STATE OF SOUTH DAKOTA)
: §
COUNTY OF BUFFALO)

IN CIRCUIT COURT

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 SUPPLEMENTAL MEMORANDUM

INTRODUCTION

Sprint Communications Company, LP ("Sprint") submits this supplemental memorandum in opposition to Native American Telecom, LLC's ("NAT") Application for Stay of Administrative Proceedings Pending Judicial Review ("Application"). In its reply,[1] NAT argues new facts and case law to which Sprint seeks an opportunity to respond;[2] these new facts and case law, however, do not alter the correct conclusion in this case. First, although NAT expands its tribal exhaustion doctrine argument and cites to new authority, the tribal exhaustion doctrine is simply inapplicable to this case. No additional cases cited by NAT alter this conclusion. Second, while NAT significantly expands its factual representations to the Court, these "facts" are contrary to those findings made by the South Dakota Public Utilities Commission (the "PUC") in its May 4, 2011 Order Denying Motion to Stay ("May 4 Order"). This is not a case where the tribal court must first determine whether it has jurisdiction to regulate intrastate telecommunications traffic – the law is clear it does not. The South Dakota Supreme Court, the United States Supreme Court, the South Dakota federal district court, and the

[1] Although not denominated a reply brief, NAT's brief is effectively a reply brief as it responds to arguments made by Sprint on appeal, as well as raising new material.

[2] In order to have this opportunity, Sprint has also filed a Motion for Leave to File a Supplemental Memorandum in Opposition to NAT's Application.

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PUC have already, either directly or by analogy, determined that jurisdiction over interstate and intrastate telecommunications services resides in federal or state tribunals, respectively, but not in a tribal forum. In short, this case must proceed before the PUC.

I. IN THIS CASE, THE DOCTRINE SERVES NO PURPOSE BUT DELAY

Though NAT cites to an abundance of cases citing the tribal exhaustion doctrine, none of these cases alter the simple conclusion that the doctrine is inapplicable to this case. As set forth by the United States Supreme Court, when tribal court exhaustion serves no purpose but delay, it must give way. *See Strate v. A-1 Contractors*, 520 U.S. 438, 459 n.14 (1997)[3]; *Nevada v. Hicks*, 533 U.S. 353, 369 (2001).[4] To avoid any further delay, the case must proceed before the PUC. NAT has acknowledged that the case will be ultimately decided by the PUC, albeit after the delay proscribed by the United States Supreme Court: "There is no doubt that this Commission will hear this case at a later date but under the Tribal Exhaustion Doctrine, the Tribal Court should have the first crack at determining its jurisdiction." April 5, 2011 PUC Hearing transcript at 7 (transcript is available as documents labeled 1166-1131 included in the administrative record submitted to the Court by the PUC on June 15, 2011). In fact, because of NAT's delay tactics, Sprint's complaint before the PUC was filed over a year ago, but this case has yet to proceed

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[3] "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." (Emphasis added.)

[4] "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."

beyond this threshold stage. This is the very delay the Supreme Court in *Strate* said was unwarranted.

None of the cases cited by NAT change this simple conclusion. For example, NAT alleges that the Connecticut case of *Drumm v. Brown*, 245 Conn. 657, 716 A.2d 50 (1998), establishes an idea of a "reservation affair" that would entitle the tribal court to jurisdiction. Even if such an idea could alter the result in this case (which it does not), the PUC has already found that this case is not simply a "reservation affair." Instead, the PUC specifically found that (1) the tariff under which NAT is imposing its charges is not limited to providing services on the reservation, and (2) that NAT's services are not limited to members of the Crow Creek Sioux Tribe. May 4 Order at 2. According to South Dakota law, these factual findings of the PUC "shall be given great weight." SDCL § 1-26-36. As such, the PUC has determined that this case is not a "reservation affair" to which the doctrine of tribal exhaustion could apply.

Drumm is also not simply a "reservation affair" case, even though the core of the case involved a tribally-related activity. *Drumm* involved three plaintiffs who sued tribal officers for wrongful discharge and other claims arising out of their investigation into improper activities at a tribal casino. The Connecticut court applied exhaustion of tribal remedies because two of the plaintiffs had filed a tribal court complaint after the district court had dismissed their complaint. *See* 245 Conn. at 685-88, 716 A.2d at 65-66. The court held that dismissal was improper, as the district court should have entered a stay instead of dismissal. The court then remanded as to the third plaintiff who had not sued in tribal court.

