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March 26, 2012

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Patricia Van Gerpen
Executive Director
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500 E Capitol Avenue
Pierre, SD 57501

**Re: In The Matter Of The Application Of Native American Telecom, LLC For A
Certificate Of Authority To Provide Local Exchange Service Within The
Study Area Of Midstate Communications, Inc.
TC-11-087**

Dear Ms. Van Gerpen:

Enclosed for filing in the above-entitled matter, please find the following documents filed by Sprint Communications Company L.P.:

1. CONFIDENTIAL Direct Testimony of Randy G. Farrar on behalf of Sprint Communications Company L.P.
2. Public Direct Testimony of Randy G. Farrar on behalf of Sprint Communications Company L.P.
3. Exhibit RGF-1 to Farrar Direct Testimony.
4. Exhibit RGF-2 to Farrar Direct Testimony.
5. Exhibit RGF-3 to Farrar Direct Testimony.
6. Exhibit RGF-4 to Farrar Direct Testimony.
7. CONFIDENTIAL Exhibit RGF-5 to Farrar Direct Testimony.
8. Exhibit RGF-6 to Farrar Direct Testimony.
9. Exhibit RGF-7 to Farrar Direct Testimony.

BRIGGS AND MORGAN

Patricia Van Gerpen
March 26, 2012
Page 2

10. Exhibit RGF-8 to Farrar Direct Testimony.
11. Exhibit RGF-9.
12. Exhibit RGF-10.

By copy of same, the parties have been served.

If you have any questions, please contact me.

Sincerely,

/s/ Philip R. Schenkenberg

Philip R. Schenkenberg

PRS/smo
Enclosure
cc: Service List

Patricia Van Gerpen
March 26, 2012
Page 3

CERTIFICATE OF SERVICE

The undersigned certifies that on this 26th day of March, 2012, copies of

1. CONFIDENTIAL Direct Testimony of Randy G. Farrar on behalf of Sprint Communications Company L.P.
2. Public Direct Testimony of Randy G. Farrar on behalf of Sprint Communications Company L.P.
3. Exhibit RGF-1 to Farrar Direct Testimony.
4. Exhibit RGF-2 to Farrar Direct Testimony.
5. Exhibit RGF-3 to Farrar Direct Testimony.
6. Exhibit RGF-4 to Farrar Direct Testimony.
7. CONFIDENTIAL Exhibit RGF-5 to Farrar Direct Testimony.
8. Exhibit RGF-6 to Farrar Direct Testimony.
9. Exhibit RGF-7 to Farrar Direct Testimony.
10. Exhibit RGF-8 to Farrar Direct Testimony.
11. Exhibit RGF-9.
12. Exhibit RGF-10.

were served via email to:

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BRIGGS AND MORGAN

Patricia Van Gerpen
March 26, 2012
Page 4

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BRIGGS AND MORGAN

Patricia Van Gerpen
March 26, 2012
Page 5

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BRIGGS AND MORGAN

Patricia Van Gerpen
March 26, 2012
Page 6

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/s/ Philip R. Schenkenberg
Philip R. Schenkenberg

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA**

IN THE MATTER OF THE APPLICATION) Docket No. TC11-087
OF NATIVE AMERICAN TELECOM, LLC)
FOR A CERTIFICATE OF AUTHORITY TO)
PROVIDE LOCAL EXCHANGE SERVICE)
WITHIN THE STUDY AREA OF)
MIDSTATE COMMUNICATIONS, INC.)

Sprint Communications Company L.P.

Direct Testimony of Randy G. Farrar

Filed March 26, 2012

PUBLIC VERSION

Table of Contents

I.	Introduction	1
II.	Purpose and Scope of Testimony	5
III.	NAT-CC Is Providing Service Without a Certificate	7
IV.	NAT-CC Is a Sham Entity	9
V.	Financial Analysis	19
	A. CCST Profitability	19
	B. NATE, WideVoice, and Free Conference Profitability	24
	C. CCST Vs. NATE, WideVoice, and Free Conference Profitability	27
	D. Future Financial Viability of NAT-CC	28
VI.	Summary and Conclusion	34

1 **DIRECT TESTIMONY**

2

3 **I. Introduction**

4

5 **Q. Please state your name, occupation, and business address.**

6 A. My name is Randy G. Farrar. My title is Senior Manager – Policy Support. I
7 am employed by Sprint United Management Company, the management
8 subsidiary of Sprint Nextel Corporation. My business address is 6450 Sprint
9 Parkway, Overland Park, Kansas 66251.

10

11 **Q. What is your educational background?**

12 A. I received a Bachelor of Arts degree from The Ohio State University,
13 Columbus, Ohio, with a major in history. Simultaneously, I completed a
14 program for a major in economics. Subsequently, I received a Master of
15 Business Administration degree, with an emphasis on market research, also
16 from The Ohio State University.

17

18 **Q. Please summarize your work experience.**

19 A. I have worked for a subsidiary of Sprint Nextel Corporation (or a
20 predecessor) since 1983 in the following capacities:

21 - 2011 to present: Regulatory Policy Manager. I provide financial,
22 economic, and policy analysis concerning interconnection, switched

1 and special access, reciprocal compensation and other
2 telecommunications issues at both the state and federal level.

3 - 2005 to 2011: Senior Manager – Interconnection Support. I provided
4 *interconnection support, and financial, economic, and policy analysis*
5 *concerning interconnection and reciprocal compensation issues.*

6 - 1997 to 2005: Senior Manager – Network Costs. I was an instructor
7 for numerous training sessions designed to support corporate policy on
8 *pricing and costing theory, and to educate and support the use of*
9 *various costing models. I was responsible for the development and*
10 *support of switching, transport, and financial cost models concerning*
11 *reciprocal compensation, unbundled network elements, and wholesale*
12 *discounts.*

13 - 1992 to 1997: Manager - Network Costing and Pricing. I performed
14 financial analyses for various business cases, analyzing the profitability
15 of entering new markets and expanding existing markets, including
16 Custom Calling, Centrex, CLASS and Advanced Intelligent Network
17 features, CPE products, Public Telephone and COCOT, and intra-
18 Local Access and Transport Area (“LATA”) toll. Within this time frame,
19 I was a member of the USTA’s Economic Analysis Training Work
20 Group (1994 to 1995).

21 - 1987 to 1992: Manager - Local Exchange Costing. Within this time
22 frame I was a member of the United States Telephone Association’s

1 (USTA) New Services and Technologies Issues Subcommittee (1989
2 to 1992).

3 - 1986 to 1987: Manager - Local Exchange Pricing. I investigated
4 alternate forms of pricing and rate design, including usage sensitive
5 rates, extended area service alternatives, intraLATA toll pricing, and
6 lifeline rates.

7 - 1983 to 1986: Manager - Rate of Return, which included presentation
8 of written and/or oral testimony before state public utilities
9 commissions in Iowa, Nebraska, South Carolina, and Oregon.

10

11 I was employed by the Public Utilities Commission of Ohio from 1978 to
12 1983. My positions were Financial Analyst (1978 - 1980) and Senior
13 Financial Analyst (1980-1983). My duties included the preparation of Staff
14 Reports of Investigation concerning rate of return and cost of capital. I also
15 designed rate structures, evaluated construction works in progress,
16 measured productivity, evaluated treatment of canceled plant, and
17 performed financial analyses for electric, gas, telephone, and water utilities.
18 I presented written and oral testimony on behalf of the Commission Staff in
19 over twenty rate cases.

20

21 **Q. What are your responsibilities in your current position?**

22 A. I provide financial, economic, and analysis concerning policy,
23 interconnection, switched and special access, reciprocal compensation, and

1 other telecommunications issues at both the state and federal level. I
2 maintain a working understanding of the interconnection and intercarrier
3 compensation provisions of the Communications Act of 1934 as amended
4 most recently by the Telecommunications Act of 1996 ("the Act" or "the
5 1996 Act") and the resulting rules and regulations of the Federal
6 Communications Commission ("FCC").
7

8 **Q. Have you provided testimony before other regulatory agencies?**

9 A. Yes. In addition to my previously referenced testifying experience, since
10 1995 I have presented written or oral testimonies or affidavits before twenty-
11 seven state regulatory agencies (Illinois, Pennsylvania, New Jersey, Florida,
12 North Carolina, Nevada, Texas, Georgia, Arizona, New York, Oklahoma,
13 Missouri, Virginia, Iowa, Kentucky, Ohio, South Dakota, Tennessee,
14 Minnesota, Arkansas, Oregon, Colorado, Alabama, Louisiana, California,
15 Wisconsin, and Connecticut) and the FCC, concerning interconnection
16 issues, reciprocal compensation, access reform, universal service, the
17 avoided costs of resold services, local competition issues such as the cost
18 of unbundled network elements, and economic burden analyses in the
19 context of Incumbent Local Exchange Carrier ("ILEC")-claimed rural
20 exemptions.
21

1 **II. Purpose and Scope of Testimony**

2

3 **Q. On whose behalf are you testifying?**

4 A. I am testifying on behalf of Sprint Communications Company L.P. ("Sprint"),
5 a subsidiary of Sprint Nextel Corporation.

6

7 **Q. What is the purpose of this proceeding?**

8 A. On October 11, 2011, Native American Telecom, LLC ("NAT-CC")¹ applied
9 to the South Dakota Public Utilities Commission ("Commission") for a state
10 Certificate of Authority to provide competitive local exchange service on the
11 Crow Creek Reservation. This is the second time that NAT-CC has applied
12 for such a Certificate, the first time being on September 8, 2008; but, that
13 application was voluntarily withdrawn after Sprint and other parties
14 intervened to oppose that application.

15

16 This hearing is to determine whether NAT-CC's second request should be
17 granted.

18

19 **Q. What is the purpose of your Direct Testimony?**

¹ The acronym "NAT-CC," i.e., NAT-Crow Creek, is used in the April 1, 2009 *Joint Venture Agreement* to reference Native American Telecom, LLC. This testimony will use that acronym to better distinguish NAT-CC from NATE (Native American Telecom Enterprise, LLC), a non-tribal entity.

1 A. The purpose of my Direct Testimony is to demonstrate to the Commission
2 that NAT-CC is a sham entity, established for the sole purpose of “traffic
3 pumping.” It is not in the public interest to grant this Certificate.

4
5 First, as pointed out by the FCC in its recent *Connect America Order*,²
6 “traffic pumping” is not in the public interest. As discussed in Section V.D,
7 the FCC has taken deliberate steps to end the practice.

8
9 Second, the *Joint Venture Agreement*³ between (1) the Crow Creek Sioux
10 Tribe (“CCST”), (2) Native American Telecom Enterprise, LLC (“NATE”),
11 and (3) WideVoice Communications, Inc. (“WideVoice” or “WVC”), is
12 deliberately and intentionally designed for only one purpose – to promote
13 NAT-CC’s “traffic pumping” business and to enrich NATE and WideVoice.

14
15 Third, the *Service Agreement* between NAT-CC and Free Conference is
16 deliberately and intentionally designed for only one purpose – to promote
17 NAT-CC’s “traffic pumping” business and to enrich Free Conference.⁴

18

² *In the Matter of Connect America Fund, et al*; WC Docket No. 10-90, et al; FCC 11-161; Report and Order and Further Notice of Proposed Rulemaking; Adopted October 27, 2011, Released November 18, 2011 (*Connect America Order*).

³ Joint Venture Agreement, April 1, 2009, By And Between Crow Creek Sioux Tribe And Native American Telecom Enterprise, LLC And WideVoice Communications, Inc. (“*Joint Venture Agreement*”). See Exhibit RGF-1.

⁴ *Service Agreement By and Between: Native American Telecom – Crow Creek and Free Conferencing Corporation*, effective July 1, 2009 – June 30, 2012 (*Service Agreement*). See Exhibit RGF-2.

1 Fourth, NAT-CC's "traffic pumping" business harms Sprint and Sprint's
2 customers (many of whom live in South Dakota) by increasing its costs of
3 doing business; e.g., forcing Sprint to augment its transport facilities, by
4 increasing its legal and regulatory expenses, and by billing Sprint grossly
5 inflated amounts of switched access traffic.

6
7 Finally, and most importantly, NAT-CC provides virtually no financial benefit
8 to CCST. NAT-CC exists to benefit only three entities: NATE, WideVoice,
9 and Free Conference. Due to actions taken by the FCC in the *Connect*
10 *America Order*, the NAT-CC business model will be made unsustainable in
11 four or five years. At that time, NAT-CC will be forced to exit the South
12 Dakota market, leaving CCST with negligible benefits and potentially
13 significant liabilities.

14
15 **III. NAT-CC is Providing Service Without a Certificate**

16
17 **Q. Does NAT-CC have a Certificate of Authority to provide competitive**
18 **local exchange service to non-tribal members on the Crow Creek**
19 **Reservation?**

20 **A.** No, NAT-CC does not have a Certificate of Authority to provide competitive
21 local exchange service to non-tribal members on the Crow Creek
22 Reservation.

23

1 **Q. Has NAT-CC requested such a Certificate?**

2 A. Yes, NAT-CC has request such a Certificate on two occasions. First, on
3 September 8, 2008, NAT-CC applied to the Commission for a Certificate.
4 However, on October 28, 2008, after NAT-CC obtained authorization from
5 the Tribal Utility Authority, NAT-CC withdrew its application from the
6 Commission.

7
8 Second, on October 11, 2011, NAT-CC reapplied to the Commission for a
9 Certificate. This hearing is a result of that second application.

10

11 **Q. Is NAT-CC providing service to a non-tribal member without a**
12 **Certificate?**

13 A. Yes, NAT-CC has been providing service to Free Conference, a non-tribal
14 member, without a Certificate since approximately December 2009.⁵ Note
15 that NAT-CC affirmed that Free Conference is not a tribal member.⁶ Also,
16 NAT-CC contends that it does not have to determine whether its services
17 are being provided to non-tribal members or to customers of CCST.⁷

18

19 In NAT-CC's current application, it is essentially asking the Commission for
20 permission to continue doing what it has been doing, without permission, for
21 more than two years.

⁵ It is Sprint's position that Free Conference is not an end-user.

⁶ See NAT-CC's response to Sprint Request For Admission No. 2, Exhibit RGF-3.

⁷ NAT-CC's Response to Sprint's Discovery Requests Nos. 1 and 3, and Request for Admission No. 1, Exhibit RGF-3.

1

2 **Q. Does NAT-CC require a Certificate in order to provide service to a**
3 **non-tribal member?**

4 A. Sprint has taken the position that NAT-CC needs a Certificate to provide
5 service to non-tribal members. Ultimately, that is a legal question that
6 Sprint's attorneys will brief. However, apparently NAT-CC now believes it
7 needs such a Certificate – why else would NAT-CC make the application?

8

9 **Q. Do you believe it is in the public interest to give a Certificate to a**
10 **company that has been willfully operating, perhaps illegally, without a**
11 **certificate for over two years?**

12 A. No, I do not believe it is in the public interest to give a Certificate to a
13 company that has been willfully operating, perhaps illegally, without a
14 certificate for over two years.

15

16 **IV. NAT-CC Is a Sham Entity**

17

18 **Q. Please describe the creation of NAT-CC and the *Joint Venture***
19 ***Agreement.***

20 A. On August 26, 2008, NAT-CC was organized under the laws of South
21 Dakota by the Los Angeles office of Legalzoom.com Inc. Per the NAT-CC
22 Articles of Incorporation, its two founders were Gene DeJordy and Tom

1 Reiman, who are non-tribal members. Thus, NAT-CC was initially created
2 without any involvement by the CCST.⁸
3

4 On September 8, 2008, NAT-CC applied to the Commission for a state
5 Certificate of Authority to provide competitive local exchange service on the
6 Crow Creek Reservation. That application described NAT-CC as “a joint
7 venture with the Crow Creek Sioux Tribe ... to provide service only within
8 the exterior boundaries of the Crow Creek Indian Reservation.”
9

10 On October 28, 2008, NAT-CC obtained authorization from the Tribal Utility
11 Authority to provide LEC services within the Crow Creek Indian Reservation.
12 NAT-CC then withdrew its application for a certificate from the Commission.
13

14 On April 1, 2009, the NAT-CC *Joint Venture Agreement* was signed by
15 CCST, NATE, and WideVoice.
16

17 In April/May 2009, NAT-CC and Free Conference signed a *Service*
18 *Agreement* making Free Conference the sole provider of conferencing
19 service for NAT-CC.⁹
20

⁸ Preliminary Injunction Transcript, Sprint Communications Company L.P. v. Native American Telecom, U.S. Court Dist. Of S.D., Case 10-4110, (Oct. 14, 2010) (“Oct. 24, 2010 Tr.”), Exhibit RGF-4. See also NAT Articles of Organization, Exhibit RGF-5.

⁹ *Service Agreement*, paragraph 6.

1 On October 11, 2011, for the second time NAT-CC applied to the
2 Commission for a state Certificate of Authority to provide competitive local
3 exchange service on the Crow Creek Reservation.
4

5 **Q. The Direct Testimonies of Jeff Holoubek and Carey Roesel on behalf of**
6 **NAT-CC both describe the benefits to the CCST provided by NAT-CC.**
7 **Do you agree with the conclusion of their testimonies?**

8 A. No. I believe that NAT-CC has brought very little benefit to the CCST, at too
9 high of a cost. NAT-CC has, however, provided significant financial benefit
10 to NATE, WideVoice, Free Conference. In fact, it would appear from the
11 terms of the *Joint Venture Agreement*, that the sole purpose of NAT-CC is
12 to enrich NATE, WideVoice, and Free Conference.
13

14 **Q. Please describe the ownership interest in Native American Telecom**
15 **("NAT-CC").**

16 A. Per the *Joint Venture Agreement* dated April 1, 2009. NAT-CC has the
17 following legal ownership:

- 18 • CCST owns 51% of NAT-CC,
- 19 • NATE, which is owned by non-tribal members Tom Reiman and
20 Gene DeJordy, owns 25% of NAT-CC, and
- 21 • WideVoice , which is a Nevada corporation that operates an end
22 office switch in California, owns 24% of NAT-CC. It is owned by

1 non-tribal members including Dave Erickson (who also owns Free
2 Conference, the sole provider of conferencing services for NAT-CC).

3
4 However, as discussed below, CCST's 51% ownership results in little
5 meaningful control over NAT-CC, and has resulted in no financial benefit.

6

7 **Q. Does CCST receive any meaningful financial benefit from NAT-CC**
8 **under the terms of the *Joint Venture Agreement*?**

9 A. No. While the terms of the *Joint Venture Agreement* assigns 51%
10 ownership to CCST, in reality CCST receives no financial benefit.

11

12 First, NATE & WideVoice get to skim-off 15% of "Gross Revenues" before
13 CCST sees a dime. Specifically, the *Joint Venture Agreement* states:

14 ***Section 6.06 WVC and NATE Cost Passthrough Escrow for***
15 ***On-Going Operation and Maintenance Costs.***
16 NATE and WVC will incur expenses related to the operation and
17 maintenance of the Crow Creek telecommunications network that may
18 not be readily segregated from the other operation and maintenance
19 expenses incurred by NATE and WVC. To cover such expenses, **15%**
20 **of gross revenues of NAT-CC shall be set aside and placed in an**
21 **escrow account for the benefit of NATE and WVC.** (Bold emphasis
22 added – except title.)
23

24 Second, NAT-CC has agreed to pay up to 95% of the switched access
25 revenue it receives directly to Free Conference, which is owned and
26 controlled by the same parties as WideVoice. Specifically, the *Service*
27 *Agreement* states:

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9. Marketing Fee and Payment Terms. NAT-CC shall pay FCC a marketing fee at a rate per minute of IXC traffic terminating on FCC's equipment in accordance with the schedule set forth on Exhibit B.

Exhibit B – Marketing Fee Schedule

<u>Minutes Per Month</u>	<u>Rate per Minute</u>
0 – 15,000,000	(75% of Gross Tariff)
15,000,001-25,000,000	(85% of Gross Tariff)
25,000,001 and above	(95% of Gross Tariff)

Third, it is not clear if CCST receives any of the switched access revenues not paid directly to Free Conference. CCST is only allowed its share of predefined "Net Profits," which are narrowly defined by the *Joint Venture Agreement*. Specifically, the *Joint Venture Agreement* states:

Section 6.01 Net Profits.

Net Profits is defined as: (1) revenue generated from the provision of service to end user customers, including payments and universal service support, **but does not include other sources of revenue, such as access charges**, related to services provided by third-party businesses to locate on the reservation unless separately identified as NAT-CC revenue in an arrangement with third-party businesses; minus (2) costs associated with the build-out, operation, and maintenance of the telecommunications network on the Crow Creek reservation, including repayment of debt, interest, taxes, and maintenance and operations expenses. (Bold emphasis added – except title.)

In addition, CCST may be denied any "end user" revenue which Free Conference, a "third-party business, may pay to NAT-CC.

1 It also appears that CCST may not be able to realize any ongoing financial
2 benefit from end-user revenues generated from tribal members living on the
3 reservations because tribal members receive service at no charge.¹⁰

4
5 These financial restrictions on CCST are particularly important in light of the
6 ongoing disputes between NAT-CC and the IXCs. In its 2011 FCC Form
7 499-A (which contains 2010 revenue information), NAT-CC reports
8 "Uncollectible revenue" of \$3,930,146 in 2010.¹¹ This is undoubtedly billed,
9 but uncollected charges to the IXCs in 2010. In the unlikely scenario that
10 NAT-CC collects any of these charges,¹² it is not clear whether CCST would
11 receive any of this revenue per the terms of the *Joint Venture Agreement*.

12

13 **Q. Does CCST have any meaningful decision making or operational**
14 **control over NAT-CC, or ability to influence financial decisions?**

15 A. No. CCST has virtually no meaningful control over NAT-CC, despite its
16 51% legal ownership.

17

¹⁰ Preliminary Injunction Transcript, *Sprint Communications Company L.P. v. Native American Telecom*; U.S. District Court, District of South Dakota, Case 10-4110, March 3, 2011 ("Mar. 3, 2011 Tr.") Tr. P. 150, Exhibit RGF-6.

¹¹ NAT-CC's 2011 FCC Form 499-A, Line 421: Uncollectible revenue/bad debt expense associated with gross billed revenues amounts shown on Line 419 [See Instructions], Exhibit RGF-7.

¹² The FCC's *Connect America Order* does not address retroactive payments.

1 First, despite 51% ownership, the terms of the *Joint Venture Agreement*
2 give CCST only three of the nine seats on the Board of Directors.

3 Specifically, the *Joint Venture Agreement* states:

4 **Section 8.01 Board of Directors.**

5 The Board of Directors shall consist of Nine (9) members. Three (3)
6 members of NAT-CC's Board of Directors shall be designated by
7 CCST
8

9 Second, CCST has no control over the day-to-day operations of the
10 NAT-CC network, even when it directly affects the Crow Creek Indian
11 Reservation and its Citizens. This control is reserved solely in the hands of
12 NATE. If a dispute arises on this issue, CCST has only three of nine votes.

13 Specifically, the *Joint Venture Agreement* states:

14 **Section 6.07 Voting Rights.**

15 (b) Regarding decisions affecting the regular and ordinary operations
16 of the CLEC and the CLEC network, **NATE shall have the authority**
17 **to make decisions concerning the regular and ordinary**
18 **operations of the CLEC and CLEC Network as it affects the Crow**
19 **Creek Indian Reservation, its Citizens and Customers**. Where
20 disagreements, disputes or conflicts arise regarding the operations of
21 the CLEC and CLEC Network, resolution will be accomplished through
22 a Majority Rule vote of the designated Board of Directors, each director
23 having one equally weighted vote. (Bold emphasis added – except
24 title)
25

26 Third, CCST has no control over the technical aspects of the NAT-CC
27 network, including "traffic pumping." This control is reserved solely in the
28 hands of WideVoice. If a dispute arises on this issue, CCST has only three
29 of nine votes. Specifically, the *Joint Venture Agreement* states:

30 **Section 6.07 Voting Rights.**

31 (c) WVC shall have authority over the normal operations of NAT-CC as
32 it affects the technical aspects of NAT-CC including but not limited to

1 **traffic flow over the Network.** Where disagreements, disputes or
2 conflicts arise regarding the operations of the CLEC and CLEC
3 Network, resolution will be accomplished through a Majority Rule vote
4 of the designated Board of Directors, each director having one equally
5 weighted vote. (Bold emphasis added – except title.)
6

7 Note that the reference to “traffic flow over the Network” includes NAT-CC’s
8 “traffic pumping” business, in which NATE and WideVoice maintain total
9 operational and financial control under the terms of the *Joint Venture*
10 *Agreement*.

11
12 Finally, CCST only has 51% voting rights in matters that deal directly with
13 tribal matters. Specifically, the *Joint Venture Agreement* states:

14 **Section 6.07 Voting Rights.**

15 (a) Regarding decisions affecting the physical health and financial
16 success and wellbeing of the Crow Creek Indians Reservation and
17 its Citizens, CCST shall have 51%
18

19 However, given the previous limitations of CCST’s involvement in NAT-CC’s
20 operations, this “right” is essentially meaningless.

21
22 **Q. What is your conclusion concerning the terms of the *Joint Venture***
23 ***Agreement* and the testimonies of Jeff Holoubek and Carey Roesel on**
24 **behalf of NAT-CC?**

25 A. Despite NAT-CC being described as a joint, tribally-owned venture,
26 designed to bring financial benefits to CCST, the *Joint Venture Agreement*
27 is, in fact, deliberately and intentionally designed to leave all meaningful
28 control in the hands of NATE and WideVoice.

1

2 More importantly, the *Joint Venture Agreement* is deliberately and
3 intentionally designed to leave all financial benefit in the hands of NATE,
4 WideVoice, and Free Conference.

5

6 **Q. Please discuss the role of Free Conference in NAT-CC.**

7 A. The role of Free Conference cannot be understated and is key to
8 understanding how and why NAT-CC was created.

- 9 • Per the *Service Agreement*, Free Conference is the sole provider of
10 conferencing services for NAT-CC.¹³
- 11 • Free Conference, which provides the “free” conferencing services
12 essential to “traffic pumping,” is owned and controlled by Dave
13 Erickson.¹⁴
- 14 • Dave Erickson owns and controls WideVoice, which in turn means that
15 Dave Erikson owns and controls a significant portion of NAT-CC.¹⁵
- 16 • In July 2010, Mr. Carlos Cestero, an employee of Free Conferencing,
17 took over as controller for NAT-CC. He acts as controller for NAT-CC,
18 Free Conferencing, WideVoice, and three other entities owned by
19 Dave Erickson.¹⁶ He is not being paid by NAT-CC.¹⁷ Mr. Cestero

¹³ *Service Agreement*, paragraph 6.

¹⁴ Mar. 3, 2011 Tr. p. 67.

¹⁵ Mar. 3, 2011 Tr. p. 67.

¹⁶ Mar. 3, 2011 Tr. p. 13-16, 20-21.

¹⁷ Mar. 3, 2011 Tr. p. 20.

1 opened two new NAT-CC bank accounts, for which only WideVoice
2 employees have access (and NATE employees do not).¹⁸

- 3 • In 2010, Mr. Jeff Holoubek, the Director of Legal and Finance for Free
4 Conferencing, became President of NAT-CC without even a vote taken
5 by the NAT-CC Board of Directors.¹⁹
- 6 • In 2010 and 2011, WideVoice made loans to NAT-CC in order to pay
7 for day-to-day operations.²⁰ When AT&T made a large payment to
8 NAT-CC in January 2011, Mr. Holoubek simply directed Mr. Cestero to
9 use most of that payment to payback some of the WideVoice loans.²¹
10 This is not in accordance with the *Service Agreement* that requires that
11 75% - 95% of this amount be paid to Free Conference, and the
12 balance retained by NAT-CC.
- 13 • Free Conference is the only conference calling company with which
14 NAT-CC is in business. In fact, the *Service Agreement* prohibits
15 NAT-CC from doing business with any other conference calling
16 company.²² In 2010 and 2011, NAT-CC paid Free Conference **[Begin**
17 **Confidential]** \$ [REDACTED] in "Marketing Fees,"²³ which is actually a
18 sharing of switched access revenues **[End Confidential]**.

19

¹⁸ Mar. 3, 2011 Tr. p. 79.

¹⁹ Mar. 3, 2011 Tr. p. 68.

²⁰ March 3, 2011 Tr. Exh. 26.

²¹ March 3, 2011 Tr. p. 98.

²² *Service Agreement*, paragraph 6.

²³ NAT-CC's 2010 and 2011 Financial Statements, Exhibit RGF-8.

1 **Q. What other evidence is there that NAT-CC was established as a sham**
2 **entity for the purpose of bilking Sprint and other IXCs as part of its**
3 **traffic pumping scheme?**

4 A. As referenced above, NAT-CC does not charge traditional end-users for
5 service. Also, according to the *Service Agreement*, NAT-CC is not charging
6 anything for services and connectivity it provides to Free Conference.²⁴
7 NAT-CC's business plan is to rely on the billing of access charges to IXCs.
8 Mr. Reiman testified on this point. Specifically, he stated:

9 [w]e bill [the IXCs], and that's how this whole big picture works. That's
10 how [sic] the business model is based on.²⁵
11

12 Mr. DeJordy also has commented on the point that the business was
13 established for the purpose of billing access charges. Specifically, he
14 stated:

15 [the] business model is largely dependent on the use of
16 FreeConferenceCall and other services that use its networks to
17 terminate calls.²⁶
18

19 **V. Financial Analysis**

20

21 **A. CCST Profitability**

22

23 **Q. Have you reviewed the financial statements for NAT-CC?**

²⁴ *Service Agreement*, at paragraph 22.

²⁵ Oct. 14, 2010 Tr. p. 66.

²⁶ <http://blog.freeconferencecall.com/?paged=7>.

1 A. Yes. I have reviewed the Balance Sheet and Income Statement (Profit &
2 Loss) for NAT-CC for 2010 and 2011. I have concluded that, consistent
3 with the terms of the *Joint Venture Agreement*, CCST has not financially
4 benefitted from its ownership in NAT-CC, while NATE, WideVoice, and Free
5 Conference are reaping significant windfalls from NAT-CC.

6

7 **Q. What percent ownership does the CCST have in NAT?**

8 A. As discussed above, the CCST owns 51% of NAT-CC. I will use this 51%
9 ownership in the following analysis.

10

11 **1. Balance Sheet**

12

13 **Q. Analyzing NAT-CC's Balance Sheet as of December 31, 2011, has the**
14 **CCST financially benefitted from its ownership position in NAT-CC?**

15 A. No. Through December 31, 2011, the CCST has not financially benefitted
16 from its ownership in NAT-CC. In fact, the CCST has lost substantial value
17 from this business. As of December 31, 2011:

18 **[Begin Confidential]**

- 19 • CCST's share of equity investment is [REDACTED] \$ [REDACTED] due
20 primarily to [REDACTED] in 2010 and 2011,
21 • CCST's share of an outstanding long term debt to WideVoice
22 Communications is \$ [REDACTED], and
23 • CCST's share of "Total Assets" is only \$ [REDACTED].

1 [End Confidential]

2

3 Thus, as summarized in Table 1, in just two years CCST has experienced a
4 total loss in value of [Begin Confidential] \$ [REDACTED] [End Confidential].

