal law. *El Paso* addressed whether tribal court exhaustion was required for claims asserted under tribal law which, if brought in state court, would have been removable to federal court. In enacting Price-Anderson, Congress had statutorily overruled the well-pleaded complaint rule, ordaining instead federal court jurisdiction over complaints that on their face raised only state law claims of liability for conduct otherwise covered by Price-Anderson.

> The Act not only gives a district court original jurisdiction over such a claim, ... but provides for removal to a federal court as of right if a putative Price-Anderson action is brought in a state court[.] ... Congress thus expressed an unmistakable preference for a federal forum, at the behest of the defending party, both for litigating a Price-Anderson claim on the merits and for determining whether a claim falls under Price-Anderson when removal is contested.

Id. at 484-85. The Supreme Court held that the same rule should apply to tribal courts, thereby negating an exhaustion requirement. The fact that Congress had not expressly mentioned tribal courts was immaterial.

Preventing the "mischief of duplicative determinations" was one of the goals of Price-Anderson and, thus, in *El Paso*, the Supreme Court pretermitted tribal exhaustion.

> We are at a loss to think of any reason that Congress would have favored tribal exhaustion. Any generalized sense of comity toward nonfederal courts is obviously displaced by the provisions for preemption and removal from state courts, which are thus accorded neither jot nor tittle of deference. The apparent reasons for this congressional policy of immediate access to federal forums are as much applicable to tribal – as to state – court litigation.

Id. at 485-86.[5] *Cf. Blue Legs v. Bureau of Indian Affairs*, 827 F. 2d 1094 (8th Cir. 1989) (Congress prescribed exclusive federal court jurisdiction over RCRA claims).

NAT attempts to distinguish Price-Anderson from the Federal Communications Act ("FCA"), arguing that the FCA enacts a less elaborate regulatory structure. But the FCA has been held to be "a comprehensive scheme for the regulation of interstate communication." *Benanti v. United States*, 355 U.S. 96, 104 (1957). The FCA sets out standards by which carriers file tariffs and forbids carriers from charging

[5] NAT alleges that Sprint has failed to demonstrate that an injunction would serve the public interest, and instead espouses that tribal exhaustion will serve the public interest in this case. NAT Brief at 40-41. NAT, however, ignores the principles of "duplicative determination" which complex regulatory structure of the FCA helps combat. By specifying two possible forums for rate and tariff determinations, and eliminating all others, Section 207 helps ensure that duplicative determinations will not be made. 47 U.S.C. § 207. Following NAT's argument to its logical conclusion, the tribal court could be issuing decisions concerning the FCA at odds with standing federal law or FCC regulations. Such a result cannot be maintained. The public interest and the overall regulatory structure of the FCA will only be served if NAT claims are heard in and decided by the proper body.

unreasonable rates or engaging in unreasonable practices. *See* 47 U.S. §§ 201-203. The FCC also has broad powers to enforce these provisions. *Id.* at 204-05, 207. Courts have held that, based on these provisions, "federal law completely occupies the field of interstate communications, thereby preempting state law." *MCI Telecommc'ns Corp. v. O'Brien Mktg., Inc.*, 913 F. Supp. 1536, 1540 (S.D. Fla. 1995).

How far this preemptive force reaches is open to debate especially in view of the Telecommunications Act of 1996. *See e.g., In re Universal Service Fund Billing Practices Litig.*, 247 F. Supp. 2d 1215 (D. Kan. 2002). But it is certain that in this Circuit, NAT's efforts to enforce its tariffs implicate the FCA and must be brought in federal court. In *MCI Telecommc'ns Corp. v. Garden State Investment Corp.*, 981 F.2d 385 (8th Cir. 1992), the IXC sued a customer for unpaid telecommunication charges. *Id.* at 386. The district court dismissed the complaint for lack of subject matter jurisdiction, *i.e.*, no federal question jurisdiction. *Id.* Reversing, the Eighth Circuit noted that

> Although a user's refusal to pay charges fixed by a tariff will often arise in the contest of a broken contract, the carrier's claim for payment is necessarily based on the filed tariff. The district court was thus confronted with a proposition of federal law in deciding what, if anything, MCI could recover.
>
> * * *

> Here, Garden States' obligation to "pay for [interstate telephone service] at the rate fixed by tariff 'grow[s] out of and depend[s] upon' the Communications Act in the same way that a shipper's duty to pay for interstate freight service depends on the Interstate Commerce Act."

