STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	: §	
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 MEMORANDUM IN SUPPORT OF APPLICATION FOR STAY OF ADMINISTRATIVE PROCEEDINGS PENDING JUDICIAL REVIEW

INTRODUCTION

Appellant Native American Telecom, LLC ("NAT") hereby files this 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.

STATEMENT OF FACTS

I. THE STRUCTURE AND PURPOSE OF NAT

NAT is a full-service, tribally-owned limited liability company organized under the laws of the State of South Dakota. NAT's ownership structure consists of the Crow Creek Sioux Tribe (51%) (Tribe), Native American Telecom Enterprise, LLC (25%) (NAT ENTERPRISE), and WideVoice Communications, Inc. (24%) (WideVoice).[1]

[1] For sake of clarity, it should be noted that NAT ENTERPRISE is a telecommunications development company and is a ***separate and distinct entity*** from NAT. The Tribe is a federally recognized Indian tribe with its tribal headquarters located on the Crow Creek Sioux Tribe

NAT provides high-speed Internet access, basic telephone, and long-distance services on and within the Crow Creek Sioux Tribe Reservation (Reservation). NAT's services take place exclusively within the exterior boundaries of the Reservation. NAT *does not* provide services within the State of South Dakota outside the exterior boundaries of the Reservation. As a result of its efforts, NAT has created jobs and provided much-needed economic opportunities on the Reservation.[2]

II. NAT's EFFORTS ON THE RESERVATION AND SPRINT'S REFUSAL TO PAY THE CROW CREEK SIOUX TRIBAL UTILITY AUTHORITY'S LAWFULLY-IMPOSED ACCESS TARIFFS

In 1997, the Crow Creek Sioux Tribal Council established the Crow Creek Sioux Tribe Utility Authority (Tribal Utility Authority) for the purpose of planning and overseeing utility services on the Reservation and to promote the use of these services "to improve the health and welfare of the residents."

Reservation in Fort Thompson, South Dakota. WideVoice is a Competitive Local Exchange Carrier (CLEC).

[2] The lack of sufficient telephone and other telecommunications services upon Native American reservations has been a long-standing problem. While 94% of all Americans have at least one telephone in their home, the Federal Communications Commission (FCC) has found that only 47% of Native Americans living on reservations or other tribal lands have telephone service. The FCC has determined that this lower telephone subscribership is "largely due to the lack of access to and/or affordability of telecommunications services in these areas." *Federal-State Joint Board on Universal Services: Promoting Development and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas, Twelfth Report and Order,* 15 FCC Red. 12208 (2000), at ¶¶ 20, 26 (2000 FCC Report). The FCC has also found that "by enhancing tribal communities' access to telecommunications, including access to interexchange services, advanced telecommunications, and information services, we increase tribal communities' access to education, commerce, government and public services." *Id.* at ¶ 23. *See* Tracey A. LeBeau, *Reclaiming Reservation Infrastructure: Regulatory and Economic Opportunities for Tribal Development,* 12 Stan. L & Pol'y Rev. 237, 238 (2001) ("Reservation infrastructures, including basic services such as water, electricity, gas and telecommunications, are currently incapable of supporting tribal populations").

On August 19, 2008, the Tribe issued its "Crow Creek Indian Reservation - Telecommunications Plan to Further Business, Economic, Social, and Educational Development" (Telecommunications Plan).

On October 28, 2008, the Tribal Utility Authority entered its "Order Granting Approval to Provide Telecommunications Service" (Approval Order).[3] Under this Approval Order, NAT was "granted authority to provide telecommunications service on the Crow Creek Reservation subject to the jurisdiction of the laws of the Crow Creek Sioux Tribe."[4]

As a result of the Approval Order, NAT properly filed two Access Service Tariffs (Access Tariff) governing termination of telephone traffic on the Reservation. One Access Tariff was filed with the Federal Communications Commission (FCC) for interstate traffic. A second Access Tariff was filed with the Tribal Utility Authority.[5]

In September 2009, pursuant to the Approval Order, and after over one year of planning and infrastructure development, NAT launched one of the first new tribally-owned telephone systems in the United States.[6] NAT provides telephone and advanced broadband service to residential and business customers on the Reservation.