5

[Begin Confidential]

6

Table 1

7

CCST 2010 and 2011 Change in Value

8

A	B	C
Row	Description	Amount
1	Equity Investment	[REDACTED]
2	Loan from WVC	[REDACTED]
3	Total Assets	[REDACTED]
4	Total Value	[REDACTED]

9

10

11

[End Confidential]

12 Q. How did you arrive at these figures?

13 A. As of December 31, 2011, NAT-CC reports cumulative "Retained Earnings"

14 of [Begin Confidential] [REDACTED] \$ [REDACTED], "Net Income" in 2011 of

15 [REDACTED] \$ [REDACTED], and "Shareholder Distributions" of [REDACTED] \$ [REDACTED],

16 which adds to "Total Equity" of [REDACTED] \$ [REDACTED]. Thus, CCST's 51%

17 ownership means that CCST's cumulative "Total Equity" investment in

18 NAT-CC is worth [REDACTED] \$ [REDACTED] (\$ [REDACTED]) * 51%] [End

19 Confidential].

20

21 As of December 31, 2011, NAT-CC also reports an outstanding loan from

22 WideVoice [Begin Confidential] \$ [REDACTED]. Thus, CCST's share of this

23 long term liability is \$ [REDACTED] (\$ [REDACTED] * 51%) [End Confidential].

24

1 Finally, NAT-CC reports "Total Assets" of [Begin Confidential] \$ [REDACTED].
2 Thus, CCST's share of "Total Assets" is only \$ [REDACTED] [\$ [REDACTED] * 51%]
3 [End Confidential].
4

5 2. Income Statement (Profit & Loss)

6

7 **Q. Analyzing NAT-CC's Income Statements (Profit & Loss) for 2010 and**
8 **2011, has the CCST financially benefitted from its ownership position**
9 **in NAT-CC?**

10 **A. No, CCST has not financially benefitted from its ownership in NAT-CC. In**
11 **fact, the CCST [Begin Confidential] [REDACTED] in**
12 **both 2010 and 2011 [End Confidential].**

13
14 Even if NAT-CC was to report an operating profit, it is doubtful that CCST
15 would realize any significant financial benefit. As already discussed in
16 Section IV, under the terms of the *Service Agreement*, NAT-CC pays 75% -
17 95% of its access revenues directly to Free Conference.

18
19 In addition, per the unreasonable terms of its *Joint Venture Agreement*,
20 CCST is entitled to share only a small part of NAT-CC's total revenue
21 sources.
22

1 Specifically, the *Joint Venture Agreement* states that CCST is allowed only
2 a share of narrowly defined "Net Profits."

3 **Section 6.01 Net Profits.**

4 Net Profits is defined as: (1) revenue generated from the provision of
5 service to end user customers, including payments and universal
6 service support, but does not include other sources of revenue, such
7 as access charges, related to services provided by third-party
8 businesses to locate on the reservation unless separately identified as
9 NAT-CC revenue in an arrangement with third-party businesses; minus
10 (2) costs associated with the build-out, operation, and maintenance of
11 the telecommunications network on the Crow Creek reservation,
12 including repayment of debt, interest, taxes, and maintenance and
13 operations expenses.
14

15 **Q. Looking at NAT-CC's 2010 and 2011 Income Statements, is there any**
16 **"Net Profits" attributable to CCST?**

17 A. NAT-CC financials indicate "End User Fee Income" of **[Begin Confidential]**
18 **\$** in 2010 and **\$** in 2011 **[End Confidential]**. Setting aside the
19 limitations on sharing "Net Profits" under the *Joint Venture Agreement*,
20 business expenses would have to be paid before CCST would receive its
21 51% share of its "Net Profits." Potential CCST "Net Profits" are further
22 limited because less than 10% of tribal members receive telephone service
23 from CCST,²⁷ and they receive that telephone service for free.²⁸ This is
24 supported by the fact that in March 2011, Peter Lengkeek, the Treasurer of
25 CCST, testified that CCST had received no money from NAT-CC.²⁹

²⁷ See Mar. 2, 2011 Tr. pp. 151 and 154, where Mr. Lengkeek testified that there were approximately 115 installations of service. Compare that to the 2000 Census Data, included as Exhibit RGF-10, that shows a total Native American population on the CCST reservation of 1,936.

²⁸ Mar. 3, 2011 Tr. p. 150.

²⁹ Mar. 3, 2011 Tr. p. 171. "Q. My question to you was, isn't it true the Tribe has received no money from NAT. Isn't that correct? A: Yes."

1

2

B. NATE, WideVoice, and Free Conference Profitability

3

4

Q. Have NATE, WideVoice, and Free Conference financially benefitted from its ownership position in NAT-CC?

5

6

A. Yes, NATE, WideVoice, and Free Conference have profited from their investment in NAT-CC. The terms of the *Joint Venture Agreement* and *Service Agreement* virtually guarantees that NATE, WideVoice, and Free Conference will profit from NAT-CC. Using reasonable assumptions, I estimate that in 2010 and 2011 alone, NATE, WideVoice, and Free Conference collectively have realized a positive cash flow of approximately **[Begin Confidential] \$ [Redacted] [End Confidential]**.

10

11

12

13

14

Q. How did you arrive at these figures?

15

A. There are at least four sources of income for NATE, WideVoice, and Free Conference. First, per the terms of the unreasonable *Joint Venture Agreement*, NATE and WideVoice get to skim-off 15% of "Gross Revenues" before CCST sees a dime. Specifically, the *Joint Venture Agreement* states:

16

17

18

19

1 **Section 6.06 WVC and NATE Cost Passthrough Escrow for**
2 **On-Going Operation and Maintenance Costs.**

3 NATE and WVC will incur expenses related to the operation and
4 maintenance of the Crow Creek telecommunications network that may
5 not be readily segregated from the other operation and maintenance
6 expenses incurred by NATE and WVC. To cover such expenses, 15%
7 of gross revenues of NAT-CC shall be set aside and placed in an
8 escrow account for the benefit of NATE and WVC.
9

10 NAT-CC reported "Total Income" of **[Begin Confidential]** \$ [REDACTED] in
11 2010 and \$ [REDACTED] in 2011, or a two-year total of \$ [REDACTED]. Note that (1)
12 NAT-CC reports "Total Income" rather than the typical "Total Revenue," and
13 (2) no "escrow amount" appears on the "Income Statement." Thus, it
14 appears that the NAT-CC reported "Total Income" is likely calculated after
15 the 15% escrow has been deducted from "Gross Revenue." The NATE and
16 WideVoice escrow amount for 2010 and 2011 is approximately \$ [REDACTED]
17 $\{[\$ [REDACTED] / (1 - 15\%)] - [REDACTED]\}$ **[End Confidential]**.

18
19 Second, the majority of NAT-CC's operational expenses are, in fact, the
20 result of services provided by WideVoice, and Free Conference. Thus,
21 these expenses are, as a result, direct revenue sources to WideVoice, and
22 Free Conference. NAT-CC's two-year "Marketing Expense" of **[Begin**
23 **Confidential]** \$ [REDACTED] is, in fact, a revenue sharing arrangement paid
24 directly to the Free Conference, which is owned by Dave Erickson, who also
25 is an owner of WideVoice. In fact, [REDACTED]% of all NAT's access revenues in
26 2010 and 2011 were paid directly to Free Conference Call **[End**
27 **Confidential]**.

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Third, NAT-CC's two-year "Repair and Maintenance" of **[Begin Confidential]** \$ [REDACTED] is most likely paid directly to NATE and WideVoice per terms of the *Joint Venture Agreement*³⁰ **[End Confidential]**. In its responses to Sprint's Discovery Requests, NAT-CC refused to provide information on this expense item. I will assume 100% of this expense item was paid directly to NATE and WideVoice.

Fourth, according to the 2011 NAT-CC's "Balance Sheet," NAT-CC has paid a total of **[Begin Confidential]** \$ [REDACTED] of "Shareholder Distributions," i.e., dividends paid to the owners. At least \$ [REDACTED] of this "Shareholder Distribution" was paid directly to Mr. Reiman and Mr. DeJordy, the owners of WideVoice.³¹ **[End Confidential]**.

In addition, I suspect that some portion of NAT-CC's two-year "Professional Fees" of **[Begin Confidential]** \$ [REDACTED] and "Consulting Fees" of \$ [REDACTED] is most likely paid directly to NATE and WideVoice per terms of the *Joint Venture Agreement*³² **[End Confidential]**. However, in its responses to Sprint's Discovery Requests, NAT-CC refused to provide information on these expense items. Without further information, I have not included any of these amounts in this analysis, which makes my estimate conservative.

³⁰ *Joint Venture Agreement*, Articles III and IV.
³¹ Mar. 3, 2011 Tr. p. 76-77.
³² *Joint Venture Agreement*, Articles III and IV.

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The following Table 2 summarizes the estimated total positive cash flow of [Begin Confidential] \$ [REDACTED] that has been realized by NATE, WideVoice, and Free Conference [End Confidential].

[Begin Confidential]
Table 2
NATE, WideVoice, and Free Conference
2010 and 2011 Cash Flows

A	B	C
Row	Description	Amount
1	Escrow	[REDACTED]
2	Marketing Fee	[REDACTED]
3	Repair & Maintenance	[REDACTED]
4	Shareholder Distribution	[REDACTED]
5	Total	[REDACTED]

[End Confidential]

C. CCST Vs. NATE, WideVoice, and Free Conference

- Q. What do you conclude about the financial relationship between CCST and NATE & WideVoice?
- A. As discussed in Section IV, the *Joint Venture Agreement* and *Service Agreement* are intentionally designed to enrich NATE, WideVoice, and Free Conference, while leaving CCST with little financial benefit. Even worse, these contracts will likely leave CCST with a significant liability. Specifically, I have estimated that in 2010 and 2011 NATE, WideVoice, and Free Conference have realized a positive cash flow of approximately [Begin Confidential] \$ [REDACTED], as summarized in Table 2 [End Confidential]. This cash has gone directly to entities such as Free Conference and Wide

1 Voice located or operating in California and Nevada. None of this cash will
2 ever benefit the CCST.

3
4 In contrast, CCST has accumulated value of [Begin Confidential] [REDACTED]
5 \$ [REDACTED], as summarized in Table 1 [End Confidential].
6

7 **D. Future Financial Viability of NAT-CC**

8
9 **Q. Do you believe that NAT-CC is a financially viable entity in the future?**

10 A. No, I do not believe that NAT-CC is a financially viable entity in the future.
11 As already discussed, NAT-CC was established for one reason only, "traffic
12 pumping." In recent FCC decisions, the FCC has specifically targeted
13 "access stimulation," its term for "traffic pumping."
14

15 **Q. How has the FCC targeted "traffic pumping?"**

16 A. In the FCC's recent *Connect America Order*, the FCC has an entire section
17 titled "Rules To Reduce Access Stimulation." In this Order, the FCC
18 recognizes the harmful effects of traffic pumping. For example, the FCC
19 explicitly states:

20 The record confirms the need for prompt Commission action to
21 address the adverse effects of access stimulation (§ 662)
22
23 Access stimulation imposes undue costs on consumers, inefficiently
24 diverting capital away from more productive uses such as broadband
25 deployment. (§ 663)
26

1 The record indicates that a significant amount of access traffic is going
2 to LECs engaging in access stimulation. ... When carriers pay more
3 access charges as a result of access stimulation schemes, the amount
4 of capital available to invest in broadband deployment and other
5 network investments that would benefit consumers is substantially
6 reduced. (¶ 664)

7
8 Access stimulation also harms competition by giving companies that
9 offer a “free” calling service a competitive advantage over companies
10 that charge their customers for the service. (¶ 665)

11
12 ... excess revenues that are shared in access stimulation schemes
13 provide additional proof that the LEC’s rates are above cost. (¶ 666)

14
15 **Q. Has the FCC explicitly rejected NAT-CC’s premise that assisting Tribal**
16 **lands somehow justifies “traffic pumping?”**

17 A. Yes. NAT-CC’s premise is essentially a “Robin Hood” defense – it’s alright
18 to “rob the bank” as long as the stolen funds are put to good use. However,
19 the FCC has explicitly rejected NAT-CC’s premise that assisting Tribal lands
20 somehow justifies “traffic pumping.” Explicitly, the FCC stated:

21 Several parties claim that access stimulation offers economic
22 development benefits, including the expansion of broadband services
23 to rural communities and tribal lands. Although expanding broadband
24 services in rural and Tribal lands is important, we agree with other
25 commenters that how access revenues are used is not relevant in
26 determining whether switched access rates are just and reasonable in
27 accordance with section 201(b). ... Moreover, Congress created an
28 explicit universal service fund to spur investment and deployment in
29 rural, high cost, and insular areas, and the Commission is taking
30 action here and in other proceedings to facilitate such deployment.
31 (¶ 666)

32
33 For example, the *Connect America Order* has set aside \$50 million of the
34 Phase I Mobility Fund in 2012 specifically for tribal areas, and \$100 million

1 of the Phase II Mobility Fund annual budget in future years specifically for
2 tribal areas.

3

4 **Q. How has the FCC addressed the problem of “traffic pumping?”**

5 A. The FCC established a process where traffic pumping CLECs such as
6 NAT-CC will have to reduce their rates on all intrastate and interstate traffic.

7 In just over four years from now, by July 1, 2016, NAT-CC will have to

8 reduce its rates for all interstate traffic, including “traffic pumping,” to

9 \$0.0007. By July 1, 2017, all traffic will be exchanged on a Bill-and-Keep

10 basis, essentially a \$0.0000 rate.³³

11

12 **Q. What effect will a rate of \$0.0007 have on NAT-CC’s financials?**

13 A. At a rate of \$0.0007, NAT-CC’s business model will almost certainly fail.

14 Table 3, below, restates NAT-CC’s 2011 Income Statement assuming all

15 IXCs pay the 2016 rate of \$0.0007.

³³ Under a Bill-and-Keep arrangement, carriers do not bill each other for terminating the other carrier's traffic. In other words, two carriers exchange each other's traffic without compensation from the other carrier. Instead, all compensation is received from each carrier's own end-users.

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2
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5

[Begin Confidential]

Table 3
NAT-CC 2011 Income Statement
Restated for July 2016 Rate of \$0.0007

A Row	B Description	C 2011 Income Statement		E Assumptions
		Actual	At \$0.0007	
1	Minutes			
2	Sprint			13% of IXC total
3	Total Industry			Cell D2 / 13%
4	Rate		\$ 0.0007	July 2016 rate
5				
6	Gross Revenues			Cell D3 * D4
7	15% Escrow			Cell D6 * 15%
8	Revenues			Cell D6 - D7
9				
10	Expenses			
11	Marketing			Cell D8 * 75%
12	All Other Operating Exp.			
13	Total Expenses			
14				
15	Net Income		\$ (327,032)	

6
7
8

[End Confidential]

9 As can be seen, at the 2016 rate of \$0.0007, and at current demand and
10 expense levels, NAT-CC will almost certainly lose over \$300,000 per year
11 under the following assumptions:

- 12 • Sprint's actual interstate and intrastate minutes terminated to
13 NAT-CC in 2011 were [Begin Confidential] [Redacted] [End
14 Confidential],
- 15 • Sprint's minutes are equal to 13% of the total IXC industry,³⁴
- 16 • All IXCs pay the \$0.0007 rate on every minute,

³⁴ *Sprint Communications Company, L.P., Plaintiff, vs. Native American Telecom, LLC, and Crow Creek Sioux Tribal Court, Defendants*; United States District Court, District of South Dakota, Southern Division; Civ. 10-4110-KES; Order Denying Defendant Native American Telecom's Motion for a Preliminary Injunction; May 31, 2011, at page 14, Exhibit RGF-9.

- 1 • NAT-CC pays Free Conference a 75% "Marketing Fee" to Free
2 Conference, which is equal to lowest end of the 75% - 95% payout
3 range called for in the NAT-CC – Free Conference *Service*
4 *Agreement*, and
- 5 • All Other Operating Expenses remain unchanged.

6

7 **Q. How does this analysis conclude concerning transport rates under the**
8 **FCC's *Connect America Order*?**

9 A. This analysis assumes that by 2016, transport will not be a significant
10 source of revenue for NAT-CC under the *Connect America Order*. While
11 the FCC did not address transport rate elements, it did ask for comments
12 and suggestions as part of the FNPRM.

13

14 In addition to "traffic pumping," NAT-CC is also engaged in "mileage
15 pumping," a deceptive practice of placing the conference calling company-
16 owned conference bridge equipment as far away as possible from a tandem
17 switch for the sole purpose of inflating transport billings to the IXCs. In
18 other words, rather than designing its network in the most efficient manner
19 possible, as does any rational company, "mileage pumpers" such as
20 NAT-CC intentionally and deliberately design their networks in as inefficient
21 manner as possible – just to inflate the transport billings. South Dakota's
22 geography is ideal for "mileage pumping."

23

1 It is clear that the FCC wants to discourage the deceptive practice of
2 "mileage pumping." Specifically, in the *Connect America Order*, the FCC
3 states:

4
5 **Ultimately, we agree with concerns raised by commenters that the**
6 **continuation of transport charges in perpetuity would be**
7 **problematic.** For example, **the record contains allegations of**
8 **"mileage pumping," where service providers designate distant**
9 **points of interconnection to inflate the mileage used to compute**
10 **the transport charges.** Further, Sprint alleges that current incumbent
11 LEC tariffed charges for transport are "very high and constitute a
12 sizeable proportion of the total terminating access charges ILECs
13 impose on carriers today." ... As a result, commenters suggest that
14 perpetuating high transport rates **could undermine the**
15 **Commission's reform effort and lead to anticompetitive behavior**
16 **or regulatory arbitrage such as access stimulation.** We therefore
17 seek comment on the appropriate treatment of, and transition for, all
18 tandem switching and transport rates in the FNPRM. (¶ 820) (Bold
19 emphasis added.)
20

21 Based on this comment, it would be unreasonable to allow "traffic pumping"
22 and "mileage pumping" LECs such as NAT-CC to continue to bill IXC's
23 outrageous amounts for transport across vast distances for the sole purpose
24 of inflating access billings.

25
26 Assuming the FCC follows through on its intentions to eliminate "mileage
27 pumping" by 2016, transport will not be a significant source of revenue for
28 "traffic pumping" and "mileage pumping" LECs such as NAT-CC.

29
30 **Q. What do you conclude?**

1 A. As already discussed, NAT-CC's sole purpose for existence is to be a
2 "traffic pumper." Even in the best of conditions, i.e., if NAT-CC is somehow
3 able to convince regulatory and legal authorities to require the IXCs to pay
4 NAT-CC's past and current billings, the business model will begin to
5 deteriorate immediately due to the forced rate reductions required by the
6 FCC's *Connect America Order*. The NAT-CC business model will almost
7 certainly fail by 2016 at a rate of \$0.0007, and will certainly fail by 2017
8 under Bill-and-Keep. However, regardless of the authoritative decisions,
9 NATE, WideVoice, and Free Conference will continue to siphon off at least
10 **[Begin Confidential]** \$ [REDACTED] per year (one-half of the two-year estimate
11 of \$ [REDACTED] from Table 2) from NAT-CC's operations **[End Confidential]**.
12 To the extent IXC's actually have to pay, and at a higher rate, NATE,
13 WideVoice, and Free Conference's windfall will be significantly greater.
14
15 However, once the NAT-CC business model inevitably fails, NATE,
16 WideVoice, and Free Conference will exit the market, taking their
17 accumulated windfall with them, leaving CCST responsible for 51% of
18 accumulated losses.

19

20 **VI. Summary and Conclusion**

21

22 **Q. Should NAT-CC be granted certification in South Dakota?**

1 A. No. First, for the reasons set forth in this testimony, the Commission should
2 deny NAT-CC's request for a Certificate, and should prohibit further
3 provision of service by NAT-CC to non-tribal members in the state.

4
5 Second, if the Commission is inclined to grant certification, it should only do
6 so after imposing conditions that address the issues raised in this testimony.

7
8 Finally, before the Commission grants a Certificate to companies that are
9 established for the purpose of operating an "access pumping" scheme, the
10 Commission should consider establishing rules applicable to such
11 operations, including ways to address "mileage pumping" and the intrastate
12 rates that apply to this traffic. It is my opinion that high mileage and high
13 rates are the primary reason that "access pumping" is occurring in rural
14 states such as South Dakota.

15

16 **Q. Does this conclude your Direct Testimony?**

17 A. Yes, it does.

18

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Confidential

In Separate Sealed Envelope

Pages 217-253

JOINT VENTURE AGREEMENT

April 1, 2009

By And Between:

CROW CREEK SIOUX TRIBE

And

NATIVE AMERICAN TELECOM

ENTERPRISE, LLC

And

WIDEVOICE COMMUNICATIONS, INC.

Contents

JOINT VENTURE AGREEMENT.....	5
WITNESSETH	5
ARTICLE I. JOINT VENTURE	6
Section 1.01 Articles of Organization.	6
Section 1.02 The Operating Agreement.	6
Section 1.03 CCST's Capital Contribution.	6
Section 1.04 NATE's Capital Contribution.....	6
Section 1.05 WVC's Contribution.	7
Section 1.06 Additional Contributions.....	7
Section 1.07 Dissolution.	7
Section 1.08 The Closing.....	8
ARTICLE II. DUTIES OF CCST	8
Section 2.01 Duty to Secure Permissions, Easements and Licenses.	8
Section 2.02 Duty to Protect Assets of NAT-CC.....	9
Section 2.03 Duty to Act in the Best Interest of the Tribe and Its Members.	9
ARTICLE III. DUTIES OF NATE	9
Section 3.01 Responsibility to Obtain Permissions	9
Section 3.02 Provision of Subscriber Services.	9
Section 3.03 Provision of Maintenance Services.....	9
Section 3.04 Provision of Subscriber Side Equipment.....	10
Section 3.05 Subscriber Sales Venues.	10
Section 3.06 Subscriber Billing.....	10
Section 3.07 Subscriber Support Services.	10
Section 3.08 Yellow Pages Listing and CLEC Web Site Resources.	10
Section 3.09 Relationship with Residents of the Crow Creek Reservation.	10
Section 3.10 Establishment of Wi-MAX Network on Crow Creek Reservation.....	11
Section 3.11 Government Relationship and Grants.	11
Section 3.12 Financial Statements.....	11
ARTICLE IV. DUTIES OF WVC.....	11
Section 4.01 Building the Network.	11
Section 4.02 Provision of Connectivity to the Network.....	11

Section 4.03 Provision of Services	12
Section 4.04 Provision of Switching and Trunk-Side Transport to the PSTN.....	12
Section 4.05 Tracking of Subscriber Side Lines.....	12
Section 4.06 Maintenance of the Network.	12
Section 4.07 Financial Statements of WVC Cost Center.....	12
ARTICLE V. DUTY OF CONSTRUCTIVE TRUST OVER COMPANY OPPORTUNITIES	13
Section 5.01 Duty of Constructive Trust Over Company Opportunities.....	13
ARTICLE VI. STRUCTURE AND COMPENSATION.....	13
Section 6.01 Net Profits.	13
Section 6.02 CCST Compensation.....	14
Section 6.03 NATE Compensation.....	14
Section 6.04 WVC Compensation.....	14
Section 6.05 Grants.....	14
Section 6.06 WVC and NATE Cost Passthrough. Escrow for On-Going Operation and Maintenance Costs.	14
Section 6.07 Voting Rights.....	14
ARTICLE VII. OWNERSHIP TRANSFERS	15
Section 7.01 Restrictions on Transfers of Ownership.....	15
Section 7.02 Right of First Refusal and Right to Join in Sale.....	15
Section 7.03 Prohibited Transfers.	17
Section 7.04 Termination of Restrictions.	17
ARTICLE VIII. CORPORATE GOVERNANCE	17
Section 8.01 Board of Directors.....	17
Section 8.02 Meetings of the Board of Directors.	18
ARTICLE IX. ADDITIONAL COVENANTS.....	18
Section 9.01 Best Efforts.....	18
Section 9.02 Nondisclosure of Confidential Information.	18
Section 9.03 Filing of Agreement.....	19
Section 9.04 Company Designee.	19
Section 9.05 Attorneys and Auditors.....	20
ARTICLE X. REPRESENTATIONS AND WARRANTIES OF CCST	20
Section 10.01 Existence and Power.....	20

Section 10.02 Authorization.....	20
Section 10.03 Governmental Authorization.....	21
Section 10.04 Non-Contravention.....	21
Section 10.05 Ownership.....	21
Section 10.06 Finder's Fees.....	21
Section 10.07 Litigation.....	21
ARTICLE XI. REPRESENTATIONS AND WARRANTIES OF NATE.....	22
Section 11.01 Organization and Existence.....	22
Section 11.02 Company Authorization.....	22
Section 11.03 Governmental Authorization.....	22
Section 11.04 Non-Contravention.....	22
Section 11.05 Ownership.....	23
Section 11.06 Finder's Fees.....	23
Section 11.07 Litigation.....	23
ARTICLE XII. REPRESENTATIONS AND WARRANTIES OF WVC.....	23
Section 12.01 Organization and Existence.....	23
Section 12.02 Corporate Authorization.....	23
Section 12.03 Governmental Authorization.....	24
Section 12.04 Non-Contravention.....	24
Section 12.05 Finder's Fees.....	24
Section 12.06 Litigation.....	24
ARTICLE XIII. INDEMNIFICATION.....	24
Section 13.01 CCST's and WVC's and NAT-CC's Right to Indemnification.....	24
Section 13.02 NATE's and WVC's and NAT-CC's Right to Indemnification.....	25
Section 13.03 CCST's and NATE's and NAT-CC's Right to Indemnification.....	25
Section 13.04 Notice.....	25
Section 13.05 Third-Party Claims.....	26
ARTICLE XIV. DEFAULTS.....	27
Section 14.01 Defaults.....	27
Section 14.02 Remedies.....	27
ARTICLE XV. TERMINATION.....	28
Section 15.01 Grounds for Termination.....	28

Section 15.02 Effect of Termination.....	28
ARTICLE XVI. MISCELLANEOUS	28
Section 16.01 Survival.....	28
Section 16.02 Rules of Construction.....	29
Section 16.03 Notices.....	29
Section 16.04 Amendments; No Waivers.....	30
Section 16.05 Expenses.....	30
Section 16.06 Successors and Assigns.....	30
Section 16.07 Governing Law.....	30
Section 16.08 Counterparts; Effectiveness.....	30
Section 16.09 Entire Agreement.....	31
Section 16.10 Partial Invalidity.....	31
Section 16.11 Captions; Definitions.....	31
Section 16.12 Dispute Resolution; Arbitration.....	31
Section 16.13 Third Party Beneficiaries.....	32
IN WITNESS WHEREOF.....	33
Crow Creek Sioux Tribe (AUTHORIZED SIGNATURE).....	33
Native American Telecom Enterprise, LLC (AUTHORIZED SIGNATURE)	33
WideVoice Communications, Inc., Inc. (AUTHORIZED SIGNATURE).....	33

JOINT VENTURE AGREEMENT

This Agreement (hereinafter, "Agreement") is entered into this 1st day of April, 2009, by and between Crow Creek Sioux Tribe (hereinafter, "CCST"), a Sovereign Nation, and Native American Telecom Enterprise, LLC. (hereinafter, "NATE"), a Limited Liability Company organized under the laws of South Dakota, and WideVoice Communications, Inc. (hereinafter, "WVC"), a Subchapter-S Corporation organized under the laws of Nevada.

WITNESSETH

WHEREAS, CCST's jurisdiction extends to the territory within the reservation's boundaries as defined by the Constitution and Bylaws of the CCST.

WHEREAS, NATE is a telecommunications management company specializing in Competitive Local Exchange Carrier (hereinafter, "CLEC") management operations on Indian reservations;

WHEREAS, WVC is a telecommunications traffic management and construction company specializing in CLEC construction and telecommunications traffic connectivity and management operations, and recruitment of traffic partners;

WHEREAS, CCST and NATE and WVC are interested in jointly developing a telecommunications network on the Crow Creek Indian Reservation in South Dakota, the company named "Native American Telecom, LLC" (hereinafter, "NAT-CC"), a Limited Liability Company organized under the laws of South Dakota;

WHEREAS, NAT-CC is a CLEC that operates with the authority of the Crow Creek Utility Authority to provide Broadband service and an array of other Telecommunication services within the exterior boundaries of the Crow Creek Indian Reservation and an array of other Telecommunication services outside the exterior boundaries of the Crow Creek Indian Reservation, and has acquired and controls certain Permissions, Easements, Licenses, Transmission Plans, Business Plans, Preliminary Engineering Design Work, and Other Studies, Plans or Reports relevant to the operation a CLEC network in South Dakota (hereinafter, "Other Assets");

NOW THEREFORE, in consideration of the foregoing promises and for other good and valuable consideration, the sufficiency of which is hereby acknowledged, and relying on each party's respective covenants, representations and warranties, the parties agree as follows:

ARTICLE I. JOINT VENTURE

Section 1.01 Articles of Organization.

NAT-CC is organized as a Limited Liability Company under the Laws of South Dakota to construct and operate a CLEC. The Certificate of Organization and Articles of Organization for NAT-CC are attached as Exhibit A hereof. Upon Closing of this Agreement, NAT-CC will amend its Articles of Organization to either change its name to "Native American Telecom – Crow Creek, LLC" or establish a d/b/a of Native American Telecom – Crow Creek.

Section 1.02 The Operating Agreement.

At the Closing Date, NAT-CC will amend the Operating Agreement and will cause the adoption of By-laws substantially in the form of Exhibit B hereof.

Section 1.03 CCST's Capital Contribution.

At the Closing Date, CCST will contribute the necessary Easements and other Land Rights necessary to construct and manage the CLEC substantially in the form of Exhibit C [easements and rights in perpetuity for the life of NAT-CC] hereof. In exchange for the CCST Contribution, CCST will retain 51% ownership in NAT-CC subject to the By-laws of NAT-CC.

Section 1.04 NATE's Capital Contribution.

At the Closing Date, NATE will transfer all of its rights, title and interest to the Permissions, Licenses and the Other Assets to NAT-CC. NATE will contribute and be responsible for the management of NAT-CC in its daily operations and throughout the NAT-CC build-out of the broadband infrastructure. In exchange for the NATE Contribution, NATE will retain 25% ownership in NAT-CC subject to the By-laws of NAT-CC.

Section 1.05 WVC's Contribution.

At the Closing Date and concurrent with the NATE Contribution, WVC will transfer sufficient funds to cover all costs of construction and implementation of the Wi-MAX Network, on an "as required" basis, to NAT-CC in exchange for NAT-CC's Secured Promissory Note(s), substantially in the form of Exhibit D hereof (the "Secured Promissory Note"). WVC will also construct and maintain the CLEC core elements and infrastructure necessary to conduct broadband and telecommunication services. In consideration of WVC's contribution, NAT-CC will execute and deliver a Security Agreement(s), substantially in the form Exhibit E hereof and any other documents reasonably required to constitute a valid and enforceable preferential lien upon all of the tangible and intangible assets and contractual rights of NAT-CC, including without limitation the Permissions, Easements, Licenses, and Other Assets. WVC will retain 24% ownership in NAT-CC subject to the By-laws of NAT-CC.

Section 1.06 Additional Contributions.

CCST and NATE and WVC shall cause NAT-CC to use its best efforts to secure financing for the development and construction and further build-out of the Network. The financing shall be procured from sources available in the market including by not limited to Charitable Donations and State and Federal Grants, under such terms and conditions as NATE may be able to obtain in its capacity as Manager. In the event that, notwithstanding NAT-CC's best efforts, the required financing is not obtained, NAT-CC shall first use its own monetary assets and income, thereafter WVC may contribute the necessary funds to NAT-CC and WVC shall retain the rights to, including without limitation, the Permissions detailed in the Secured Promissory Note.

