

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
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COUNTY OF BUFFALO) FIRST JUDICIAL CIRCUIT

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IN THE MATTER OF THE COMPLAINT * CIV. 08-11-8
FILED BY SPRINT COMMUNICATIONS *
COMPANY, LP AGAINST NATIVE * **MEMORANDUM DECISION**
AMERICAN TELECOM, LLC REGARDING * **AND ORDER**
TELECOMMUNICATIONS SERVICES. *

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This matter came before the Court for argument on July 19, 2011. The parties and interveners were all represented by counsel at said hearing. The Court also received briefs and has considered the same.

FACTS AND PROCEDURAL HISTORY

This matter was commenced before the South Dakota Public Utilities Commission (PUC) by the filing of a complaint from Sprint Communications Company, LP (Sprint) against Native American Telecom, LLC (NAT). In that complaint Sprint seeks a determination that the commission has sole authority to regulate sprint's intrastate interexchange service; that NAT lacks authority to bill Sprint for switched access service without a certificate of authority and a valid tariff on file with the PUC; and a declaration that because the commission has the sole authority over Sprint's intrastate exchange services, the Crow Creek Sioux Tribe utility authority is without jurisdiction over Sprint. In addition, Sprint requested a ruling and determination that NAT must repay Sprint the amounts that it inadvertently paid NAT for unauthorized and illegal switched access charges.

Petitions to intervene were filed by the South Dakota Telecommunications Association (SDTA), the South Dakota Network, LLC (SDN), Midstate

Telecommunications, (Midstate), AT&T Communications of the Midwest Inc. (AT&T), and the Crow Creek Sioux Tribe utility authority (tribal utility).

NAT filed a motion to dismiss the proceedings in the PUC for lack of jurisdiction. Later NAT filed a motion to stay the matter until the Crow Creek Sioux Tribal Court and the Tribal Utility Authority determined if the tribe had jurisdiction under the tribal exhaustion doctrine. Ultimately, the PUC ordered that the motion to dismiss and motion to stay be briefed during the proceedings. At its regularly scheduled meeting on April 5, 2011 the commission heard arguments by the parties on NAT's motion to stay. The commission found that it had jurisdiction in the matter pursuant to SDCL Chapters 1-26, 49-13, and 49-31, and further jurisdiction under federal authority as per 47 U.S.C. 152(b). The commission voted unanimously to deny NAT's request to stay the current proceedings under the tribal exhaustion doctrine. 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 a decision. The commission voted unanimously to grant NAT's request to defer the motion to dismiss.

NAT's motion to stay the PUC proceeding was based on the doctrine of tribal exhaustion. NAT argues that it is a tribally owned limited liability company that is organized under the laws of the state of South Dakota. During the PUC proceedings, on July 7, 2010, NAT filed a complaint against Sprint with the Crow Creek Sioux tribal court. In its complaint filed with the Crow Creek Sioux Tribal Court NAT stated that it seeks to enforce NAT's well established legal rights to collect compensation for terminating defendant sprint's telecommunication calls on the Crow Creek Sioux Tribe Reservation.

On August 16th, 2010 Sprint filed a complaint in the Federal District Court, District of South Dakota. In that complaint Sprint sued NAT and the judge of the Crow Creek Sioux tribal court. In Sprint's complaint filed in federal court, Sprint requested damages and declaratory and injunctive relief. In the federal court proceedings NAT and the Crow Creek Sioux Tribal Court moved to stay the proceedings until the Crow Creek Sioux Tribe determines whether it has jurisdiction over the matter. Sprint moved for a preliminary injunction to enjoin the Crow Creek Sioux tribal court from hearing the matter any further. 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 the Crow Creek Sioux tribal court's motion to stay the federal court proceedings. *Sprint Communications Co. LP v Native American Telecom LLC*, 2011 WL 4973319. In doing so, the federal court found that the tribal exhaustion rule was inapplicable because the Crow Creek Sioux Tribal Court does not have jurisdiction over interstate telecommunication issues. The federal court found that Section 207 of the Federal Communication Act clearly establishes jurisdiction in the federal court and in the FCC. Not decided by federal court was the issue of intrastate telecommunications.