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[3] The Approval Order was signed by then-Crow Creek Tribal Chairman Brandon Sazue.

[4] The Approval Order "is akin to competitive local exchange (CLEC) approval provided to carriers outside of reservations."

[5] The Approval Order requires that the basic telephone service offered by NAT must be "consistent with the federal universal service requirements of 47 U.S.C. § 214(e) and the rules of the Federal Communications Commission." NAT has always complied with this portion of the Approval Order.

[6] NAT has physical offices, telecommunications equipment, and telecommunications towers on the Reservation. NAT also provides a computer training facility with free Internet and telephone service to tribal members. NAT will soon be opening a new stand-alone Internet Library and Training Facility, which will include Internet stations and educational facilities for classes.

The telephone and advanced broadband network system on the Reservation enables the Tribe to pursue new economic development opportunities. The Tribe describes its advanced telecommunications system as a vehicle for "paving the way for much-needed business, economic, social and educational development on the Crow Creek Reservation." Specifically, the broadband network supports high-speed broadband services, voice service, data and Internet access, and multimedia.[7]

Shortly after NAT launched its tribally-owned telephone system, Sprint improperly refused to pay NAT's lawfully-imposed Access Tariff.[8] In March 2010, NAT filed a complaint with the Tribal Utility Authority seeking enforcement of its Access Tariff. Specifically, NAT alleged that Sprint was not paying the required Access Tariff for services NAT rendered on the Reservation.[9]

On March 29, 2010, the Tribal Utility Authority entered an Order agreeing with NAT and finding that Sprint's "self-help" in refusing to pay NAT's Access Tariff violated the "filed

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[7] The broadband network uses WiMax (Worldwide Interoperability for Microwave Access) technology operating in the 3.65 GHZ licensed spectrum, providing service to residential, small business, hospitality, and public safety customers. WiMax is a Broadband Wireless Access technology based on the IEEE 802.16 standard that enables the delivery of high-speed personal, business, and enterprise class broadband services to subscribers anytime, anywhere. Through the use of advanced antenna and radio technology with OFDM/OFDMA (Orthogonal Frequency Division Multiplexing), NAT delivers wireless IP (Internet Protocol) voice and data communications. WiMax was selected because this technology offers flexible, scalable, and economically viable solutions that are key components to deploying in vast rural environments, such as the Reservation.

[8] Sprint is a limited partnership that provides interexchange services on the Reservation. It should be noted that Sprint initially paid NAT its lawfully-imposed Access Tariffs. However, shortly after making these initial payments, Sprint engaged in the improper "self-help" actions that have resulted in this (and other) lawsuits.

[9] Sprint has taken the position, despite its earlier Access Tariff payments and the applicability of lawful tariffs in effect, that the termination of traffic by NAT on the Reservation is not subject to compensation, even though NAT incurs costs to terminate Sprint's traffic.

rate doctrine."[10] Specifically, the Tribal Utility Authority found that "[Sprint's] self-help actions could jeopardize the ability of a carrier, like [NAT], to serve the essential telecommunications needs of the residents of the Crow Creek reservation." The Tribal Utility Authority also held "[NAT] commenced providing essential telecommunications services . . . to the residents of the Crow Creek reservation pursuant to [the Tribal Utility Authority's Approval Order]. . . . It is also a matter of public record that [NAT] has commenced offering new and critically needed services on the reservation."

The Tribal Utility Authority's Order concluded by stating:

> The Crow Creek reservation is a rural, high-cost service area. Access service revenue has historically been a critically important source of revenue for rural carriers, like [NAT], to support operations. . . . If carriers, like Sprint, are able to take self-help actions and not pay for services rendered subject to a lawful tariff, it would not only put at risk the continued operation of carries like [NAT], but would also put at risk the services relied upon by, and in some cases essential to[,] the health and safety of . . . consumers."

