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

CIV. 11-8

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

SPRINT COMMUNICATIONS COMPANY, LP'S OPPOSITION TO NATIVE AMERICAN TELECOM, LLC'S APPLICATION FOR STAY OF ADMINISTRATIVE PROCEEDINGS PENDING JUDICIAL REVIEW

INTRODUCTION

Sprint Communications Company, LP ("Sprint") submits this memorandum in opposition to Native American Telecom, LLC's ("NAT") Application for Stay of Administrative Proceedings Pending Judicial Review ("Application"). The facts underlying this memorandum can be found in the South Dakota Public Utilities Commission's (the "Commission") May 4, 2011 Order Denying Motion to Stay ("May 4 Order"). These facts demonstrate that NAT's reliance on the tribal exhaustion doctrine is misplaced and, as further demonstrated in the May 4 Order, the Commission properly denied NAT's Motion to Stay. NAT's Application is both untimely and without merit, and should be denied.

I. NAT'S APPLICATION IS UNTIMELY UNDER SDCL § 1-26-32

NAT has failed to timely apply for a stay; as such, its Application must be denied. South Dakota law provides as follows:

> 1-26-32. When agency decision in contested case becomes effective--Application for stay pending appeal--Time--Granting of further stay--Security or other supervision--Inapplicability to determinations of benefits under Title 61.
>
> Any agency decision in a contested case is effective ten days after the date of receipt or failure to accept delivery of the decision by the parties. 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. The court, as a condition to granting a stay, may require the appellant to furnish a bond or other such security or order supervision as the court may direct to indemnify or protect the state or agency or any person from loss, damage, or costs which may occur during the stay. This section does not apply to determinations of benefits made by the Department of Labor pursuant to Title 61.

SDCL § 1-26-32 (emphasis added). The law is clear that an application for a stay "may be made **only** within ten days of the date of receipt." *Id.* (emphasis added).

> Words and phrases in a statute must be given their plain meaning and effect. When the language in a statute is clear, certain and unambiguous, there is no reason for construction, and the Court's only function is to declare the meaning of the statute as clearly expressed.

Arends v. Dacotah Cement, 2002 SD 57, ¶ 11, 645 N.W.2d 583, 587 (quoting *Martinmaas v. Engelmann*, 2000 SD 85, ¶ 49, 612 N.W.2d 600, 611). Here, the Court must declare the meaning of SDCL § 1-26-32 as clearly expressed: the Commission's Order is dated May 4 and was emailed to the parties that very day. *See* Affidavit of Scott G. Knudson at ¶ 2 and Ex. 1 (PUC transmittal email and May 4 order). NAT's registered agent and attorney were on the PUC's service list and email transmittal.[1] *Id.* at Exs. A and B (PUC service list in TC 10-026)Thus, any application for a stay had to have been made by May 14, 2011.

NAT is aware of this rule. NAT cites the rule in its Application. In fact, NAT's fifth "reason" in support of its Application is exactly the reason for which the Application must be denied. NAT states "The SDPUC's determination will, unless stayed by the Court, go into effect ten days after NAT's receipt of the 'Order.'"

NAT's failure to address its tardiness is troubling. Nowhere in its application does NAT disclose that it received the Commissioner's order of May 4. As of May 14, those ten days had

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[1] *See* SDAR 20:10:01:09.01. ("The commission shall serve all documents electronically…").

run and the Commission's Order was already in effect. It cannot now be stayed, even following a hearing on the application. *See Claggett v. Dep't of Rev.*, 464 N.W.2d 212, 214 (S.D. 1990) (powers of appellate court to grant relief depends on compliance with statutory conditions precedent). SDCL § 1-26-32 demanded that NAT's application be made by May 14, 2011. A hearing on this point is unnecessary. NAT's application, dated May 17, 2011, is untimely and must be denied now.

II. NAT'S APPLICATION IS WITHOUT MERIT

The court need not even consider the merits of NAT's Application as it is clearly untimely. If the Court were to do so, however, it would see how groundless NAT's Application is. Each "reason" cited by NAT as the basis for its Application can be easily dismissed.

