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

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

CIV. 11-08

NATIVE AMERICAN TELECOM, LLC's REPLY MEMORANDUM IN SUPPORT OF APPLICATION FOR STAY OF ADMINISTRATIVE PROCEEDINGS PENDING JUDICIAL REVIEW

INTRODUCTION

Native American Telecom, LLC ("NAT") submits this reply memorandum in support of its application to stay all proceedings currently before the South Dakota Public Utilities Commission ("SDPUC" or "Commission"), pending this Court's review of the applicability of the "tribal exhaustion doctrine" in South Dakota's state courts and administrative agencies.[1]

STATEMENT OF THE ISSUES

The sole issues before the Court at this time are (1) whether NAT's "Application for Stay of Administrative Proceedings Pending Judicial Review" should be granted, or in the alternative,

[1] NAT's reply memorandum addresses the issues raised in the following briefs that were submitted in opposition to NAT's Application for Stay – (1) Sprint Communications Company, L.P.'s Opposition to Native American Telecom, LLC's Application for Stay of Administrative Proceedings Pending Judicial Review (dated May 27, 2011) ("Sprint's Memorandum"); (2) Public Utilities Commission's Opposition to Native American Telecom, LLC's Application for Stay of Administrative Proceedings Pending Judicial Review (dated June 16, 2011) ("Commission's Memorandum"); (3) Intervening Parties' Brief in Opposition to Motion for Stay (dated June 27, 2011) ("Intervenors' Memorandum"); and (4) Sprint Communications Company, L.P.'s Supplemental Memorandum (dated July 12, 2011) ("Sprint's Supplemental Memorandum"). When appropriate, Sprint, Intervenors, and Commission will be collectively referred to as "Opposing Parties."

(2) whether NAT's perfected appeal transfers jurisdiction of this matter from the Commission to the Circuit Court.

DISCUSSION OF LAW

I. NAT's "APPLICATION FOR STAY" MEETS THE REQUIREMENTS OF SDCL § 1-26-30

SDCL § 1-26-30 provides that "[a] *preliminary, procedural,* or *intermediate agency action* or ruling is *immediately reviewable* if review of the final agency decision *would not provide an adequate remedy.*" NAT's appeal of the Commission's May 4, 2011 "Order Denying Motion to Stay" ("Order") meets this standard.[2] The Commission's "preliminary, procedural, and intermediate action" in denying NAT's request for injunctive relief is immediately reviewable under this statutory authority. Requiring NAT to unnecessarily proceed with costly administrative agency litigation based upon the Commission's improper application of the tribal exhaustion doctrine – a *purely court-made legal doctrine* and a *matter of first impression* in South Dakota's state courts – simply leaves NAT with no other adequate remedy.

NAT's "inadequate remedy" position is further supported by the fact that the issue of tribal exhaustion is a "threshold one" because it determines the appropriate forum. *Gaming*

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[2] This Court must review administrative agency decisions the same as the Supreme Court; there is no presumption that the agency's decision was correct. *See In re Montana–Dakota Util. Co.,* 2007 S.D. 104, ¶ 6, 740 N.W.2d 873, 876 (citing *U.S. West Commc'n, Inc. v. Pub. Util. Comm'n,* 505 N.W.2d 115, 122–23 (S.D.1993) (citing *Northwestern Bell v. Pub. Util. Comm'n,* 467 N.W.2d 468, 469 (S.D.1991))). This Court's review is controlled by SDCL § 1-26-36. "[G]reat weight must be given to the findings of the agency and reverse only when those findings are clearly erroneous in light of the entire record." *Williams v. S.D. Dep't of Ag.,* 2010 S.D. 19, ¶ 5, 779 N.W.2d 397, 400 (citation omitted). Questions of law, however, are reviewed *de novo. U.S. West Commc'n, Inc.,* 505 N.W.2d at 122. In analyzing the proper standard of review regarding this issue, the Eighth Circuit Court of Appeals has stated that "[T]he legal scope of the [tribal exhaustion] doctrine is a matter of law to be reviewed *de novo.*" *Gaming World International, Ltd. v. White Earth Band of Chippewa Indians,* 317 F.3d 840, 849 (8th Cir. 2003) (citing *Bowen v. Doyle,* 230 F.3d 525, 530 (2d Cir.2000); *U.S. v. Tsosie,* 92 F.3d 1037, 1041 (10th Cir.1996)) (emphasis added).