As such, the Tribal Utility Authority found "Sprint's non-payment of [NAT's] access tariff charges to be a violation of the laws of the Crow Creek Sioux Tribe."[11] As of today's date, however, Sprint continues to entirely ignore this Order and refuses to pay the Tribal Utility

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[10] The "filed rate doctrine" requires all customers, such as Sprint, who avail themselves of tariffed services, to pay lawfully-imposed tariff rates. The "filed rate doctrine" is a common law construct that originated in judicial and regulatory interpretations of the Interstate Commerce Act and was later applied to the Communications Act of 1934 (as amended). The doctrine has been consistently applied to a variety of regulated industries and stands for the principle that a validly filed tariff has the force of law and may not be challenged in the courts for unreasonableness, except upon direct review of an agency's endorsement of the rate. *See, e.g. Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 117 (1990). The doctrine is premised on two tenets – (1) it prevents carriers from engaging in price discrimination between ratepayers; and (2) it preserves the exclusive role of authorities in approving "reasonable" rates for telecommunications services. *Marcus v. AT&T Corp.*, 138 F.3d 46, 58 (2nd Cir. 1998).

[11] The Tribal Utility Authority's Order also provided Sprint with an invitation to address Sprint's concerns. However, Sprint has also entirely ignored this part of the Order.

Authority's lawfully-imposed Access Tariff.

III. SPRINT'S ACTIONS HAVE RESULTED IN DUPLICATIVE FEDERAL COURT AND STATE REGULATORY AGENCY LEGAL PROCEEDINGS

A. Sprint's South Dakota Public Utilities Commission Complaint

Less than two months after the Tribal Utility Authority issued its Order, Sprint filed a complaint with the Commission. Sprint's complaint concerns issues identical to those decided by the Tribal Utility Authority. In its SDPUC complaint, Sprint alleges that (1) the SDPUC has the sole authority to regulate Sprint's interexchange services within the State of South Dakota; (2) the Tribal Utility Authority lacks jurisdiction over Sprint; and (3) NAT must seek a Certificate of Authority from the SDPUC and file a tariff with the Commission before NAT can access charges for switched access service.

NAT (along with the Tribal Utility Authority) requested that Sprint's SDPUC complaint be stayed based on the doctrine of "tribal exhaustion" and dismissed for lack of jurisdiction. On May 4, 2011, the Commission denied NAT's request for injunctive relief.[12]

B. NAT's Complaint in Crow Creek Tribal Court

On July 7, 2010, NAT filed a complaint with the Crow Creek Tribal Court. NAT's complaint concerns issues identical to those decided by the Tribal Utility Authority. In its Tribal Court complaint, NAT alleges that (1) Sprint is unlawfully refusing to compensate NAT for Access Tariffs; and (2) the Tribal Utility Authority and Tribal Court have proper jurisdiction over Sprint in this matter. At this time, NAT's complaint is pending before the Tribal Court.

[12] The Commission's May 4, 2011 decision is now the subject of the administrative appeal to this Court.

C. Sprint's Complaint in Federal District Court

On August 16, 2001, Sprint filed a complaint with the South Dakota Federal District Court (Southern Division). Sprint's complaint concerns issues identical to those decided by the Tribal Utility Authority and contained in NAT's Tribal Court complaint. In sum, Sprint alleges that the Tribal Utility Authority and Tribal Court have no jurisdiction over its activities on the Reservation and requests damages, declaratory relief, and injunctive relief.

NAT filed its Motion to Stay this federal district court lawsuit based upon the "tribal exhaustion doctrine." The federal district court recognized the applicability of the tribal exhaustion doctrine. However, the district court denied NAT's request for injunctive relief because the federal court (or FCC) was the proper venue for this interstate telecommunication matter.

D. The Commission's May 4, 2011 "Order Denying NAT's Motion to Stay"

On May 4, 2011, the Commission issued its "Order Denying Motion to Stay."[13] In its Order, the Commission noted 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 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).

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[13] A copy of the SDPUC's Order is attached as "Exhibit 1" to the "Affidavit of Scott R. Swier in Support of NAT's Application for Stay of Administrative Proceedings Pending Judicial Review."

DISCUSSION OF LAW

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

A through 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 failure to accept delivery of the agency's decision."[14] (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).

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[14] 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 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).