A. The South Dakota Supreme Court has recognized the Commission's authority to regulate telecommunications

First, NAT alleges that the Commission's May 4 Order is a complex one for which the South Dakota Supreme Court has provided no analysis. This is untrue. The Commission has been granted broad and sweeping authority to regulate telecommunications within the state. *See* SDCL § 49-31-3. Sprint initiated an action before the Commission because NAT is engaged in a scheme to artificially inflate the volume of traffic to purports to "serve." This scheme, known as traffic pumping or access stimulation, violates state and federal telecommunications law. The FCC defines it as "an arbitrage scheme employed to take advantage of intercarrier compensation rates by generating elevated traffic volume to maximize revenues." *Intercarrier Compensation/Universal Fund Reform Notice of Proposed Rulemaking*, FCC-13, ¶ 636 (released Feb. 9, 2011), 76 FED. REG. 11632 (Mar. 2, 2011) ("NPRM").[2] Moreover, NAT is offering local

[2] The FCC also found that "access stimulation imposes undue costs on consumers, inefficiently diverting the flow of capital away from more productive uses such as broadband deployment, and harms competition." NPRM ¶ 637. Continuing, the FCC observed "all

exchange service in South Dakota without a certificate of authority issued by the Commission. SDCL §§ 49-31-3; 49-31-69. The Commission is the entity charged with adjudicating Sprint's Commission Complaint.

The South Dakota Supreme Court has explicitly held that the Commission has express "authority and jurisdiction over intrastate facilities" and that the Commission's authority is "extensive and crucial to the overall regulatory scheme." *Cheyenne River Sioux Tribe Tel. Auth. v. Public Utils. Comm'n of South Dakota*, 1999 SD 60, ¶ 21, 595 N.W.2d 604, 610 (1999). In making this finding, the court expressly rejected any argument that the Commission's authority impinged upon tribal self-government (the very principle supporting the tribal exhaustion rule). *Id*

This broad authority is further enumerated under SDCL § 49-31-7.1, entitled "Powers and Duties of Commission." Under this provision, the Commission may:

> inquire into the management of the business of all telecommunications companies subject to the provisions of this chapter, and the commission shall keep informed as to the manner and method in which the same is conducted, and may obtain from such telecommunications companies full and complete information necessary to enable it to perform the duties and carry out the objects for which it was created.

SDCL § 49-31-7.1(3). Not only does the Commission have the authority to regulate NAT, but it also has the authority to inquire into NAT's management practices.

The South Dakota Supreme Court has recognized the Commission's primacy over telecommunications in the state:

> The regulatory scheme of telecommunications services specifically grants [the Commission] authority and jurisdiction over intrastate facilities. *See* 47 U.S.C. §

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customers of these long distance providers bear these costs and, in essence, ultimately support businesses designed to take advantage of today's above-cost intercarrier access system." *Id.* The FCC cited record evidence that estimated the cost of traffic pumping at over $2.3 billion in the last 5 years. *Id.* Another link to the NPRM is http://www.fcc.gov/rulemaking/07-135 (click on 'Connect America Fund A National Broadband Plan for Our Future').

> 152(b). The authority of [the Commission] 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, 1999 SD 60, ¶ 21, 595 N.W.2d at 609; *see also* May 4 Order at 2-3 (citing *Cheyenne River*). Through its regulation, the Commission protects public welfare. "Public service commissions are generally empowered to, and are created with the intention that they should regulate public utilities insofar as the powers and operations of such utilities affect the public interest and welfare." *In re Establishment of Switched Access for US West Commc'ns, Inc.*, 2000 SD 140 ¶ 21, 618 N.W.2d 847, 852 (S.D. 2000) (quoting *Northwestern Bell Tel. Co. v. Chicago & N.W. Transp. Co.*, 245 N.W.2d 639, 642 (S.D. 1976)). As such, the Commission clearly acted within its legislatively granted and judicially recognized authority.[3] There is no reason to stay the Commission's proceedings.