Section 1.07 Dissolution.

In the event that any Permissions, Easements and/or Licenses necessary to develop and construct the CLEC Network are not obtained, either CCST or NATE or WVC may terminate this Agreement by giving written notice to the other parties and CCST and NATE and WVC will dissolve NAT-CC. Upon such dissolution (a) CCST shall receive any Permissions, Easements, and Licenses contributed by CCST, and shall assume no NAT-CC Debt; (b) NATE shall receive any Permissions, Easements, and Licenses contributed by NATE; (c) WVC shall receive, at its option, all the cash and other liquid assets, other tangible assets selected by WVC (the "Tangible Assets") and any proceeds from the

assets sold by NAT-CC at WVC's request, net of the unpaid purchase price of such assets, (the "Sold Assets") up to WVC's total capital investment; (d) WVC shall assume financial responsibility for the NAT-CC liabilities consisting of the unpaid purchase price of the Tangible Assets; (e) each of NATE and WVC shall be responsible for one half of all outstanding liabilities except for liabilities consisting of the unpaid purchase price of Tangible Assets as stated in Section 1.07 (d), including but not limited to any and all legal responsibilities and liabilities, including but not limited to repayment of Grant money, where applicable; and (f) CCST and NATE and WVC shall divide the retained earnings of NAT-CC, net of the return of the WVC capital contribution to WVC, in proportion to their respective holdings of NAT-CC.

Section 1.08 The Closing.

The closing of the transactions contemplated hereunder shall take place as soon as possible following satisfaction or waiver of the conditions set forth in this Agreement, or at such other time or place, as CCST and NATE and WVC may agree (the date of the closing, the "Closing Date").

ARTICLE II. DUTIES OF CCST

Section 2.01 Duty to Secure Permissions, Easements and Licenses.

CCST has the duty to procure and contribute the necessary Permissions and Easements and Licenses to allow the construction and build-out of the CLEC Network on the Crow Creek Indian Reservation. This includes but is not limited to the land for the lines, the antenna towers for the wireless telecommunications system, the land and buildings for the switches and other equipment, and the land and buildings for the local offices, internet library, and other service, sales, operations, and maintenance locations. It is understood that NAT-CC may have to construct the aforementioned structures, the cost of which shall be paid with the funds contributed by WVC, subject to the Secured Promissory Note, and reimbursed with revenues and profits of NAT-CC, including Federal Grants. Upon repayment, the Secured Promissory Note will be satisfied and extinguished.

Section 2.02 Duty to Protect Assets of NAT-CC.

CCST has the duty to protect the assets of NAT-CC, using its police powers to protect against theft and vandalism and trespass of and on the physical assets of NAT-CC.

Section 2.03 Duty to Act in the Best Interest of the Tribe and Its Members.

CCST has the duty to act in a manner that best serves the interests of the Tribe and its members, which is defined for purposes of this Agreement as the development of NAT-CC consistent with the direction of the Board of Directors. To the extent that there is a distribution of income from NAT-CC's net earnings, CCST shall use the income for improvements on the reservation that benefit tribal members, including but not limited to housing, infrastructure, schools, health care facilities, and community facilities. CCST shall account for all income and expenses that it incurs and provide an Annual Report to the Tribe.

ARTICLE III. DUTIES OF NATE

Section 3.01 Responsibility to Obtain Permissions

NATE shall have a duty to obtain all necessary Permissions, Easements, Licenses and Regulatory Approvals needed to perform the construction and build-out of the CLEC Network, including but not limited to the ICA agreement between NAT-CC and Midstate.

Section 3.02 Provision of Subscriber Services.

NATE shall install and manage Subscription Services including Telephony and Internet Service. NATE shall provide and manage Service Personnel, Installation Personnel, and Truck Roll Services. NATE shall manage the Installation and, in the event of a disconnect of service, the De-Installation of all subscriber equipment.

Section 3.03 Provision of Maintenance Services.

NATE shall provide on-site personnel for maintenance, additions and changes of radio base site, tower, ancillary equipment and applications servers and conferencing equipment where required.

Section 3.04 Provision of Subscriber Side Equipment.

NATE shall provide, distribute and manage all subscriber equipment including but not limited to the Fixed Wireless Radio Components, the Voice over Internet Protocol ("VoIP") ATA, the subscriber Firewall Components including but not limited to a WiFi, NAT-CC router, or UPS device, when necessary, as determined by interoperability tests. NATE shall maintain an accurate inventory of all equipment.

Section 3.05 Subscriber Sales Venues.

NATE shall provide and manage at least one storefront, including the procurement of fixtures and inventory, and train management personnel necessary to man and operate the storefront. NATE shall also provide and manage the services and components necessary to process mail orders and keep an accurate inventory of all sales and equipment.

Section 3.06 Subscriber Billing.

NATE shall provide and manage Subscriber Billing Services for, including but not limited to, Telephony Services, Long Distance Services, Public Internet Connectivity and Services, and Equipment Rentals or Purchases of Equipment.

Section 3.07 Subscriber Support Services.

NATE shall provide and manage Subscriber Support Services including but not limited to a "Help Desk" Call Center for Changes in Service, Service Activation, Service De-Activation, Billing Inquiries, Collections, and Disputes.

Section 3.08 Yellow Pages Listing and CLEC Web Site Resources.

NATE shall provide and manage "Yellow and White Pages" Listing Services and Web Site Resources including a Tribal Portal and a Home Page for the CLEC.

Section 3.09 Relationship with Residents of the Crow Creek Reservation.

NATE shall have a duty to maintain a working relationship with the residents of the Crow Creek Indian Reservation and to serve as arbitrator in the event of any disputes by the Crow Creek residents relating to NAT-CC and its operations. NAT-CC shall seek the assistance of CCST where practicable to resolve such disputes.

Section 3.10 Establishment of Wi-MAX Network on Crow Creek Reservation.

NATE shall, together with WVC, and working with CCST, design and implement a Wi-MAX network on the Crow Creek Sioux reservation that includes a minimum of one base site, an antenna tower, equipment shelter, and equipment for the operation and maintenance of the broadband and telephony network on the reservation.

Section 3.11 Government Relationship and Grants.

NATE shall have a duty to maintain and develop government relations and seek and apply for State and Federal Grant money wherever NAT-CC may qualify.

Section 3.12 Financial Statements.

NATE shall maintain and provide regular up-to-date accounting of all Income and Expenses, Assets and Liabilities and Retained Earnings, of NAT-CC, including but not limited to Projected Expenses, and shall provide at least Quarterly Reports. In addition, the latest Financial Statements and Reports shall be made available to Directors upon their request within 96 hours or three business days.

ARTICLE IV. DUTIES OF WVC

Section 4.01 Building the Network.

WVC shall design, construct, and maintain the CLEC Network, including but not limited to the Switch and all trunk side equipment and facilities, using either its own personnel or certified contractors. WVC shall provide CLEC Administration Services that include Code Administration and New and Existing Project Administration involving disparate regulatory and industry entities.

Section 4.02 Provision of Connectivity to the Network.

WVC shall provide trunk-side broadband, telephony, and other connectivity services including VoIP (SIP), Internet, and Local Exchange Telephone Service, connectivity, for the telecommunications network established on the Crow Creek Indian Reservation. WVC shall design the network connectivity to achieve the performance requirements established by NAT-CC.

Section 4.03 Provision of Services.

WVC shall provide "Class 5" residential and simple small business telephony services via VoIP to include the following features where allowed and available: Anonymous Call Rejection *77; Call Forwarding (Busy *88, Fixed, No Answer); Call Waiting; 3-Way Call Waiting; Calling Name Delivery; Call Restriction for Caller ID; Call Return; Call Hold; Calling Name Block for Outgoing Calls; Direct Inward Dialing; Direct Outward Dialing; Remote Call Forwarding; Remote Call Forwarding Activation; Repeat Call *66; Speed Dialing 8 & 30; Message Waiting Indicator – Stutter Dial Tone; and Multi-line Hunt Groups.

Section 4.04 Provision of Switching and Trunk-Side Transport to the PSTN.

WVC shall provide switching and trunk-side Transport of Local, Long Distance, and International Inbound and Outbound Calls to the Public Switched Telephone Network ("PSTN"), including Operator Services (0 + Dialing), Directory Assistance Services (411), and Emergency Services (911).

Section 4.05 Tracking of Subscriber Side Lines.

WVC shall provide and manage and keep inventory of Lines in Service and VoIP Lines Registered, and keep Call Detail Records and Call Ratings Reports as an aggregate per line.

Section 4.06 Maintenance of the Network.

WVC shall be responsible for the maintenance and repair of the trunk side of the CLEC Network and its Equipment using either its own personnel or certified contractors.

Section 4.07 Financial Statements of WVC Cost Center.

WVC shall maintain and provide regular up-to-date accounting of all Income and Expenses, Assets and Liabilities and Retained Earnings, of NAT-CC, as they pertain to the WVC cost-center, including but not limited to Projected Expenses, and shall provide at least Quarterly Reports. In addition, the latest Financial Statements and Reports shall be made available to Directors upon their request within 96 hours or three business days.

ARTICLE V. DUTY OF CONSTRUCTIVE TRUST OVER COMPANY OPPORTUNITIES

Section 5.01 Duty of Constructive Trust Over Company Opportunities.

No Associate, Director or Employee (a "NAT-CC Official") of NAT-CC shall usurp a Company Opportunity. A Company Opportunity is a business opportunity which becomes known to a NAT-CC Official, whether it is a CCST Official or a NATE Official or a WVC Official, due to his/her position within the company. In such an instance the Opportunity or Knowledge belongs to NAT-CC, and the Officials owe a duty (a fiduciary duty) not to use that Opportunity or Knowledge for their own benefit. Each Official agrees to hold such Opportunities in Constructive Trust for the Company, and use of such knowledge for an Opportunity that therefore does not inure to NAT-CC, whether or not it results in a direct financial benefit, will be considered a usurpation resulting in the right to damages, including punitive damages for the improper appropriation. NAT-CC may also obtain an injunction to prevent someone's use of the Knowledge or Opportunity. It is agreed that this principle will be applied to relationships entered into prior to the formation of NAT-CC but for the formation of NAT-CC would have been less significant. If one or more Partners of NAT-CC violate their fiduciary duty as explained in this agreement, then that Partner(s) shall not benefit in any action by NAT-CC by way of ownership in NAT-CC from an award of damages of any kind. Rather, such an award will inure to the Partner(s) that have not violated the Company Trust.

ARTICLE VI. STRUCTURE AND COMPENSATION

Section 6.01 Net Profits.

Net Profits is defined as: (1) revenue generated from the provision of service to end user customers, including customer payments and universal service support, but does not include other sources of revenue, such as access charges, related to services provided by third-party businesses to locate on the reservation unless separately identified as NAT-CC revenue in an agreement with third-party businesses; minus (2) costs associated with the build-out, operation, and maintenance of the

telecommunications network on the Crow Creek reservation, including repayment of debt, interest, taxes, and maintenance and operations expenses.

Section 6.02 CCST Compensation.

CCST is entitled to 51% of the Net Profits of NAT-CC, subject to the Secured Promissory Note, and subject to the management decisions regarding use of revenues for expansion, and use of revenues for retained earnings.

Section 6.03 NATE Compensation.

NATE is entitled to 25% of the Net Profits of NAT-CC, subject to the Secured Promissory Note, and subject to the management decisions regarding use of revenues for expansion, and use of revenues for retained earnings.

Section 6.04 WVC Compensation.

WVC is entitled to 24% of the Net Profits of NAT-CC, subject to the Secured Promissory Note, and subject to the management decisions regarding use of revenues for expansion, and use of revenues for retained earnings.

Section 6.05 Grants.

To the extent allowed, assets acquired by donation, gift or grant will be used first for the satisfaction of the Secured Promissory Note, and second for the operation and expansion of NAT-CC. Where possible, these assets will be used to pay for ordinary and extraordinary operating expenses. Nothing in this Agreement prevents the distribution of such assets to the Partners, where allowed.

Section 6.06 WVC and NATE Cost Passthrough. Escrow for On-Going Operation and Maintenance Costs.

NATE and WVC will incur expenses related to the operation and maintenance of the Crow Creek telecommunications network that may not be readily segregated from other operation and maintenance expenses incurred by NATE and WVC. To cover such expenses, 15% of gross revenues of NAT-CC shall be set aside and placed in an escrow account for the benefit of NATE and WVC.

Section 6.07 Voting Rights.

- (a) Regarding decisions affecting the physical health and financial success and well-being of the Crow Creek Indian Reservation and its Citizens, CCST shall have

51%, NATE shall have 25%, and WVC shall have 24% of the voting power of NAT-CC.

- (b) Regarding decisions affecting the regular and ordinary operations of the CLEC and the CLEC Network, NATE shall have the authority to make decisions concerning the regular and ordinary operations of the CLEC and the CLEC Network as it affects the Crow Creek Indian Reservation, its Citizens and Customers. Where disagreements, disputes or conflicts arise regarding the operations of the CLEC and the CLEC Network, resolution will be accomplished through a Majority Rule vote of the designated Board of Directors, each director having one equally weighted vote.
- (c) WVC shall have authority over the normal operations of NAT-CC as it affects the technical aspects of NAT-CC including but not limited to traffic flow over the Network. Where disagreements, disputes or conflicts arise regarding the operations of the CLEC and the CLEC Network, resolution will be accomplished through a Majority Rule vote of the designated Board of Directors, each director having one equally weighted vote.

ARTICLE VII. OWNERSHIP TRANSFERS

Section 7.01 Restrictions on Transfers of Ownership.

Neither CCST nor NATE nor WVC will Transfer (directly, indirectly or in bankruptcy) any of its NAT-CC ownership interests (including any contractual rights), whether by operation of law or otherwise, prior to the Expiration Date (as defined in Section 7.02 of this Agreement). As used in this Agreement, the term "Transfer" shall include any sale, pledge, gift, assignment or other disposition of, or encumbrance of, NAT-CC.

Section 7.02 Right of First Refusal and Right to Join in Sale.

CCST or NATE or WVC may Transfer any of its NAT-CC ownership to any third party if it receives a bona fide offer (the "Offer") from a reputable, financially responsible person ("Third Party") and not less than Sixty (60) Days prior to the closing date of the proposed sale, gives written notice thereof (the "Notice of Transfer") to the Other Parties (the "Optionees") subject to the provisions of this Section 7.02:

- (a) The Notice of Sale shall state that a bona fide offer has been received and shall contain all the Terms and Conditions of the Offer and a copy of all supporting documents.
- (b) The Optionees shall have the option (the "Option") for a period of Thirty (30) Days (the "Option Period") after receipt of the Notice of Sale to: (i) if the Transfer is of all of the Transferring Partner's NAT-CC ownership, commit to purchase all, but not less than all, of the NAT-CC ownership of the Transferring Partner on the same terms and conditions as set forth in the Offer; or (ii) if the Transfer is a sale or exchange of less than all of the Transferring Partner's NAT-CC ownership, elect to join in the sale or exchange, in each case by delivering written notice of its election to the Transferring Partner within the Thirty (30) Day period.
- (c) If the Optionees elect to purchase the NAT-CC ownership, the closing of the purchase shall take place on the date designated as the Closing Date of the Offer, but in no event later than Thirty (30) Days after the expiration of the Option Period, in the offices of NAT-CC, or at such other time and place as may be mutually agreed upon in writing by the Transferring Partner and the Optionees.
- (d) If two Optionees express their desire to acquire the NAT-CC ownership of the Transferring Partner, then each Optionee will have the Option to purchase 50%, in equal shares, of the Transferring Partner's interest. In the event that one Optionee wishes to purchase less than 50% of the Transferring Partner's interest, then the other Optionee will have the Option to purchase all of the remaining interest of the Transferring Partner.
- (e) In the event the Optionee: (i) fails to exercise the Option within the Option Period; or, (ii) after electing to purchase the Transferring Partner's ownership interest, fails to close the purchase hereunder (unless such failure to close is attributable to the action or inaction of the Transferring Partner), the Option to Purchase shall Expire (the "Expiration Date") and the Transferring Partner shall have the right to Transfer the NAT-CC ownership interest to the Third Party designated in the Notice of Transfer in accordance with the terms of the Offer. However, as a condition to the effectiveness of such transfer, the Third Party shall thereupon become a party to this Agreement with the same rights and

obligations of the Transferring Partner and, shall confirm such fact by executing a counterpart of this Agreement.

- (f) The provisions of this Section 7.02 shall not be applicable to a Qualified Public Offering (as defined in Section 7.04) of this Agreement.

Section 7.03 Prohibited Transfers.

Notwithstanding anything to the contrary provided in this Agreement, neither CCST nor NATE nor WVC will Transfer any of its ownership interest, to any person (other than CCST or NATE or WVC): (i) that competes directly or indirectly with NAT-CC in the "Business"; (ii) if such a person's ownership interest in NAT-CC would create a reasonable expectation of future complications for either NATE or WVC; or (iii) if such person's ownership interest in NAT-CC would breach the ownership percentage limitations imposed upon NAT-CC by the United States federal communications laws, or any federal law, or the laws of the Crow Creek Utility Authority, or the rules and regulations promulgated thereunder, or any other regulatory authority or court in the exercise of its lawful jurisdiction.

Section 7.04 Termination of Restrictions.

Upon the sale of NAT-CC ownership interests as part of a firm commitment underwritten public offering or widely distributed private placement underwritten by a nationally recognized full-service investment bank (a "Qualified Public Offering"), all restrictions imposed upon the transfer of NAT-CC ownership, corporate governance, and corporate action through this Agreement shall expire.

ARTICLE VIII. CORPORATE GOVERNANCE

Section 8.01 Board of Directors.

The Board of Directors shall consist of Nine (9) members. Three (3) members of NAT-CC's Board of Directors shall be designated by CCST, Three (3) members of the Board of Directors shall be designated by NATE and Three (3) members of the Board of Directors shall be designated by WVC. Each designated director shall serve at the pleasure of the designating person and shall be removed upon the request of the designating person. Any vacancy in the Board of Directors shall be filled by a director nominated by the person that designated the director being replaced.

Section 8.02 Meetings of the Board of Directors.

NAT-CC's Board of Directors shall meet at least quarterly until such time as the Board of Directors determines that meetings of such frequency are no longer required. In addition, any director shall be entitled to call a special meeting of the Board if a meeting has not been held within the prior Ninety (90) Days. NAT-CC shall reimburse members of the Board of Directors for the customary and reasonable expenses of attending the meetings of the Board of Directors.

ARTICLE IX. ADDITIONAL COVENANTS

Section 9.01 Best Efforts.

Subject to the terms and conditions of this Agreement, each party will use commercially reasonable efforts to take, or cause to be taken, all actions and to do, or cause to be done, all things necessary or desirable under applicable laws and regulations to consummate the transactions contemplated by this Agreement. CCST and NATE and WVC each agree to execute and deliver such other documents, certificates, agreements and other writings and to take such other actions as may be necessary or desirable in order to consummate or implement expeditiously the transactions contemplated by this Agreement.

Section 9.02 Nondisclosure of Confidential Information.

- (a) Each of CCST, NATE and WVC hereby agrees that it will not use Confidential Information (as defined below) for its own purposes or for the purposes of any person other than NAT-CC and will not disclose Confidential Information to any person (other than its directors, officers or employees), except: (i) to the extent required by law; (ii) with the prior written permission of the other party; or (iii) in the case of NATE, to the extent required to comply with its obligations under the Management Contract. Each of CCST and NATE and WVC also agrees to take all reasonable precautions to prevent inadvertent disclosure or use of such Confidential Information by its directors, officers or employees and shall forever maintain confidential and in complete secret such Confidential Information

except as to any item or portion thereof that is or becomes publicly known through no fault of itself.

- (b) For purposes of this Section 9.02 the term "information" includes without limitation, information relating directly or indirectly to: research and development; patent, trademark, and copyright development and licensing thereof; trade secrets and inventions; formulas, designs, drawings, specifications and engineering; processes and equipment; financing, distribution, marketing, sales, customer services, and operation techniques, strategies and maintenance costs; price lists, pricing policies and quoting procedures; financial and accounting information; names of customers and their representatives; potential business of promotional opportunities; computer and technology fundamentals, programs, database, and software; and the type, quantity, quality and specifications of services given to clients.
- (c) The term "Confidential Information" means facts, details, intelligence, content, materials, ideas, or information, whether or not contained in books, records, statements, or plans, which: (i) are proprietary to NAT-CC; (ii) are provided to NAT-CC by CCST or NATE or WVC pursuant to the Management Agreement; (iii) are designated or deemed or treated as confidential by NAT-CC; (iv) are not generally known by outside personnel; (v) are known by CCST or NATE or WVC through its ownership of, or services rendered to NAT-CC; or (vi) are provided or available to NAT-CC and required to keep in confidence pursuant to any agreement.

Section 9.03 Filing of Agreement.

A copy of this Agreement, as amended from time to time, shall be filed with and retained by a designated representative of each of the three Partners of NAT-CC.

Section 9.04 Company Designee.

Designated rights granted to NAT-CC by the terms of this Agreement may be exercised by such person, persons, entity or entities as the Board of Directors of the Company, in its sole discretion, shall designate acting by vote or unanimous written consent.

Section 9.05 Attorneys and Auditors.

CCST and NATE and WVC shall cause NAT-CC to retain outside attorneys and consultants, as necessary, for the start-up and continued operation of NAT-CC. Any expenses incurred prior to the execution of this Agreement shall be reviewed and, if directly related to the establishment of NAT-CC and reasonable, approved for payment.

ARTICLE X. REPRESENTATIONS AND WARRANTIES OF CCST

CCST hereby represents and warrants to NATE and WVC that:

Section 10.01 Existence and Power.

CCST is a validly existing Indian Tribe duly recognized by the United States Government operating under the laws of the Crow Creek Sioux Tribe and has all requisite power, authority and legal right to conduct its affairs as a Sovereign Nation as defined under the Laws of South Dakota and of the United States Government.

Section 10.02 Authorization.

- (a) The execution, delivery and performance by CCST of this Agreement and the documents to be delivered in connection herewith are within CCST's powers and have been duly authorized by its Tribal Counsel and the Crow Creek Utility Authority and, upon execution thereof will be duly executed and delivered by CCST.
- (b) This Agreement constitutes the valid and binding agreement of CCST, enforceable against it in accordance with its terms, except as such enforceability may be limited by bankruptcy, insolvency, reorganization, moratorium and similar laws relating to or affecting creditors generally, by general equity principles (regardless of whether such enforceability is considered in a proceeding in equity or at law) or by an implied covenant of good faith and fair dealing.

Section 10.03 Governmental Authorization.

The execution, delivery and performance by CCST of this Agreement and the documents to be delivered in connection herewith require no approval or other action by or in respect of, or filing with, any Tribal or United States Governmental Authority.

Section 10.04 Non-Contravention.

The execution, delivery and performance by CCST of this Agreement and the documents to be delivered in connection herewith do not and will not: (i) contravene or conflict with any other governing document of CCST; (ii) assuming compliance with matters set forth in Section 10.02 and Section 10.03, contravene or conflict with or constitute a violation of any provision of any Tribal or United States law, regulation, judgment, injunction, order or decree binding upon or applicable to CCST.

Section 10.05 Ownership.

CCST is currently the record and beneficial owner of each of the Easements, Licenses and the Other Assets and will transfer and deliver the Easements, Licenses and the Other Assets to NAT-CC free and clear of any liens or encumbrances.

Section 10.06 Finder's Fees.

There is no investment banker, broker, finder or other intermediary which has been retained by or is authorized to act on behalf of CCST who might be entitled to any fee or commission from NATE or WVC or NAT-CC upon consummation of the transactions contemplated herein.

Section 10.07 Litigation.

There is no pending or to CCST's knowledge threatened claim or litigation that could affect CCST's title and interest in the Licenses or Easements and no events or circumstances have occurred that may result in any such claim or litigation or any action that might interfere with the execution of the terms of this Agreement.

ARTICLE XI. REPRESENTATIONS AND WARRANTIES OF NATE

NATE hereby represents and warrants to CCST and WVC that:

Section 11.01 Organization and Existence.

NATE is a Limited Liability Company organized, validly existing and in good standing under the laws of South Dakota.

Section 11.02 Company Authorization.

- (a) The execution, delivery and performance by NATE of this Agreement and the transactions contemplated herein are within its company powers and have been duly authorized on the part of NATE.
- (b) This Agreement constitutes the valid and binding agreement of NATE, enforceable against it in accordance with its terms except as such enforceability may be limited by bankruptcy, insolvency, reorganization, moratorium and similar laws relating to or affecting creditors generally, by general equity principles (regardless of whether such enforceability is considered in a proceeding in equity or at law) or by an implied covenant of good faith and fair dealing.

Section 11.03 Governmental Authorization.

The execution, delivery and performance by NATE of this Agreement and the documents to be delivered in connection herewith require no approval or other action by or in respect of, or filing with, any Tribal or United States Governmental Authority.

Section 11.04 Non-Contravention.

The execution, delivery and performance by NATE of this Agreement and the documents to be delivered in connection herewith do not and will not: (i) contravene or conflict with the Certificate of Organization or By-laws or any other governing document of NATE; (ii) assuming compliance with matters set forth in Section 11.02 and Section 11.03, contravene or conflict with or constitute a violation of any provision of any Tribal or United States law, regulation, judgment, injunction, order or decree binding upon or applicable to NATE.

Section 11.05 Ownership.

NAT is currently the record and beneficial owner of Permissions, Licenses and Other Assets controlled by NATE and NATE shall direct NAT to transfer and deliver the Permissions, Licenses and the Other Assets to NAT-CC free and clear of any liens or encumbrances.

Section 11.06 Finder's Fees.

There is no investment banker, broker, finder or other intermediary which has been retained by or is authorized to act on behalf of NATE who might be entitled to any fee or commission from CCST, WVC or NAT-CC upon consummation of the transactions contemplated herein.

Section 11.07 Litigation.

There is no pending, or to NATE's knowledge, threatened claim or litigation that could affect NATE's title and interests and no events or circumstances have occurred that may result in any such claim or litigation.

ARTICLE XII. REPRESENTATIONS AND WARRANTIES OF WVC

WVC hereby represents and warrants to CCST and NATE that:

Section 12.01 Organization and Existence.

WVC is a Subchapter-S Corporation duly incorporated, validly existing and in good standing under the laws Nevada.

Section 12.02 Corporate Authorization.

- (a) The execution, delivery and performance by WVC of this Agreement and the transactions contemplated herein are within its corporate powers and have been duly authorized by all necessary corporate or other action on the part of WVC.
- (b) This Agreement constitutes the valid and binding agreement of WVC, enforceable against it in accordance with its terms except as such enforceability may be limited by bankruptcy, insolvency, reorganization, moratorium and similar laws relating to or affecting creditors generally, by general equity principles (regardless of whether such enforceability is considered in a

proceeding in equity or at law) or by an implied covenant of good faith and fair dealing.

Section 12.03 Governmental Authorization.

The execution, delivery and performance by WVC of this Agreement and the documents to be delivered in connection herewith require no approval or other action by or in respect of, or filing with, any Tribal or United States Governmental Authority.

Section 12.04 Non-Contravention.

The execution, delivery and performance by WVC of this Agreement and the documents to be delivered in connection herewith do not and will not: (i) contravene or conflict with any the Articles of Incorporation or By-laws or any other governing document of WVC; (ii) assuming compliance with matters set forth in Section 12.02 and Section 12.03, contravene or conflict with or constitute a violation of any provision of any Tribal or United States law, regulation, judgment, injunction, order or decree binding upon or applicable to WVC.

Section 12.05 Finder's Fees.

There is no investment banker, broker, finder or other intermediary which has been retained by or is authorized to act on behalf of WVC who might be entitled to any fee or commission from CCST or NATE or NAT-CC upon consummation of the transactions contemplated herein.

Section 12.06 Litigation.

There is no pending, or to WVC's knowledge, threatened claim or litigation that could affect WVC's title and interests and no events or circumstances have occurred that may result in any such claim or litigation.

ARTICLE XIII. INDEMNIFICATION

Section 13.01 CCST's and WVC's and NAT-CC's Right to Indemnification.

NATE will indemnify CCST and WVC and NAT-CC, and hold CCST and WVC and NAT-CC, and their respective present and future directors, officers and employees, harmless from any and all liabilities, losses, obligations, claims, costs and expenses (including

without limitation court costs and reasonable attorneys fees) of any type or nature that CCST or WVC or NAT-CC may suffer or incur as a result of or relating to: (i) the breach or inaccuracy, or any alleged breach or inaccuracy, of any of the representations, warranties, covenants or agreements made by NATE in this Agreement or in any of the exhibits hereof; or (ii) any acts or omissions of NATE occurring prior to the Closing Date.

Section 13.02 NATE's and WVC's and NAT-CC's Right to Indemnification.

CCST will indemnify NATE and WVC and NAT-CC, and hold NATE and WVC and NAT-CC, and their respective present and future directors, officers and employees, harmless from any and all liabilities, losses, obligations, claims, costs and expenses (including without limitation court costs and reasonable attorneys fees) of any type or nature that NATE or WVC or NATE may suffer or incur as a result of or relating to: (i) the breach or inaccuracy, or any alleged breach or inaccuracy, of any of the representations, warranties, covenants or agreements made by CCST in this Agreement or in any of the exhibits hereof; or (ii) any acts or omissions of CCST occurring prior to the Closing Date.

Section 13.03 CCST's and NATE's and NAT-CC's Right to Indemnification.

WVC shall indemnify and hold CCST and NATE and NAT-CC, and their respective present and future directors, officers and employees harmless from any and all liabilities, losses, obligations, claims, costs and expenses (including without limitation court costs and reasonable attorneys fees) that CCST or NATE or NAT-CC may suffer or incur as a result or relating to: (i) the breach or inaccuracy, or any alleged breach or inaccuracy, of any representations, warranties, covenants or agreements made by WVC in this Agreement or in any of exhibits hereof; or (ii) any acts or omissions of WVC occurring prior to the Closing Date.

Section 13.04 Notice.

The party seeking indemnification hereunder (for purposes of this Article XIII, "Indemnatee") shall promptly, and within Thirty (30) Days after notice to it (notice to Indemnatee being the filing of any legal action, receipt of any claim in writing, or similar form of actual notice) of any claim as to which it asserts a right to indemnification, notify the party from whom indemnification is sought (for purposes

of this Article XIII, "Indemnitor") of such claim. If notice is given, Indemnitor shall promptly indemnify Indemnitee upon receipt of any such notice. The failure of Indemnitee to give such notification shall not relieve the Indemnitor from any liability that it may have pursuant to this Agreement unless the failure to give such notice within such time shall have been prejudicial and in such case only to the extent thereof, and in no event shall the failure to give such notification relieve the Indemnitor from any liability it may have other than pursuant to this Agreement. In the event that the Indemnitor fails to fully indemnify the Indemnitee within Ten (10) Days after the Indemnitee's right to indemnity hereunder is notified to the Indemnitor, without any legally valid reason to deny its obligations to indemnify, the Indemnitor shall be liable to pay the amount claimed.

Section 13.05 Third-Party Claims.