World International, Ltd. v. White Earth Band of Chippewa Indians, 317 F.3d 840, 849 (8th Cir. 2003). The Eighth Circuit Court of Appeals has also found that although the tribal exhaustion doctrine is "prudential, rather than jurisdictional," exhaustion is "*mandatory* when a case fits within the policy." *Id.* (citing *Duncan Energy Co. v. Three Affiliated Tribes,* 27 F.3d 1294, 1300 (8th Cir.1994); *Burlington N. R.R. Co. v. Crow Tribal Council,* 940 F.2d 1239, 1245 (9th Cir.1991)).

NAT should not be required to further proceed in this administrative matter without the "threshold issue" of tribal exhaustion – a purely court-made legal doctrine and a matter of first impression in South Dakota's state courts – being resolved by this Court. There is simply no other adequate remedy for NAT. As such, NAT's request for this Court to review the Commission's "preliminary, procedural, and intermediate action" regarding the applicability of the tribal exhaustion doctrine is proper under SDCL § 1-26-30.

II. NAT's "APPLICATION FOR STAY" WAS TIMELY SOUGHT

Opposing Parties allege that NAT's "Application for Stay" was untimely sought.[3] However, as discussed in NAT's previous memorandum in support of its Application for Stay,[4] a thoughtful review of the South Dakota Administrative Procedures Act and the South Dakota Rules of Civil Procedure reveals that NAT's "Application for Stay" was timely sought.

First, SDCL §1-26-32 provides in relevant part that "[a]n application to the circuit court for a stay of the agency's decision may be made only *within ten days* of the date of receipt or

[3] *See* Sprint's Memorandum at pages 1-3; Commission's Memorandum at pages 2-3; and Intervenor's Memorandum at page 3.

[4] *See* Native American Telecom, LLC's Memorandum in Support of Application for Stay of Administrative Proceedings Pending Judicial Review at pages 8-9.

failure to accept delivery of the agency's decision."[5] (emphasis added).

Second, SDCL §1-26-32.1 provides that "[t]he *sections of Title 15 relating to practice and procedure in the circuit courts shall apply to procedure for taking and conducting appeals under this chapter* so far as the same may be consistent and applicable, and unless a different provision is specifically made by this chapter or by the statute allowing such appeal." (emphasis added).

Third, SDCL §15-6-6(a) states in relevant part that "[i]n computing any period of time prescribed or allowed by *this chapter*, by order of court, or by *any applicable statute*, the day of the act, event, or default from which the designated period of time begins to run *shall not be included*. . . . . When the period of time prescribed or allowed is *less than eleven days*, intermediate Saturdays, Sundays, and legal holidays *shall be excluded* in the computation." (emphasis added).

On Wednesday, May 4, 2011, the Commission issued its Order. Under SDCL §1-26-32, NAT was then required to seek is "Application for Stay" within "ten days of the date of receipt . . . of the agency's decision." Of course, "the day of the act" (Wednesday, May 4, 2011) is specifically excluded from this calculation. *See* SDCL §15-6-6(a). Also, because the period of time prescribed to seek a stay under SDCL §1-26-32 is "less than eleven days" any "intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation." *See* SDCL §15-6-6(a).

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[5] SDCL §1-26-32 provides in part:

> An application to the circuit court for a stay of the agency's decision may be made only within ten days of the date of receipt or failure to accept delivery of the agency's decision. Upon receiving a timely application for a stay and notice of hearing thereon, the court may enter a temporary stay pending a hearing on the application. Following a hearing, the court may order a further stay, pending final decision of the court.