Although *Drumm* cited *Strate* in its decision, *Drumm* failed to address the conclusion in *Strate* that absent a federal grant of authority, tribal courts lack adjudicatory jurisdiction over non-tribal members, a point the Supreme Court made clear in *Hicks* (tribal courts cannot hear

§ 1983 claims against non-member state officials). The court in *Drumm*, moreover, relied extensively on pre-*Strate* precedent, including dicta from *National Farmers Union* and *Iowa Mutual* regarding tribal authority over non-members that has been subsequently rejected by the Supreme Court in *Hicks* and *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001).

Drumm concludes that the exhaustion rule is mandatory. 245 Conn. at 992-93, 716 A.2d at 68. But, exhaustion is a rule of comity,[5] hence it is by definition a discretionary rule, and courts around the country have concluded the doctrine is not binding on state courts. *See Astorga v. Wing*, 211 Ariz. 139, 142, 118 P.3d 1103, 1106 (2005); *Meyer & Assocs., Inc. v. Coushatta Tribe of Louisiana*, 992 So.2d 446, 452 (La. 2008); *Michael Minnis & Assocs., P.C. v. Kaw Nation*, 90 P.3d 1009, 1014 (Okla. Civ. App. 2003); *Maxa v. Yakima Petroleum, Inc.*, 83 Wash.App. 763, 767, 924 P.2d 372, 373 (1996); *Gavle v. Little Six, Inc.*, 555 N.W.2d 284, 290-92 (Minn. 1996).[6] Indeed, at oral argument, before the PUC, "NAT's position was that the Commission has the discretion to either invoke or not invoke the doctrine of tribal exhaustion. Tr. at 32." May 4 Order at 2.

The holding in *Drumm* is also distinguishable from this case because here Sprint did not initiate a tribal court proceeding. Moreover, *Strate's* directive in note 14 to avoid delay has been expansively applied since *Drumm*. As *Hicks* and *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 128 S.Ct. 2709, 2720 (2008) have indicated, absent a grant of jurisdiction, or

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5 The Supreme Court of South Dakota held that comity did not require circuit court to defer creditor's security interest claim against cattle to tribal court to adjudicate dispute between creditor and debtor's father, both enrolled tribal members, as to ownership of cattle that had been sold. *See First National Bank of Philip v. Temple*, 2002 SD 36, ¶ 15, 642 N.W.2d 197, 203.

6 NAT also cites *Tohono O'odham Nation v. Schwartz*, 837 F.Supp. 1024 (D. Ariz. 1993), in support of its position. But NAT fails to cite the more recent case of *Astorga v. Wing*, 211 Ariz. 139, 142, 118 P.3d 1103, 1106 (2005), where the Arizona Court of Appeals determined that the application of the tribal exhaustion doctrine was not required because federal courts have the ability to review these determinations, whereas state courts do not.

unless the very limited exceptions set forth in *Montana v. United States*, 450 U.S. 544 (1981) apply, there is no jurisdiction in tribal court and no need to exhaust. The South Dakota federal court here realized this and enjoined the tribal court.

In addition to the PUC's determination that this is not simply a "reservation affair," ample authority exists to direct both the PUC and this Court in this case as to the PUC's authority to act in the field of telecommunications. First, the South Dakota Supreme Court has explicitly held that the PUC has exclusive "authority and jurisdiction over intrastate facilities" (like NAT's) and that the PUC'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);[7] *see also* SDCL § 49-31-3. Second, the FCC has determined that the PUC shall regulate service to nonmembers on a reservation. *See In re Western Wireless Corp. Pet. for Designation as an Eligible Telecommc'ns Carrier for the Pine Ridge Reservation in South Dakota*, FCC 01-284, 16 F.C.C. Rcd. 18145 ¶¶ 16, 23-24 (2001) (holding that the PUC shall regulate service to nontribal members residing on a reservation).[8] NAT ignores both of these decisions but instead simply alleges that the South Dakota Supreme Court will rule in a manner <u>contrary</u> to its existing precedent.

Another new authority NAT cites to is *Klammer v. Lower Sioux Convenience Store*, 535 N.W.2d 379 (Minn. Ct. App. 1995), which involved a pro se litigant pursuing a claim against a tribally-owned business arising out of an incident that occurred on the reservation. *Id.* at 380. The case pre-dates *Strate* and *Plains Commerce Bank* and thus offers this Court no guidance to whether the Crow Creek tribal court has been granted jurisdiction to resolve Sprint's state law

[7] This precedent was recognized and cited by the Commission (*see* May 4 Order at 2-3), but which NAT fails to acknowledge.