If any claim for Indemnification and Hold Harmless by Indemnitee arises out of a claim by a person other than Indemnitee, Indemnitor may, by written notice to Indemnitee, undertake to conduct any proceedings or negotiations in connection therewith or necessary to defend Indemnitee and take all other steps or proceedings to settle or defeat any such claims or to employ counsel to contest any such claims; provided that Indemnitor shall reasonably consider the advice of Indemnitee as to the defense of such claims, and Indemnitee shall have the right to participate, at its own expense, in such defense, but control of such litigation and settlement shall remain exclusively with Indemnitor. Indemnitee shall provide all reasonable cooperation in connection with any such defense by Indemnitor. Counsel, filing fees, court fees and other costs or expenses of all proceedings, contests or lawsuits with respect to any such claim or asserted liability shall be borne by Indemnitor. If any such claim is made hereunder and Indemnitor does not elect to undertake the defense thereof by written notice to Indemnitee, Indemnitee shall be entitled to control such litigation and settlement and shall be entitled to indemnity with respect thereto pursuant to the terms of this Article XIII. To the extent that Indemnitor undertakes the defense of such claim by written notice to Indemnitee and diligently pursues such defense at its expense, Indemnitee shall be entitled to indemnification hereunder only to the extent that such defense is unsuccessful as determined by a final and unappealable judgment of a court of competent jurisdiction, or by written acknowledgment of the parties.

ARTICLE XIV. DEFAULTS

Section 14.01 Defaults.

The occurrence of any of the following events shall constitute an "Event of Default" for purposes of this Agreement on the part of the party with respect to which such event occurs (the "Defaulting Party"):

- (a) The institution by the Defaulting Party of proceedings of any nature under any laws of any jurisdiction, whether now existing or subsequently enacted or amended for the relief of debtors wherein such party is seeking relief as a debtor;
- (b) A general assignment by the Defaulting Party for the benefit of creditors;
- (c) The institution against the Defaulting Party of a case or other proceeding under any bankruptcy or similar laws as now existing or hereunder amended or becoming effective, which proceeding is not dismissed, stayed or discharged within a period of Sixty (60) Days after the filing thereof;
- (d) The appointment of a receiver for all or substantially all of the Defaulting Party's business or assets on the grounds of insolvency, and such appointment is not vacated within Sixty (60) Days of such occurrence;
- (e) The admission by the Defaulting Party in writing of its inability to pay its debts as they come due;
- (f) The breach by the Defaulting Party of any of the material provisions contained in this Agreement;

Section 14.02 Remedies.

Upon an Event of Default, pursuant to Sections 14.01(a) through (f), inclusive, the other party(s) (the Non-Defaulting Party), may elect to dissolve NAT-CC or purchase the ownership interest of the Defaulting Party. In the event, that the Non-Defaulting Party elects to dissolve NAT-CC, the Defaulting Party, as applicable, shall vote its ownership interest in NAT-CC to effect such dissolution.

ARTICLE XV. TERMINATION

Section 15.01 Grounds for Termination.

This Agreement may be terminated at any time: (i) by mutual written agreement of CCST and NATE and WVC; or (ii) by either CCST or NATE or WVC if the transactions contemplated by Sections 1.01, 1.02, 1.03, 1.04, 1.05 and 1.06 shall not have been consummated on or before May 30, 2009, or such other date, if any, as CCST and NATE and WVC shall agree in writing; provided that no party may terminate this Agreement pursuant to this clause if such party's failure to fulfill any of its obligations under this Agreement shall have been the reason that the transactions contemplated herein shall not have been consummated on or before such date; and (iii) by either CCST or NATE or WVC if another party is then in material breach of this Agreement, and the terminating party(s) is not then in material breach of this Agreement. The party desiring to terminate this Agreement pursuant to this Section 15.01 shall give Five (5) Business Days notice of such termination to the other parties.

Section 15.02 Effect of Termination.

If this Agreement is terminated as permitted by Section 15.01 such termination shall be without liability to any party (or any director, officer, employee, agent, consultant or representative of such party) to this Agreement. If the termination is pursuant to Section 15.01 (iii) as the result of the failure of any party to fulfill a material covenant of this Agreement or a misrepresentation by any party to this Agreement, such party shall be fully liable for any and all damages, costs and expenses (including, but not limited to, reasonable counsel fees) sustained or incurred by the other parties as a result of such failure, breach or misrepresentation.

ARTICLE XVI. MISCELLANEOUS

Section 16.01 Survival.

The representations, warranties, covenants and agreements contained herein shall survive the execution of this Agreement.

Section 16.02 Rules of Construction.

No rule of construction requiring interpretation against the draftsman shall apply in the interpretation of this Agreement.

Section 16.03 Notices.

All notices, requests and other communications to each party hereunder shall be in writing (including facsimile or similar writing, with confirmation of receipt) and shall be given:

If to CCST, to: BRANDON SAZUE, TRIBAL CHAIRMAN

ADDRESS: Crow Creek Sioux Tribal Headquarters, Fort Thompson, SD, 57339

TELEPHONE: (605) 245-2221

FACSIMILE: (605) 245-2470

E-MAIL: BRANDONSAZUE@HOTMAIL.COM

If to NATE, to: GENE DEJORDY

ADDRESS: 16801 Valley Falls Drive, Little Rock, AR 72223

TELEPHONE: (501) 804-7797

FACSIMILE: (501) 868-8836

E-MAIL: GENE@DAKELYN.COM

If to WVC, to: DAVID ERICKSON

ADDRESS: 110 W. Ocean Blvd., Ste. C, Long Beach, CA 90802

TELEPHONE: (562) 437-1411

FACSIMILE: (562) 437-1422

EMAIL: DAVE@FREECONFERENCECALL.COM

Section 16.04 Amendments; No Waivers.

- (a) Any provision of this Agreement may be amended or waived subject to the requirements of applicable law if, and only if, such amendment or waiver is in writing and signed, in the case of an amendment, by CCST and NATE and WVC, or in the case of a waiver, by the party(s) against whom the waiver is to be effective.
- (b) No failure or delay by any party in exercising any right, power or privilege hereunder shall operate as a waiver thereof nor shall any single or partial exercise thereof preclude any other or further exercise thereof or the exercise of any other right, power or privilege.

Section 16.05 Expenses.

Except as otherwise expressly provided in this Agreement, all costs and expenses incurred in connection with this Agreement shall be paid by the party incurring such costs or expenses.

Section 16.06 Successors and Assigns.

The provisions of this Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns; provided that no party may assign, delegate or otherwise transfer any of its rights or obligations under this Agreement without the consent of the other parties hereto and compliance with applicable laws and regulations.

Section 16.07 Governing Law.

This Agreement shall be construed in accordance with and governed by the Laws of the State of South Dakota and of the United States Federal Government without giving effect to conflicts of laws or regulatory authority or court in the exercise of its lawful jurisdiction.

Section 16.08 Counterparts; Effectiveness.

This Agreement may be signed in any number of counterparts, each of which shall be an original, with the same effect as if the signatures thereto and hereto were upon the same instrument. This Agreement shall become effective when each party hereto shall have received a counterpart hereof signed by the other parties hereto.

Section 16.09 Entire Agreement.

This Agreement, including the Exhibits hereto, constitutes the entire agreement between the parties with respect to the subject matter hereof and supersedes all prior agreements, understandings and negotiations, both written and oral, between the parties with respect to the subject matter of this Agreement. No representation, inducement, promise, understanding, condition or warranty not set forth herein has been made or relied upon by any party hereto.

Section 16.10 Partial Invalidity.

If any provision of this Agreement shall be held to be invalid or unenforceable, such invalidity or unenforceability shall not invalidate or render this Agreement unenforceable, but rather this Agreement shall be construed as if not containing the invalid or unenforceable provision. However, if such provision is an essential element of this Agreement, the Parties shall promptly attempt to negotiate a substitute.

Section 16.11 Captions; Definitions.

The captions herein are included for convenience of reference only and shall be ignored in the construction or interpretation hereof.

Section 16.12 Dispute Resolution; Arbitration.

The parties agree with the principle that disputes, claims and controversies arising out of or related to this Agreement or any of the notes or agreements set forth in Exhibits C, D, and E (including the performance, enforcement, breach, or termination thereof, and any remedies relating thereto) (each, a "Dispute") should be regarded as business problems to be resolved promptly through business-oriented negotiations before resorting to arbitration. The parties agree to use their best efforts and to attempt in good faith to resolve any Dispute promptly by negotiation between the Directors approved by the parties who have authority to settle the Dispute. Either party(s) may give the other party(s) written notice of any Dispute not resolved in the normal course of business ("Notice of Dispute"). Within Fifteen (15) Days after receipt of the Notice of Dispute by the receiving party(s) ("Date of Notice"), the receiving party(s) shall submit to the other(s) a written response, which shall include a statement of such party's position. Within Thirty (30) Days after the Date of Notice, the party(s) shall meet at a mutually acceptable time and place, and thereafter as often as they

reasonably deem necessary, to attempt to resolve the Dispute. All reasonable requests for information made by one party to the others will be honored.

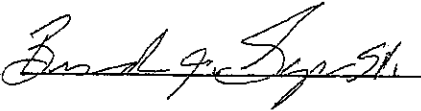
- (a) All negotiations pursuant to this Section 16.11 shall be confidential and shall be treated as compromise and settlement negotiations for purposes of applicable rules of evidence.
- (b) In the event the Dispute has still not been resolved by negotiation, then such Dispute shall be settled by binding arbitration according to the rules of the American Arbitration Association before an Arbitral Panel composed of three (3) Arbitrators. One of such Arbitrators shall be selected by CCST, another by NATE, and another by WVC. The Arbitration shall be legally binding and shall take place at a location within the state of South Dakota designated by the Board of Directors. The arbitral award or order ("Award") shall be given in writing, shall detail the disputed matters and the reasons upon which the Award is based. The Award of the Arbitrators shall be final and binding upon the parties and shall not be subject to appeal to any court or other authority. Judgment upon the award or order may be entered in any court of competent jurisdiction, and application may be made to any such court for enforcement thereof. Each party shall bear its own costs and expenses in connection with the Arbitration, but shall share equally in the costs and fees of the Arbitration proceedings. Each party accepts and submits to the arbitral jurisdiction referenced above and to any court of competent jurisdiction with regard to enforcement of the Award. Process in any such action or proceeding may be served on any party anywhere in the world.

Section 16.13 Third Party Beneficiaries.

No provision of this Agreement shall create any third party beneficiary rights in any person (except in favor of NAT-CC), nor shall any provision of this Agreement modify any rights of any third party under any existing law, regulation or contract with any third party.

IN WITNESS WHEREOF, the parties hereto here caused this Agreement to be duly executed by their respective authorized officers as of the day and year first above written.

Crow Creek Sioux Tribe (AUTHORIZED SIGNATURE)

By: 

Brandon J. Sazue Sr

PRINT NAME

Native American Telecom Enterprise, LLC (AUTHORIZED SIGNATURE)

By: _____

PRINT NAME

WideVoice Communications, Inc., Inc. (AUTHORIZED SIGNATURE)

By: _____

PRINT NAME

WideVoice Communications, Inc., Inc. (AUTHORIZED SIGNATURE)



By:

Patrick J. Chicas

PRINT NAME

IN WITNESS WHEREOF, the parties hereto here caused this Agreement to be duly executed by their respective authorized officers as of the day and year first above written.

Crow Creek Sioux Tribe (AUTHORIZED SIGNATURE)

By: _____

PRINT NAME

Native American Telecom Enterprise, LLC (AUTHORIZED SIGNATURE)

By: 

Gene DeJordy

PRINT NAME

WideVoice Communications, Inc., Inc. (AUTHORIZED SIGNATURE)

By: _____

PRINT NAME

SERVICE AGREEMENT BY AND BETWEEN:
NATIVE AMERICAN TELECOM – CROW CREEK
AND
FREE CONFERENCING CORPORATION

This sets forth the terms of the Agreement ("Agreement") made this 1st day of July, 2009 by and between Native American Telecom – Crow Creek, LLC ("NAT-CC") a South Dakota Limited Liability Company and Free Conferencing Corporation ("FCC") a Nevada Corporation. NAT-CC agrees to provide to FCC certain telecommunications services and other associated services (collectively "Service"), as described below, and FCC agrees to accept Service subject to the specific terms and charges set forth in this Agreement. In this Agreement, FCC and NAT-CC are referred to collectively as "the Parties" and individually as "a Party".

RECITALS

WHEREAS, NAT-CC owns and operates a Competitive Local Exchange Carrier ("CLEC") network that offers broadband and other wireless telecommunication services to Residents of the Crow Creek Indian Reservation, and to others that reside outside the exterior boundaries of the Crow Creek Indian Reservation.

WHEREAS, FCC is engaged in the business of providing audio conferencing and related telecommunications services.

WHEREAS, NAT-CC desires to contract with FCC to bring audio conferencing and related telecommunications traffic to the Crow Creek Indian Reservation in order to promote a telecommunications business model that is viable and self-sustaining and allows NAT-CC to operate a broadband wireless telecommunications network without the need for government aid or subsidies.

NOW, THEREFORE, for valuable consideration, including the promises, covenants, representations and warranties hereinafter set forth, the receipt and adequacy of which are hereby acknowledged, the parties intending to be legally and equitably bound, agree as follows:

1. **FCC Equipment.** NAT-CC shall arrange for the assignment to FCC of telephone numbers direct inward dial (DID's) in sufficient quantity for FCC to manage its incoming traffic, and shall arrange for FCC to co-locate, at FCC's expense, at NAT-CC's switch site, certain electronic computer equipment as identified on the attached "Exhibit A" and acceptable to NAT-CC, all in accordance with the terms of this Agreement. NAT-CC shall provide the required connectivity with Signaling System No.7 (SS7), including Automatic Number Identification (ANI) on all calls, and standard 19" telecommunications equipment racks at the switch location. In addition, NAT-CC shall provide a dedicated digital subscriber line (DSL) Internet connection with eight dedicated internet protocol (IP) addresses. FCC shall use the equipment installed at the site to provide telecommunication services to its customers. NAT-CC will not be held liable for damage to the equipment during the shipment (to or from NAT-CC site) or during installation of FCC's equipment. NAT-CC is responsible for full liability insurance on all of the equipment listed in Exhibit "A" that resides at NAT-CC locations. At the termination of this Agreement, FCC will, at FCC's sole cost and expense, remove the equipment from the Site and repair any damage caused by such removal. Shipping costs at all times are the sole responsibility of FCC.

2. **Confidentiality.** During the term of this Agreement and for a period of Three (3) Years thereafter, neither Party shall disclose any terms of this Agreement, including pricing or any other Confidential Information of the other Party. For purposes of this Agreement, the term "Confidential Information" shall mean information in written or other tangible form specifically labeled as such when disclosed by a Party. Any Confidential Information transmitted orally shall be identified as such at the time of its disclosure. All Confidential Information shall remain the property of the disclosing Party. A Party receiving Confidential Information shall: (I) use or reproduce such information only when necessary to perform this Agreement; (II) provide at least the same care to avoid disclosure or unauthorized use of such information as it provides to protect its own Confidential Information; (III) limit access to such Information to its employees or agents who need such Information to perform this Agreement; and (IV) return or destroy all such Information, including copies, after the need for it has expired, upon request of the disclosing Party, or upon termination of this Agreement. Notwithstanding the foregoing, neither party shall be deemed to be in breach of this Agreement if Confidential Information is disclosed pursuant to a valid order or subpoena issued by a court or other governmental agency, commission, or department, having competent jurisdiction over the Party or the Parties, or if the disclosure of such information is required for purposes of enforcing the opposite Party's obligations under this Agreement. **NAT-CC acknowledges herein that FCC's registered user and conference participant information, including but not limited to telephone numbers, names, addresses, email addresses, identification numbers, and any other user information, is and always will be considered FCC's Confidential Proprietary Information and is and always will be the exclusive property of FCC.**

3. **Term.** The initial term of this Agreement shall be for Three (3) Years from July 1st, 2009 through June 30th, 2012. After, this Agreement shall continue in full force and effect until canceled by either Party giving Sixty (60) Days written notice to the other

Party. Service will be discontinued the first business day of the third month after such notice of termination.

4. **Termination.** NAT-CC and FCC may mutually agree to terminate this Agreement at anytime without cause. NAT-CC or FCC may terminate this Agreement at any time for cause, without liability for such termination, upon Ninety (90) Days notice. "Cause" shall include, without limitation, any breach or violation of this Agreement by NAT-CC or FCC, any change in law, or regulation that may prohibit this contract. If any traffic is deemed "fraudulent" or "misrepresented" by the IXC, NAT-CC has the right to terminate that traffic immediately and will notify FCC of such termination. Furthermore upon termination of this Agreement NAT-CC shall have no liability to FCC for any damages arising from such termination, including but not limited to prospective profits or sales, commitments for advertising, or other materials, services or expenditures. Upon termination, NAT-CC will, at FCC's request, provide recorded messages (Referral Messages) on all FCC's DID's referring callers to FCC's new telephone number so as to minimize the possibility of losing future contact with FCC's callers. NAT-CC will maintain such referral messages for a minimum period of six (6) Months before being reassigned for other use.

5. **FCC Responsibilities.** FCC shall abide by all federal and state regulations and laws applicable to its services and operations and any regulatory authority or court in the exercise of its lawful jurisdiction. Unless otherwise required by law or regulation, in the event any service shall be alleged to violate state or federal law or regulations, NAT-CC may terminate this Agreement, if the alleged violation remains uncured for Fifteen (15) Days after notice to FCC and, upon such termination, NAT-CC shall have no liability and no further obligation to FCC except for payment to FCC for revenue already earned.

6. **Relationship of NAT-CC and FCC and FCC's Conference Participants.** FCC shall be NAT-CC's sole provider for all audio conferencing traffic. NAT-CC is prohibited from contacting, by any means or method, any of FCC's Conference Participants for any purpose. FCC is solely responsible for all products and services it provides to its Conference Participants.

FCC agrees to indemnify and hold harmless NAT-CC and its affiliates, as well as their respective officers, directors, employees and agents, from any and all claims by Conference Participants with respect to any of the services provided by FCC to Conference Participants except to the extent that a claim is the result of the gross negligence or willful misconduct of NAT-CC.

No Conference Participant or any other third party shall be considered a party to or beneficiary of this Agreement or have any claim under this Agreement against either NAT-CC or FCC.

7. *Conference Traffic.* FCC shall provide a minimum of 15,000,000 minutes per month of conferencing traffic within One Hundred and Eighty (180) Days from the first day of operation under this Agreement. For the 15,000,000 minute monthly guarantee, NAT-CC will grant FCC the exclusive right to locate and install equipment in its central offices for the purpose of providing audio conferencing and related telecommunications services to FCC's Registered Users and Conference Participants. Further NAT-CC agrees it will not grant access to its facilities without the express written permission of FCC, to any company or individual that would compete in a similar business with FCC, except that if FCC fails to render at least 12,000,000 minutes of traffic for sixty (60) consecutive days, then NAT-CC may, at its option, contract with other providers of telecommunications traffic in order to make up the difference in traffic up to a maximum of 15,000,000 minutes of total combined monthly traffic.

8. *Effect of Possible Changes in Tariffs.* This Agreement is subject to change, modification, or cancellation as may be required by any regulatory authority or court in the exercise of its lawful jurisdiction. Any and all service rendered hereunder by NAT-CC shall be subject to terms and conditions regarding possible changes to NAT-CC's tariffs, as such tariffs may from time to time be in effect and/or amended. To the extent applicable, NAT-CC's tariffs are hereby incorporated by reference in Exhibit B. In the event of substantial decrease in any of the switched access rates charged by NAT-CC, or in the event of switched access settlements retained by NAT-CC, then it is agreed that payment to FCC will decrease accordingly in direct proportion to the decrease in rates received by NAT-CC, as to be agreed to by the Parties. In the event that the Parties cannot agree to proposed changes, then either party has the option to terminate this Agreement with sixty (60) days notice to NAT-CC.

9. *Marketing Fee and Payment Terms.* NAT-CC shall pay FCC a marketing fee at a rate per minute of IXC traffic terminating on FCC's equipment in accordance with the schedule set forth on Exhibit B. This marketing fee is due and payable within thirty (30) days of NAT-CC's receiving payment from the IXC carriers. This fee will be disbursed when total accumulated payment is equal to or greater than \$1,000.00.

10. *Traffic Reporting.* NAT-CC will provide FCC with real time ANI and Dialed Number Identification Service (DNIS) to all FCC DID's. Additionally, NAT-CC shall provide monthly machine readable accounting reports (Excel spreadsheets or equivalent), reflecting traffic terminated on FCC's DID's which was billed to remitting IXC's. If telephone traffic billed to remitting IXC's by NAT-CC is less than 97% of traffic terminating on FCC equipment, as tabulated by FCC's equipment, FCC shall inform NAT-CC within ninety (90) days of receipt of the monthly accounting report and FCC and NAT-CC shall designate representatives to work together in good faith to audit any unbilled traffic and resolve any discrepancies identified.

11. *Traffic Forecasts.* All DID's primary rate interface (PRI) circuits and facilities requested by FCC are subject to initial and continued availability from NAT-CC. FCC shall give NAT-CC a forecast covering a good faith estimate of the monthly traffic volume and distribution by market for the ordered Services for the first One Hundred and Twenty (120) day period following the commencement of Service. During the term

of this Agreement, FCC shall continue to provide forecasts by market to NAT-CC as requested. If the traffic volume to be provided on the NAT-CC network by FCC is such that a delay in processing orders is required, NAT-CC shall have the right to temporarily delay order processing for such period of time as NAT-CC deems necessary. Both Parties agree to work together as required for circuit expansion on reasonable schedules.

12. Force Majeure. Neither Party shall be liable for any delay or failure in performance under this Agreement, other than for any delay or failure in an obligation to pay money, to the extent such delay or failure is caused by fire, flood, explosion, accident, war, strike, embargo, governmental requirement, civil or military authority, Act of God, inability to secure materials or labor, a decline in available conference minutes below the fifteen million (15,000,000) threshold subject to the cure being granted to NAT-CC as described in Section 7, or any other causes beyond their reasonable control. Any such delay or failure shall suspend this Agreement until the Force Majeure ceases, and the term shall be extended by the length of the suspension.

13. Use of Name and Marks. This Agreement confers no right to use the name, service marks, trademarks, copyrights, or patents of either Party except as expressly provided herein. Neither Party shall take any action, which would compromise the registered copyrights or service marks of the other.

14. Independent Contractor Relationship. Each Party agrees that it shall perform its obligations hereunder as an independent contractor and not as the agent, employee or servant of the other. Neither Party nor any personnel furnished by such Party shall be deemed employees or agents of the other, or entitled to any benefits available under any plans for such other Party's employees. Each Party has and hereby retains the right to exercise full control over the employment, direction, compensation and discharge of all of its employees assisting in the performance of its obligations. Each Party shall be solely responsible for all matters relating to payment of employees including compliance with social security taxes, withholding taxes, and all other regulations governing such matters, and each Party shall be responsible for its own acts and those of its own subordinates, employees, agents, and subcontractors during the performance of such Party's obligations hereunder. This Agreement is solely an agreement for services to be provided by NAT-CC to FCC. By signing this Agreement the Parties do not create a partnership, a cooperative venture, or a joint venture of any kind or nature. Neither Party shall be liable for the debts or obligations of the other, nor shall a Party have, or hold itself out as having, the power or authority to bind or create liability for the other by its intentional or negligent act.

15. Assignment. This Agreement may be transferred and assigned by either party with the consent of the other party, which consent shall not be unreasonably withheld. If this is done, all the terms and conditions of this Agreement shall continue to apply to such assignee, and Assignor shall have no further obligation or liability under this Agreement.

16. **Rules of Construction.** No rule of construction requiring interpretation against the draftsman shall apply in the interpretation of this Agreement.

17. **Modification of Agreement.** This Agreement, including its Exhibits, may only be amended, modified or supplemented by a separate written document duly executed by authorized representatives of both Parties.

18. **Waiver.** No term or provision herein shall be waived, and no breach or default excused, unless such waiver or consent is in writing and signed by the Party to which it is attributed. No consent by a Party to, or waiver of, a breach or default by the other, whether expressed or implied, shall constitute a consent to or waiver of, any subsequent breach or default.

19. **Partial Invalidity.** If any provision of this Agreement shall be held to be invalid or unenforceable, such invalidity or unenforceability shall not invalidate or render this Agreement unenforceable, but rather this Agreement shall be construed as if not containing the invalid or unenforceable provision. However, if such provision is an essential element of this Agreement, the Parties shall promptly attempt to negotiate a substitute.

20. **Entire Agreement.** This Agreement, together with the attached Exhibits, represents the entire agreement of the Parties with respect to the subject matter hereof and supersedes all other agreements, written or oral, between the Parties relating to the Service.

21. **Governing Law.** Both parties agree that the laws of the State of California shall apply to any actions or claims arising out of or in relation to this agreement, without regard to conflict of California principles.

22. **NAT-CC Assumes Charges for Provision of Telecommunications Services to FCC.** In consideration for the covenants, representations, and warranties of FCC to NAT-CC contained in this Agreement and of the willingness of FCC to perform its obligations hereunder to the extent set forth herein, NAT-CC shall provide all telecommunications services utilized by FCC in connection with this Agreement without charge. This shall include both installation charges as well as monthly recurring charges (MRC). Such services shall include, but are not limited to, PRI's, co-location space, rack space, POTS lines (analog telephone circuits), DSL or other dedicated Internet access, referral message fees, electrical power, fire protection, generator and/or battery backup, DID's, labor of switch technicians as needed, switch programming as needed. NAT-CC shall have the right to change this Section to allow for payment for services if FCC traffic drops below 12,000,000 for 90 (ninety) consecutive days.

23. **No Third Party Beneficiaries.** Nothing contained in this Agreement, either expressed or implied, is intended to confer upon any other person any rights or remedies under, or by reason of, this Agreement except as expressly set forth herein.

24. Notices. All notices and communications under this Agreement shall be in writing and shall be given by personal delivery, by registered or certified mail, return receipt requested, or by facsimile transmission, addressed to the respective Party as set forth below, or to such other address as may be designated in writing by such Party. Notice shall be deemed given upon receipt.

If to NAT-CC:

Company Name: Native American Telecom – Crow Creek
Address:
City/State/Zip:
Contact Name:
E-mail address:
Phone number:
Fax number:

If to FCC:

Company Name: Free Conferencing Corporation
Address: 110 W. Ocean Blvd., Ste. C
City/State/Zip: Long Beach, CA 90802
Contact Name: David Erickson
E-mail address: dave@freeconferencecall.com
Phone number: 877 482-5838
Fax number: 562 437-1422

Payment method:
Wire or Electronic payment information:

Exhibit A – Equipment Itemized Descriptions

Equipment to be co-located at NAT-CC site

Please include: Serial number, model number

Quantity	Equipment	Description

Exhibit B – Marketing Fee Schedule

Minutes per Month	Rate per Minute
0 – 15,000,000	(75% of Gross Tariff)
15,000,001- 25,000,000	(85% of Gross Tariff)
25,000,001 and above	(95% of Gross Tariff)

Free Conferencing Corporation

_____ Date: _____

David Erickson

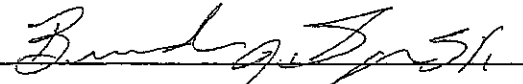
Native American Telecom – Crow Creek

_____ Date: _____

Gene DeJordy – Native American Telecom Enterprise

_____ Date: _____

Patrick Chicas - Wide Voice Communications



Date: 4-30-09

Brandon Sazue – Crow Creek Sioux Tribe

Free Conferencing Corporation

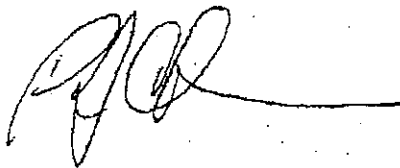
_____ Date: _____

David Erickson

Native American Telecom – Crow Creek

_____ Date: _____

Gene DeJordy – Native American Telecom Enterprise



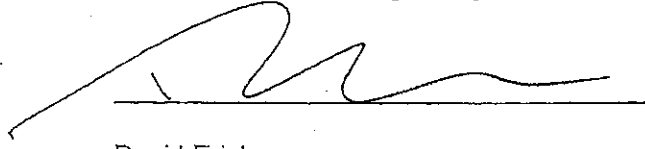
_____ Date: 05/15/2009 _____

Patrick Chicas - Wide Voice Communications

_____ Date: _____

Brandon Sazue – Crow Creek Sioux Tribe

Free Conferencing Corporation



Date: 5/1/2009

David Erickson

Native American Telecom – Crow Creek

_____ Date: _____

Gene DeJordy – Native American Telecom Enterprise

_____ Date: _____

Patrick Chicas - Wide Voice Communications

_____ Date: _____

Brandon Sazue – Crow Creek Sioux Tribe

Free Conferencing Corporation

_____ Date: _____

David Erickson

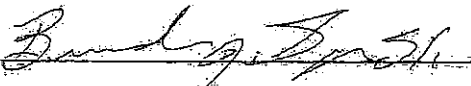
Native American Telecom – Crow Creek

_____ Date: _____

Gene DeJordy – Native American Telecom Enterprise

_____ Date: _____

Patrick Chicas - Wide Voice Communications



Date: 4-30-09

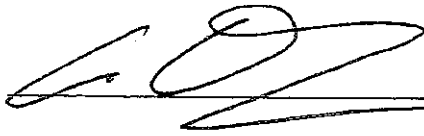
Brandon Sazue – Crow Creek Sioux Tribe

Free Conferencing Corporation

_____ Date: _____

David Erickson

Native American Telecom – Crow Creek



Date: May 1, 2009

Gene DeJordy – Native American Telecom Enterprise

Date: _____

Patrick Chicas - Wide Voice Communications

Date: _____

Brandon Sazue – Crow Creek Sioux Tribe

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA**

IN THE MATTER OF THE APPLICATION
OF NATIVE AMERICAN TELECOM, LLC
FOR A CERTIFICATE OF AUTHORITY TO
PROVIDE LOCAL EXCHANGE SERVICE
WITHIN THE STUDY AREA OF
MIDSTATE COMMUNICATIONS, INC.

Docket No. TC11-087

**NATIVE AMERICAN TELECOM, LLC'S
OBJECTIONS AND RESPONSES TO
SPRINT COMMUNICATIONS COMPANY L.P.'S
DISCOVERY REQUESTS**

Native American Telecom, LLC ("NAT") hereby submits its objections and responses to Sprint Communications Company L.P.'s ("Sprint") Discovery Requests.

GENERAL OBJECTIONS

NAT incorporates the following objections into each of its specific objections below.

1. NAT objects generally to each discovery request to the extent it seeks information protected by the attorney-client privilege, the attorney work product doctrine, common interest doctrine, joint defense privilege, or any other applicable privilege or right.

2. NAT objects generally to each discovery request to the extent it is overbroad and seeks information not relevant to the subject matter of this action or reasonably calculated to lead to the discovery of admissible

evidence, and to the extent that the requests are vague and ambiguous or unduly burdensome.

3. NAT objects generally to each discovery request insofar as it purports to require NAT to inquire of all of its current and former employees, agents and representatives to determine whether information responsive to the question exists on the grounds that such an inquiry would be unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence. NAT will therefore limit its inquiry to the appropriate employees currently employed by NAT that have or have had responsibility for matters to which the discovery request relates.

4. NAT objects generally to each discovery request to the extent that the information requested is known to Sprint or its counsel, or to the extent they require disclosure of information, documents, writings, records or publications in the public domain, or to the extent the information requested is equally available to Sprint from sources other than NAT.

Please see NAT's specific objections and responses attached hereto.

Dated this 9th day of March, 2012.