B. The Doctrine of Exhaustion of Tribal Remedies is an Issue of Federal Law not Binding on State Tribunals

The doctrine of exhaustion of tribal remedies. is a federal court-made rule based on concepts of comity and, where appropriate, deference to tribal self-government by a federal court. *Strate v. A-1 Contractors*, 520 U.S. 438,453 (1997) ("we reiterate that *National Farmers* and *Iowa Mutual* enunciate only an exhaustion requirement, a 'prudential rule' ... based on comity") (citation omitted); *see also id.* at 450 (describing the rule as nothing "more than a prudential exhaustion rule"). The cases NAT cites in favor of exhaustion are irrelevant. Federal

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[3] The FCC has also reached a similar result. The FCC has recognized the primacy of the Commission to protect non-tribal members living on the Reservation. *In re Western Wireless Corp. Pet. for Designation as an Eligible Telecommc'ns Carrier for the Pine Ridge Reservation in South Dakota*, [*Western Wireless*], FCC 01-284, 16 F.C.C. Rcd. 18145 (2001) determined that the telecommunications regulatory scheme gives the FCC jurisdiction to determine ETC[3] status over tribal members on the reservation. Conversely, the FCC also determined that the Commission possessed authority to determine ETC status with respect to non-tribal members on the reservation. *Id.* at ¶ 23.

courts cannot make the rule binding on state courts or state agencies. Congress has plenary authority over Indian affairs under the Indian Commerce Clause. U.S. Const., art. I, § 8, cl. 3; *Cotton Petroleum v. New Mexico*, 490 U.S. 163, 192 (1989); *Washington v. Confederated Bands and Tribes of Yakima Indian Nation*, 439 U.S. 463, 501 (1979). So far Congress has not enacted a statutory equivalent to this common law doctrine that might apply to states.

Likewise, NAT has cited no South Dakota decision that has declared South Dakota bound by the federal doctrine. As noted above, the Commission has been granted broad and sweeping authority to regulate telecommunications within this state. *See* SDCL § 49-31-3. The South Dakota Supreme Court has explicitly held that the Commission has express "authority and jurisdiction over intrastate facilities" and that the Commission's authority is "extensive and crucial to the overall regulatory scheme." *Cheyenne River*, 1999 SD 60 at ¶ 21, 595 N.W.2d 610. In making this finding, the court expressly rejected any argument that the Commission's authority impinged upon tribal self-government (the very principle supporting the tribal exhaustion rule). *Id.* Thus, not only is the tribal exhaustion rule not binding on the Commission, its authority to act in the field of telecommunications has been examined and approved.

C. The tribal exhaustion doctrine does not apply to these proceedings

Under its second through fourth points, NAT alleges that the tribal exhaustion doctrine somehow demands a different result than that reached by the Commission. The Commission properly considered and rejected the doctrine, as must this Court. In its Application, in addition to citing older and now circumscribed authority, NAT fails to give the entire reasoning and basis behind the tribal exhaustion doctrine, as well as its limitations.

The doctrine of tribal exhaustion requires parties to exhaust their case in tribal court before seeking relief in a federal court, including questions of jurisdiction. *Nevada v. Hicks*, 533 U.S. 353, 369 (2001). The doctrine is not an absolute, as it is only a prudential rule based on

comity. *Strate*, 520 U.S. at 450-51 (1997). In *Strate*, the Supreme Court articulated very significant restrictions 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.

520 U.S. at 459 n.14 (citations omitted). *Strate* holds that absent a congressional grant of tribal court jurisdiction, the rule is there is no tribal court jurisdiction over non-members and exhaustion is not required. NAT failed to point out this limitation on the rule, which applies only to federal courts. Thus, in this case, NAT seeks a judicially-approved delay in violation of the United States Supreme Court's precedent.

The question of exhaustion of tribal remedies can be promptly resolved in this case. First, Sprint has no reservation presence in this case. The lack of a 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 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.

Hornell Brewing Co. v. Rosebud Sioux Tribal Court, 133 F.3d 1087, 1093-94 (8th Cir. 1998).

Second, exhaustion is not required because Congress has divested the Tribal Court of any jurisdiction over NAT's claims against Sprint. 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:

> 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).