On Tuesday, May 17, 2011, NAT's "Application of Stay" was served upon Sprint, the Intervenors, and the Commission. A review of the May 2011 calendar shows that because of multiple intermediate Saturdays and Sundays, NAT's "Application for Stay" was timely served upon the parties before SDCL §1-26-32's ten day time period had expired.[6]

III. THE APPLICABILITY OF THE "TRIBAL EXHAUSTION DOCTRINE" IS A PURELY LEGAL ISSUE AND A MATTER OF FIRST IMPRESSION IN SOUTH DAKOTA'S STATE COURTS

Opposing Parties next allege that NAT's "Application for Stay" should be denied because the tribal exhaustion doctrine is an issue of federal law, not binding on state tribunals.[7] In its Order, the Commission found that "[t]he doctrine of tribal exhaustion is a prudential, not jurisdictional rule, based on the principle of comity. Sprint [and the Intervenors] asserted that this federally created doctrine is *not applicable to state courts or state administrative agencies*." (SDPUC Order at page 2) (emphasis added). The Commission's decision denying NAT's motion for injunctive relief was, at least in substantial part, based on the fact that "no caselaw or statutory authority was cited demonstrating that this doctrine has been adopted by [South Dakota's] state courts or by [South Dakota] law or that this doctrine is binding on a state administrative agency." (SDPUC Order at page 3).

NAT agrees with Opposing Parties that the applicability of the tribal exhaustion doctrine – a court-made legal rule – is a matter of first impression in South Dakota's state courts. As such, the doctrine's applicability should be determined by South Dakota's judicial branch, not a

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[6] Sprint makes a brief argument questioning the application of SDCL § 15-6-6(a) to NAT's appeal. *See* Sprint's Supplemental Memorandum at page 7, fn.9. However, Sprint's argument is unpersuasive. SDCL § 1-26-32.1 clearly provides that the South Dakota Rules of Civil Procedure apply to the taking and conducting of administrative appeals.

[7] *See* Sprint's Memorandum at pages 5-9; Commission's Memorandum at pages 3-5; and Intervenor's Memorandum at page 3.

state administrative agency.[8]

In its recent "supplemental memorandum," Sprint fails to adequately respond to the plethora of United States Supreme Court, federal court, and state court decisions that support the likely application of the exhaustion doctrine in South Dakota's state courts.[9] *See e.g., Iowa Mutual Ins. Co. v. LaPlante,* 480 U.S. 9, 16 (1987) (indicating that the exhaustion doctrine applies to state courts as well as federal courts when it used the phrase "*any* nontribal court"); *Bowen v. Doyle,* 880 F.Supp. 99, 123 (W.D.N.Y. 1995) ("[a]lthough *[Iowa Mutual]* and *National Farmers Union* apply th[e] exhaustion rule to actions in federal court, those decisions . . . compel application of the exhaustion rule to the controversy at issue here [in a parallel state court action]. . . ."); *Tohono O'odham Nation v. Schwartz,* 837 F.Supp. 1024, 1030-33 (D.Ariz. 1993) ("the question of tribal court jurisdiction should be determined, in the first instance, by the tribal court," and "[the non-Indian contractor] improperly brought this action in state court prior to exhaustion of the issues in tribal court"); *Drumm v. Brown*, 716 A.2d 50, 61 (Conn. 1998) ("Our analysis, which is based primarily on the three United States Supreme Court exhaustion cases, persuades us that the [state] courts of [Connecticut] must apply the exhaustion of tribal remedies doctrine"); *Klammer v. Lower Sioux Convenience Store,* 535 NW2d 379, 384 (Minn.Ct.App. 1995) (reversing state district court's denial of tribal business' motion to dismiss non-Indian plaintiff's suit "and refer[ring] him to tribal court to first exhaust his remedies there"); *Matsch v.*

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[8] It should be noted that in its "Staff Brief," the Commission's own lawyers advised "[the] Commission should take a pragmatic approach to this matter as it relates to the tribal exhaustion doctrine and grant NAT's Motion to Stay thereby permitting either the tribal court or the federal court to resolve questions of its jurisdiction. . . ." Staff Brief, page 8. The Commission's lawyers also opined that "[Sprint's and the Intervenors'] argument that the 'tribal court's lack of jurisdiction is clear' appears questionable. . . ." Staff Brief, page 5. The Commission's "Staff Brief" is found in Chronological Index No. 37 (page numbers 759-771).

[9] For an analysis of these recent decisions, *see* NAT's Memorandum in Support of Application for Stay of Administrative Proceedings Pending Judicial Review, pages 12-15.