[8] In that case, the FCC also considered and rejected application of *Montana*, finding no threat to tribal sovereignty – the very foundation to the exhaustion doctrine.

claims against NAT. In addition, *Klammer* never resolved the question whether tribal sovereign immunity required that the convenience store be sued in tribal court. The decision has also been subsequently distinguished by the Minnesota Court of Appeals in *Lemke et. al v. Brooks*, 614 N.W.2d 242 (Minn. Ct. App. 2000) (holding exhaustion not required in wrongful death action against tribal member involving on-reservation conduct). *Klammer* simply is not persuasive in this instance.

II. NAT'S "FACTS" ARE CONTRARY TO THE EVIDENCE

In its reply, for the first time, NAT presents four pages of "facts" to the Court. Nothing contained in these four pages alters the conclusion in this case regarding exhaustion, but NAT also asserts facts that are contrary to evidence in the record and to the findings of the PUC.

First, in order to support its allegation that "Sprint's actions have resulted in duplicative federal court and state regulatory agency legal proceedings" (NAT Reply at 6), NAT distorts the timeline of events. As the PUC found, "this is not a case where a complaint was filed with the PUC after being first filed in tribal court. Sprint's complaint was filed with the PUC prior to NAT's complaint filed with tribal court." May 4 Order at 3. Not only are the PUC's findings supported by the timeline and to be given "great weight" (SDCL § 1-26-36), but these findings also demonstrate that NAT, in fact, instituted "duplicative proceedings." After NAT filed in tribal court, Sprint was wholly within its rights to seek an injunction against proceeding further in a forum which had no jurisdiction over it, and it is improper for NAT to suggest otherwise.

Second, NAT seems to represent that its tribal court complaint is still "pending before the Tribal Court." NAT Reply at 6. NAT, however, ignores that it, the tribal court, and the tribal court judge have been enjoined from proceeding by the United States District Court for the District of South Dakota. *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 fact, the PUC recognized that it "will not grant a stay pending proceeding in tribal court when it appears that the tribal court is barred from proceeding." May 4 Order at 3. As the federal court enjoined NAT from proceeding further in tribal court, its arguments before the PUC and now before this Court are an assault on the federal court's jurisdiction to enjoin NAT.

III. NAT'S APPEAL OF A COLLATERAL ORDER DOES NOT DENY THE PUC ITS JURISDICTION

NAT's appeal of the May 4 Order does not deprive the PUC of jurisdiction in this case. In fact, NAT's counsel represented to the PUC that the action there should continue to allow for discovery which bears on NAT's motion to dismiss. *See* May 4 Order at 1. South Dakota law makes no provision that an agency action is automatically stayed, let alone removed from agency jurisdiction, pending an appeal. *See* SDCL § 1-26-32.[9]

NAT analogizes its appeal to an appeal from circuit court to the South Dakota Supreme Court. NAT Reply at 15. A better analogy is that NAT is appealing a collateral or interlocutory, not a final, order. The motion for a stay, if granted, would yield only an interlocutory order, as it is does not ultimately decide the issues pending before the PUC. *See* SDCL § 15-26A-3 (delineating between final and other orders when appealing). The proceedings must thus be governed by SDCL § 15-26A-19, which requires that NAT must apply for a stay pending the appeal in order to halt the lower court proceedings. As such, NAT's appeal does not automatically divest the lower court of jurisdiction.

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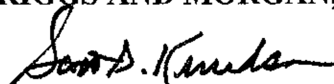
[9] In addition to failing to establish that the Commission is automatically divested of jurisdiction, SDCL § 1-26-32 arguably sets forth an exclusive timeline that bars the application of SDCL § 15-6-6(a) by way of SDCL § 1-26-32.1. SDCL § 1-26-32.1 sets a default rule "unless a different provision is specifically made by this chapter." SDCL § 1-26-32 is that different provision as it specifies that "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." (Emphasis added.)

CONCLUSION

NAT's Application for a Stay is untimely and without merit. Therefore, Sprint respectfully requests that this Court deny NAT's Application.

Dated: July 12, 2011

BRIGGS AND MORGAN, P.A.



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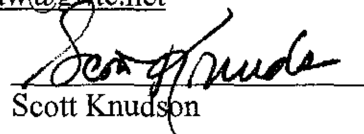

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