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 served upon the parties before SDCL §1-26-32's ten day time period had expired.

II. THIS COURT SHOULD GRANT NAT's "APPLICATION FOR STAY"

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 Order meets this standard. The Commission's "preliminary, procedural, and intermediate action" in denying NAT's request for injunctive relief based on the tribal exhaustion doctrine is immediately reviewable under this statutory authority. Requiring NAT to proceed with costly litigation before the Commission, based upon the Commission's improper application of the tribal exhaustion doctrine – a *purely legal issue* and a *matter of first impression* in South Dakota's state courts – clearly does not provide NAT with any other adequate remedy.

In its Order, the Commission noted that "[t]he doctrine of tribal exhaustion is a prudential, not jurisdictional rule, based on the principle of comity. Sprint, SDN, SDTA, and

Midstate 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 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 the Commission's finding that the applicability of the "tribal exhaustion doctrine" is a matter of first impression in South Dakota's state courts and administrative agencies. As such, a stay of the administrative proceeding is appropriate so that this Court may review this complex and significant legal issue and its applicability in South Dakota.[15]

III. THE TRIBAL EXHAUSTION DOCTRINE

A. Exhaustion Of Tribal Remedies In Federal Court

The "tribal exhaustion doctrine" recognizes that, although federal and tribal court jurisdiction may be concurrent, a federal court must abstain from accepting jurisdiction over suits arising on the reservation or involving "reservation affairs" until parties expend all available tribal court remedies.

The United States Supreme Court first discussed the doctrine in *National Farmers Union Ins. Co. v. Crow Tribe of Indians,* 471 U.S. 845 (1985). In *National Farmers Union,* the Supreme Court listed three reasons for the exhaustion of tribal court remedies: (1) to promote

[15] The applicability of the doctrine, and the different positions taken by the courts, are analyzed in numerous law review articles. *See e.g.,* B. Watson, *The Curious Case of Disappearing Federal Jurisdiction Over Federal Enforcement of Federal Law: A Vehicle of Reassessment of the Tribal Exhaustion/Abstention Doctrine,* 80 Marq. L.Rev. 531 (1997); L. Reynolds, *Exhaustion of Tribal Remedies: Extolling Tribal Sovereignty While Expanding Federal Jurisdiction,* 73 N.C. L.Rev. 1089 (1995); T. Joranko, *Exhaustion of Tribal Remedies in the Lower Courts After* National Farmers Union *and* Iowa Mutual: *Toward a Consistent Treatment of Tribal Courts by the Federal Judicial System,* 78 Minn. L.Rev. 259 (1993).

the congressional policy of strengthening tribal self-governance; (2) to serve the orderly administration of justice; and (3) to provide the parties and the federal court involved with the benefit of the tribal court's expertise. *Id.* at 856-57. All three of these purposes for exhaustion are aimed towards strengthening and validating the tribal court system, a goal which the federal government has consistently encouraged.

The first basis for the exhaustion of tribal court remedies, the policy encouraging tribal self-government, recognizes that "Indian tribes retain 'attributes of sovereignty over both their members and their territory.'" *Iowa Mutual Ins. Co. v. LaPlante,* 480 U.S. 9, 14 (1987) (quoting *United States v. Mazurie*, 419 U.S. 544, 557 (1975)). In addition, the *Iowa Mutual* Court recognized that tribal civil jurisdiction over the actions of non-Indians on reservation lands is also an important part of tribal sovereignty. *Id.* at 18. These statements recognize the importance of the role that the tribal court system plays in tribal self-governance. *Id.* at 14.

The second purpose of exhaustion, the orderly administration of justice, recognizes that exhaustion serves as an effective measure against "procedural nightmare[s]." *National Farmers Union,* 471 U.S. at 856-757. Litigation may be pending in a federal and a tribal court, wasting the time and money of both governments. Thus, by mandating that parties first exhaust all available tribal remedies where a case arises on the reservation or involves a reservation affair, the Supreme Court assured the prevention of conflicting adjudications and wasted judicial resources. In order to assure the orderly administration of justice, the *Iowa Mutual* Court recognized that exhaustion is not complete until the tribal appellate court is permitted an opportunity to rectify any errors the lower tribal court may have made. *Iowa Mutual,* 480 U.S. at 17.