Id. at 387-88 (quoting *Ivy Broad. Co. v. Am. Tel. & Tel. Co.*, 391 F.2d 486, 494 (2nd Cir. 1968) (citations and other internal quotations omitted)). *Accord Cahnmann v. Sprint Corp.*, 133 F.3d 484 (7th Cir. 1998) (customer's state law claims were removable as they relied on FCC tariff).

Congress made limited jurisdictional concessions in the FCA. State commissions may regulate intrastate calls. *See* 47 U.S.C. § 152. By extension, the Tribe could argue that it may be able to regulate purely intra-Reservation calls, from one tribal member to another on the Reservation. As noted in Sprint's opening brief at 25-26, NAT's tribal tariff is not so limited. Beyond that, however, the FCC had held that either it or the state utilities commission may regulate services. *See In re Western Wireless Corp.*, CC Dkt No 96-45, at ¶¶ 16, 23-24 (FCC regulates ETC determination where state cannot; state to regulate services to non-members on reservation). In fact, it was NAT that involved the FCA by specifically referring to the FCA provisions in its tribal complaint. Hence, NAT must adhere to the jurisdictional prerequisites of the FCA.

The same result attends here. Congress has set a regulatory regime that ordains an exclusive Federal forum to decide questions of

interstate telecommunications or information services. The Tribal Utility Authority's order against Sprint on its face attempts to enforce NAT's FCC tariff. This raises the same "mischief" the Court saw in *El Paso* of "duplicative determinations."[6]

NAT points to no federal grant of authority to adjudicate a FCA claim against Sprint in tribal court. It cites numerous statements of general FCC policy to promote communications services on reservations, but none of those pronouncements amount to a congressional grant of adjudicatory authority over Sprint to the Tribal Court. Addressing a similar lack of authority in *Hicks*, the Supreme Court articulated:

> Because the Fallon Paiute-Shoshone Tribes lacked legislative authority to restrict, condition, or otherwise regulate the ability of state officials to investigate off-reservation violations of state law, they also lacked adjudicative authority to hear respondent's claim that those officials violated tribal law in the performance of their duties. Nor can the Tribes identify any authority to adjudicate respondent's § 1983 claim. And since the lack of authority is clear, there is no need to exhaust the jurisdictional dispute in tribal court.

Hicks, 533 U.S. at 374. NAT cannot proceed in tribal court, and exhaustion is not required.

[6] In fact, as noted at the hearing, Congress knows how to draft statutory language to exclude tribes for the reach of legislation. *See, e.g.*, Title VII of the Civil Rights Act, 42 U.S.C. § 2000(b)(1) and the Americans with Disability Act, 42 U.S.C. § 12111(b).

III. THE GENERAL RULE OF *MONTANA* APPLIES TO PRECLUDE TRIBAL COURT JURISDICTION OVER SPRINT.

A Sprint is not Doing Business on the Reservation.