Prairie Island Indian Community, 567 NW2d 276, 278-79 (Minn.App. 1997) ("[a] party challenging a decision of a tribal court is required to exhaust all tribal court remedies").

In sum, NAT believes that the South Dakota Supreme Court, much like the federal courts and state courts that have addressed this issue, would find that the exhaustion doctrine is binding on South Dakota's courts (and administrative agencies). Therefore, NAT's "Application for Stay" should be granted until South Dakota's judicial branch provides guidance as to the applicability of this complex and significant court-made doctrine.

III. BECAUSE SPRINT'S AMENDED COMPLAINT BEFORE THE COMMISSION IS LIMITED TO *INTRASTATE* TELECOMMUNICATIONS MATTERS, THE FEDERAL DISTRICT COURT'S DECISION IS NOT BINDING AUTHORITY IN THIS *INTRASTATE* DISPUTE

Sprint's Amended Complaint before the Commission is limited to *intrastate* telecommunications matters. Sprint's Amended Complaint states that it "seeks a determination that the [Commission] has the sole authority to regulate Sprint's *intrastate* interexchange services. . . . Concomitantly, Sprint seeks a declaration that the Commission has the sole authority over [its] *intrastate* interexchange services. . . ." Sprint's Amended Complaint (Introduction) (Chronological Index No. 1) (emphasis added). Sprint's Amended Complaint then requests a declaration that "the Commission has sole authority to regulate Sprint's interexchange services *within the State of South Dakota.*" (Prayer for Relief) (Chronological Index No. 1) (emphasis added).[10]

The Honorable Karen E. Schreier's decision in *Sprint v. Native American Telecom, LLC, et al.,* Civ. 10-4110-KES, 2010 WL 4973319 (December 1, 2010) is not binding authority in this

[10] *See also* Commission's Memorandum at page 1 ("Sprint's [Amended Complaint] [seeks]: (1) a determination that the Commission has the sole authority to regulate Sprint's *intrastate* interexchange services. . . . (2) a declaration that . . . the Commission has sole authority over Sprint's *intrastate* interexchange services. . . .") (emphasis added).

state court matter. A close analysis reveals that Judge Schreier's denial of NAT's motion to stay applies only to *interstate* telecommunications matters. In fact, Judge Schreier routinely emphasized the "interstate" scope of her decision:

> The question here is, with regard to claims arising under an *interstate tariff*, whether Congress expressed a preference for a federal forum both by federal preemption of claims and by limiting jurisdiction over a claim to a federal forum."

Id. at page 6 of 18 (emphasis added).

> [T]he [Federal Communications Act] is a "comprehensive scheme for the regulation of *interstate communication.*"

Id. at page 7 of 18 (emphasis added) (quoting *Benanti v. United States,* 355 U.S. 96, 104 (1957)).

> The court finds that Congress has expressed a preference for a federal forum both by preempting all non-federal substantive law claims regarding *interstate tariffs*. . . .

Id. at page 10 of 18 (emphasis added).

> Congress has . . . occupied the telecommunications field for *interstate tariffs* . . . [and] has also chosen to preempt state and tribal court jurisdiction for *interstate tariff claims*. . . .

Id. at page 13 of 18 (emphasis added).

> [The Crow Creek Sioux Tribal Court] does not have jurisdiction in this case because § 207 has preempted state and tribal jurisdiction for *interstate tariff claims*. . . .

Id. at page 16 of 18 (emphasis added).

> Congress chose to vest jurisdiction for *interstate tariff claims* with the federal courts and the FCC. . . .

Id. at page 17 of 18 (emphasis added).

> Congress has preempted tribal court jurisdiction for *interstate tariff claims* brought under § 207. . . .

Id. at page 18 of 18 (emphasis added).[11]

Of course, the matter before this Court involves the applicability of the exhaustion doctrine in an *intrastate tariff* dispute. There is no question that Judge Schreier's decision is limited to the parties' *interstate tariff* dispute.

Both Sprint and Intervenors allege that Judge Schreier's decision is, to some extent, "precendential" in this state court matter.[12] However, Sprint and Intervenors submit two entirely different (and contrary) arguments as to whether Judge Schreier's decision is binding in this *intrastate* telecommunications dispute.