The third reason for the exhaustion of tribal court remedies is that it will provide the

parties and other courts with the expertise of the "tribal courts [which] are best qualified to interpret and apply tribal law." *Id.* at 16. Tribal laws are made up of tribal customs, written codes and ordinances, and of tribal common law provided by opinions of the tribal court. Thus, as promoted through exhaustion of tribal court remedies, the application of tribal law is best served in the tribal court system.

B. Exhaustion Of Tribal Remedies In State Court

Support for application of the Exhaustion Doctrine in state courts is found in the United States Supreme Court's decisions, recent federal court case law, and recent state court case law.

The United States Supreme Court cases indicate that the doctrine is based primarily upon respect for a substantive "federal policy supporting tribal self-government. . . ." *Iowa Mutual Ins. Co.,* 480 U.S. at 16. In articulating and applying the doctrine, the cases repeatedly refer to that policy. *Id.* at 14 ("[w]e have repeatedly recognized the Federal Government's longstanding policy of encouraging tribal self-government"); *Id.* at 17 (referring to "the federal policy of deference to tribal courts"); *National Farmers Union Ins. Cos. v. Crow Tribe of Indians,* 471 U.S. 845, 856 (1985) ("[o]ur cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination"). The *Iowa Mutual* Court also indicated that exhaustion applies to state as well as federal courts when it used the phrase "*any* nontribal court." *Iowa Mutual,* 480 U.S. at 16 (emphasis added). The Supreme Court did not define the term "nontribal court," but the plain meaning of the term must encompass *all courts* that are not employed in the justice systems of the various Indian nations.

Federal district courts that have recently addressed this issue have also found that the Exhaustion Doctrine should be applied in state courts. In *Bowen v. Doyle,* 880 F.Supp. 99

(W.D.N.Y. 1995), the district court found that the doctrine should have equal application to state courts as well as federal courts. The district court noted that "[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]. . . ." *Id.* at 123. The district court further reasoned that litigation of reservation disputes "in a forum other than the tribe's simply 'cannot help but unsettle a tribal government's ability to maintain authority.' ... The same disruption occurs whether it is a federal or a state court that asserts jurisdiction over a civil dispute that is otherwise within the tribal court's authority." *Id.* at 124 (quoting *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 60 (1978)).

Tohono O'odham Nation v. Schwartz, 837 F.Supp. 1024 (D.Ariz. 1993), involved a request of a federal court to enjoin state court proceedings. The district court found that while the contract at issue was negotiated and executed off the reservation, its performance occurred exclusively within reservation boundaries. *Id.* at 1032. Thus, the district court considered the *locus* of the matter to have occurred on the reservation. *Id.* Relying on the reasoning that "the question of tribal court jurisdiction should be determined, in the first instance, by the tribal court," the district court opined "[the non-Indian contractor] improperly brought this action in state court prior to exhaustion of the issues in tribal court." *Id.* at 1030-33.

Similarly, when state courts have faced a reservation-based claim or a claim involving a "reservation affair," many have applied the Exhaustion Doctrine. For instance, in *Drumm v. Brown,* 716 A.2d 50 (Conn. 1998), the Connecticut Supreme Court noted that "the doctrine of exhaustion of tribal remedies is a matter of first impression in [Connecticut's state courts]. . . ." *Id.* at 55. In finding that the doctrine was applicable in Connecticut, the Court provided the following analysis:

> We first consider whether the doctrine is binding on the [state] courts of [Connecticut]. The defendants, relying on cases from other jurisdictions, contend that state courts must apply the doctrine. The plaintiffs suggest, however, that the doctrine is not binding on state courts. Our analysis, which is based primarily on the three United States Supreme Court exhaustion cases, *persuades us that the courts of this state must apply the exhaustion of tribal remedies doctrine.*

Id. at 61. The Connecticut Supreme Court concluded its analysis by stating:

