BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE COMPLAINT FILED BY SPRINT COMMUNICATIONS COMPANY, LP, AGAINST NATIVE AMERICAN TELECOM, LLC REGARDING TELECOMMUNICATIONS SERVICES	)))))	ORDER DENYING MOTION TO STAY TC10-026

On May 4, 2010, the Public Utilities Commission (Commission) received a complaint from Sprint Communications Company, LP (Sprint) against Native American Telecom, LLC (NAT), in which Sprint seeks: 1) a determination that the Commission has the sole authority to regulate Sprint's intrastate interexchange services and that NAT lacks authority to bill Sprint for switched access services without a Certificate of Authority and valid tariff on file with the Commission; 2) a declaration that because the Commission has the sole authority over Sprint's intrastate interexchange services, the Crow Creek Sioux Tribe Utility Authority is without jurisdiction over Sprint; and 3) a determination that NAT must repay Sprint the amounts it inadvertently paid NAT for unauthorized and illegal switched access charges. On May 5, 2010, Sprint filed an Amended Complaint.

Petitions to intervene were filed by the South Dakota Telecommunications Association (SDTA), South Dakota Network, LLC (SDN), Midstate Communications (Midstate), AT&T Communications of the Midwest, Inc., (AT&T), and the Crow Creek Sioux Tribe Utility Authority (CCSTUA). On June 1, 2010, NAT filed a Motion to Dismiss and a Motion to Establish Briefing Schedule for Respondent's Motion to Dismiss. At its regularly scheduled meeting on June 18, 2010, the Commission granted Petitions to Intervene to all those who filed to intervene. On June 29, 2010, NAT filed a Motion to Stay.

At its regularly scheduled meeting on August 10, 2010, the Commission voted to require that the Motion to Dismiss and Motion to Stay be briefed during the same briefing schedule. The parties subsequently filed briefs on the Motion to Dismiss and Motion to Stay. On October 12, 2010, NAT filed a Motion to Extend Filing Date of NAT's Reply Brief. On October, 13, 2010, Sprint filed a Stipulation to NAT's Request for Additional Time to File Reply Briefs in Support of its Motions to Stay and to Dismiss. On December 13, 2010, Sprint filed a Motion for Leave to File a Supplemental Reply to NAT's Reply Brief, or to Strike. On December 13, 2010, a Supplemental Reply Brief of Sprint was filed. On January 10, 2011, NAT filed a Response to Sprint's Motion for Leave to File a Supplemental Reply to NAT's Reply Brief, or to Strike. At its regularly scheduled meeting on January 13, 2010, the Commission voted to deny Sprint's Motion to Strike and granted Sprint's Motion to File a Supplemental Reply to NAT's Reply Brief.

At its regularly scheduled meeting of April 5, 2011, the Commission heard arguments by the parties on NAT's Motion to Stay. The Commission has jurisdiction in this matter pursuant to SDCL Chapters 1-26, 49-13, and 49-31, and 47 U.S.C. section 152(b). The Commission voted unanimously to deny NAT's request to stay the current proceedings. NAT then requested that its Motion to Dismiss be deferred until after discovery at which time the Commission could have more information on which to base its decision. The Commission voted unanimously to grant NAT's request to defer the Motion to Dismiss.

NAT's motion to stay this complaint proceeding before the Commission is based on the doctrine of tribal exhaustion. NAT states that it is a tribally owned limited liability company organized under the laws of South Dakota. As noted above, this complaint was filed with the Commission by Sprint on May 4, 2010. Subsequently, on July 7, 2010, NAT filed a complaint against Sprint with the Crow Creek Sioux Tribal Court (CCSTC). NAT's Ex. 5 (attached to Brief in Support of Motion to Stay). In its complaint filed with the CCSTC, NAT stated that it "seeks to enforce Plaintiff NAT's well established legal rights to collect compensation for terminating Defendant Sprint's telecommunications calls on the Crow Creek Sioux Tribe Reservation." *Id.* at 1.

On August 16, 2001, Sprint filed a complaint with the South Dakota Federal District Court against NAT and the judge in the CCSTU case. NAT's Ex. 6 (attached to Brief in Support of Motion to Stay). In Sprint's complaint filed in federal court, Sprint requested damages and declaratory and injunctive relief. In this same proceeding, NAT and the CCSTC moved to stay the proceeding until CCSTC determines whether it has jurisdiction over the matter. Sprint moved for a preliminary injunction to enjoin CCSTC from hearing the matter. Sprint's Ex. Z (attached to Supplemental Reply Brief). On December 1, 2010, the federal court granted Sprint's motion for a preliminary injunction regarding NAT's complaint filed in tribal court and denied NAT and CCSTC's motion to stay the federal court proceeding. *Sprint Communications v. Native American Telecom*, et al, 2010 WL 4973319 (D.S.D.) The federal court found that the tribal exhaustion rule is inapplicable because CCSTC does not have jurisdiction over the matter. *Id.* at 6.The federal court found that section 207 of the Federal Communications Act establishes jurisdiction in the federal district courts and the FCC. *Id.*

The doctrine of tribal exhaustion is a prudential, not jurisdictional rule, based on the principle of comity. *Strate v. A-1 Contractors*, 520 U.S. 438, 451 (1997). Sprint, SDN, SDTA, and Midstate asserted that this federally created doctrine is not applicable to state courts or state agencies. At oral argument, NAT's position was that the Commission has the discretion to either invoke or not invoke the doctrine of tribal exhaustion. Tr. at 32. The parties disagreed as to the effect of the federal court's decision on the proceedings in the CCSTC. Sprint's position was that the entire tribal court proceeding had been enjoined from proceeding by the federal court. Tr. at 27-28, 30. NAT's position was that the federal court decision only applied to interstate matters and that the tribal court could proceed with the complaint with respect to intrastate matters. Tr. at 29.