SWIER LAW FIRM, PROF. LLC

/s/ Scott R. Swier

Scott R. Swier
202 N. Main Street
P.O. Box 256
Avon, South Dakota 57315
Telephone: (605) 286-3218
Facsimile: (605) 286-3219
scott@swierlaw.com
Attorneys for NAT

INTERROGATORIES

INTERROGATORY NO. 1: Explain the customer relationships NAT intends to have covered by the certificate it seeks (i.e., provision of voice service to non-tribal members on the reservation; provision of voice service to tribal members on the reservation; provision of data service to non-tribal members on the reservation, etc.)

RESPONSE/OBJECTIONS: *Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter. NAT also objects that the terms "customer relationship" and "intends to have covered" are vague, overbroad, and ambiguous. Without waiving said objections, NAT's states that NAT would intend to have all customer relationships covered by its certificate of authority as mentioned in Sprint's interrogatory.*

INTERROGATORY NO. 2: Identify and describe the services, goods, or products you have provided to Free Conferencing Corporation, including all features and practices associated with the provision of each service, the specific tariff or contract provision(s) pursuant to which each service, good, or product has been provided.

RESPONSE/OBJECTIONS: *Subject to and notwithstanding the aforementioned general objections, NAT also objects that the terms in this interrogatory ("services," "goods," "product") are vague, overbroad, and ambiguous. Moreover, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter.*

INTERROGATORY NO. 3: *Setting aside Free Conferencing Corporation, are all of those currently receiving voice service Tribal members? Explain how, during the application and provisioning process, you have identified whether individuals are Tribal members.*

RESPONSE/OBJECTIONS: *Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter. NAT also objects that the term "Tribal member" is vague, overbroad and ambiguous. Without waiving said objections, NAT does not discriminate between its applicants for service. All services are provided to individuals and businesses located within the Reservation boundaries.*

INTERROGATORY NO. 4: How will NAT limit itself to providing service only on the Reservation given that it uses wireless signal that in some cases is capable of extending beyond Reservation boundaries?

RESPONSE/OBJECTIONS: *Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter. Without waiving said objections, as far as NAT is aware, the signal's strength does not travel beyond Reservation boundaries. However, if Sprint would like to test this signal strength and Reservation boundaries, NAT will cooperate with Sprint to the extent this is relevant to this proceeding.*

INTERROGATORY NO. 5: In the federal court case between NAT and Sprint, Mr. Keith Williams testified on October 14, 2010 that calls to NAT numbers were switched by a Widevoice switch in Los Angeles, before being routed in IP back to NAT router in Ft. Thompson. October 14 Hearing Tr. Pp. 18-19. Is that true today? If so, where is that reflected in NAT's response to Staff Request 1-2. Regardless of switch location, provide detail (make, model, capacity, cost, date of purchase, ownership information, location) with respect to the switch now being used.

RESPONSE/OBJECTIONS: *Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter.*

INTERROGATORY NO. 6: Describe the equipment to be used to provide NAT's Inbound Calling Service to those receiving it.

RESPONSE/OBJECTIONS: *Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter.*

INTERROGATORY NO. 7: Identify the location of the cell towers and WiMax equipment you claim allows you to provide service throughout the reservation. Provide coverage maps that demonstrate the signals being generated can reach throughout the reservation.

RESPONSE/OBJECTIONS: *Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter.*

INTERROGATORY NO. 8: Will NAT allow other carriers to establish IP-IP interconnection? On what terms?

RESPONSE/OBJECTIONS: *Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter. Without waiving said objections, yes, the carrier must provide its own TDM transport to Fort Thompson, South Dakota.*

INTERROGATORY NO. 9: With respect to the voice services you have been providing, identify the taxes, assessments and surcharges that apply, including USF surcharges, TRS, and 911 assessments. Has NAT been collecting and/or remitting such amounts? If so, explain how amounts have been calculated, if not, why not? In doing so you should explain the calculations that resulted in NAT's remittance of \$10,665 to USAC for the 2012 calendar year.

RESPONSE/OBJECTIONS: *Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor*

reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter.

INTERROGATORY NO. 10: You list "Communications Center" as an asset valued at \$99,241.61 on your December 31 2011 Balance Sheet. What makes up that category, and how did you determine the value of that asset?

RESPONSE/OBJECTIONS: *Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter. Without waiving said objections, the value is at "cost basis."*

INTERROGATORY NO. 11: You list "Wi-Max Equipment" as an asset valued at \$216,086.81 on December 31 2011 Balance Sheet. What makes up that category, how did you determine the value of that asset, and what is its depreciation rate?

RESPONSE/OBJECTIONS: *Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor*

reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter.

INTERROGATORY NO. 12: With respect to the "Marketing Expense" of \$170,097.75 listed on your 2011 Profit and Loss statement, please identify all of the expenses included in this line item, including amounts NAT paid to Free Conferencing Corporation.

RESPONSE/OBJECTIONS: *Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter.*

INTERROGATORY NO. 13: With respect to the "Telephone and Circuit Expenses" of \$132,101 listed on your 2011 Profit and Loss, please identify the facilities covered by this line item, and identify the parties to whom you paid this expense and the amount paid to each party.

RESPONSE/OBJECTIONS: *Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor*

reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter.

INTERROGATORY NO. 14: With respect to the "Professional Fees" of \$87,710 listed on your 2011 Profit and Loss, please identify the parties to whom you paid this expense, the services they provided, and the amount paid to each party.

RESPONSE/OBJECTIONS: *Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter.*

INTERROGATORY NO. 15: With respect to the "End User Fee Income" of \$166,629 listed on your 2011 Profit and Loss, please describe all of the expenses included in this line item, identify the payment dates and amounts, and identify the payor(s).

RESPONSE/OBJECTIONS: *Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor*

reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter.

INTERROGATORY NO. 16: With respect to the "Access Termination Fee Income" of \$91,814 listed on your 2011 Profit and Loss, please describe the sources of revenue within this account, and identify the payor(s) including the amount paid by each payor(s).

RESPONSE/OBJECTIONS: *Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter.*

INTERROGATORY NO. 17: With respect to the "CABS Collection Fee Income" of \$157,983 listed on your 2011 Profit and Loss, please describe the sources of revenue within this account, and identify the payor(s) including the amount paid by each payor(s).

RESPONSE/OBJECTIONS: *Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in*

this Certificate for Authority matter. Such information also constitutes confidential financial information and trade secrets.

INTERROGATORY NO. 18: Explain from a technical standpoint how NAT proposes to provide intrastate interexchange service. Identify the rates and terms that will apply to the intrastate interexchange service NAT proposes to provide.

RESPONSE/OBJECTIONS: *Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter. Without waiving said objection, a copy of NAT's tariff can be found at <http://nativeamericantelecom.com>. NAT's intrastate rates mirror interstate rates (even though NAT could legally charge more for intrastate service).*

INTERROGATORY NO. 19: Identify any factual information provided to Mr. Roesel by NAT or its representatives.

RESPONSE/OBJECTIONS: *Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter. This interrogatory is also vague,*

ambiguous, overbroad, and constitutes confidential financial and proprietary information and trade secrets.

INTERROGATORY NO. 20: Identify the cases in which Mr. Roesel has testified or prefiled testimony over the last four years.

RESPONSE/OBJECTIONS: *Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter.*

INTERROGATORY NO. 21: What documents has Mr. Roesel relied on to conclude NAT has the financial capability to provide the services covered by its application?

RESPONSE/OBJECTIONS: *Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter. This interrogatory is also vague, ambiguous, overbroad, and constitutes confidential financial and proprietary information, and trade secrets.*

INTERROGATORY NO. 22: Identify by name the members of the Tribal Utility Authority who voted to approve NAT's application for authority to provide service on the Reservation.

RESPONSE/OBJECTIONS: *Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter.*

INTERROGATORY NO. 23: What carriers besides MidState has NAT interconnected with for the exchange of telecommunications?

RESPONSE/OBJECTIONS: *Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter. This interrogatory is also vague and ambiguous as to "interconnected with for the exchange of telecommunications" and requests proprietary information.*

INTERROGATORY NO. 24: Identify the manufacturer(s) of the WiMax technology NAT uses, including the model and serial numbers of each

piece of technology (hardware) NAT proposes to use to provide services under its Application.

RESPONSE/OBJECTIONS: *Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter.*

INTERROGATORY NO. 25: What managerial and technical experience does NAT's management have in providing the telecom services proposed in its application? Where and over what period of time has NAT provided those services?

RESPONSE/OBJECTIONS: *See NAT's Application for Certificate of Authority and written testimony submitted by NAT.*

INTERROGATORY NO. 26: When did Tom Reiman stop serving as NAT's president?

RESPONSE/OBJECTIONS: *Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter.*

INTERROGATORY NO. 27: Who maintains NAT's financial records?

Where are NAT's financial records kept?

RESPONSE/OBJECTIONS: *Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter.*

INTERROGATORY NO. 28: Identify all of NAT's bank accounts.

RESPONSE/OBJECTIONS: *Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter.*

INTERROGATORY NO. 29: Identify by name the employees and work locations of all of NAT's employees.

RESPONSE/OBJECTIONS: *Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter.*

INTERROGATORY NO. 30: Identify the employees and officers of Free Conferencing who provide services to NAT or perform functions for NAT.

RESPONSE/OBJECTIONS: *Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter.*

INTERROGATORY NO. 31: When did NAT first approach Free Conferencing to enter into a contract with NAT?

RESPONSE/OBJECTIONS: *Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter.*

INTERROGATORY NO. 32: When did NAT open its stand-alone Internet Library and Training Facility?

RESPONSE/OBJECTIONS: *Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in*

this Certificate for Authority matter.

INTERROGATORY NO. 33: If NAT's revenues do not exceed expenses, where will NAT obtain the necessary resources to continue to provide high quality telecommunication services to its customers?

RESPONSE/OBJECTIONS: *Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter. Without waiving said objections, NAT maintains that its revenues will exceed expenses. Also, following the Federal Communications Commission's recent USF/ICC Order, and consistent with this Order, more IXCs now recognize their legal duty to pay these tariffs and are doing so.*

INTERROGATORY NO. 34: Please provide all Business Plans you have prepared for the South Dakota market.

RESPONSE/OBJECTIONS: *Subject to and notwithstanding the aforementioned general objections, such information constitutes proprietary and trade secret information and is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter.*

INTERROGATORY NO. 35: NAT is 25% owned by Native American Telecom Enterprise, LLC. Please describe in detail the ownership and business activities of NAT Enterprise.

RESPONSE/OBJECTIONS: *Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter. Without waiving said objections, Native American Telecom Enterprise, LLC ("NATE") is owned by Tom Reiman and Gene DeJordy and is engaged in bringing telecommunications services to remote areas, including Indian reservations.*

INTERROGATORY NO. 36: Please describe and identify, in detail, all cash transactions and payments from NAT to NAT Enterprise in 2010 and 2011. This should include, but not limited to, professional or consulting fees, interest payments, shareholder distributions, and percent of gross revenues per Section 6.06 of the Joint Venture Agreement.

RESPONSE/OBJECTIONS: *Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor*

reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter.

INTERROGATORY NO. 37: NAT is 24% owned by Wide Voice Communications, Inc. Please describe in detail the ownership and business activities of Wide Voice.

RESPONSE/OBJECTIONS: *Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter. Without waiving said objections, Wide Voice Communications, Inc. provides engineering and technical expertise to NAT.*

INTERROGATORY NO. 38: Please describe and identify, in detail, all cash transactions and payments from NAT to Wide Voice in 2010 and 2011. This should include, but not limited to, professional or consulting fees, interest payment, shareholder distributions, and percent of gross revenues per Section 6.06 of the Joint Venture Agreement.

RESPONSE/OBJECTIONS: *Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor*

reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter.

INTERROGATORY NO. 39: As of year-end 2010 and 2011, please provide the number of:

- (a) Retail residential customers,
- (b) Retail traditional business customers (i.e., business customers with a physical presence in your service territory other than a NAT premises, with actual employees at that location,
- (c) Conference calling companies (e.g., Free Conference Call), and
- (d) Any other customers.

RESPONSE/OBJECTIONS: *Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter. Without waiving said objections, Sprint has also already been provided with this information.*

INTERROGATORY NO. 40: As of year-end 2010 and 2011, please provide the number of:

- (a) Retail residential access lines,

(b) Retail traditional business access lines (i.e., business customers with a physical presence in your service territory other than a NAT premises, with actual employees at that location.

(c) Conference calling companies access lines (e.g., Free Conference Call), and

(d) Any other access lines.

RESPONSE/OBJECTIONS: *Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter.*

INTERROGATORY NO. 41: Please provide the number of NAT employees as of year-end 2010 and 2011.

RESPONSE/OBJECTIONS: *Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter.*

INTERROGATORY NO. 42: Please provide an organization chart showing all NAT employees as of year-end 2011.

RESPONSE/OBJECTIONS: *Subject to and notwithstanding the*

aforementioned general objections, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter.

INTERROGATORY NO. 43: Please provide a detailed diagram showing the call path through NAT-owned or controlled equipment for traffic terminating to any and all Conference Call Company-owned or controlled conference bridge equipment.

RESPONSE/OBJECTIONS: *Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter.*

INTERROGATORY NO. 44: Please provide a detailed diagram showing the call path through NAT-owned or controlled equipment for traffic terminating to a traditional residential or business end-user (non-Conference Call Company).

RESPONSE/OBJECTIONS: *Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in*

this Certificate for Authority matter.

REQUESTS FOR ADMISSIONS

REQUEST FOR ADMISSION NO. 1: Admit that NAT needs a certificate to serve non-tribal members, even on the Reservation.

ANSWER: *Deny*

REQUEST FOR ADMISSION NO. 2: Admit that Free Conferencing Corporation is a non-tribal member.

ANSWER: *Admit*

REQUEST FOR ADMISSION NO. 3: Admit NAT is currently providing local exchange service within the Reservation.

ANSWER: *Admit*

REQUEST FOR ADMISSION NO. 4: Admit NAT is currently offering interexchange service within the Reservation.

ANSWER: *Admit*

DOCUMENT REQUESTS

DOCUMENT REQUEST NO. 1: Provide all documentation, including general ledger journal entries or other accounting records of NAT reflecting NAT's long term liabilities to Widevoice as listed on your December 31, 2011 Balance Sheet.

RESPONSE/OBJECTIONS: *Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter.*

DOCUMENT REQUEST NO. 2: Provide any documents that evidence commitments for future financing of NAT's operations.

RESPONSE/OBJECTIONS: *Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter.*

DOCUMENT REQUEST NO. 3: Provide 2011 bank statements, general ledger and journal entries and any other financial records that identify the detail for NAT's income and expenses.

RESPONSE/OBJECTIONS: *Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter.*

DOCUMENT REQUEST NO. 4: Provide any documents (other than what was attached to the application, amended application, or responses to staff discovery requests) that were provided to Mr. Roesel.

RESPONSE/OBJECTIONS: *Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter.*

DOCUMENT REQUEST NO. 5: Produce all documents that reflect NAT's Board of Directors' minutes, meetings, and resolutions, and NAT's bylaws.

RESPONSE/OBJECTIONS: *Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter.*

DOCUMENT REQUEST NO. 6: Provide all documents reflecting NAT's contract with Free Conferencing.

RESPONSE/OBJECTIONS: *Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter.*

DOCUMENT REQUEST NO. 7: Provide all general ledger journal entries or other accounting records of NAT that support NAT's balance sheets and profit and loss statements for 2009, 2010 and 2011.

RESPONSE/OBJECTIONS: *Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter.*

DOCUMENT REQUEST NO. 8: Provide all documents reflecting NAT's loan from Widevoice.

RESPONSE/OBJECTIONS: *Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter.*

DOCUMENT REQUEST NO. 9: Please provide any cost studies or similar analyses that you have performed or had prepared on your behalf by any consultant or other third party for access services and high volume access services.

RESPONSE/OBJECTIONS: *Subject to and notwithstanding the aforementioned general objections, such information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence in this Certificate for Authority matter.*

VERIFICATION

I, *Jeff Holoubek*, state that I have first-hand knowledge of the matters set forth above and hereby verify that, to the best of my knowledge and belief, the allegations and statements contained herein are true and correct.

Dated this 9th day of March, 2012.

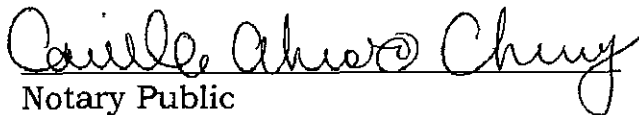


NATIVE AMERICAN TELECOM, LLC
By: Jeff Holoubek
Its: President

STATE OF CALIFORNIA)

COUNTY OF Los Angeles)

Subscribed and sworn to before
me this 9 day of March, 2012.


Notary Public

My Commission Expires: 10-8-15

(SEAL)



CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of *NATIVE AMERICAN TELECOM, LLC'S OBJECTIONS AND RESPONSES TO SPRINT COMMUNICATIONS COMPANY L.P.'S DISCOVERY REQUESTS* was delivered *via electronic mail* on this 9th day of March, 2012, to the following parties:

Service List (SDPUC TC 11-087)

/s/ Scott R. Swier
Scott R. Swier

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UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

* * * * *

Case Civ. 10-4110

SPRINT COMMUNICATIONS COMPANY, L.P.,

Plaintiff,

-vs-

THERESA MAULE, in her official capacity
as Judge of Tribal Court, CROW CREEK
SIOUX TRIBAL COURT, and
NATIVE AMERICAN TELECOM, LLC,

Defendants.

U.S. District Courthouse
Sioux Falls, SD
October 14, 2010
9:00 o'clock a.m.

* * * * *

H E A R I N G

* * * * *

BEFORE: The Honorable Karen E. Schreier

APPEARANCES:

Mr. Stanley E. Whiting
Whiting Law Office
142 East 3rd Street
Winner, SD 57580
-and-

1 Mr. Scott G. Knudson
2 Briggs & Morgan
3 2200 IDS Center
4 80 S. Eighth St.
5 Minneapolis, MN 55402-2157

6 -and-

7 Mr. Tommy Drake Tobin
8 Attorney at Law
9 PO Box 730
10 Winner, SD 57580

11 for the Plaintiff

12 Ms. Jamie L. Damon
13 Attorney at Law
14 Box 1115
15 Pierre, SD 57501

16 for Defendant Theresa Maule, in her official
17 capacity as Judge of Tribal Court

18 Ms. Judith H. Roberts
19 DeMersseman Jensen Christianson Stanton & Huffman
20 Box 1820
21 Rapid City, SD 57709

22 for Defendant Crow Creek Sioux Tribal Court

23 Mr. Scott R. Swier
24 Swier Law Office
25 Box 256
Avon, SD 57315

for Defendant Native American Telecom, LLC

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INDEX TO WITNESS

<u>Witness</u>	Direct	Cross	Redirect	Recross
Keith Williams	13	29	40	44
Thomas Reiman	45	81	116 125	123 125
Peter Lengkeek	127 142			

INDEX TO EXHIBITS

OFFERED

RECEIVED

PLAINTIFF'S EXHIBITS

Exhibit 101 (Affidavit of Keith Williams)	83	83
Exhibit 102 (Affidavit of Thomas Reiman)	104	104
Exhibit 103 (Order Granting Approval to Provide Telecommunications Service)	104	104
Exhibit 104 (Application for Certificate of Authority)	104	104
Exhibit 105 (Agreement for Interconnection and Ancillary Services)	104	104
Exhibit 106 (Joint Venture Agreement)	110	110

DEFENDANTS' EXHIBITS

Exhibit 41 (Existing WideVoice, LLC - NAT - Crow Creek Network Topology)	29	28
Exhibit 41A (Hand drawn map by Keith Williams)	27	28
Exhibits 42 - 45 (Photographs)	65	65

1 THE COURT: This is the time scheduled for a
2 hearing in the matter entitled Sprint Communications
3 Company, LP, versus Theresa Maule, Crow Creek Sioux Tribal
4 Court, and Native American Telecom, LLC.

5 Would counsel please note their appearances for
6 the record?

7 MR. WHITING: Your Honor, my name is Stan
8 Whiting. I'm here on behalf of Sprint. With me is Tom
9 Tobin from Winner, South Dakota. Bret Lawson is in-house
10 corporate counsel from Kansas City. The gentleman that
11 will be handling the matters today is Scott Knudson from
12 Minneapolis.

13 THE COURT: Thank you.

14 MR. SWIER: Good morning, Your Honor. Scott
15 Swier. I represent Native American Telecom in this matter.

16 MS. ROBERTS: Good morning, Your Honor. Judith
17 Roberts. I represent Crow Creek Tribal Council, and in
18 extension of them the Utility Authority and the Tribal
19 Court.

20 MS. DAMON: Your Honor, my name is Jamie Damon.
21 I represent Theresa Maule, in her official capacity as
22 Judge of the Tribal Court.

23 THE COURT: Thank you. First I wanted to take up
24 the motion filed by Theresa Maule to dismiss the claim
25 against her, because she no longer serves as a Tribal Court

1 Judge. Mr. Knudson, do you have any objection to that?

2 MR. KNUDSON: No, we have no objection, because
3 we are only suing the Tribal Judge in his or her official
4 capacity. If Ms. Maule is no longer the Judge of Tribal
5 Court, it wouldn't make sense to keep her in the case.

6 On the other hand, in order for us to obtain the
7 relief we are requesting, we need to maintain somebody in
8 the capacity as Tribal Judge in order for the injunction to
9 lie.

10 There was a hearing yesterday before B.J. Jones from
11 North Dakota whom apparently the Tribal Council appointed
12 to serve as the substitute for Ms. Maule, but I am informed
13 that his capacity to serve as Tribal Judge is yet in
14 question. Perhaps you could address us, Miss Damon.

15 THE COURT: Miss Roberts?

16 MS. ROBERTS: Your Honor, what the Tribal Council
17 did is appoint B.J. Jones as a Special Judge just for this
18 case. He has not been hired as the Tribal Judge. But
19 because of the questions of conflicts and just to handle
20 this one matter, the Tribal Council did appoint a Special
21 Judge from off the Reservation.

22 THE COURT: So does the -- do any of the
23 Defendants have any objection to the substitution of
24 B.J. Jones for Theresa Maule?

25 MS. DAMON: The only thing I would have to say

1 about it is there's been a difference in the funding. I
2 think one of the things the Tribe and Northern Plains Court
3 of Appeals needs to determine is who is actually doing the
4 funding.

5 The reason why I'm here, separate on behalf of
6 Theresa, is because there's been -- previously under 638
7 Contract the tribe no longer had control or authority over
8 the Court, so Northern Plains Court of Appeals was asked to
9 step in and run the Court system. They have previously
10 been paying the Clerk and the Court staff, including the
11 Judge.

12 So I think that's the only confusing thing is Northern
13 Plains, I guess I'd like to know if the Sioux Tribal Court,
14 which is represented by Judith Roberts, if they are
15 planning on representing whoever would step in.

16 MS. ROBERTS: I believe, Your Honor, that much of
17 that is irrelevant of today. What happened in the past as
18 far as the contract with the BIA and the funding and who
19 was running the Court, that has been changed. That funding
20 is no longer in place. The BIA is very aware of it. The
21 Tribe is taking full control through resolution and
22 notification through the BIA that they are running the
23 Court. It's a natural progression, a yearly funding
24 mechanism that's been processed through the BIA and
25 Northern Plains. That no longer exists. That's

1 intertribal workings. It's nothing unusual.

2 THE COURT: Miss Roberts, I think the only issue
3 I am concerned about is if B.J. Jones is substituted for
4 Theresa Maule, are you then representing B.J. Jones and the
5 Crow Creek Sioux Tribal Court?

6 MS. ROBERTS: Yes, Your Honor.

7 THE COURT: Then Miss Damon can be excused.

8 MS. ROBERTS: Yes.

9 THE COURT: Miss Damon, with that understanding,
10 do you have any objection to B.J. Jones being substituted
11 for Theresa Maule?

12 MS. DAMON: No, Your Honor.

13 THE COURT: Miss Roberts, do you have any
14 objection to B.J. Jones being substituting for Theresa
15 Maule?

16 MS. ROBERTS: Well, only in the aspect that he is
17 not a Tribal Judge of Crow Creek. He has been specially
18 appointed. This happens on many Reservations. He is only
19 in this one particular case.

20 THE COURT: So if the caption read, "B.J. Jones,
21 in his official capacity as Special Judge of the Tribal
22 Court," if it reflects that, do you have any objection?

23 MS. ROBERTS: No, Your Honor.

24 THE COURT: Mr. Swier, any objection?

25 MR. SWIER: No, Your Honor.

1 THE COURT: Then I'm going to grant the Motion to
2 Dismiss Theresa Maule. The Plaintiffs made a motion to
3 substitute B.J. Jones, because he is the newly appointed
4 Special Judge for this case. So I'm going to grant the
5 Plaintiff's motion to substitute B.J. Jones, in his
6 official capacity as Special Judge of Tribal Court.

7 Miss Damon, you are excused then. Thank you.

8 (Miss Damon left the Courtroom)

9 THE COURT: Then that takes us to the main
10 motions today, which is a Motion for Preliminary Injunction
11 and a Motion for Stay. I'll have the Plaintiffs proceed
12 first on their Motion for Preliminary Injunction. Both of
13 the issues kind of intertwine, but I'll have the Plaintiffs
14 go first.

15 MR. SWIER: Your Honor, if I may?

16 THE COURT: You may.

17 MR. SWIER: In our response to the Preliminary
18 Injunction Motion, we did touch upon the Tribal exhaustion
19 issue. However, if the Court looks, there was a separate
20 brief filed by Sprint which specifically opposed our Motion
21 to Stay. That was Document I believe 34 was their brief.
22 That was filed -- our reply brief in that is actually due
23 next week, our 14 days. Even though my brief in opposition
24 of the Preliminary Injunction Motion encompasses that
25 Tribal exhaustion issue, I do think it's fair I be given an

1 opportunity before the Court would make a ruling on the
2 Tribal exhaustion to complete my reply brief, which again
3 would be due early next week. Some of the issues that have
4 been brought up I thought were not appropriate to put in
5 the preliminary injunction opposition brief, but I would
6 like the opportunity to do a standard reply to their
7 specific Tribal exhaustion brief.

8 THE COURT: I will allow you to do that.

9 MR. KNUDSON: Your Honor, I would think in the
10 context of allowing him to file a reply brief, that Sprint
11 -- let me restate it. We should also be entitled to reply
12 to the papers they filed in response for a Motion for a
13 Preliminary Injunction, which we received only yesterday
14 morning.

15 THE COURT: You can do that, too. Do you have
16 any evidence you are presenting?

17 MR. KNUDSON: I submitted a written record which
18 I thought was comprehensive. I have no idea what he
19 intends to present by way of live testimony. On that
20 basis, I feel I'm being prejudiced by the fact he brings in
21 witnesses at the last minute, without identifying who they
22 are or what the subject matter of their testimony would be.

23 THE COURT: This was scheduled as an evidentiary
24 hearing. If any party wanted to produce evidence, they
25 can. So I'll start out with any evidence. You said you

1 don't have any evidence to present.

2 MR. KNUDSON: Well, the evidence I have submitted
3 as part of my moving papers would be the Affidavit of Amy
4 Clouser, which I think is competent evidence, as regards to
5 why it would be appropriate to proceed in this case in
6 Federal Court and to preclude the Tribal Court from
7 addressing the complaint that NAT has filed there.

8 Also, with my Affidavit, I submitted a number of
9 documents that also support Sprint's Motion for Preliminary
10 Injunction. I think on that basis we have an adequate
11 factual record for this Court to make a ruling with respect
12 to their request for exhaustion and our request for
13 preliminary injunction enjoining the Tribal Court.

14 I think their live testimony is cumulative of the
15 papers they have submitted with their motion papers. So I
16 think the Court should bear that in mind that this live
17 testimony may be duplicative of what has already been
18 submitted in writing. I would object to it on the grounds
19 of it being cumulative.

20 THE COURT: Well, at this point I haven't heard
21 what the substance of their live testimony is, so I can't
22 determine if it's duplicative or not. So your objection is
23 noted, but it's denied. If you think something is
24 cumulative as we go along, you can renew your objection at
25 that time.

1 MR. KNUDSON: Thank you, Your Honor.

2 THE COURT: Thank you. Why don't I hear all the
3 evidence first before I hear argument, so you can put your
4 argument into context with the evidence. So if you don't
5 have any evidence to present, I'll ask the Defendants if
6 they have any evidence. Mr. Swier?

7 MR. SWIER: Native American Telecom will have two
8 witnesses this morning for this evidentiary hearing.

9 MR. KNUDSON: Can I have a proffer of what they
10 would testify to?

11 THE COURT: Who are the witnesses?

12 MR. SWIER: First one is Keith Williams.
13 Mr. Williams is an engineer. His Affidavit was placed in
14 the record. However, this is an evidentiary hearing, and I
15 would like him to offer some live testimony so that the
16 Court can better understand this very complex issue of
17 telecommunications in this area. We think that would be
18 much more helpful than just simply relying upon the written
19 submission.

20 Our second witness, Your Honor, would be Tom Reiman.
21 Tom Reiman is a minority owner of Defendant NAT. He also
22 submitted an Affidavit, but, again, there are some areas
23 that we think provide the Court with a better factual
24 record when it can be presented live, as opposed to the
25 cold written record. Of course I do believe we have that

1 ability. The Court has set this as an evidentiary hearing.
2 That's why we are here today.

3 MS. ROBERTS: Your Honor, depending on the
4 testimony that is given, Crow Creek Tribe may have one
5 witness, and that would be Peter Lengkeek, a Council
6 member.

7 THE COURT: Mr. Knudson?

8 MR. KNUDSON: The last witness, I don't even know
9 what the substance of the testimony would be. This person
10 has never surfaced in name in any record or document that
11 I've seen so far. I renew my objection, but nonetheless,
12 the Court has set aside this morning for this hearing, if I
13 understand correctly?

14 THE COURT: You can have as much time as you
15 need. I have other things scheduled this afternoon, but I
16 can move them, if we need longer than this morning.

17 MR. KNUDSON: I'm trying to determine the
18 allocation of time, in terms of how much time would be left
19 over for argument. I think it comes together when you hear
20 the argument presented.

21 THE COURT: The amount of time you need is what
22 you have. Mr. Swier, you may proceed.

23 MR. SWIER: Your Honor, Defendant Native American
24 Telecom would call Keith Williams. Your Honor, we would
25 like to use the easel, if possible. What would be the most

1 convenient way for us to set it up? Should we direct it
2 toward the Court, or how would you like us to do that?

3 THE COURT: If you want me to see what's on
4 there, it would help if you would turn it so I can see it.

5 MR. SWIER: May I proceed?

6 THE COURT: You may.

7 KEITH WILLIAMS,
8 called as a witness, being first duly sworn, testified as
9 follows:

10 MR. KNUDSON: If we could move the easel back
11 towards the screen, both the Court and counsel could see
12 what is on the screen.

13 THE COURT: Another option is we have an overhead
14 camera. If you wanted to write something on a sheet of
15 paper there, I can see it on my screen here, and the
16 attorneys can see it on their screens. Unless you are
17 really tied to using the easel.

18 MR. SWIER: As long as everybody can see it,
19 that's all I care about, Your Honor.

20 DIRECT EXAMINATION

21 BY MR. SWIER:

22 Q. Keith, would you please introduce yourself to the
23 Court.

24 A. My name is Keith Williams. I'm a network engineer
25 with WideVoice Communications. I've been doing

1 telecommunications and IP networking for over 10 years.