In order for the *Montana* exceptions to apply at all, Sprint must be doing business on the Crow Creek Reservation. It is undisputed that Sprint's services as an interexchange carrier end at the switch South Dakota Network has in Sioux Falls. There is also no dispute that Sprint does not have a presence on the Reservation. Without a presence on the Reservation, Sprint is outside the Tribal Court's jurisdiction. *Hornell,* 133 F.3d at 1093-94; *accord Christian Children's Fund, Inc. v. Crow Creek Sioux Tribal Court,* 103 F. Supp. 2d 1161 (D.S.D. 2000).[7]

After Sprint hands off a call to South Dakota Network, any calls to NAT's exchange are sent as a traditional long distance signal to WideVoice's switch in Los Angeles. From there, the signal is converted to VoIP and sent via the Internet back to South Dakota Network, which

[7] Counsel for NAT repeatedly implied at oral argument that exhaustion was required in *Christian Children's Fund.* Tr. at 201, 205, 206. While the parties had exhausted tribal court remedies, it was not because the district court refused injunctive relief. The court said: "The present case is *very likely a case in which exhaustion is not required.* Exhaustion, however, has occurred and there is no need to deal with or decide the question of any exhaustion requirement." *Christian Children's Fund Inc.,* 103 F. Supp. 2d at 1164 (emphasis added).

further carries the signal to NAT's WiMax radio tower in Fort Thompson. It is undisputed that all of this traffic moves in interstate commerce.[8]

The decision not to pay the third and subsequent invoices was made by Sprint at its headquarters in Overland Park, Kansas. All of the material decisions for the first three invoices were made outside the Reservation. The off-reservation nature of the transaction is reinforced by the fact that NAT's management Reiman and DeJordy are non-tribal members living off the reservation – DeJordy not even in South Dakota.

NAT's Reiman claims that the people calling NAT's conference bridge services are subscribers receiving services on the Reservation. This assertion is simply not credible. The people using the conference call service are not subscribers under NAT's tariffs, nor are they subscribers of NAT in any business sense – NAT does not bill them and owes them no local service responsibilities under NAT's tariffs.[9]

Similarly, the people using NAT's conference call device do not care where that equipment is located. In NAT's parlance, this "geodiverse" device could be located anywhere in the world the Internet reaches. The services that users want is to be able to hear the voices of other people,

[8] Indeed, a call made by one local customer of NAT to another local subscriber would have to travel off the reservation if that called party was out of range of NAT's WiMax tower.

[9] Kevin Williams of WideVoice did not believe the conference call users were NAT subscribers.

none of whom need to be on the Reservation (and probably none are). To say that this activity constitutes a legitimate local phone service makes a mockery of federal communications policy to promote local phone services. In any case, the legitimacy of that activity is incontestably one of federal law.

B Sprint has no Consensual Relationship with NAT.

To circumvent the obvious lack of Sprint's presence on the Reservation, NAT argues that Sprint entered into a consensual relationship with NAT when Sprint paid the first two invoices from CABS Agent. A consensual business relationship is formed when a party being fully informed of the material facts agrees to enter into business agreement with the other party. Here Sprint was unaware of a critical material fact, that NAT was setting up a traffic pumping scheme, which NAT was careful to conceal until the volume of traffic gave away its scheme.

NAT hired a third party, CABS Agent, out of Austin, Texas to bill Sprint. CABS Agent is an existing billing service, already on Sprint's system. The invoices do not disclose that NAT's business office location, and it is not until page six of the invoice that there is any clue that Fort Thompson may be involved. Second Reiman Aff. Ex. 8. Sprint receives over 20,000 of these CLEC and ILEC invoices monthly. *Id.* *See* Second

Clouser Affidavit dated October 27, 2010, at ¶ 4. Moreover, this CABS invoice on its face said nothing about conference bridge services.

NAT now relies on an unsigned and undated letter purportedly authored by DeJordy as CEO of NAT. If this letter were sent by CABS Agent to Sprint, it would not have alerted Sprint to NAT's traffic pumping plans.[10] There is absolutely no mention of NAT's conference call equipment or that virtually all of its business would be from people off the Reservation talking to each other in some type of conference call or chat room. Instead, the letter says the exact opposite: NAT will be "providing affordable local telephone, broadband, and other telecommunications services *to tribal members and others living on the reservation.*" Second Reiman Aff. Ex. 7 (emphasis added). This statement is misleading in the extreme. Once Sprint knew the truth – that NAT was running a traffic pumping business – it stopped paying CABS Agent for NAT's invoices and asked for a refund.