Following the PUC's decision to deny NAT's motion for a stay, issued on May 4, 2011, NAT appealed to this Court. A written order and extensive decision was entered by the PUC on that date and served on all parties.

In this appeal the various parties have claimed that NAT's appeal is untimely. This Court finds those arguments without merit and finds that NAT's appeal was timely because it was served within ten days after service of the decision upon NAT's counsel. The issue presented was whether or not NAT would receive an additional three days to file based upon the mailing rule. This Court finds that when the decision

is mailed the provisions of 15-6-6 (a) apply and an additional three days are given under the mailing rule.

DECISION

The issue presented in this case is whether or not the PUC or the Tribal Utility Authority has jurisdiction over this matter with respect to intrastate telecommunications. The federal court has resolved the jurisdictional/tribal authority issues concerning interstate telecommunications. It is important to note that the Court is left with determining a very limited scope of jurisdiction concerning the Tribal Utility Authority. It is quite clear that the tribe does not have jurisdiction over calls that would originate off the reservation and terminate on the reservation or otherwise originate on the reservation and terminate off the reservation. Although the record is not clear at this point as to the volume of calls that would originate on the reservation and terminate on the reservation as opposed to the other two types of calls set forth above, this Court highly doubts that much of the volume of calls involved would lie exclusively between on reservation origination and on reservation termination.

It is quite clear that 47 U.S.C. 152(b) grants the states extensive jurisdiction and authority over intrastate telecommunication facilities. SDCL 49-31-3 states that "the commission (PUC) has general supervision and control over all telecommunications companies offering common carrier services within the state to the extent such business is not otherwise regulated by federal law or regulation".

In its tribal exhaustion argument NAT relies primarily on two federal cases, *National Farmers Union Insurance Co. v. Crow Tribe of Indians*, 471 U.S. 845 (1985), and *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987), in support of its position that the Court should stay its proceedings until after the tribal court has ruled on its own jurisdiction. In both of those cases the Supreme Court remanded the

cases back to the federal district courts with instructions to invoke the doctrine of tribal exhaustion, a federal common law rule, which is based upon the concepts of comity and deference to tribal self-government. The parties opposing NAT have argued that this is a rule that applies to federal court and not to state courts. Their argument is that the tribal exhaustion doctrine is a federal rule that is not binding on state courts or state agencies. Although this Court does not think it needs to decide that issue precisely based upon the facts and the law that exist in this case, it is this Court's understanding that since the tribal exhaustion doctrine is a rule of federal procedure, the supremacy clause would ultimately require the State of South Dakota to adopt the doctrine when there is a legitimate issue as to jurisdiction between tribal and state entities.

The tribal exhaustion doctrine was also argued to the federal court that determined the Crow Creek Sioux Tribal Court did not have jurisdiction concerning interstate telecommunications on the Crow Creek Reservation. The Court found that the tribal Court's jurisdiction was completely lacking when it came to federal/interstate telecommunications and that jurisdiction was with the FCC and/or the federal courts.

The South Dakota Supreme Court has had the opportunity to review a case where tribal and state jurisdiction have crossed paths concerning telecommunication industry issues. In *Cheyenne River Sioux Tribe Telephone Authority v. Public Utilities Commission of South Dakota*, 1999 S.D. 60, ¶ 21, 595 N.W.2d 604 a telephone company and Indian tribal subsidiary that provided telephone service sought a review of a decision of the PUC denying the proposed sale of three telephone exchanges from the telephone company to the tribal subsidiary. The Supreme Court found that the PUC exercise of authority over the tribe's agreement to purchase an on-reservation portion of the telephone exchange did not infringe on the exercise of tribal