2 Q. You are an employee of WideVoice Communications. Is
3 that right?

4 A. That's correct.

5 Q. Tell us about your experience in dealing with
6 telecommunications networks that are similar to what is
7 found on the Crow Creek Reservation.

8 A. I've worked for a couple CLECs, which are competitive
9 local exchange carriers, phone companies, doing voiceover
10 IP, in scenarios not unlike what is going on at Native
11 American Telecom.

12 Q. Real briefly, tell you what your duties are for
13 WideVoice. What do you do everyday when you get up?

14 A. Network design, implementation, troubleshooting.

15 Q. Keith, are you familiar with the network that is owned
16 on the Crow Creek Reservation by Native American Telecom?

17 A. I am.

18 MR. SWIER: At this time I do have a sheet of
19 paper. Could I approach and give this to Mr. Williams, and
20 we can put it on the screen so everyone can see it?

21 THE COURT: Sure.

22 BY MR. SWIER:

23 Q. Keith, you indicated to the Judge before you are
24 familiar with the system that is used by NAT in this case.
25 Is that right?

1 A. That's correct.

2 MR. SWIER: With the Court's permission, could
3 the witness approach the easel?

4 THE COURT: It did just zoom in now, if you want
5 to try it.

6 BY MR. SWIER:

7 Q. Keith, I'd like you to explain to the Court how this
8 complex system that we are all arguing about works. Would
9 you take us through a call simply from say Fargo, North
10 Dakota, and how that routes and ultimately gets to the
11 Reservation at Ft. Thompson?

12 A. Okay. I'll start by drawing just the United States,
13 or something similar to.

14 Q. Keith, could you turn that so -- there we go. Okay.
15 You've drawn a picture of the United States. Mark for the
16 Court where North Dakota would be, and where would South
17 Dakota be?

18 A. (Witness indicating).

19 Q. Mark where the Crow Creek Reservation would be,
20 approximately, in South Dakota.

21 A. (Witness indicating).

22 Q. Keith, let's say my grandmother lives in Fargo, and
23 she wants to make a call from Fargo to the Crow Creek
24 Reservation to NAT's facility there.

25 A. Okay.

1 Q. Take us through the first step that grandma does.

2 A. The first step is obviously she would pick up her
3 telephone and would be given dial tone by the local
4 exchange carrier, the LEC.

5 Q. That would be the LEC, the local exchange carrier in
6 Fargo?

7 A. Correct. Depending on the digits she dialed, for
8 instance, if she wanted to dial someone on the Crow Creek
9 Reservation, it would be 605-477. 605 is the area code or
10 NPA. That's how you discern what area of the country you
11 are calling.

12 Q. The 605 area code is obviously all of South Dakota.

13 A. All of South Dakota, correct. They only have one area
14 code. 477 designates Ft. Thompson, Crow Creek. So 477
15 anything would go to Ft. Thompson.

16 Q. Grandma picks up the phone and dials 605 for the area
17 code in South Dakota. 477 is the prefix for Ft. Thompson.
18 Correct?

19 A. Correct.

20 Q. Let's say it's 477-1111, for example. That then would
21 be the number grandma would be using to call her friend in
22 Crow Creek.

23 A. Ft. Thompson.

24 Q. Okay. What happens next after she picks up the phone
25 and dials?

1 A. Well, the switch in Fargo would then go to the LERG,
2 which is the local exchange routing guide. It's an
3 industry standard database that lists switch identifiers,
4 the NPAs NXXs they serve and how to get to them.

5 Q. So the LERG, what does that stand for again, just so
6 we're straight?

7 A. Local exchange routing guide.

8 Q. Tell me if I'm wrong. That's a database in the
9 industry that shows how grandma's call would initially get
10 routed from Fargo to Ft. Thompson.

11 A. Sure. I mean ultimately TeleCourier manages that
12 database and keeps track of all the switches in North
13 America and the rate centers and phone numbers that would
14 be served by those switches.

15 Q. So grandma picks up the phone. She dials her
16 Ft. Thompson number. It's then -- that's Step No. 1. Then
17 what happens? You go to the LERG.

18 A. Yes. So the LERG would tell you in this case to get
19 to Ft. Thompson, you would go to SDN.

20 Q. What does SDN stand for?

21 A. South Dakota Network.

22 Q. Where is that located?

23 A. Sioux Falls.

24 Q. Is it safe to say -- let's think about this as a road
25 going somewhere. Is that our first leg on the road?

1 A. It would be your first leg into getting to 605-477.

2 Yes. You have to go to South Dakota Network to get to
3 there.

4 Q. When grandma's phone call travels from Fargo to the
5 South Dakota Network on the way to Ft. Thompson, what is
6 the next step? Where does that call go?

7 A. Once the South Dakota Network gets it, they would see
8 it's destined for Ft. Thompson, in which point they would
9 route the call to WideVoice, who has a switch in
10 Los Angeles.

11 Q. That's what I want to talk about. Why if the call is
12 coming from grandma in Fargo down to SDN in Sioux Falls
13 with the ultimate termination stop being Ft. Thompson, why
14 is it going from SDN to WideVoice's facility in
15 Los Angeles?

16 A. Native American Telecom does not own their own
17 telephone infrastructure, per se, switching equipment in
18 Ft. Thompson.

19 Q. So if anyone is going to make a call to
20 Ft. Thompson, be it from Fargo, Canada, wherever, you never
21 have that interconnection directly from SDN to
22 Ft. Thompson. It just doesn't exist. Right?

23 A. Correct.

24 Q. So we go from Fargo, the call travels to Sioux Falls,
25 because there is no facility in Ft. Thompson, it goes to

1 WideVoice's facility in Los Angeles.

2 A. That's correct.

3 Q. What leg of the route then would SDN to Los Angeles
4 be?

5 A. I would say that's 2.

6 Q. That's the second place. When grandma's call then
7 gets routed to WideVoice's high-tech facility in Los
8 Angeles, then what happens?

9 A. At that point that is the end of what would be the
10 traditional telephone call using the TDM PSTN network?

11 Q. The old network.

12 A. Correct. At that point WideVoice takes that call and
13 routes it to Ft. Thompson via IP.

14 Q. Again, I don't think any of us are technical gurus.
15 Explain to the Judge what IP is.

16 A. IP would be Internet protocol, basically using the
17 Internet, as opposed to the public switch telephone
18 network.

19 Q. Is that done based on the technology that's now
20 available to both WideVoice and what's on the Reservation?

21 A. Yes. I mean ultimately most new telephone,
22 telecommunication deployments would be using IP at this
23 point.

24 Q. So then from the WideVoice facility in Los Angeles to
25 Ft. Thompson, what leg of the journey would that be?

1 A. I would say that's 3.

2 Q. Okay. So grandma's call goes from Fargo to SDN in
3 Sioux Falls to Los Angeles and ultimately ends in
4 Ft. Thompson.

5 A. Correct.

6 Q. Explain then the technology that is present at
7 Ft. Thompson that makes this whole thing work.

8 A. In Ft. Thompson obviously they have a router which
9 terminates that IP leg, at which point, depending on where
10 grandma is at within the Reservation, they also have a
11 wireless network out there, WiMax, that would direct where
12 to send that phone call.

13 Q. Is that any different than any other system in the
14 country?

15 MR. KNUDSON: Objection. Foundation.

16 THE COURT: Overruled. You may answer.

17 A. Not at its core, no. It's pretty traditional in that
18 sense. WiMax is a little different, but this is what would
19 be considered the last mile. It's how you reach the end
20 users from the local rate center.

21 Q. Again, one of the keys here, tell me if I'm wrong, is
22 that there's simply not the infrastructure equipment for
23 any call to go from SDN directly to the Ft. Thompson-Crow
24 Creek Reservation.

25 A. Correct. That switching equipment is expensive. I

1 mean ultimately Midstate, who serves Ft. Thompson as the
2 traditional LEC in that area, their switching equipment is
3 in Kimball. It's not in Ft. Thompson, per se, either.

4 Q. Explain to the Court the kind of high-tech technology
5 that NAT has invested out on the Crow Creek Reservation?
6 What is out there? What makes this thing work?

7 A. Again, they've got a network facility out there that
8 obviously terminates these IP connections, allows the
9 wireless WiMax connection to customers throughout the
10 Reservation, at which point they would deploy within the
11 end user locations, ATAs, which are basically digital --
12 analog-to-digital phone converters, or digital-to-analog
13 phone converters, but allows you to turn that IP signal
14 into a traditional phone signal. They also within that
15 network facility house application services, so they have
16 servers, and they are offering services, as well.

17 Q. Some pretty serious infrastructure out there?

18 A. Yes.

19 Q. Just so I understand this, grandma picks up the phone
20 in Fargo. She calls her granddaughter in Ft. Thompson.

21 Dials 605-477-1111. Grandma's call goes to Sioux Falls to
22 SDN. Because there's no infrastructure from SDN in
23 Sioux Falls to Ft. Thompson, the call then goes from
24 Sioux Falls to WideVoice's technology in Los Angeles.

25 A. Correct, and this leg, too, is over dedicated

1 facilities. I mean WideVoice is paying for dedicated
2 services back to SDN. So the trunk side of this call is on
3 private line, leased line facilities.

4 Q. So the call travels down on that private leased line
5 from Sioux Falls to Los Angeles. WideVoice's technology
6 takes grandma's call and ships it to the facilities on the
7 Reservation in Ft. Thompson.

8 A. That is correct.

9 Q. Keith, let's say when grandma picks up the phone in
10 Fargo, her local exchange is let's just say AT&T. Would
11 the process be any different if AT&T were that provider?

12 A. No. I mean the local exchange carrier, as well as the
13 IXC, who would be the interexchange carrier, or the
14 long-distance carrier, it wouldn't matter. Again, the LERG
15 would tell you if you are dialing Ft. Thompson, regardless
16 of where you are coming from, you would go to SDN, and then
17 to the Ft. Thompson rate center.

18 Q. So AT&T would use the same routing system, same
19 dedicated line system as what is being used here. Is that
20 right?

21 A. That is correct.

22 Q. How about Sprint instead of AT&T? Let's put Sprint in
23 that situation. Would that be the same?

24 A. Two and three for sure are always the same. One, you
25 could be anywhere. The end is always going to look the

1 same.

2 Q. But ultimately grandma's call from Fargo gets to
3 granddaughter in Ft. Thompson on the Reservation because of
4 the facility that's been built on the Reservation?

5 A. That is correct.

6 Q. Keith, we're talking in this case, also, about
7 conference calling. We have seen how a single call from a
8 grandma to a granddaughter works.

9 Do this. Put a point down in Florida, put a point in
10 Texas, and put a point in New York. Let's say those three
11 points are involved in a business dealing, and instead of
12 traveling to wherever, they want to conduct their business
13 meeting via a conference call.

14 A. Okay.

15 Q. Explain to the Court then how this conference calling
16 with these three companies works.

17 A. In that case, I mean depending on the number you dial
18 for that conference call, that still would decide where the
19 call routes. In this case if they are dialing 605-477-1112
20 is their conference bridge --

21 Q. Then all three of them would use the same number?

22 A. They would all dial the same number. That's correct.
23 So when they dial that number, the routing again would stay
24 the same. In the end you would end up going to South
25 Dakota Network, who would tell you to route that call to

1 Ft. Thompson. To get there, it would go via WideVoice's
2 dedicated facilities to Los Angeles, at which point we
3 would redirect the call back to Ft. Thompson where they
4 house and own their own conferencing equipment.

5 Q. If we have three people on this conference call, is
6 the way that that call is routed, ultimately terminating
7 and ending in Ft. Thompson, any different than grandma's
8 call to granddaughter on the Reservation?

9 A. It is not.

10 Q. It's the exact same?

11 A. Yes.

12 Q. Let me ask you this. What if Sprint were the company
13 that -- let's say they were using Sprint's calling
14 conference services. All right? How does that change this
15 route?

16 A. In that case you would need to know where the Sprint
17 local was. But if Sprint were in Florida, say, I mean it
18 would end up the same. All these people would call. It
19 would go to the LERG database, which would say send that
20 call to whatever that NPA NXX was, and that's where that
21 call would terminate.

22 Q. So that route is the same, whether it's Sprint, AT&T,
23 or a conference calling company.

24 A. Correct. I mean in the end, depending on the number
25 you dial, the call will always go to whatever the rate

1 center is for that NPA access.

2 Q. But using the 605-477 prefix, your conference call or
3 grandma's call ends because of the high-tech equipment at
4 Ft. Thompson.

5 A. Any call calling 605-477 will end in Ft. Thompson. It
6 will be go to the facilities on the Native American Telecom
7 Reservation.

8 Q. The facilities in Ft. Thompson, you've been there
9 before?

10 A. I have not.

11 Q. Are you aware if those facilities are actually located
12 on the Reservation?

13 MR. KNUDSON: Objection. Foundation.

14 THE COURT: Sustained. Lack of foundation.

15 MR. SWIER: May I have a moment, Your Honor?

16 THE COURT: You may.

17 MR. SWIER: Your Honor, at this time I've marked
18 Defendant's Exhibit 41. We have previously filed 40
19 exhibits with the Court. I want to keep the numbering
20 consistent, if I could. May I approach?

21 THE COURT: You may. Do you have a copy for
22 counsel and for me?

23 MR. SWIER: Yes.

24 BY MR. SWIER:

25 Q. Keith, I'm showing you what's been marked Exhibit 41.

1 THE COURT: And one for the Plaintiff.

2 Q. Personally I found this confusing. I like that a lot
3 better what you did. Defendant's Exhibit 41, is that
4 simply a little bit more detailed schematic of what you
5 just showed us?

6 A. Certainly. It still shows the rate centers, the
7 switch identifiers --

8 THE COURT: Just a minute. He's making an
9 objection.

10 MR. KNUDSON: Objection. Foundation. Who
11 prepared this document? How was it prepared? Why wasn't
12 it provided earlier?

13 THE COURT: He hasn't offered it yet, so he may
14 lay foundation through the questions. So the objection is
15 overruled.

16 BY MR. SWIER:

17 Q. Can you explain to the Court what this document is,
18 please.

19 A. It's a routing diagram explaining how the call
20 scenario we're talking about would route based on the
21 WideVoice network.

22 Q. Who prepared this document?

23 A. I did.

24 Q. In a nutshell again, explain to the Court briefly what
25 this shows.

1 A. It shows basically the same thing we were just showing
2 within the nationwide, but it gets a little more detailed.
3 So, again, you have Sprint's switch here, or pretty much
4 any switch in the world, who is trying to route to
5 Ft. Thompson. So this would have been the switch
6 identifier for there. To get to there, you would have to
7 go to South Dakota Networks.

8 Once you get there, again, they would say to send that
9 call to WideVoice via their switch identifier, which is the
10 identifier here. At which point we send that back via an
11 IP network to SDN and on to the Reservation, where that
12 call would go to the WiMax we talked about and to the end
13 user, or to their application services there within their
14 facilities.

15 Q. So Exhibit 41 is simply a more detailed explanation of
16 what you did previously?

17 A. Yes.

18 MR. SWIER: Your Honor, at this time I would like
19 to have Mr. Williams' original drawing of the United States
20 marked Exhibit 41A, if I could, please.

21 THE COURT: It may be marked.

22 MR. SWIER: I would also move to have Exhibits
23 41A, which is Mr. Williams' drawing, and Exhibit 41, the
24 more computerized-generated schematic, admitted into
25 evidence.

1 THE COURT: Any objection?

2 MR. KNUDSON: No objection.

3 THE COURT: 41 and 41A are both received.

4 MR. SWIER: At this time I don't have anymore
5 questions for Mr. Williams. Thank you.

6 THE COURT: Thank you. Miss Roberts, any
7 questions?

8 MS. ROBERTS: No, Your Honor.

9 THE COURT: Mr. Knudson?

10 MR. KNUDSON: Yes, Your Honor. I need the
11 Court's indulgence. I only have one copy of Mr. Williams'
12 Affidavit, and it's marked up. I may need to show him his
13 Affidavit. I believe probably Mr. Swier has a copy that is
14 clean.

15 THE COURT: Mr. Swier?

16 MR. SWIER: I do have a copy. Could we make a
17 copy, and let him use that so I can keep my clean copy?

18 THE COURT: Sure. If you would give it to
19 Nicole.

20 MR. KNUDSON: Your Honor, I have an unsigned
21 version. I would prefer to use a signed copy.

22 THE WITNESS: I have a signed copy where I was
23 sitting.

24 MR. SWIER: I have one right here, Your Honor.

25 MR. KNUDSON: How are we marking exhibits for the

1 Plaintiff then?

2 THE COURT: The Clerk will mark it for you.

3 MR. KNUDSON: We'll solve that when we get to it.

4 CROSS-EXAMINATION

5 BY MR. KNUDSON:

6 Q. So, Mr. Williams, Scott Knudson. I represent Sprint
7 Communications, the Plaintiff in this action. I believe
8 you testified that you hadn't been to Ft. Thompson yet. Is
9 that correct?

10 A. That is correct.

11 Q. Is this your first time to South Dakota?

12 A. It is not.

13 Q. Now, I'd like you to turn your attention to this
14 schematic. I believe it's still showing up on the screen.
15 Do you have it in front of you?

16 A. Yes.

17 Q. What you have described then is how I believe you said
18 all calls that could end up at the Ft. Thompson 477
19 exchange are routed. Is that correct?

20 A. That is correct.

21 Q. If I understand your testimony correctly, from the
22 schematic, all the traffic that ends up at the Ft. Thompson
23 477 exchange goes first to this switch owned by South
24 Dakota Network. Is that correct?

25 A. Correct.

1 Q. And that's based on the LERG data you've analyzed.

2 Correct?

3 A. Yes.

4 Q. You believe the LERG data to be something you can rely
5 on?

6 A. I would say so.

7 Q. And if I follow this schematic correctly, then all
8 this traffic that is intended for the Ft. Thompson 477
9 exchange goes out to WideVoice in Los Angeles. Correct?

10 A. Yes.

11 Q. You've reviewed the Amy Clouser Affidavit. Haven't
12 you?

13 A. Yes.

14 Q. You agree with her analysis that is where the traffic
15 goes?

16 A. Yes.

17 Q. There is a switch owned by WideVoice in Los Angeles.
18 Correct?

19 A. Yes.

20 Q. You receive traffic from other areas of the country,
21 as well, traffic destined for 477. Correct?

22 A. Correct.

23 Q. In fact, let me ask you this. Freeconferencecall.com,
24 is that a company owned by WideVoice?

25 A. It is not.

1 Q. Is it reverse? Freeconferencecall.com owns WideVoice?

2 A. I don't know that. There's definitely a business
3 dealing there.

4 Q. Then if I understand correctly then, you switched all
5 of this traffic intended back to Ft. Thompson 477 exchange
6 from Los Angeles back, and if I follow the schematic
7 correctly, it ends up back at a router owned by South
8 Dakota Network?

9 A. Yes. Basically this would be the demarc or the edge
10 of the equipment today owned by WideVoice. So, yes, it
11 would end up back at an SDN router here in South Dakota.

12 Q. From the Sioux Falls switch owned by South Dakota
13 Network, it goes over the fiberoptic South Dakota Network
14 phones to Ft. Thompson. Isn't that true?

15 A. Yes.

16 Q. Now, you have this little cloud between a router in
17 Los Angeles and a router in Sioux Falls. It says ATT IP
18 Network. Can you explain what that is?

19 A. Sure. The internet is obviously -- I mean ultimately
20 incumbents own the networks, so everyone is paying access
21 to get on the network. In this case WideVoice pays AT&T
22 for dedicated facilities to access the Internet in
23 Los Angeles.

24 Q. So the calls that go from your WideVoice switch in
25 Los Angeles back to the South Dakota Network switch in

1 Sioux Falls are an Internet protocol?

2 A. Correct. They are using the public Internet.

3 Q. You use this term "voiceover Internet protocol." Is
4 that right?

5 A. Yes.

6 Q. Is that the kind of signal that's going from the
7 switch in Los Angeles to the South Dakota Network?

8 A. It is.

9 Q. I want to clarify then what you call the traditional
10 service, when grandma was calling her granddaughter. The
11 traditional service ends at the South Dakota Network switch
12 in Sioux Falls. Correct?

13 A. It does not. It actually ends at the WideVoice switch
14 in Los Angeles.

15 Q. I see. The traditional, that would be the first leg.
16 The second leg, that's a traditional.

17 A. Correct. That would be using traditional TDM
18 facilities.

19 Q. Would we call that the legacy network?

20 A. Yes. That would be the PSTN.

21 Q. Now, you indicated that Native American Telecom is
22 using WiMax technology. Are you familiar with that
23 technology?

24 A. I am somewhat, yes.

25 Q. That's a radio-based technology. Correct?

1 A. Yes.

2 Q. Do you understand that Native American Telecom, NAT,
3 for short, has gone to the FCC to get a radio license to
4 operate its WiMax facility?

5 A. I believe you would have to.

6 Q. Do you know the range of that WiMax signal on
7 Ft. Thompson?

8 A. I don't, but traditionally it's 20 miles or something,
9 give or take, I believe.

10 Q. So if it's located in Ft. Thompson, it radiates out in
11 a circle that is 20 miles in radius, so it could be 40
12 miles in diameter?

13 A. Sure, if that's correct. Again, I'm not completely
14 familiar with how far. That's the basis, yes.

15 Q. You understand the topography in South Dakota around
16 Ft. Thompson is fairly flat. Correct?

17 A. I don't know that. I would assume.

18 Q. There are no tall --

19 A. It's not the mountains.

20 Q. Nor are there any tall buildings nearby.

21 A. Not that I'm aware of.

22 Q. Let me go back to your schematic for a second. This
23 call -- let's say it's grandma's call that ultimately gets
24 on the Ft. Thompson 477 exchange. This whole process is
25 moving through interstate commerce. Isn't it?

1 A. I would guess, sure.

2 Q. So it's really an interstate call regulated by the
3 Federal Communications Commission?

4 MR. SWIER: Objection. Calls for a legal
5 conclusion.

6 THE COURT: Sustained.

7 BY MR. KNUDSON:

8 Q. Let me make sure I understand what states this call
9 gets routed through. It starts in Fargo, North Dakota,
10 according to Mr. Swier's example. Then it goes to South
11 Dakota. Right? Then from South Dakota it goes all the way
12 to Los Angeles. Now, you have to go through a number of
13 different states to get there. Correct?

14 A. It could.

15 Q. Likewise, on its way back over this dedicated Internet
16 line, it's going to travel through a number of states to
17 get back to South Dakota. Correct?

18 A. Assumably, yes.

19 Q. Then you understand that Sioux Falls, South Dakota, is
20 not located on the Ft. Thompson or the Crow Creek
21 Reservation. Don't you?

22 A. It is not located. Correct.

23 Q. Let me understand you correctly. I believe you said
24 when this call goes back to Ft. Thompson, it ends up in
25 some equipment, and then ultimately it's actually going to

1 the granddaughter in your first example. It's going
2 through some equipment. Who owns that equipment that
3 actually gets the signal to the final call to party?

4 A. Native American Telecom, as far as I know.

5 Q. Excuse me?

6 A. As far as I know, it's Native American Telecom.

7 Q. Now, this conference bridge equipment, that's
8 something a little different. Isn't it?

9 A. Different how?

10 Q. Let's ask it a different way. I think in your
11 Affidavit you said there are a hundred or so customers on
12 the Reservation on Native American Telecom.

13 A. I believe so, yes.

14 Q. In order for you to get a signal through this process
15 of your schematic to an individual resident on the
16 Reservation, they need an ATA device. Don't they?

17 A. Yes.

18 Q. That ATA device then converts that signal coming from
19 the WiMax radio to some signal that a regular old phone
20 could use. Correct?

21 A. It would do a digital-to-analog conversion, digital
22 being the IP network, analog being the traditional PSTN, so
23 yes.

24 Q. With the conference calling bridge equipment, however,
25 isn't it true you don't need that ATA unit?

1 A. Correct.

2 Q. So when we go to the hand drawing, can you put that up
3 for me? When we have the example of callers in, was it
4 New York, Florida, and Texas, they call one of these 477
5 numbers, and they can talk to each other without having to
6 use one of these ATA units. Correct?

7 A. Correct.

8 Q. In fact, a conference bridge could have more than
9 three callers on it at one time. Isn't that true?

10 A. Depending on the equipment, sure.

11 Q. Now, in order for these conference bridge numbers to
12 work then, they are a preassigned four-digit number that
13 goes 605-477, and I think in your example it was 1112.
14 Correct?

15 A. Correct.

16 Q. So if you identified, let's say, a hundred thousand
17 minutes of use to one of those four-digit numbers, like
18 1112, that would indicate it's a conference bridge call.
19 Correct?

20 A. If it was that number in this example, yes.

21 Q. Do you know how many numbers in NAT's exchange are
22 dedicated to conference calling bridges?

23 A. I do not.

24 Q. You have done no particular traffic analysis yourself
25 to see how much of NAT's traffic, that is, directed to the

1 477 exchange, is a conference calling bridge call, have
2 you?

3 A. I have not.

4 Q. Your Affidavit. Are you familiar with it, sir?

5 A. I am.

6 MR. KNUDSON: Let's mark it. May I approach?

7 THE COURT: You may.

8 MR. KNUDSON: Do you have a copy?

9 THE COURT: I do.

10 BY MR. KNUDSON:

11 Q. Mr. Williams, I'm handing you what's been marked for
12 identification as Plaintiff's Exhibit 101. Can you
13 identify that document?

14 A. Yes.

15 Q. What is it?

16 A. It's my Affidavit.

17 Q. That's your signature at the back?

18 A. It is.

19 Q. You submitted this Affidavit as part of the record in
20 this proceeding?

21 A. I did.

22 Q. Turn your attention to Paragraph 4 of your Affidavit.
23 Again, if I could direct your attention to the second
24 sentence, and if you could read it for me, please.

25 A. "NAT delivers all line side subscriber calls to

1 subscribers or subscriber equipment located on the Crow
2 Creek Reservation in Ft. Thompson, South Dakota."

3 Q. Let's go back to grandma's illustration, if you would
4 take that document out, please. I would like to see, when
5 you describe your grandma calling her granddaughter, was
6 the granddaughter the subscriber on the Reservation?

7 A. If the grandmother is calling the granddaughter, the
8 granddaughter would be the subscriber on the Reservation.

9 Q. Now, you used the term "subscriber equipment." Do you
10 see that, sir?

11 A. Yes.

12 Q. Can you explain to me what "subscriber equipment"
13 refers to in terms of this network that NAT has created?

14 A. It would be the ATA, digital-to-analog converter that
15 is allowing that IP network to go back to the traditional
16 PSTN.

17 Q. If I'm clear then, from looking at the other example
18 of these three people calling each other, 477-605-1112, the
19 conference bridge number, they are not terminating those
20 calls with this ATA equipment. Correct?

21 MR. SWIER: Objection. Asks for a legal
22 conclusion as to what "termination" is.

23 THE COURT: Overruled. You may answer.

24 A. No. In that case it would be terminating to whatever
25 their conferencing equipment is.

1 Q. So it wouldn't be subscriber equipment then. Right?

2 A. It depends on the definition of "subscriber." In this
3 case if the granddaughter was housing the conference
4 revenue, it would be the subscriber because she is the end
5 user. That's who you are calling. Right?

6 Q. Right. The granddaughter isn't housing the --

7 A. No. Instead Native American Telecom is.

8 Q. Native American Telecom is the subscriber here, if I
9 understand?

10 A. In that case, yes.

11 Q. When you refer to the next sentence, and I'll read it
12 here. "In the case of the latter, the subscriber equipment
13 is voice application equipment." Can you explain to me
14 what "voice application equipment" refers to?

15 A. I mean I would assume in this case it's some sort of
16 server that is offering a telecommunication service. I
17 mean in the end that subscriber equipment, that server,
18 would still be doing the termination of that phone call.

19 Q. So it could be in the termination of this one call to
20 any of these three people who aren't on the Reservation?

21 None of them are on the Reservation. Right?

22 A. Not in that example.

23 Q. You agree, I believe, in Paragraph 5 that the Clouser
24 trafficking analysis correctly concluded that traffic ends
25 up at the WideVoice switch in Los Angeles. Right?

1 A. Within the traditional PSTN, yes. The ultimate switch
2 identifier would be WideVoice.

3 Q. You personally have done no traffic analysis of what
4 calls going into the 477 exchange go to which numbers.
5 Have you?

6 A. What do you mean?

7 Q. You have not looked to see how many calls or how many
8 minutes of usage go to any particular number on the 477
9 exchange.

10 A. I do not know the minutes of usage for any number on
11 the 477 exchange.

12 MR. KNUDSON: No further questions, Your Honor.

13 THE COURT: Mr. Swier?

14 MR. SWIER: Thank you, Your Honor.

15 REDIRECT EXAMINATION

16 BY MR. SWIER:

17 Q. I have just a couple questions for you. You talked
18 about VoIP, V-o-I-P?

19 A. That's correct.

20 Q. Explain what VoIP is.

21 A. Voice over Internet Protocol. Again, we talked about
22 the legacy telephone network, which is how phones worked up
23 until probably the mid '90s traditionally everywhere. With
24 the advent of the Internet, VoIP protocol, which typically
25 uses another protocol on the top of that called SIP,

1 Session Initiation Protocol, which allows you to use that
2 Internet, which in this case we'll call it the new network,
3 the IT network, to carry telephone traffic the same as the
4 traditional network, but obviously it opens that network
5 and facility to allow easier access to offer those
6 services. I mean the traditional network, the LEC that
7 owned the copper --

8 Q. The LEC being the local exchange carrier?

9 A. Local exchange carrier, would be the only one who
10 could provide service, because they owned the
11 infrastructure in the ground. By allowing Internet
12 protocol to do the same thing, it allows you to reach a lot
13 more people in a lot easier manner. Typical traditional
14 telephone services also require huge amounts of equipment
15 to take up large facilities. You can service the same
16 amount of people in much less space.

17 Q. So technology is good for the consumer?

18 A. And it's good for those providing service. Real
19 estate is expensive, as are the equipment and contracts to
20 maintain it.

21 Q. Mr. Knudson asked you some questions about the SDN
22 switch in Sioux Falls. If you could look at your map
23 again, Keith, Exhibit 41A. Earlier you testified that
24 there's simply no infrastructure equipment that goes from
25 SDN in Sioux Falls to Ft. Thompson. Is that correct?

1 A. Yes.

2 Q. Explain to us what WideVoice Communications, which is
3 a minority partner of NAT, explain what WideVoice is doing
4 from an investment standpoint to try to alleviate that
5 infrastructure problem between Ft. Thompson and
6 Sioux Falls.

7 MR. KNUDSON: Objection. Outside the scope of
8 cross.

9 THE COURT: Overruled. You may answer.

10 A. Can you ask the question again?

11 Q. Sure. What is WideVoice Communication doing? What
12 kind of infrastructure are they investing in for that
13 Sioux Falls to Ft. Thompson problem we have?

14 A. One, they are offering a solution to be able to
15 deliver those phone calls to the NAT exchange at a more
16 reasonable rate than they are getting from whoever the
17 incumbent would be.

18 Q. In the future will that call from Sioux Falls not be
19 required to go to Los Angeles?

20 A. The call itself, yes, will route through SDN.
21 WideVoice is in the process of redesigning their network.
22 We have worked out agreements with SDN to actually house
23 trunking equipment within their facilities here in South
24 Dakota, at which point Leg 2 would go away, because it
25 would terminate directly within equipment in Sioux Falls,

1 and Leg 3 would go over leased-line facilities directly to
2 Ft. Thompson.