As noted in Sprint's opening brief, the regulated nature of telecommunications also factors in here. Congress has determined that "It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor[.]" 47 U.S.C. § 201(a). This

[10] Sprint has no record of receiving that letter. *See* Second Clouser Aff. at ¶ 5.

provision applies to Sprint as a common carrier. The FCC has weighed in with an order that specifically prohibits IXC's like Sprint from blocking access to local exchange carriers engaged in traffic pumping, deeming such blocking to be an unreasonable practice under 47 U.S.C. § 201(b). *In re Establishing Just and Reasonable Rates for Local Exch. Carriers*, 22 F.C.C.R. 11629, WC Docket No. 07-135, at ¶ 12 (June 28, 2007). In short, Sprint has no choice but to accept calls from its customers that are directed to NAT's exchange. In these circumstances there is no way to conclude there was a meeting of the minds on all material terms. *Vander Heide v. Boke Ranch, Inc.*, 2007 SD 69 ¶ 12, 736 N.W.2d 824, 832. Further, "consent is not mutual unless the parties all agree upon the same thing in the same sense." SDCL 53-3-3. Obviously, here Sprint was unaware of what NAT was up to until CABS Agent sent its third invoice.

C Sprint's Efforts to Involve *Strate* does not Implicate the Second *Montana* Exception.

Long on rhetoric but short on logic, NAT enumerates over a dozen ways Sprint's efforts to use a federal forum to resolve its dispute with NAT[11] amounts to an attack on the Tribe's sovereignty. This dispute started in March 2010, when Sprint discovered NAT's traffic pumping

[11] Sprint is also entitled to seek relief from the State Public Utilities Commission for NAT's violation of state telecommunications law.

operation and refused to pay the charges CABS Agent was billing Sprint. NAT refused to return the amounts Sprint had paid. On March 23, NAT filed an ex parte complaint against Sprint with the Tribal Utility Authority, which issued an ex parte order three days later signed by then Tribal Chairman Brandon Sazue in his capacity as Chair of the TUA. Sprint exercised its right to seek relief from the SD PUC on May 4, 2010, when it initiated a complaint against NAT before the SD PUC. It is no coincidence that NAT subsequently filed a tribal court complaint against Sprint and has since used that complaint to seek to stay or dismiss the PUC proceeding. Sprint then sought relief in this Court from having to defend the tribal court action. And, unsurprisingly, NAT now tries to use the tribal complaint to stay proceedings in this Court.

The Court needs to address the second *Montana* exception only if Sprint is found to be on the Reservation. In *Hornell*, the Eighth Circuit held the breweries' conduct in making Crazy Horse malt liquor was not on the reservation, and thus tribal court jurisdiction was lacking. 133 F.3d at 1093-94. It reached this decision notwithstanding claims that the conduct caused harm within the reservation, and the breweries had other products marketed on the reservation. *Id.* at 1089, 1093. *Hornell* would not place Sprint's actions on the Reservation.

NAT's argument both proves too much and greatly overstates the case for the second *Montana* exception. This is a business dispute with a South Dakota limited liability company, formed and managed by non-tribal members, who manage the company off the Reservation and who are the only two people personally liable for NAT's debt. NAT is also financed by WideVoice, a Nevada limited liability company operating in Los Angeles. NAT ownership structure places 51 percent of the equity in the Tribe, which had to only contribute easement or licenses to the venture. Management of NAT rests with DeJordy and Reiman (who run NAT Enterprises); NAT's board is controlled by non-tribal interests (NAT Enterprise and WideVoice have 2/3 of the board). NAT's argument that this business arrangement implicates tribal sovereignty would make the second *Montana* exception swallow the rule. NAT's tribal identity – if in fact it can claim one at all[12] – is in name only. In substance, NAT is still managed and controlled by non-members.