The Federal District Court for the District of South Dakota has recognized the lack of tribal court jurisdiction in the face to the Federal Communications Act. It was only after Sprint filed its Complaint with the Commission that NAT filed an action in tribal court. *See* May 4 Order (outlining procedural history). Sprint then successfully moved the federal district court to enjoin the tribal court action, based on the clear lack of jurisdiction.[4] *See Sprint Communications Co. v. Native American Telecom, LLC*, Civ. No. 10-4110, Order...Granting Plaintiff's Motion for a Preliminary Injunction, 2010 WL 4973319 (Dec. 1, 2010). In that case, the court concluded that the tribal exhaustion doctrine was not implicated where jurisdiction

[4] As the Commission ruled at page 3 of its order, the federal court's injunction barred the tribal court from proceeding over any part of the tribal complaint NAT filed. Knudson Aff. Ex. 1.

clearly lay elsewhere. *Id.* at *6. The same result is required here. 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, is not required in this case. *See Strate*, 520 U.S. at 459 n.14; *Hicks*, 533 U.S. at 369.

D. <u>In accordance with its agreement and representations, NAT must answer Sprint's discovery</u>

Finally, NAT alleges that it is "adversely affected and aggrieved" by the Order because it is now subject to Sprint's discovery requests. Such an allegation is directly contrary to NAT's representations to the Commission. First, propounded in January, Sprint's discovery is directly related to its Complaint before the Commission, in which Sprint alleges that NAT illegally operates a traffic pumping scheme in South Dakota without a certificate of authority as required by state law. In discussion by the parties to resolve NAT's refusal to respond, NAT agreed to provide answers to some of the discovery. Specifically, as NAT's counsel communicated to the Commission:

> Karen and Scott:
> I believe the solution offered by Mr. Knudson to the parties' discovery dispute is as follows:
> NAT would provide answers to Sprint's Interrogatories 8, 9, 12, 19, 20, and 21.
> NAT would provide responses to Sprint's RFPD 8, 9, 10, 14, and 18.
> I will agree to provide this information to Sprint by the end of March. Of course, NAT reserves the right to object to any of these discovery requests on the basis of privilege and/or any other legally justifiable reason.

Knudson Aff., Ex. 3 (Swier March 21, 2011 email). NAT failed to live up to its promise to provide this information to Sprint by the end of March.

Not only did NAT enter into an agreement with Sprint that NAT would provide some answers, NAT specifically represented to the Commission that its discovery was necessary in order to determine whether NAT's Motion to Dismiss should be granted, a decision the Commission delayed making based upon NAT's request "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." May 4 Order, page 1 (Knudson Aff. Ex 1). As revealed in the April 5, 2011, hearing transcript, NAT represented to the Commission that discovery should proceed:

> I think the Motion to Dismiss as the Staff Brief said is premature and that we should move forward with discovery, and when discovery is completed NAT can move forward with its Motion to Dismiss and this Commission can have more information on which to base its decision.

April 5, 2011, Transcript at 51:5-10 (argument of NAT counsel) Knudson Aff. Ex. 4.[5] Now, in seeking to delay the Commission proceedings, NAT presents an entirely different position to this Court. NAT must be held to its agreements and representations. Sprint's discovery requests cannot be used as a basis for a stay.

CONCLUSION

NAT's Application clearly untimely and without merit. Therefore, Sprint respectfully requests that this Court deny NAT's Application.

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BRIGGS AND MORGAN, P.A.

Scott G. Knudson (admitted pro hac vice)
Philip R. Schenkenberg
2200 IDS Center
Minneapolis, MN 55402
(612) 977-8400

WHITING LAW OFFICE
Stanley E. Whiting
142 E. 3rd Street
Winner, SD 57580
(605) 842-3373

[5] When Sprint followed up on NAT's representation to the Commission, NAT's counsel has said no discovery will be forthcoming. Knudson Aff. Ex. 5 (Swier April 19, 2011 email).

TOBIN LAW OFFICES
Tom D. Tobin
422 Main Street
Winner, SD 57580
(605) 842-2500

Counsel for Sprint Communications Company, LP