3 Q. So WideVoice is making that investment so we don't
4 have to have the Sioux Falls to Los Angeles leg?

5 A. Correct. Ultimately it saves me money or us money, as
6 WideVoice, in turn, allowing us to offer a more competitive
7 rate.

8 Q. Keith, the high-tech conference calling equipment in
9 Ft. Thompson, that is located within the exterior
10 boundaries of the Reservation, according to your knowledge?

11 A. As far as I know, yes.

12 Q. In fact, to the best of your knowledge, is NAT, Native
13 American Telecom, a majority tribally owned company?

14 MR. KNUDSON: Objection. Calls for a legal
15 conclusion. Foundation.

16 THE COURT: Sustained based on lack of
17 foundation.

18 BY MR. SWIER:

19 Q. Keith, the service in this case, the services that are
20 being provided, the equipment that allows the services to
21 be provided, that's located on the Reservation. Isn't it?

22 MR. KNUDSON: Objection. Foundation.

23 A. As far as I know, yes.

24 THE COURT: Overruled.

25 Q. The equipment is located on the Reservation?

1 A. It is located on the Ft. Thompson facility.

2 MR. SWIER: I don't believe I have any other
3 questions. Thank you, Your Honor.

4 THE COURT: Mr. Knudson?

5 MR. KNUDSON: Thank you, Your Honor.

6 RE CROSS-EXAMINATION

7 BY MR. KNUDSON:

8 Q. So if I understand Mr. Swier's redirect correctly,
9 WideVoice is providing all of this equipment to this
10 network that's going to be operated by NAT. Correct?

11 A. No. WideVoice is providing our own facilities for
12 this transport. Again, Native American Telecom owns
13 whatever equipment they have in the Ft. Thompson facility.

14 Q. Okay. So even if WideVoice goes forward with this
15 plan to put another switch in South Dakota so we don't have
16 this long -- I take it your testimony is that Leg No. 2
17 would go away?

18 A. The TDM leg would go away. Obviously -- not
19 obviously, but within this, the call control for our
20 switching will still be in Los Angeles. From the
21 traditional PSTN standpoint, you will still see WideVoice's
22 switch identifier. But obviously with the IP switching
23 technology we were talking about before allows you to be
24 geo-diverse in the location of that equipment.

25 So the calls themselves will actually route SDN

1 directly to Ft. Thompson. There will be a signaling
2 protocol back to Los Angeles to communicate how to direct
3 that call.

4 Q. So just to be clear, even with this additional
5 technology, the final leg into the Reservation is over
6 South Dakota Network fiber. Correct?

7 A. Ask that one more time.

8 Q. Even with this new equipment being located in
9 Sioux Falls, the final leg going into the Reservation will
10 be on South Dakota Network fiber.

11 A. It will be, yes.

12 MR. KNUDSON: No further questions.

13 THE COURT: Anything further, Mr. Swier?

14 MR. SWIER: No, Your Honor.

15 THE COURT: You can be excused. Thank you.

16 (Witness excused)

17 THE COURT: You may call your next witness.

18 MR. SWIER: We will call Tom Reiman.

19 TOM REIMAN,

20 called as a witness, being first duly sworn, testified as
21 follows:

22 DIRECT EXAMINATION

23 BY MR. SWIER:

24 Q. Would you please introduce yourself to the Court and
25 spell your last name.

1 A. My name is Thomas J. Reiman, R-E-I-M-A-N. I am the
2 President of Native American Telecom Enterprise, which is a
3 minority owner of NAT.

4 Q. Tom, I'd like to talk with you briefly about the
5 corporate structure of Defendant Native American Telecom,
6 who we will refer to as NAT. Will you share with the Court
7 the ownership structure of NAT?

8 A. Native American Telecom, LLC, is 51 percent owned by
9 the Crow Creek Sioux Tribe.

10 Q. Hold on right there. So Defendant NAT is majority
11 owned by the Crow Creek Sioux Tribe.

12 A. That is correct.

13 Q. How is the remaining 49 percent dealt with?

14 A. Native American Telecom Enterprise, LLC, owns 25
15 percent. WideVoice Communications owns 24 percent,
16 equaling one hundred percent of the corporation.

17 Q. This gets a little bit confusing, but I want the Court
18 to understand. The Defendant in this case, Native American
19 Telecom, LLC, is that a distinct and separate entity from
20 your company, Native American Telecom Enterprises, LLC?

21 A. Yes, it is.

22 Q. Tom, tell us how Native American Telecom, LLC, came
23 about.

24 A. Native American Telecom, LLC, has been a thought of
25 ours for a long time. I come from serving Indian

1 Reservations for the last 11 years, and hadn't been on one
2 prior to that in my entire life. Stepping onto the Pine
3 Ridge in 2000, we saw how Indians and Native Americans live
4 out there.

5 Q. Give me a little bit of your background on that. How
6 did you come into this type of telecommunication system
7 work on Indian Reservations?

8 A. I was in the wireless business with Western Wireless
9 Corporation. There was a tornado back in 1999 in Oglala,
10 South Dakota, which completely destroyed the entire town
11 and also the infrastructure of the telephone lines. The
12 company I worked for, John, the CEO was John Stanton who
13 noticed that. Bill Clinton came out, the President at the
14 time, to view this catastrophe, and decided maybe that
15 company could make a difference. So what they did is
16 brought in cellular-on-wheels, which is called COW, and
17 what they did is started a telecommunications system out
18 there before the land lines could ever rebound from such a
19 problem.

20 Because of what we were able to do out there, we
21 decided or the company decided to try to bring modern
22 telecommunication services to the Pine Ridge Indian
23 Reservation.

24 So what we did and the Tribe did is went in front of
25 the FCC to get eligible telecommunication carrier status.

1 They were granted, the first Tribe to ever be granted
2 eligible telecommunication state carrier status.

3 What they would do is give Western Wireless the
4 opportunity to build out an infrastructure on the Pine
5 Ridge Indian Reservation, and which we did. We provided
6 telephone cellular phones at low cost to people who had no
7 other phones.

8 At that time we figured the telephone penetration was
9 less than 25 percent, meaning 75 percent of the people did
10 not have telephones. We were able to bring that up to over
11 90 percent in a matter of six, seven years. From them, we
12 went on to other reservations because of what we saw.

13 Q. Let me ask you this. So you started working on the
14 Reservations back in the early '90s.

15 A. Late '90s, 1999, 2000 is when we first started.

16 Q. The reason of that is because of the natural disaster
17 that happened out on Pine Ridge with the Oglala Sioux?

18 A. That exposed the situation to us.

19 Q. As a result of that, President Clinton and the United
20 States Government found this was a priority to restabilize
21 communication services.

22 A. Correct.

23 Q. And you did that, and it was successful. Take us then
24 to how you got from that point and what you've done through
25 the past few years, ultimately how we came to NAT.

1 A. What we did, we saw successes were happening on the
2 Pine Ridge Indian Reservation, and then went and started to
3 do the same thing on other Indian Reservations where they
4 were suffering the same situation without basic phone
5 service. We did that on seven Reservations in South
6 Dakota, three Reservations in North Dakota, and during that
7 period Alltel bought out Western Wireless.

8 Q. Western Wireless being the company you used to work
9 for?

10 A. Correct. Alltel bought us out. We continued to do
11 the same thing. Alltel was a lot larger corporation than
12 what Western Wireless was. We were small. And what has
13 happened in the industry is these large companies have
14 taken over the smaller companies.

15 But, anyway, I did not actually enjoy doing what I was
16 doing. My capacity was minimized, and I didn't feel like I
17 was doing what I could for these poverty areas. Then that
18 was the time I decided to start Native American Telecom
19 Enterprise to address this personally better.

20 When I arrived on the Reservation in 1999, it was the
21 first time, and I could not believe people in the United
22 States actually lived this way, and why wasn't anything
23 being done? I've heard of Reservations all my life. I had
24 never seen anything like that. What I'm saying is there
25 were three or four families living in homes. There are

1 very little to live off of. There are no jobs, no economic
2 activity out there.

3 So what we decided to do is do a joint venture with
4 the Crow Creek Reservation where we thought we could maybe
5 start or thought we could do economic development out there
6 by starting a Tribally-owned telephone company.

7 Q. Let me stop you right there. You're going to be asked
8 this by Mr. Knudson, and it's in his pleadings. Sprint is
9 alleging that the Defendant in this case, Native American
10 Telecom, LLC, is simply a shell or a sham organization
11 because you were one of the organizers of the LLC.

12 Explain to the Court again a little more in-depth the
13 ownership structure of Defendant NAT and how this is a
14 Tribally-owned business.

15 A. Native American Telecom, LLC, was formed with my
16 partner and I, Gene DeJordy, prior to us ever talking to
17 any Tribes. We were going to form this corporation, Native
18 American Telecom, LLC, and then approach a Tribe and give
19 them the opportunity to start their Tribally-owned
20 telephone company. That's what we did. Then the agreement
21 was drawn up with the Tribal Council.

22 We had a pretty big to-do over it just because it was
23 an exciting thing for them. There isn't a lot of companies
24 investing much money on Indian lands today.

25 Q. Talk about that a little bit. Talk about the

1 negotiation process between Native American Telecom and the
2 Tribe to try to bring the Tribe and the Reservation into
3 this company.

4 MR. KNUDSON: Objection on relevancy grounds. I
5 think we've agreed that the papers say the Crow Creek Tribe
6 owns 51 percent of the equity of Native American Telecom.
7 We don't need to go into the background and negotiations
8 leading to that result.

9 THE COURT: Overruled. You may answer.

10 A. Restate that question. Would you, Scott?

11 Q. Can you take us through the negotiating process and
12 how it came to be that Native American Telecom, LLC, came
13 to be majority Tribally-owned?

14 A. I had meetings. Initially I was out there offering
15 cell phones and got to know some of the people. This is
16 when our idea came to start our own Tribally-owned
17 telephone company. So I had met with the Tribal Council
18 and the Chairman at the time, Brandon Sazue, to discuss the
19 possibilities of our big dream to start a telephone company
20 that would be Tribally-owned by the Crow Creek Sioux Tribe
21 and what this would offer to people, that being a telephone
22 company they owned that would provide state-of-the-art
23 Internet and phone service to their people at minimal or no
24 cost.

25 Q. What was the Tribe's reaction?

1 A. Well, as Tribal people, I think when people come on to
2 the Reservation, they may see that as too good to be true.

3 But Brandon, you know, I've been around Native
4 Americans for the last 10 years, and I have a very good
5 track record where everything I've said I was going to do,
6 I did. I had references. I said, "Feel free to check them
7 out." I had a long dealing with the Oglala Sioux Tribe,
8 the Rosebud Sioux Tribe, the Yankton Sioux Tribe, where we
9 did go out and make a difference.

10 Now they have an opportunity to make this even bigger
11 and better, where they can be their own telephone company,
12 less dependent on outside carriers. If you go there right
13 now on Crow Creek, I had heard 93 cents out of every dollar
14 leaves the Reservation, because there are no services
15 there. They have to purchase all services from off the
16 Reservation. This gives them one less chance to be less
17 dependent on outside resources where they can have their
18 own telephone company. So it was a dream to them and it
19 was a dream to me, and we were making it a reality.

20 Q. Why did you decide to make this business majority
21 Tribally-owned? You wouldn't need to do that. You and
22 Mr. DeJordy have plenty of experience in the business. Why
23 was that important to you?

24 A. It would give them the opportunity, after we educated
25 the people out there, to own this company, and we could go

1 forward. We have trained several people.

2 We have put on I think about a hundred and some
3 customers. I've been in the majority of those homes. I
4 see the eyes light up when the Internet turns on, and they
5 have access to services they've never had before. I am
6 very proud of what we've accomplished there, and look to
7 accomplish bigger and better things.

8 Right now that tower serves Ft. Thompson and three
9 other communities. There's a school in Stephan that is the
10 home of the Crow Creek Chieftans, which is the high school
11 which boards students up there. My dream is to put a tower
12 there and give those students wireless Internet that they
13 don't have right now, Internet services in the dorms with
14 computers, that they have the fair shake that everybody
15 else does outside of Indian grounds.

16 Q. Let me ask you this. Are you aware of any efforts
17 Sprint Communications Company has ever made to bring
18 technology to the Crow Creek Reservation?

19 A. No.

20 Q. Are you aware of any efforts Sprint has made in
21 assisting economic development on the Crow Creek
22 Reservation?

23 MR. KNUDSON: Objection. Totally irrelevant and
24 it's also argumentative.

25 THE COURT: Sustained.

1 BY MR. SWIER:

2 Q. Tom, share with the Court -- first of all, share with
3 the Court the work that NAT has done, the infrastructure
4 it's built. Let's start with that. Talk about the
5 infrastructure NAT has built.

6 A. Okay. We erected an 80-foot monopole tower out there
7 without any ground penetration. The lands on Indian
8 country are very historical. There are things you do not
9 want to disturb.

10 Q. Sacred.

11 A. Sacred, exactly. We wanted to erect our tower without
12 touching the ground at all. We went in there and put up a
13 tower without any ground penetration, weighted down with
14 thousands of pounds of brick, and then we put in a tower we
15 brought in, a concrete tower, with the plans that would
16 serve the Ft. Thompson area. We then brought in equipment.

17 This whole time we've involved the people of Crow
18 Creek and also the Tribal Council. That was where -- they
19 looked at this with excitement. Then after we got the
20 system up and running, which took approximately a year, we
21 put in an Internet Cafe in the Tribal Hall where we put in
22 six computers.

23 What we found out is it was fine and dandy to bring
24 Internet to the households, but in many cases these people
25 were not able to afford a computer. So we decided to give

1 them an opportunity by putting in six computers and them
2 having access to them, also, from phone service.

3 Q. You talked about you did all this infrastructure and
4 provided these services. When you talk about "you," who
5 has done this?

6 A. Native American Telecom, LLC. Without the Tribe's
7 consent, this could not be done.

8 Q. Talk about some of the other either equipment NAT has
9 invested or talk a little bit more about what's going on
10 out there on the Reservation with these services.

11 A. As far as the equipment we've invested in the hut,
12 it's thousands of dollars.

13 Q. When you talk about the structure where the telecom
14 equipment is located, talk about that a little bit.

15 A. We put a shelter in out there that houses all this
16 electronic equipment. What that does is provide the WiMax
17 system. It provides other services that we would like to
18 start out there and have started.

19 We also have invested in CPEs, which are
20 customer-premises equipment, and that is a piece of
21 equipment required to get that signal to the home. So we
22 have invested those. Each install is approximately \$500.
23 A hundred of those is \$50,000 that we've invested, plus
24 time and labor. We've invested a lot of money with the
25 thinking we could continue to invest out there by bringing

1 this service to other parts of the Reservation.

2 Right now we serve the Ft. Thompson area. We would
3 love to serve the village of Crow Creek, the town of
4 Stephan where the school is located, Big Bend, also, so we
5 could serve the entire Reservation. That's what our
6 thoughts were, and that's what we would like to do.

7 Q. You talked about the equipment and infrastructure
8 investment that NAT has made. Where is that equipment
9 located?

10 A. It's housed at our shelter behind the old ambulance
11 and the new ambulance building and our new Internet and
12 Learning Center that we just completed construction and
13 plan on opening in November, which will be a Learning
14 Center.

15 Q. Is all the equipment NAT has invested and erected, is
16 that located in Ft. Thompson? Correct?

17 A. Yes.

18 Q. Is all of that equipment and investment and
19 infrastructure located within the exterior boundaries of
20 the Crow Creek Reservation?

21 A. Yes.

22 Q. The Internet Library that you talked about. Is that
23 structure and those services, are those all provided on the
24 Reservation?

25 A. Yes.

1 Q. Is the equipment and infrastructure you talked about
2 owned by Native American Telecom?

3 A. Yes.

4 Q. Is Native American Telecom a majority Tribally-owned
5 business?

6 A. Yes.

7 Q. Tom, as a result of NAT's effort and infrastructure
8 investment, share with the Court what is going on on the
9 Reservation from an employment and economic development
10 standpoint.

11 A. From an employment, we have hired four full-time
12 people, and I think seven part-time people to actually help
13 us with our operations out there.

14 Q. Are those people and their work and their offices, are
15 they all located on the Reservation?

16 A. Yes, they are.

17 Q. Go ahead.

18 A. With that we provide the training, too. There are a
19 lot of capable people out there doing this. They just
20 haven't had the opportunity to do this. So when we come
21 out there as a company offering some jobs, we have a lot of
22 inquiries, because people do not have the opportunities on
23 the Crow Creek Reservation that they may have otherwise.
24 There are not a lot of corporate infrastructure out there.

25 So what we decided, because of our Internet Cafe with

1 the six computers being booked all the time, we open at
2 10:30 and people come in and they do research and their
3 papers and stuff like that, we decided to invest additional
4 funds to build a Native American Telecom Communication and
5 Learning Center, which we have -- the construction is done.
6 We just haven't gotten the equipment put in there yet. We
7 are excited about that. The Tribe is excited, and the
8 people on the Crow Creek Indian Reservation are excited
9 about it.

10 Q. These new efforts, are these all located again on the
11 Reservation?

12 A. Yes. We took an old building pretty much run down and
13 rebuilt it. Now it looks like a brand new building in
14 Ft. Thompson, which is in the confines of the Crow Creek
15 Sioux Indian Reservation.

16 MR. SWIER: May I approach?

17 THE COURT: You may.

18 Q. I'm showing you Exhibits 42 -- start with Exhibit 42.
19 Will you share with the Court what Exhibit 42 shows?

20 A. That is our recently completed Native American Telecom
21 Communication and Learning Center, which used to be an old
22 ambulance storage area, run down.

23 Q. Where is that building located?

24 A. In Ft. Thompson.

25 Q. On the Reservation?

1 A. On the Reservation.

2 Q. Who had made the investment to rebuild and provide the
3 service?

4 A. Native American Telecom, LLC.

5 Q. Again, what is the intended purpose of this facility?

6 A. To provide Internet access, learning capabilities, GED
7 certification. With our network being what it is, like a
8 fourth generation, high-tech, high-speed network, we are
9 looking at putting Skype televisions in there so learning
10 can be done.

11 You'll have Tribal members able to have instruction,
12 and the instructor doesn't have to be on the ground. He
13 can be anywhere in the world. We'll be offering classes
14 that they can further their education.

15 What we've seen so far is people have developed
16 websites there and are now accessing outside resources
17 because of the Internet.

18 Q. Before NAT made this investment, was any of this type
19 of learning or economic development taking place on the
20 Crow Creek Reservation?

21 MR. KNUDSON: Objection. Foundation.

22 THE COURT: Sustained.

23 BY MR. SWIER:

24 Q. Were you aware of the economic shape of the Tribe and
25 the economic, I guess the noneconomic things that were

1 going on out there, for lack of a better word?

2 Were you familiar with how it was economically on the
3 Tribe before NAT came?

4 MR. KNUDSON: Objection. Foundation.

5 THE COURT: Overruled.

6 A. Yes. I spent a lot of time out there and had
7 firsthand experience of the situation and living
8 circumstances out there.

9 Q. Describe for the Court the difference between pre-NAT
10 and current-NAT from a technological standpoint.

11 A. What we saw out there, pre-NAT would be homes without
12 any Internet access. The telephone company, Midstates
13 would say everybody has access. Well, they may have wires
14 to every home, but affordability is a big issue out there.

15 Q. How were people affording NAT services then?

16 A. Subsidized by NAT.

17 Q. So NAT is providing the infrastructure and subsidizing
18 the services for Tribal members.

19 A. Correct.

20 Q. Why would you do that?

21 A. Otherwise they wouldn't get it. They don't have it.
22 They don't have the funds to be able to. Are you going to
23 buy food, or are you going to buy Internet?

24 Q. Explain to the Court the subsidies NAT is providing on
25 the Reservation.

1 A. We are providing the hookup to the Reservation people
2 to the homes. We provide the service. We provide the
3 telephone. In some cases we have worked out where we can
4 provide computers.

5 Q. In their submissions Sprint almost made fun of NAT
6 because you weren't accepting any government handouts or
7 Universal Service Funds. Are you familiar with the
8 Government subsidies and USF funds that may be available to
9 NAT?

10 MR. KNUDSON: Object to the tone of the question,
11 but that's all.

12 THE COURT: Overruled. You may answer.

13 A. I am familiar with eligible telecommunication carrier
14 status. That's how you go about getting Universal Service
15 Funding. You have to get that status prior to getting
16 Universal Service Funding. We looked at that, knowing it
17 was going to take us a few years to get there.

18 Q. So you knew that NAT would ultimately -- could avail
19 themselves of government subsidies. Did you decide to
20 pursue that ultimately?

21 A. Ultimately, yes.

22 Q. But what happened was ultimately your business model
23 changed. Right?

24 A. Yes.

25 MR. KNUDSON: Objection. Leading.

1 THE COURT: Sustained as leading.

2 BY MR. SWIER:

3 Q. How did your business model ultimately change in that
4 regard?

5 A. The business that the Tribe and us set up was getting
6 funds from long-distance carriers, and then they ceased to
7 pay what they were being billed.

8 Q. Is Native American Telecom's business model to be a
9 profitable, privately-held business, not reliant on
10 government subsidies?

11 A. Yes.

12 Q. Why not just take the easy money and not worry about
13 having to compete in the marketplace? Why not take the
14 easy government funds?

15 A. Because our business model was able to train
16 individuals out there. We could work for what we were
17 going to get. We offered it as a business. It to me makes
18 more sense to do that. Obama had stimulus funds out there
19 for buildout of this particular purpose.

20 In the first round we saw all these telephone
21 companies objecting to anybody that filed, because they
22 think it's their sacred land. We decided to build our own
23 business model and depend on our knowledge to make this
24 business happen.

25 Q. When you were negotiating with the Tribe, was it

1 important to the Tribe to actually be able to have and to
2 own a self-sustaining, competitive, privately-held
3 telecommunications company?

4 MR. KNUDSON: Objection. Hearsay.

5 THE COURT: Sustained.

6 BY MR. SWIER:

7 Q. What was important to the Tribe in how this business
8 model was ultimately crafted?

9 MR. KNUDSON: Objection. Vague. Hearsay.

10 THE COURT: Sustained.

11 BY MR. SWIER:

12 Q. Tom, what was your company's intent in how this
13 Tribally-owned company was going to make money without
14 government funds?

15 A. By offering services out there. We looked at several
16 different opportunities and different organizations to be
17 involved with to bring into this. Our ultimate plans were
18 to start a conference service out there, a telephone
19 communication center where we could employ not seven to
20 eight people, but possibly a hundred people by building a
21 communications center out there, where we could do customer
22 service on the Reservation, where we could bring
23 infrastructure there, a corporation majority owned by the
24 Tribe to make a difference out there.

25 Q. Was the Crow Creek Sioux Tribe on board with your

1 vision?

2 MR. KNUDSON: Objection. Hearsay.

3 THE COURT: Sustained.

4 MR. SWIER: May I approach?

5 THE COURT: You may.

6 BY MR. SWIER:

7 Q. I'll show you Exhibits 43, 44, and 45. Going back to
8 NAT's investment on the Reservation. Can you take a look
9 at Exhibit 43 and explain to the Court what that is?

10 A. This is the interior of the building we remodeled out
11 there. This is the old ambulance building that was being
12 used for storage of different things.

13 Q. That's now going to be what?

14 A. That is going to be the Native American Telecom
15 Communication and Learning Center.

16 Q. When is the projected opening date of that facility?

17 A. November 2010.

18 Q. And is that building located within the boundaries of
19 the Reservation?

20 A. Yes, it is.

21 Q. Look at the next exhibit, please. I think it's
22 Exhibit 44. Explain to the Court what that exhibit shows,
23 please.

24 A. That is the remodeled interior of the photo, Exhibit
25 43. This is how it currently looks today. That would be

1 one of the classrooms.

2 Q. Exhibit 43 is a before. Exhibit 44 is an after?

3 A. Yes, but it's a partial after, because there are other
4 rooms in this building.

5 Q. If you look at Defendant's Exhibit 45, please.

6 Explain to the Court what that shows.

7 A. That's another office in that same building.

8 Q. And Exhibit 46, please.

9 A. I don't have 46.

10 MR. SWIER: Your Honor, at this time I would move
11 to admit Defendant's Exhibits 42, 43, 44, and 45 into
12 evidence.

13 THE COURT: Any objection?

14 MR. KNUDSON: We'd like copies, but otherwise no
15 objection.

16 THE COURT: Exhibits 42, 43, 44, and 45 are
17 received.

18 BY MR. SWIER:

19 Q. Tom, financially how does NAT try to make this work?

20 A. We do conferencing out there. The reason is, you have
21 to have that to be able to provide what we're trying to
22 build out there. We get funded by IXCs, interexchange
23 carriers, AT&Ts, Sprints, for the traffic they got paid
24 for, and we have a tariff, that it's a legal tariff and
25 it's been filed with the FCC and also with the Tribal

1 Utility. We bill those companies, and that's how this
2 whole big picture works. That's how the business model is
3 based on.

4 Q. So you are a Tribally-owned private company that wants
5 to make a profit.

6 A. That's correct, and make things better out there.

7 Q. How dare you.

8 MR. KNUDSON: Objection.

9 THE COURT: Sustained.

10 MR. KNUDSON: Move to strike.

11 THE COURT: Motion to Strike is granted.

12 BY MR. SWIER:

13 Q. Explain to the Court -- Keith did this somewhat, but
14 explain how the conference calling is part of NAT's
15 business plan.

16 A. We run conferencing minutes out there, and we get paid
17 on those. We set up a competitive local exchange carrier
18 status. I can get into the background on how that got
19 started, if you wish.

20 Q. Sure.

21 A. We initially went to the Public Utilities Commission
22 to get our competitive local exchange carrier status to be
23 a telephone company. Every telephone company in South
24 Dakota intervened objecting to us becoming a competitive
25 local exchange carrier.

1 We then went to the Public Utilities Commission to get
2 our application returned or dismissed. Once again, every
3 telephone company in South Dakota intervened and said, "You
4 cannot dismiss this." The PUC granted that dismissal,
5 because we are the ones that admitted to even try to get it
6 initially.

7 So what we did was went in front of the Crow Creek
8 Sioux Tribal Utility Authority and were granted competitive
9 local exchange carrier status from them.

10 Q. Let's talk about that for a moment. Do you know when
11 the Crow Creek Tribe started the Tribal Utility Authority?

12 MR. KNUDSON: Objection. This is cumulative of
13 the DeJordy Affidavit. It's really not in dispute here.

14 THE COURT: Overruled. You may answer.

15 A. I believe it was 1997.

16 Q. How many years was that before you approached the
17 Tribe to come together in this partnership?

18 A. We approached the Tribe in 2008.

19 Q. So the Tribal Utility Authority had been up and
20 running for 10 years before you approached the Tribe?

21 A. Yes.

22 MR. KNUDSON: Objection. Vague. What does
23 "running" mean?

24 THE COURT: Overruled. The answer will stand.

25 BY MR. SWIER:

1 Q. So NAT went to the Tribal Utility Authority. What
2 happened?

3 A. We explained to them what we wanted to do, utilizing
4 their utility code to establish a competitive local
5 exchange carrier, a Tribally-owned telephone company on the
6 Crow Creek Sioux Indian Reservation.

7 Q. What did the Tribal Utility Authority do with your
8 request?

9 A. They granted our application.

10 Q. By granting your application, what did they provide
11 NAT with the power to do?

12 A. Start a telephone business and telephone company on
13 the Crow Creek Sioux Indian Reservation within the
14 boundaries of it.

15 Q. Based on your knowledge of this Reservation, had this
16 type of business model ever been presented to the Tribal
17 Utility Authority before?

18 A. Not that I'm aware of.

19 Q. So you got the Tribal Utility Authority's permission.

20 A. Yes.

21 Q. After you received that Utility Authority permission,
22 what did NAT do?

23 A. We had to design our business model and how we were
24 going to do this. Now we become a telephone company. To
25 start a telephone company is very expensive. So we had to

1 put together a business model for economic development on
2 the Crow Creek Sioux Indian Reservation. We had to look at
3 outside parties to invest in our telephone company.

4 Q. So in order to make this work, in order to make this
5 Tribally-owned telecommunications company work, you needed
6 to have private outside investment.

7 A. That's correct.

8 Q. Before NAT, how much off-Reservation private
9 investment was going on on the Reservation?

10 A. From the looks of it, I would say very little.

11 Q. Not any?

12 A. Well, there were a couple stores out there,
13 convenience stores that sold high-priced goods and
14 high-priced gasoline.

15 Q. Then what happened?

16 A. We did a lot of research and found a company,
17 WideVoice, that was interested, also, in making a
18 difference in Indian country. So we went in front of the
19 Council and talked about how we were going to establish a
20 business. That's when we formed the partnership with the
21 Tribe and with WideVoice.

22 Q. The Tribal Government on Crow Creek, that is headed by
23 the Tribal Council. Is that correct?

24 A. Yes.

25 Q. Did you get the support and the okay from the Tribal

1 Council to move forward with NAT's business model?

2 A. Yes. It was done through resolutions.

3 Q. Explain to the Court then between the time the Utility
4 Authority gave you permission until the time that things
5 started getting going, which was about a year before the
6 telephone company was up and running. What were NAT's
7 efforts, in addition to what you already talked about, in
8 that year time to get things going?

9 A. We had to secure land, and that had to be done through
10 the Resolution of Tribal Grounds and also through the BIA.
11 We had to get our FCC license to offer WiMax out there.
12 Just a lot of things that take a lot of time.

13 We had to buy phone numbers from the incumbent out
14 there, which is Midstates, a block of phone numbers to be
15 able to offer our own phone numbers. We had to develop
16 relations with SDN, which had the only link into there. So
17 we had to do that. We had to get an interconnect agreement
18 with Midstates Communications, which dragged out for six,
19 eight months. They are not all that excited about another
20 telephone company being started on the Crow Creek Indian
21 Reservation. They seemed to drag their feet in everything
22 we did. SDN, also. It took a long time.

23 Q. All of these preparatory activities were done by NAT,
24 the Tribally-owned company, within the boundaries of the
25 Reservation?

1 A. Yes.

2 Q. So the year of planning takes place. After a year
3 what happens?

4 A. We became live, meaning our tower was turned on,
5 emitting a WiMax signal, that we could now offer
6 communication services to Tribal members within that area
7 that site covered.

8 Q. What was the Tribe's reaction? What did you do to
9 exclaim to everyone, "This is what we've done. Look at
10 what we've done."

11 A. You know, we did not have a big ceremony. What we did
12 is started offering service. We were a small company. If
13 we went public, I might have three, four hundred people
14 coming to my door, coming to us, "We want this service."

15 So what we did is what we call a soft launch, offering
16 it to people that had computers in their homes that wanted
17 it.

18 Q. On the Reservation.

19 A. On the Reservation in Ft. Thompson.

20 Q. What was the Tribal Government's reaction after
21 seeing, "Wow, here is what we have."

22 A. They were excited. They saw somebody that actually
23 did what they said they were going to do. That's what we
24 were doing. The Tribal Government was excited. But the
25 people that got the service were the excited ones. They

1 were the ones that could experience firsthand the
2 technology they've never had before or couldn't afford
3 before coming to their home.

4 I held an appreciation dinner out there one time in
5 Ft. Thompson. The majority of the people came up to me and
6 said, "We should be holding the appreciation dinner for you
7 for doing what you are doing here, which no one else has
8 done before."

