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

RECEIVED
JUN 28 2011
SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

IN THE MATTER OF THE COMPLAINT FILED BY SPRINT COMMUNICATIONS COMPANY, LP AGAINST NATIVE AMERICAN TELECOM, LLC REGARDING TELECOMMUNICATIONS SERVICES	)	CIV 11-08

INTERVENING PARTIES' BRIEF IN OPPOSITION TO MOTION FOR STAY

South Dakota Network, LLC ("SDN"), Midstate Communications, Inc. ("Midstate") and South Dakota Telecommunications Association ("SDTA") (collectively referred to as "Intervening Parties") hereby file this Brief in Opposition to Native American Telecom, LLC's (NAT's) Application for Stay of Administrative Proceedings Pending Judicial Review in the above captioned proceeding.

I. Procedural History

On May 4, 2010, Sprint Communications Company, LP ("Sprint") filed a Complaint before the South Dakota Public Utilities Commission ("Commission") against NAT. Sprint's Complaint disputes certain switched access charges being assessed by NAT to Sprint. However, in the context of disputing such charges, Sprint raised certain tribal and state jurisdictional issues related to the regulation of both interstate and intrastate interexchange services provided within South Dakota.

SDTA is an incorporated organization representing the interest of numerous cooperative, independent, and municipal telephone companies operating throughout the state of South Dakota. SDTA sought to intervene in the docket on May 20, 2010, on the grounds that the various jurisdictional and Commission authority issues raised in Sprint's

Complaint are issues that are of interest to and that stand to affect numerous SDTA members. SDN is a limited liability company with its principal place of business in Sioux Falls, South Dakota. SDN provides various telecommunications services, including but not limited to centralized equal access services ("CEAS"), lease of facilities to various interexchange carriers, and transport services. SDN filed a Petition to Intervene on May 21, 2010, not only because the jurisdictional and Commission authority issues raised in Sprint's Complaint will affect SDN and its member companies, but also because of the potential impact of any Commission decisions in this docket on Docket TC09-098 (a docket SDN has pending against Sprint). Midstate is a local exchange carrier ("LEC") headquartered in Kimball, South Dakota, that holds a certificate of authority from the Commission to provide local exchange services. In addition to other rural areas, Midstate operates as a rural LEC on the Crow Creek Indian Reservation. Midstate also filed a Petition to Intervene on the same grounds as SDTA, and from the perspective of an incumbent LEC on the Crow Creek Reservation. On June 18, 2010, the Commission granted intervention to SDTA, SDN, Midstate as well as AT&T, and the Crow Creek Sioux Tribe Utility Authority (CCSTUA).

On June 29, 2010 NAT filed a Motion to Stay and after extensive briefing and argument by the parties, the Commission issued an Order Denying the Motion to Stay on May 4, 2011. NAT is now requesting this Court to impose a stay of the Commission proceedings pending judicial review. The Intervening Parties request the Court deny that request and allow the Commission to adjudicate this matter.

II. NAT's Application is Untimely

Intervenors concur with both Sprint and the Commission that NAT has not timely filed its Application for Stay as it missed the ten (10) day filing requirement in SDCL 1-26-32. There can be no argument that the date of receipt of the Order from the Commission is any other date than May 4, 2011, the date it was electronically mailed to NAT. [1] The Application for Stay, dated May 17, 2011 was thus filed after the Order was already effective, and is timed barred.

III. NAT's Application Lacks Merit

A. The Commission has jurisdiction over this controversy

Even in the event the Court finds NAT has timely filed its Application, the request for stay lacks merit as the Commission clearly has jurisdiction to decide this controversy. As has been argued by Sprint and the Commission in their respective Oppositions to the Application for Stay, and as has been argued by all of the Intervening Parties prior to the Commission's decision denying the Order to Stay, it is clear state commissions are granted authority and jurisdiction over intrastate facilities. 47 USC 152 (b); Cheyenne River Sioux Tribe Telephone Authority v. Public Utilities Commission of South Dakota, 1999 SD 60, ¶21, 609, 595 NW 2d 604 This premise is codified in SDCL 49-31-3 which states, "the commission has general supervision and control of all telecommunications companies offering common carrier services within the state to the

[1] Through administrate rule the Commission has established authority to serve all documents electronically. ARSD 20:10:01:09.01states, "The commission shall serve all documents electronically unless a person is unable to receive documents electronically, a document may not practicably be transmitted electronically, or the commission does not have the person's email address.

extent such business is not otherwise regulated by federal law or regulation" (emphasis added).

The South Dakota Supreme Court further supports the authority of the Commission to regulate telecommunications services. As it has opined previously:

> The regulatory scheme of telecommunications services specifically grants the PUC authority and jurisdiction over intrastate facilities. See 47 USC 152(b). The authority of the PUC is extensive and crucial to the overall regulatory scheme. See SDCL ch. 49-31. Among other things, it has 'general supervision and control of all telecommunications companies offering common carrier services within the state to the extent such business is not otherwise regulated by federal law or regulation.'" SDCL 49-31-3; Cheyenne River at ¶ 20.

NAT's argument that a stay is warranted in this matter to determine if the tribal exhaustion doctrine should apply is without merit because the authority and jurisdiction of the Commission is so clearly established in federal law, South Dakota case law and South Dakota statute.