The Commission denied NAT's motion to stay this proceeding. The Commission has clear jurisdiction over intrastate telecommunications. *See* SDCL chapters 49-13, 49-31, and 47 U.S.C. § 152(b). This complaint involves the assessment of switched access charges on intrastate interexchange traffic. NAT is assessing Sprint switched access charges to terminate this traffic pursuant to a tariff that was approved by the Crow Creek Sioux Tribe Utility Authority. This tariff is not limited to providing services on the reservation. Section 1.1 of that tariff clearly provides that the provisions of the tariff apply to intrastate access services facilities provided by NAT "into, out of and within the State of South Dakota." Sprint Ex. F at p. 14 (attached to Brief in Opposition to Motion to Stay and Motion to Dismiss). Moreover, the services provided by NAT are not limited to members of the Crow Creek Sioux Tribe.

The Commission's jurisdiction over intrastate telecommunications services is extensive. Our Supreme Court has stated:

The regulatory scheme of telecommunications services specifically grants PUC

> authority and jurisdiction over intrastate facilities. *See* 47 USC §152(b). The authority of PUC is extensive and crucial to the overall regulatory scheme. *See* SDCL ch 49-31. Among other things, it has "general supervision and control of all telecommunications companies offering common carrier services within the state to the extent such business is not otherwise regulated by federal law or regulation." SDCL 49-31-3.

Cheyenne River Sioux Tribe Telephone Authority v. Public Utilities Commission of South Dakota, 1999 SD 60, ¶ 21, 595 N.W.2d 604, 609. Notably, this statement from the Supreme Court is from a case involving the Commission's jurisdiction over the sale of certain U S WEST telephone exchanges located on the Cheyenne River Sioux Indian Reservation and the Standing Rock Sioux Indian Reservation. The court rejected arguments made by U S WEST and the Cheyenne River Sioux Tribe Telephone Authority (CRSTTA) that the Commission infringed on the tribal authority's exercise of self-government with respect to the portion of the telephone exchange located on the Cheyenne River Sioux Indian Reservation when the Commission did not approve the sale of the exchange to the CRSTTA. The South Dakota Supreme Court found that the "extensive congressional and legislative authority authorizes PUC to regulate the activities of US WEST and its sale of telephone exchanges, whether on or off the reservation." *Id.* at ¶ 21, 595 N.W.2d at 609. The court concluded that the "PUC's regulation of US WEST is not an improper infringement upon the Cheyenne River Sioux Tribe's right to self-government." *Id.*

Under the federal doctrine of tribal exhaustion, a federal court will defer to the tribal court to give the tribal court the opportunity to determine its own jurisdiction. *Strate*, 520 U.S. at 451. An unusual aspect to this proceeding is that it appears that the tribal court is barred from proceeding with the NAT complaint. In the tribal court proceeding, NAT and Sprint had agreed to not conduct further briefing on Sprint's motion to dismiss filed in tribal court until the federal court ruled on Sprint's motion for a preliminary injunction. Affidavit of Stanley Whiting (attached to Sprint's Supplemental Reply Brief). The federal court granted Sprint's motion to enjoin the tribal court proceeding on December 1, 2010. No further proceedings have taken place in tribal court. Tr. at 28. NAT claimed that notwithstanding the federal court's decision, the tribal court could proceed with NAT's complaint with respect to intrastate claims. Tr. at 29. Sprint claimed that its motion was granted in full and that if the Commission deferred to the tribal court, then the Tribal Court would be in violation of the injunction. Tr. at 27-28. Sprint asserted that the federal court enjoined the entire tribal court proceedings because the entire NAT complaint was "infused with the assertion" that it involved interstate traffic. Tr. at 30. A review of Sprint's motion shows that it was for a preliminary injunction enjoining the tribal court and tribal court judge 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." Sprint's Ex. Z (attached to Supplemental Reply Brief). The federal court subsequently granted Sprint's motion for a preliminary injunction. The motion was not granted in part. The Commission will not grant a stay pending proceedings in tribal court when it appears that the tribal court is barred from proceeding.

The Commission further notes that this is not a case where a complaint was filed with the Commission after being first filed in tribal court. Sprint's complaint was filed with the Commission prior to NAT's complaint filed with tribal court. Second, no caselaw or statutory authority was cited demonstrating that this doctrine has been adopted by our state courts or by state law or that this doctrine is binding on a state administrative agency. Therefore, based on the record in this proceeding, the Commission denies NAT's request for a stay.

It is therefore

ORDERED, that NAT's Motion to Stay is hereby denied. It is

FURTHER ORDERED, that NAT's Motion to Dismiss is deferred.

Dated at Pierre, South Dakota, this 4 day of May, 2011.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, electronically.

By: _____

Date: 5-4-11

(OFFICIAL SEAL)

BY ORDER OF THE COMMISSION:

STEVE KOLBECK, Chairman

GARY HANSON, Commissioner

CHRIS NELSON, Commissioner