self-government. They also held that the PUC's authority to regulate the sale of telephone exchanges was not preempted by federal law. In its decision the Supreme Court recognized that Indian tribes do exist as sovereign entities with powers of self-government. However, the Court found that the principles of tribal self-government, grounded in notions of inherent sovereignty and in congressional policies, seeks an accommodation between the interests of the tribes and the federal government on the one hand, and those of the states on the other hand. It found that the inherent powers of an Indian tribe do not extend to the activities of nonmembers of the tribe, but that a tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases or other arrangements. The Court found that the tribe may 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. The Court found that nothing in the federal interests of promoting economic development and self-sufficiency for Indian tribes, nor specific federal statute preempted the South Dakota PUC's authority to approve the sale of an on-reservation portion of a telephone exchange from a telephone company to a tribal utility that provided telephone services to tribal members. Rather, the South Dakota South Dakota Supreme Court found that the PUC's authority was significant as well as authorized, in part, as part of the overall regulatory scheme for telecommunications industrial regulation, and relied upon 47 U.S.C. §151. The South Dakota Supreme Court, in relying upon *Montana v. United States*, 450 US 544 (1981), that the exercise of tribal power beyond what is necessary to protect tribal self-government or to control

internal relations is inconsistent with the dependent status of the tribes and so cannot survive without express congressional delegation.

This Court has reviewed the various federal statutes involved and cannot find where the congress or a federal agency has granted, with specific language, the tribe's authority to regulate intrastate telecommunications where the calls are placed between state and tribal jurisdiction. Furthermore, NAT points to no South Dakota statute that provides the Tribe with such authority.

It is quite clear that the South Dakota statutes provide the PUC substantial and broad authority to regulate telecommunications throughout South Dakota. Although not exactly on point, the *Cheyenne River* decision shows that the South Dakota Supreme Court has reviewed this jurisdictional dispute under a similar context and has found that the tribe does not have jurisdiction. Since the South Dakota Supreme Court has so ruled, to grant a stay now to allow the tribal court to determine its own jurisdiction would serve no legitimate purpose. The issue in the complaint filed by Sprint with the PUC is to determine if the PUC has sole authority to exercise jurisdiction. Each entity, the state and the tribal authorities, have their own right and duty to determine their own jurisdiction. There is no need to wait for the tribal utility authority or the tribal courts to decide the tribal jurisdictional issues first. The tribal court has already been enjoined by the federal court from exercising any jurisdiction with respect to interstate matters.

In this case, the issue boils down to whether or not NAT can assess Sprint for switched access charges to terminate this traffic pursuant to a tariff that was approved by the Crow Creek Sioux tribal authority. This tariff is not limited to providing services on the reservation. The tribal tariff provides that the provisions of the tariff apply to interstate access facilities provided by NAT "into, out of and within the state

of South Dakota". These services are not limited to members of the Crow Creek Sioux Tribe, and as stated previously, a large and overwhelming majority of the calls and switched access charges apply to services that either originate off the reservation or terminate off the reservation and only a small portion of the charges, calls or tariffs are intertribal.

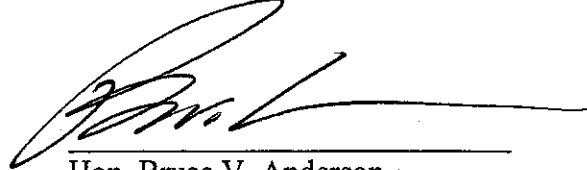
After a careful and thoughtful review of the PUC's decision, it is this Court's finding that the PUC did not act in excess of its jurisdiction or otherwise abuse its discretion in denying NAT's motion for a stay. The decision of the PUC is affirmed in all respects. This decision shall constitute the Court's findings of facts and conclusions of law.

ORDER

Based upon the above and foregoing, the order denying stay (TC 10-026) issued by the Public Utilities Commission on May 14, 2011 is hereby affirmed in all respects.

Dated this 23rd day of August, 2011.

BY THE COURT:



Hon. Bruce V. Anderson
Circuit Court Judge

ATTEST:

Clerk of Courts