Sprint alleges that Judge Schreier's decision bars the tribal court from proceeding over any part of NAT's tribal court complaint.[13] On the other hand, Intervenors appears to submit that Judge Schreier's decision is not binding in this *intrastate* dispute and that the Commission and this Court should make an independent analysis of the exhaustion doctrine's applicability. "[T]his Court should follow the path of the federal district court and conclude that the Commission rather than the tribal court, has exclusive jurisdiction of *intrastate communications services*. . . ."[14] As such, unlike Sprint, Intervenors believe that Judge Schreier's decision is not conclusively binding on the Commission (or this Court). Rather, Intervenors request that the Commission (and presumably this Court) make its own independent conclusion as to whether the Commission has exclusive jurisdiction of *intrastate* communications services.

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[11] Judge Schreier also noted that "[t]he parties are currently briefing the issue of whether the SDPUC has jurisdiction over NAT in the matter pending before the SDPUC." *Id.* at page 3 of 18, fn. 1.

[12] *See* Sprint's Supplemental Memorandum at pages 6-7; Intervenors' Memorandum at pages 5-6.

[13] *See* Sprint's Memorandum at page 8, fn. 4; Sprint's Supplemental Memorandum at pages 6-7.

[14] Intervenors' Memorandum at page 6 (emphasis added).

NAT believes that this issue is clear and unambiguous – Judge Schreier's decision to deny NAT's motion for stay was limited to *interstate* telecommunications matters. As such, this Court has the authority to ultimately determine whether the tribal exhaustion doctrine applies to this *intrastate* telecommunications dispute.

IV. NAT'S PERFECTED APPEAL TRANSFERS JURISDICTION OF THIS MATTER FROM THE COMMISSION TO THE CIRCUIT COURT

NAT has perfected its appeal to this Court under SDCL §1-26-31. Therefore, even if this Court denies NAT's Application for Stay, jurisdiction of this matter is transferred from the Commission to this Court. Sprint fails to even acknowledge the South Dakota Supreme Court's decisions in *Oberle v. City of Aberdeen,* 470 NW2d 238, 242 (SD 1991) ("SDCL 1-26-31 provides the basis for the circuit court to exercise jurisdiction"), *Schreifels v. Kottke Trucking,* 2001 SD 90, ¶ 10, 631 NW2d 186, 189 ("the notice of appeal serves as a notice of transfer of jurisdiction from the executive branch [*i.e.*, an administrative agency] to the judicial branch"), and *Ryken v. Ryken,* 440 NW2d 307, 308 (SD 1989) ("[a]n appeal from [an] . . . order strips the trial court's jurisdiction over the subject matter of the . . . order except as to trivial matters; the Supreme Court then has jurisdiction until determination of the appeal").

As such, when NAT perfected its appeal in this case, the transfer of jurisdiction from the Commission to this Court became mandatory and parallel proceedings cannot proceed before the Commission pending the resolution of NAT's current appeal to this Court.

CONCLUSION

This Court should stay all proceedings currently before the Commission because the Commission's Order encompasses an improper analysis and application of the tribal exhaustion

doctrine – a highly complex and technical legal issue on which the South Dakota Supreme Court has not provided any analysis or guidance.

In the alternative, this Court should find that NAT has perfected its appeal under SDCL §1-26-31 and this perfection serves as a mandatory transfer of jurisdiction from the Commission to the Circuit Court.

Dated this 15th day of July, 2011.

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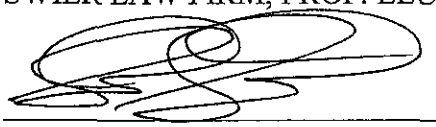

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on *July 15th, 2011,* a true and correct copy of the foregoing *NATIVE AMERICAN TELECOM, LLC's REPLY MEMORANDUM IN SUPPORT OF APPLICATION FOR STAY OF ADMINISTRATIVE PROCEEDINGS PENDING JUDICIAL REVIEW,* was served by *electronic mail* and *United States First Class mail* upon:

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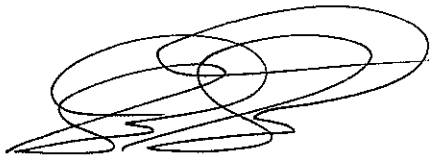

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