> Moreover, even if the Supreme Court intended its exhaustion holdings in *National Farmers Union Ins. Cos.* and *Iowa Mutual Ins. Co.* to constitute only a federal court procedural rule based upon, but severable from, the federal policy of supporting tribal self-government and self-determination, *deference to that same policy counsels that we also adopt the doctrine for the courts of this jurisdiction.* The Supreme Court established the doctrine mainly in order to avoid disruption of that "federal policy supporting tribal self-government . . . [through] direct competition [by the federal courts] with the tribal courts, thereby impairing the latter's authority over reservation affairs." *In our view, direct competition from state courts is equally likely to disrupt that federal policy.* Because we owe no less deference to federal, statutory based policy than do the federal courts, we should be no more willing than they to risk disruption of this federal policy by exercising jurisdiction over cases to which the doctrine would apply. Indeed, the well recognized " 'plenary and exclusive [federal] power over Indian affairs' "; *State v. Spears,* 234 Conn. 78, 85, 662 A.2d 80, cert. denied, 516 U.S. 1009, 116 S.Ct. 565, 133 L.Ed.2d 490 (1995); which generally precludes independent exercise of state authority vis-a-vis tribal affairs, *deepens our duty of deference to this particular policy. We conclude, therefore, that the doctrine is binding on the courts of this state.*

Id. at 63-64 (emphasis added). *See also 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. Prairie Island Indian Community,* 567 NW2d 276, 278-79 (Minn.App. 1997) (recognizing that "[a] party challenging a decision of a tribal court is required to exhaust all tribal court remedies"); William C. Canby, *American Indian Law* 160 (2d ed.

1988) ("If the federal courts must defer to tribal courts to avoid undue interference with tribal adjudication of claims against non-Indians, it is difficult to see why state courts should not be required to do the same").

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).

IV. EVEN IF THIS COURT DENIES NAT's REQUEST FOR A STAY, NAT's APPEAL TRANSFERS JURISDICTION OF THIS MATTER FROM THE COMMISSION TO THE CIRCUIT COURT

There is no question that NAT perfected its appeal to this Court under the requirements of SDCL §1-26-31.[16] "SDCL 1-26-31 provides the basis for the circuit court to exercise jurisdiction." *Oberle v. City of Aberdeen,* 470 NW2d 238, 242 (SD 1991). Our Supreme Court has stated, "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." *Schreifels v. Kottke Trucking,* 2001 SD 90, ¶ 10, 631 NW2d 186, 189 (emphasis added) (citing *Matter of Groseth Intern., Inc.,* 442 NW2d 229 (SD 1989)).

An appeal from a South Dakota administrative agency's order to the circuit court is also analogous to an appeal from a circuit court to the South Dakota Supreme Court. And as our Supreme Court has opined, "[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

[16] SDCL §1-26-31 provides:

> An appeal shall be taken by serving a copy of a notice of appeal upon the adverse party, upon the agency, and upon the hearing examiner, if any, who rendered the decision, and by filing the original with proof of such service in the office of the clerk of courts of the county in which the venue of the appeal is set, within thirty days after the agency served notice of the final decision. . . .

jurisdiction until determination of the appeal."[17] *Ryken v. Ryken,* 440 NW2d 307, 308 (SD 1989) (citing *Matter of D.H.,* 354 NW2d 185 (SD 1984)).

As such, when NAT perfected its appeal in this case, the transfer of jurisdiction from the SDPUC 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 30th day of June, 2011.

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[17] This rule applies even when an appellee files a motion prior to the filing of appellant's notice of appeal. *Ryken*, 440 NW2d at 308 (citing *J.S.S. v. P.M.Z.,* 429 NW2d 425 (N.D. 1988)).

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on *June 30th, 2011,* a true and correct copy of the foregoing *NATIVE AMERICAN TELECOM, LLC's 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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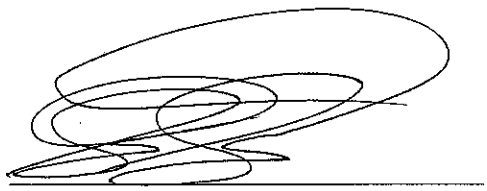

Scott R. Swier