The second *Montana* exception applies only to conduct of a non-member on the reservation that imperils the very existence of the Tribe, a standard NAT wholly ignores in its briefs. The Tribe's existence does not turn on requiring Sprint to subsidize free Internet or other information

[12] *Cf. Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 263 (1977) (non-profit corporation had no racial identity entitling it to assert discrimination claim).

Exhibit BB
1024

services to residents (both tribal and non-tribal) on the Reservation (on both trust and fee land). There are two incumbent LEC's already serving the Reservation. The question of access is really one of cost, but then, NAT refuses existing public subsidies to build out its system, despite the joint venture provision requiring the opposite. Joint Venture § 3.11. Indeed, when faced with this same argument regarding the Pine Ridge Reservation, the FCC concluded that the tribal interests did not "meet the Supreme Court's exacting standards." *Western Wireless Corp.* at ¶ 23.

Nor does Sprint's efforts to stay in federal court amount to an attack on the tribal court. The very fact there are exceptions to exhaustion in *National Farmers Union*, which were expanded in *Strate* and confirmed and expanded in *Hicks*, means that Sprint or others similarly situated can seek injunctive relief to avoid the delay and expense of a tribal court proceeding. Moreover, the Tribe elected binding arbitration in its joint venture with NAT Enterprise and WideVoice, which indicates its sovereignty interests can yield to doing business with NAT Enterprise and WideVoice. NAT did so as well when it signed an interconnection agreement with Midstate. Very simply, the Tribe agreed that every business dispute does not need to be Tribal Court. The fact

that Sprint wants the more familiar confines of federal court simply does not imperil the Tribe's existence.

CONCLUSION

There is *no* basis to require Sprint to endure the delay that litigating first in tribal court would entail. Sprint has done what Judge Murphy said it should do to avail itself of the relief *Strate* provides. This Court should enjoin any further tribal court proceedings.

Dated: October 27, 2010

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 27, 2010, the foregoing Reply Memorandum Of Plaintiff Sprint Communications Company L.P. In Support Of Its Motion For A Preliminary Injunction was filed and served on all counsel of record via the Court's CM/ECF system.

/s/ Stanley E. Whiting

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN RE:

SPRINT COMMUNICATIONS COMPANY L.P.,

Complainant,

v.

NATIVE AMERICAN TELECOM, LLC,

Respondent.

Docket No. TC10-026

AFFIDAVIT OF STANLEY E. WHITING

COUNTY OF TRIPP)
) S.S.
STATE OF SOUTH DAKOTA)

Stanley E. Whiting, being duly sworn, states under oath as follows:

1. My name is Stanley E. Whiting. I am an attorney licensed to practice in law in the State of South Dakota. I am one of the attorneys representing Sprint Communications Company, L.P. ("Sprint") in this proceeding.

2. On October 13, 2010, I attended by special appearance a scheduling conference called by B.J. Jones, who had been recently appointed by the Crow Creek Sioux Tribal Council to serve as the tribal court judge in the action Native American Telecom, LLC ("NAT"), had filed against Sprint in Crow Creek tribal court. Judge Jones orally set a schedule for the Crow Creek Sioux Tribe to intervene in NAT's action by October 28, for NAT to file another responsive brief to Sprint's motion to dismiss by November 12, with Sprint to reply by November 26.

3. Those dates have come and gone. The Tribe has not moved to intervene, while NAT and Sprint agreed to stay additional briefing until the federal district court ruled on Sprint's motion in federal district court for a preliminary injunction to enjoin the tribal court action.

This concludes my affidavit.

By: Stanley E. Whiting
Stanley E. Whiting

Subscribed and sworn to before
me this 13 day of December, 2010.

Notary Public 11-12-16