B. Tribal Exhaustion does not apply to State Court Proceedings

The Intervening Parties further support the position of Sprint and the Commission and argue that the Tribal Exhaustion Doctrine does not apply to this action filed before a state administrative body and there is no authority that indicates otherwise. The only cases cited to date in support of adoption of the Tribal Exhaustion Doctrine are federal cases. NAT relies primarily on two federal cases, National Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 US 845, (1985) and Iowa Mutual Ins. Co v. LaPlante, 480 US 9 (1987), in support of its position that this Court should stay its proceedings until after the tribal court has ruled on its jurisdiction. Both cases cited found that the federal courts had jurisdiction of the issues involved, but remanded the cases back to federal district court with instructions to invoke the doctrine of tribal exhaustion, a federal common law

rule, based on the concepts of comity and a deference to tribal self-government. It is important to note, however, that both courts analyzed jurisdiction between tribal court and federal court, not tribal court and state court. The federal rule of tribal exhaustion is a federal rule that is not binding on state courts or state agencies. And although all of the parties cite extensive case law in reference to the doctrine of tribal exhaustion in the federal court arena, no party cites a single case in reference to the State of South Dakota adopting the doctrine of tribal exhaustion. That is because there is no such doctrine in the State of South Dakota and the reliance on any federal case precedent by the Commission or this Court is misplaced.

C. Federal District Court Ruling is Precedential

This Commission can look to the recent ruling of the federal district court with regard to the inapplicability of the tribal exhaustion argument in this docket. After NAT brought a claim against Sprint in tribal court nearly two months after Sprint filed the current complaint, Sprint sued NAT in federal district court, asserting that NAT's traffic pumping activities violated the Federal Communications Commission's rules. NAT moved for a stay in federal district court on the theory of tribal court exhaustion.

The federal district court declined to follow the doctrine of tribal exhaustion on the grounds that tribal court jurisdiction was lacking, thus the exhaustion rule was inapplicable. The federal district court issued an order enjoining the tribal court from hearing the matter. See Sprint Communications v. Native American Telecom, et al, 2010 WL 4973319 (D.S.D.). Pursuant to the federal and state statutes enumerated above, this 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, that "the doctrine of tribal court exhaustion must give way," and a stay is not appropriate in this case.

IV. NAT has an Adequate Remedy

Intervenors further concur with the Commission's argument that NAT has failed to demonstrate that review of a final Commission decision would not provide an adequate remedy, thus making NAT's appeal of the Commission's Order inappropriate. SDCL 1-26-30 limits the right to judicial review of an intermediate agency action or ruling to those instances when "review of the final agency decision would not provide an adequate remedy." NAT has failed to meet this condition. That being the case, there is clearly no grounds or basis upon which this Court may grant a motion for stay, and Internenors urge the Court to deny NAT's Motion.

V. Conclusion

The Intervening Parties assert that this Commission has jurisdiction over this dispute and more specifically NAT and accordingly the Application to Stay filed by NAT is untimely and lacks merit. Accordingly, the Intervening Parties urge the Court to deny the Application to Stay.

Dated this 27 day of June, 2011.

By: Margo D Northrup

Darla Pollman Rogers
Margo D. Northrup
RITER ROGERS WATTIER & NORTHRUP, LLP
PO Box 280
Pierre, SD 57501
Attorneys for SDN and Midstate

William P. Heaston
VP, Legal and Regulatory
South Dakota Network, LLC
2900 W. 10th Street

CERTIFICATE OF SERVICE

I, Margo D. Northrup, certify that a copy of the **INTERVENING PARTIES' BRIEF IN OPPOSITION TO MOTION FOR STAY** dated June 27, 2011, was served upon the parties electronically and/or US Postal Service First Class mail to each of the following individuals:

Ms. Karen E. Cremer
Staff Attorney
South Dakota Public Utilities Commission
500 E. Capitol Ave.
Pierre, SD 57501
karen.cremer@state.sd.us

Mr. Tom D. Tobin
422 Main St.
PO Box 730
Winner, SD 57580
tobinlaw@gwtc.net

Ms. Judith Roberts
Attorney at Law
P.O. Box 1820
Rapid City, SD 57709
jhr@demjen.com

Mr. Scott G. Knudson
Briggs and Morgan, PA.
80 S. 8th St.
2200 IDS Center
Minneapolis, MN 55402
sknudson@briggs.com

Mr. Phillip Schenkenberg
Briggs and Morgan, PA.
80 South 8" Street
2200 IDS Center
Minneapolis, Minnesota 55402
pschenkenberg@briggs.com

Ms. Rolayne Ailts Wiest
Special Assistant Attorney General
South Dakota Public Utilities Commission
500 E. Capitol Ave.
Pierre, SD 57501

Mr. Stanley E. Whiting
142 E. 3rd St.
Winner, S.D 57580
swhiting@gwtc.net

Ms. Diane C. Browning
6450 Sprint Parkway
Overland Park, KS 66251
diane.c.browning@.sprint.com

Mr. William P. Heaston
V.P., Legal & Regulatory
SDN Communications
2900 W. 10th St.
Sioux Falls, SD 57104
bill.heaston@sdncommunications.com

Mr. William M. Van Camp
Attorney At Law
Olinger Lovald Mccahren & Reimers PC
PO Box 66
Pierre SD 57501-0066
Bvancamp@Olingerlaw.Net

Mr. Richard D. Coit
SDTA
P.O. Box 57
Pierre, SD 57501-0057
richcoit@sdtaonline.com

Scott R. Swier
133 N. Main St.
P.O. Box 256
Avon, SD 57315
scott@swierlaw.com

Margo D Northrup

Margo D Northrup