9 Q. Tom, for all of this to come to fruition after a year,
10 did, indeed, the financial part of it with the Tribal and
11 private investment partnership, is that what it took to get
12 this communication system up and running?

13 A. Yes. Otherwise it would not be going at all.

14 Q. So without the private off-Reservation investment on
15 the Reservation, this doesn't happen.

16 A. That's correct.

17 Q. Tom, you talked briefly about the high-tech equipment
18 that makes Native American Telecom work. Where is all of
19 that equipment located?

20 A. It's housed in our shelter on Ft. Thompson.

21 Q. On the Reservation?

22 A. On the Reservation.

23 Q. Are you employing Tribal members with seven jobs you
24 have created?

25 A. Yes.

1 Q. So we're up and running. You indicated, of course,
2 the conference calling would be part of NAT's business
3 model.

4 A. That's correct.

5 Q. I want to clear this up, because I think you will get
6 asked about it. In the submissions Sprint alleged this
7 conference calling scheme, as they called it, was doing
8 chat line and maybe some things maybe some of us think are
9 vices or not in good character. Do you understand what I'm
10 talking about?

11 A. Yes.

12 Q. What is NAT's perception or what is their business
13 model regarding funding their business and making money
14 through chat lines or porn lines or things of that nature?

15 A. We will not do it, and that was stated upfront, that
16 we would not do that.

17 Q. Have you ever done that?

18 A. No, we have not.

19 Q. Are you doing that right now?

20 A. We are not doing that right now.

21 Q. According to NAT's business model, will you ever
22 consider doing that in the future?

23 A. No.

24 Q. But couldn't you make a lot more money if you did chat
25 and porn?

1 A. It's just something we're not going to go to.

2 Q. Answer my question. Could you make a lot more money?

3 A. Yes, you could. I'm sure you could increase your
4 minutes considerably.

5 Q. But NAT has taken the position it doesn't want to do
6 chat or porn.

7 MR. KNUDSON: Objection. Relevancy.

8 THE COURT: Overruled. You may answer.

9 A. We have taken the position we will not do chat or
10 porn.

11 Q. So what do you do with your conferencing services?

12 A. We offer a service to the people of the United States
13 to be able to bring parties together, similar to what
14 Mr. Williams mentioned and how it works where you have
15 different parties that want to get together via
16 conferencing. We offer our phone numbers to them, and then
17 they call them. You can jointly add -- I mean you can have
18 a call together without being in person. It's called
19 conference bridge or conferencing.

20 Q. And the only way people from Texas and West Virginia
21 and New York can get together to conduct their business
22 would be through this conference calling opportunity.

23 A. That is correct.

24 Q. So as part of the business model, NAT assists
25 companies with conference calling.

1 A. Yes.

2 Q. Mr. Williams went through pretty well how the
3 technology of that works. Ultimately because of the
4 technology on the Reservation, is that what allows these
5 conference calls to occur and, in turn, helps make NAT
6 profitable?

7 A. Yes.

8 Q. Could NAT be profitable without this conference
9 calling part of your plan?

10 A. No.

11 Q. When Mr. Williams was talking about how the call all
12 works, there are certain fees that are supposed to be paid
13 by companies who use CLEC or an LEC, a local incumbent
14 carrier's infrastructure facilities. Correct?

15 A. Correct.

16 Q. What are those fees commonly known as?

17 A. Tariffs.

18 Q. Tariffs. I know you don't know the technical part of
19 this, so I'm not going to ask you. But with NAT's business
20 plan, is the payment of those tariffs what allows NAT to
21 make money through their equipment on the Reservation?

22 A. Yes.

23 Q. Have you had a problem getting, let's say, Sprint to
24 pay these tariffs to NAT?

25 A. Yes. They disputed these charges.

1 Q. What's been the result of the fact that Sprint just
2 flat out won't pay NAT for its services?

3 A. It's tying our hands on expansion.

4 Q. Financially?

5 A. Financially.

6 Q. Are you aware of any companies that are maybe similar
7 to NAT that this has also happened to?

8 MR. KNUDSON: Objection. Relevancy.

9 THE COURT: Sustained.

10 BY MR. SWIER:

11 Q. Have you asked Sprint to pay the tariffs?

12 A. Yes.

13 Q. What have they told you?

14 A. That's handled by our legal people. What I was told
15 is they feel they do not deserve or that payment should not
16 be made.

17 Q. In other words, NAT has asked for payment, and Sprint
18 said no.

19 A. Yes, that is correct.

20 Q. What did NAT do then to try to have Sprint pay NAT for
21 these services?

22 A. We went to the Tribal Utility and filed a document
23 with them to get Sprint to pay.

24 Q. The Tribal Utility Authority, which is a subdivision
25 of the Tribal Government. Correct?

1 MR. KNUDSON: Objection. Foundation.

2 THE COURT: Sustained.

3 BY MR. SWIER:

4 Q. Is the Tribal Utility Authority, according to your
5 knowledge, a subportion of the Tribal Government?

6 MR. KNUDSON: Objection. Foundation.

7 THE COURT: Sustained.

8 BY MR. SWIER:

9 Q. Are you familiar with how the Tribal Authority falls
10 in the government structure of the Tribe?

11 MR. KNUDSON: Objection. Foundation.

12 THE COURT: You may answer yes or no.

13 A. Yes.

14 Q. How does it fall?

15 A. It's part of the Crow Creek Sioux Tribe. The Utility
16 Authority is an organization within the Crow Creek Sioux
17 Tribe.

18 Q. So you went to the Tribal Utility Authority, and you
19 complained, "Hey, Sprint is not paying us on our tariffs."
20 Is that correct?

21 MR. KNUDSON: Objection. Leading.

22 THE COURT: Sustained as leading.

23 Q. What did you go to the Tribal Utility Authority and
24 do?

25 A. We filed a complaint with them that Sprint was not

1 paying their bill.

2 Q. What was the result of that complaint?

3 A. I don't even think they acknowledged it that I'm aware
4 of. I don't know.

5 Q. Did you get your money?

6 A. No.

7 Q. Tom, are you familiar with the parties or players in
8 the conference calling business?

9 A. Companies that are involved in conference calling?

10 Q. Yes, as a general matter.

11 A. Somewhat, yes.

12 Q. Is Sprint involved in the conference calling business?

13 MR. KNUDSON: Objection. Foundation.

14 THE COURT: Overruled. Your may answer.

15 A. I think they have their own conferencing business,
16 yes.

17 Q. In fact, is Sprint a competitor of NAT in the
18 conferencing business?

19 MR. KNUDSON: Objection. Foundation.

20 THE COURT: Overruled. You may answer.

21 A. If they are offering the same type of business, I
22 would say they would be a competitor.

23 Q. So it would be to Sprint's advantage to not pay a
24 competitor for services so their conferencing business can
25 flourish?

1 A. Yes.

2 Q. What efforts has Sprint ever made on the Reservation
3 to make technology happen?

4 MR. KNUDSON: Objection. Relevancy.

5 THE COURT: Sustained.

6 BY MR. SWIER:

7 Q. Tom, how has the business plan worked with the
8 majority Tribal ownership?

9 A. Very good. I mean you can see some of the things
10 we've done out there and accomplished, how things are
11 working. We get along very well with the existing Tribal
12 Council. Everybody that has our service is elated.
13 Everything is working as planned, except for the payments
14 coming in.

15 Q. NAT has all of its equipment on the Reservation?

16 A. Correct.

17 Q. NAT has employees on the Reservation?

18 A. That is correct.

19 Q. NAT is receiving outside financial investments on the
20 Reservation?

21 A. Yes.

22 Q. Tribal members are benefiting from the service?

23 A. Yes.

24 Q. The Tribal Government is a vital part of NAT's
25 business model?

1 A. That's correct.

2 Q. The Tribe and their government is a majority owner of
3 NAT?

4 A. Yes, they are.

5 Q. Has NAT made a difference on the Reservation with
6 Tribal members?

7 MR. KNUDSON: Objection. Relevancy.

8 THE COURT: Sustained.

9 BY MR. SWIER:

10 Q. Tom, how do you see NAT proceeding in the future
11 regarding its activities on the Reservation?

12 MR. KNUDSON: Same objection.

13 THE COURT: Sustained.

14 MR. SWIER: May I have a moment, Your Honor?

15 THE COURT: You may.

16 MR. SWIER: Your Honor, I don't have any further
17 questions. Thank you.

18 THE COURT: Miss Roberts, do you have any
19 questions of this witness?

20 MS. ROBERTS: No, Your Honor.

21 THE COURT: Mr. Knudson, I think you'll go for
22 more than a few minutes. Why don't we take a 10-minute
23 break. We'll be in recess until about ten after 11:00.

24 MR. KNUDSON: Your Honor, I have a number of
25 documents that I would be offering as exhibits. Given the

1 expedited nature, I'll need some indulgence getting copies,
2 so for the Court's convenience and Mr. Swier's convenience.

3 THE COURT: If you go to the Clerk's office, they
4 can help you. We'll be in recess.

5 (Recess 10:56 until 11:13)

6 THE COURT: Please be seated. If you'd take the
7 stand again. Mr. Knudson?

8 CROSS-EXAMINATION

9 BY MR. KNUDSON:

10 Q. Good morning. I represent Sprint Communications. I
11 have a few questions for you based on what you testified to
12 in your direct examination. Let's just confirm. You are
13 the President of Native American Telecom. Isn't that true?

14 A. Native American Telecom Enterprise.

15 Q. You are also listed in the records with the South
16 Dakota Secretary of State as President of Native American
17 Telecom. Isn't that true?

18 A. That's how it was initially filed, yes.

19 Q. You are one of the founders of Native American
20 Telecom. Correct?

21 A. Yes.

22 Q. In the recorded filings on behalf of Native American
23 Telecom with the Secretary of State, you are one of the
24 individuals who is liable for the debts of Native American
25 Telecom. Isn't that true?

1 A. Yes.

2 Q. The other individual that is also liable for the debts
3 of Native American Telecom is Mr. DeJordy. Correct?

4 A. Yes.

5 Q. Mr. DeJordy is also one of the founders of Native
6 American Telecom. Correct?

7 A. Yes.

8 Q. You live in Sioux Falls?

9 A. Yes.

10 Q. How is it your Affidavit was signed in Wyoming?

11 A. It was signed there, because I was there visiting my
12 daughter.

13 Q. And you are not a member of the Crow Creek Sioux
14 Tribe. Are you?

15 A. No.

16 Q. You are not a Native American, are you?

17 A. No.

18 Q. Mr. DeJordy, as far as you know, is not a member of
19 the Crow Creek Sioux Tribe?

20 A. As far as I know of, he is not.

21 Q. And he is not a Native American either, is he?

22 A. Not that I'm aware of.

23 Q. Mr. DeJordy now lives in Connecticut?

24 A. That is correct.

25 Q. In the City of Fairfield?

1 A. Yes.

2 Q. Now, you provided an Affidavit here --

3 MR. KNUDSON: Your Honor, a housekeeping matter.
4 This is the Keith Williams Affidavit, which I had marked.
5 I would like to offer it as Exhibit 101.

6 THE COURT: Any objection?

7 MR. SWIER: No objection.

8 MS. ROBERTS: None, Your Honor.

9 THE COURT: 101 is received.

10 BY MR. KNUDSON:

11 Q. You recall preparing an Affidavit to be filed in
12 connection with this proceeding?

13 A. Yes.

14 Q. Mr. Reiman, I'm handing you what's been marked for
15 identification as Plaintiff's Exhibit 102. Tell me if you
16 can identify that document.

17 A. It's the Affidavit I signed.

18 Q. That's your signature at the back?

19 A. Yes.

20 Q. If you could, direct your attention, sir, to Paragraph
21 4 of your Affidavit.

22 A. No. 4?

23 Q. Yes. Do you see that, sir?

24 A. Yes.

25 Q. Do you see where you say that -- could you read the

1 second sentence for me, please?

2 A. Starting with "NAT does not provide"?

3 Q. "NAT's services."

4 A. "NAT's services take place exclusively within the
5 exterior boundaries of the Reservation."

6 Q. Third sentence?

7 A. "NAT does not provide services within the State of
8 South Dakota outside the exterior boundaries of the
9 Reservation."

10 Q. Do you recall seeing this handwritten map?

11 A. Yes.

12 Q. Let's see if we can get this on the Elmo. Do you have
13 that on the screen in front of you?

14 A. Yes.

15 Q. I'd like to go back now. Just thinking about what you
16 said about Paragraph 4 and the two sentences you read to
17 us. "NAT's services take place exclusively within the
18 exterior boundaries of the Reservation." That's the second
19 sentence you read.

20 Now, is it then your position the people calling from
21 New York and Florida and Texas who get bridged on equipment
22 in Ft. Thompson are not getting services from you?

23 A. They are, but they are on the Reservation.

24 Q. But they're not calling from the Reservation. Are
25 they?

1 A. The services are on the Reservation. Our bridge is on
2 the Reservation.

3 Q. But they are outside the Reservation. Right?

4 A. Yes.

5 Q. So when they hear -- the person in New York hears an
6 answer from the person in Florida, that person in New York
7 isn't on the Reservation. Right?

8 A. Correct.

9 Q. And the voice, the sound that is carrying over to the
10 person in New York is coming off the Reservation. Correct?

11 A. Yes.

12 Q. Likewise, when the person in Florida is talking, that
13 person's voice is going into the Reservation. Correct?

14 A. Yes.

15 Q. Through a roundabout way. It has to go to Los Angeles
16 first.

17 A. Yes.

18 Q. That's coming from outside the boundaries of the
19 Reservation. Isn't it?

20 A. Yes.

21 Q. Now, you mentioned, and we heard from Mr. Williams,
22 about the WiMax technology, and that's kind of a step up,
23 isn't it, from Wi-Fi technology?

24 A. It's a different technology.

25 Q. It has the ability to go farther out. Doesn't it?

1 A. Yes.

2 Q. You heard Mr. Williams say it might go out as far as
3 20 miles. Right?

4 A. I heard him say that.

5 Q. Do you dispute that?

6 A. The tower we built projects a signal around two miles.
7 But that technology, by building a larger tower, you could
8 get it to go that far.

9 Q. You are talking about expanding your services to other
10 parts of the Reservation. Aren't you?

11 A. Yes.

12 Q. It's possible for these radio waves to go outside the
13 boundaries of the Reservation.

14 A. Depending where they are located.

15 Q. They don't stop at the boundary. Do they?

16 A. We can erect a tower and point our antennas towards
17 the Reservation.

18 Q. The Reservation is irregular in shape, isn't it?

19 A. Yes.

20 Q. In order to get coverage over all the Reservation, you
21 have to go outside the boundaries, as well, won't you?

22 A. Depending where the tower is positioned.

23 Q. But it's possible.

24 A. It's possible.

25 Q. There's nothing from the boundary itself that would

1 stop the radio waves from going outside the boundaries of
2 the Reservation. Correct?

3 A. Correct.

4 Q. Let's go back to the handwritten map. This person who
5 is calling here from New York, and they make a connection
6 to the person in Florida, and maybe they even talk to the
7 person in Texas at the same time. Do they pay per minute
8 for that call?

9 A. Depending what type of arrangements they have with
10 their long-distance carriers.

11 Q. In fact, isn't it true, Mr. Reiman, that your business
12 model, looking for minutes of usage, depends on callers who
13 effectively have unlimited calling plans?

14 A. I am not aware of that.

15 Q. That's how people can talk for an hour without
16 worrying what it cost. Isn't that true?

17 A. You can set up the plans.

18 Q. But if you are paying 25 cents a minute, you would be
19 more mindful of the cost of the call. Wouldn't you?

20 A. If who is paying the 25 cents?

21 Q. The initial caller.

22 A. They would be mindful, yes.

23 Q. In fact, if it's an unlimited calling plan, the
24 interexchange carriers, the long-distance carriers, they're
25 not getting any additional revenue from that call. Are

1 they?

2 MR. SWIER: Objection. Lack of foundation and
3 speculation.

4 THE COURT: Overruled. You may answer, if you
5 know.

6 A. I don't know.

7 Q. You can't say one way or the other if there's any
8 incremental revenues from one of your calls to the
9 long-distance carrier. Can you?

10 MR. SWIER: Same objection.

11 THE COURT: Overruled. You may answer.

12 A. I don't know what plan they are on.

13 Q. My question is you don't know if the long-distance
14 carrier gets any more incremental revenue from the person
15 using your conference bridge?

16 A. I don't know.

17 Q. But if the caller in New York or Florida or Texas has
18 one of these unlimited calling plans, that person wouldn't
19 pay any more to be on your bridge. Would that person?

20 A. If they have an unlimited plan, no.

21 Q. In fact, as you testified earlier in your direct, your
22 business model depends on lots of people calling in on your
23 conference bridge. Doesn't it?

24 A. Yes.

25 Q. When you set up this network and based your business

1 model on freeconferencecall.com or some equivalent, you
2 realized that you were walking into an area of the
3 telecommunications business where the long-distance
4 carriers were disputing the validity of terminating access
5 charges for this kind of service.

6 MR. SWIER: Objection. Irrelevant to this
7 proceeding.

8 THE COURT: Sustained.

9 BY MR. KNUDSON:

10 Q. Well, you testified your business model depends on the
11 success of being able to collect terminating access charges
12 from people using your conference bridge. Correct?

13 A. Right.

14 Q. Weren't you also aware in companies like Sprint or
15 Qwest or AT&T were objecting to having to pay terminating
16 access charges for callers who called and terminated on a
17 conference bridge?

18 MR. SWIER: Same objection. Irrelevant to this
19 proceeding.

20 MR. KNUDSON: I can link it up.

21 THE COURT: Sustained. You can link it up?

22 MR. KNUDSON: I can link it up to why I believe
23 it's relevant.

24 BY MR. KNUDSON:

25 Q. You are aware of the dispute?

1 A. No.

2 Q. So that's not something you told the Tribe, that there
3 was a possibility that Sprint, Qwest, AT&T might object to
4 your business model?

5 A. I was not aware that they --

6 Q. The point is, did you tell the Tribe that?

7 MR. SWIER: Objection, Your Honor. Irrelevant to
8 this proceeding.

9 THE COURT: Overruled. You may answer.

10 A. I could not tell them. I was not aware Sprint was not
11 paying for this service.

12 Q. Now, the person who is calling from New York, and they
13 dial this 477-1112 number, that's what Mr. Williams said
14 was a conference bridge number, that person is not a
15 subscriber. Is he?

16 MR. SWIER: I'll object, number one, as a legal
17 conclusion. Number two, this goes well beyond the scope of
18 my direct examination.

19 THE COURT: Overruled. You may answer.

20 A. They would be a subscriber if they are using our
21 calling bridge.

22 Q. Are you billing them directly for that service?

23 A. No.

24 Q. So it's your position you can be a subscriber without
25 being invoiced from NAT for any service?

1 A. Yes.

2 Q. When you were -- withdraw that. You said something
3 about Universal Service Funds, and that Mr. Swier was
4 suggesting that it would take too long to get approval as
5 an ETC, eligible telecommunications carrier. Do you
6 remember that testimony?

7 A. Yes.

8 Q. Have you ever applied for ET status?

9 A. I said it was in our business plan, and to build out
10 the system, then we would apply and go after the eligible
11 telecommunication carrier status within the FCC.

12 Q. And that would subject you to FCC regulation. Would
13 it not?

14 A. Yes.

15 Q. You talked about something here in Skype. Can you
16 explain what Skype services are?

17 A. Skype is where you have interactive computers. Your
18 computer will have a camera on it. Someone else on another
19 end will have a camera on it. An instructor could be in
20 front of someone, say they were in New York. They can
21 instruct a classroom in Ft. Thompson in our Learning
22 Facility.

23 Q. Let me get this straight. You can create a classroom
24 where you transmit information back and forth from teacher
25 to students. Right?

1 A. More economically than bringing an instructor in.

2 Q. But you could transmit this information.

3 A. Yes.

4 Q. That's one of the services you want to provide on the
5 Reservation. Right?

6 A. We would like to provide that to the students of the
7 Reservation and people of the Reservation so they have
8 access to those technologies.

9 Q. So I take it the answer to my question is, yes, that's
10 something you want to provide, informational services you
11 want to provide to the people on the Reservation?

12 A. Yes.

13 Q. I'm curious a bit about WideVoice. They own the big
14 switch down here in Los Angeles. Right?

15 A. I assume they have a switch in Los Angeles. I've
16 never been there.

17 Q. In terms of the funding for this buildout, that money
18 is coming from WideVoice. Isn't it?

19 MR. SWIER: Objection, Your Honor. Irrelevant.

20 THE COURT: Overruled. You may answer.

21 A. We have a company named Native American Telecom, and
22 we get monies from outside people to be able to invest in
23 this.

24 Q. WideVoice is one of those sources, isn't it?

25 A. Yes.

1 Q. In fact, WideVoice takes back a security interest in
2 the proceeds. Right?

3 A. Not that I'm aware of.

4 Q. Have you looked at the Joint Venture?

5 A. Yes.

6 Q. You talked about the Tribal Utility Authority, and
7 it's been up and running since 1997. Who is the current
8 chairman of the Tribal Utility Authority?

9 A. I don't know.

10 Q. Do you know how many Commissioners or members are on
11 the board?

12 A. No.

13 Q. Were you aware -- I think you testified about the
14 approval you got from the Tribal Utility Authority to start
15 this project. Correct?

16 A. Yes.

17 Q. Mr. Reiman, I'm handing you what's been marked
18 Plaintiff's Exhibit 103. Take a minute to look at it.
19 Tell me, sir, if you can identify it.

20 A. That is the Order Granting Approval from the Crow
21 Creek Utility Authority to Native American Telecom, LLC,
22 the telecommunication services on the Crow Creek Indian
23 Reservation.

24 Q. Do you see where I've highlighted some language?

25 A. Yes.

1 Q. The Tribal Utility Authority authorized you to provide
2 basic telephone service. Is that right?

3 A. Yes.

4 Q. That would be consistent with the Federal Universal
5 Service requirements of 47 USC 214(e). Right?

6 A. Yes.

7 Q. You are generally familiar with those requirements.
8 Right?

9 A. Somewhat.

10 Q. You know the rules of the Federal Communications
11 Commission. Right?

12 A. Yes.

13 Q. So, in other words, when the Tribal Utility Authority
14 granted you or Native American Telecom authority to set up
15 this network on the Reservation, it was to be subject to
16 Federal law. Wasn't it?

17 MR. SWIER: Objection. Calls for a legal
18 conclusion.

19 THE COURT: Sustained.

20 BY MR. KNUDSON:

21 Q. Your understanding, as a layman who has your
22 experience in the telecommunications industry, you would
23 have to operate the system under Federal law. Wouldn't
24 you?

25 MR. SWIER: Objection, Your Honor. Same

1 objection.

2 THE COURT: Sustained.

3 BY MR. KNUDSON:

4 Q. Did you ever appeal this order the Tribal Utility
5 Authority issued?

6 A. Appeal?

7 Q. Yes.

8 A. What's that mean?

9 Q. Did you ever contest the terms or wording of that
10 order?

11 A. No.

12 Q. Are you aware there are people living within the
13 boundaries of the Reservation who are not members of the
14 Crow Creek Sioux Tribe?

15 A. Yes.

16 Q. You provide services to those people, too, if they
17 want it. Don't you?

18 A. Yes.

19 Q. You went into -- excuse me. I'll start over.

20 When NAT went on the Crow Creek Reservation, you said
21 there was an existing local exchange carrier?

22 A. Yes.

23 Q. That's Midstates Communications?

24 A. Along with Venture Communications.

25 Q. There are two existing incumbent local exchange

1 carriers?

2 A. Yes.

3 Q. I believe you testified that they wired up the
4 Reservation with land lines. Correct?

5 A. Yes.

6 Q. You and Gene DeJordy set up Native American Telecom
7 with the idea you would make money. Correct?

8 A. Yes.

9 Q. How much have you invested, you and Mr. DeJordy
10 personally, into the business?

11 MR. SWIER: I object. May we approach?

12 THE COURT: You may.

13 (Bench conference with Mr. Swier and Mr. Knudson:)

14 MR. SWIER: My objection, Your Honor, is I don't
15 have any problem with the Court knowing what the amount of
16 the investment would be. However, I think that investment
17 amount, that monetary amount would be proprietary
18 information which I don't want to have exclaimed to the
19 entire world what that amount would be. So I don't have
20 any problem with the Court knowing it. I don't think we
21 should have him in open Court talking about the financial
22 investment. If I asked Sprint about their financial
23 investments, they would go haywire.

24 THE COURT: Do you want me to clear the
25 Courtroom, all spectators, and have him answer the

1 question?

2 MR. SWIER: That's fine. We don't want it
3 proclaimed to the world.

4 MR. KNUDSON: We can do that now or wait until
5 the end of my examination.

6 THE COURT: All right. We'll wait until the end
7 of the examination.

8 (End of bench conference)

9 (In open Court, all parties present)

10 THE COURT: We're going to reserve this question
11 until later.

12 BY MR. KNUDSON:

13 Q. Back to your Affidavit, if you would. If you look at
14 Paragraph 10, it says there, if I read it correctly,
15 "Through NAT's efforts, seven jobs (three full-time and
16 four part-time) have been created on the Reservation." Did
17 I read that correctly?

18 A. Yes.

19 Q. If I recall, my notes say in your direct that there
20 were four full-time employees and seven part-time
21 employees. Is that correct?

22 A. That's what I said, but we have different part-time
23 people that come and go. We have day laborers that we
24 provide jobs for.

25 Q. So the permanent employment at the moment is three

1 full-time and four part-time?

2 A. Yes.

3 Q. Now, there's assertions I believe by your colleague,
4 Mr. DeJordy, that NAT has created jobs on the Reservation.

5 Are you aware of any other jobs your investment has
6 created on the Reservation besides these three full-time
7 and four part-time jobs?

8 A. There are, by us providing Internet, there are other
9 jobs I've heard that people are utilizing our system to
10 expand opportunities.

11 Q. Do you know who they are?

12 A. I was told there was a bead maker out there that has
13 their beads on our website that they designed.

14 Q. Those beads were being developed before you got on the
15 Reservation.

16 A. But not being offered off the Reservation. This
17 service gives them that ability.

18 Q. Any other jobs that were created by your investments
19 besides your own employees?

20 A. Internet provides lots of opportunities for people.
21 What they are doing in their homes, I would expect to
22 provide opportunities. They are able to access things they
23 never could in the past.

24 Q. Do you have a specific number of jobs created by your
25 investment?

1 A. I do not have specific numbers.

2 Q. You said Sprint competes with NAT in the offering of
3 conference bridge services.

4 A. I thought they did. I don't know.

5 Q. You have no firsthand knowledge of that fact. Do you?

6 A. No.

7 Q. Let's go then to Paragraph 12 of your Affidavit. Do
8 you see the fourth sentence there? "As such, Sprint
9 profits handsomely from these calls."

10 A. Yes.

11 Q. What facts do you have firsthand knowledge of that
12 Sprint is collecting access charges from its customers and
13 not paying them over to NAT?

14 A. From you guys set up long-distance plans with them, so
15 you've gotten paid for that.

16 Q. What firsthand knowledge -- go back to my question.
17 What firsthand knowledge do you have of the fact that
18 Sprint is, as you claim, profiting from these calls by
19 billing for access services that it doesn't pay over to
20 NAT?

21 A. They offer telephone services, long-distance services
22 and got paid for it.

23 Q. Do you know for a fact of a single customer that's
24 been billed for access services by Sprint that hasn't been
25 paid over to NAT?

1 A. No.

2 Q. So what you are saying is simply speculation. Isn't
3 that correct? You are guessing. Aren't you?

4 A. That's why you guys have long-distance bills. You go
5 to customers, they use the phone, and you've gotten paid
6 for that.

7 Q. You are just guessing about the access charges.
8 Aren't you?

9 A. No. Isn't it true you have customers you charge
10 long-distance fees?

11 Q. How about access charges?

12 A. I think that's part of it.

13 Q. If they are not paying them, why would they be
14 charging them to their customers?

15 A. Who is not paying them?

16 Q. Sprint.

17 A. Sprint is not paying us?

18 Q. Not paying the access charges --

19 A. There's a legal tariff we have in place.

20 MR. SWIER: Your Honor, he asked the question.

21 MR. KNUDSON: He's arguing with me.

22 THE COURT: Start out with a new question.

23 BY MR. KNUDSON:

24 Q. Sprint, you say, is not paying access charges you
25 claim are due. Correct?

1 A. Correct.

2 Q. But you are saying Sprint is charging those access
3 charges to its customers and keeping the money?

4 A. Yes.

5 Q. Do you have any firsthand evidence of that fact?

6 A. No.

7 Q. I think you heard your technical expert say Sprint's
8 traffic, when it comes from grandma in Fargo to
9 granddaughter in Ft. Thompson, the call is headed off the
10 South Dakota Network. Correct?

11 A. Yes.

12 Q. You agree with that.

13 A. Yes.

14 Q. Likewise, New York, Florida, Texas, all those calls
15 get delivered to South Dakota Network. Correct?

16 A. I'm taking his word for it. I'm not the expert on it.

17 Q. Now, NAT applied for a Certificate of Authority from
18 the South Dakota Public Utilities Commission. Do you
19 recall that?

20 A. Yes.

21 Q. That ultimately NAT elected to withdraw that
22 application. Did it not?

23 A. Yes, because of all the intervention that was
24 happening by the local exchange carriers.

25 Q. Mr. Reiman, I am handing you what the court reporter

1 has marked for identification as Plaintiff's Exhibit 104.

2 THE COURT: This is actually the Clerk over here.

3 Q. I'm sorry, what the Clerk has marked as Plaintiff's
4 104. Could you take a moment to look at it?

5 A. I'm familiar with this document.

6 Q. Can you identify it for us, please?

7 A. It was our Application for Certificate of Authority
8 before the Public Utilities Commission of South Dakota.

9 Q. Is there anywhere in this Application where you
10 disclose to the South Dakota Public Utilities Commission
11 you intend to offer conference bridge services?

12 MR. SWIER: Objection. Irrelevant.

13 THE COURT: Overruled. You may answer.

14 A. Not that I'm aware of.

15 Q. Turn to Page 3 for a moment. You see there the
16 Question No. 9 on Page 3. What did NAT Telecom represent
17 to the South Dakota PUC it would be providing?

18 A. It would be what?

19 Q. Providing.

20 A. "A service area map or narrative description
21 indicating with particularity the geographic area as
22 proposed to be served by the applicant."

23 Q. What did the applicant of Native American Telecom say
24 to the PUC? Can you read the highlighted language, sir?

25 A. Directly below it?

1 Q. Yes.

2 A. "Native Telecom will provide service only within the
3 exterior boundaries of the Crow Creek Indian Reservation."

4 Q. Native Telecom is Native American Telecom?

5 A. That is correct.

6 Q. You mentioned something about an interconnect
7 agreement between Midstates Communications and Native
8 American Telecom?

9 A. Yes.

10 Q. That was something you had to set up in order for
11 Native American Telecom to start its operations?

12 A. Yes.

13 Q. Mr. Reiman, I am handing you what the Clerk has marked
14 as Plaintiff's Exhibit 105. Tell me, sir, if you can
15 identify that document for us.

16 A. Agreement for Interconnection and Ancillary Services
17 Between Native American Telecom, LLC, and Midstate
18 Communications.

19 Q. If you go to the back of the document, Page 24, who
20 executed that document on behalf of Native American
21 Telecom?

22 A. Who? Gene DeJordy.

23 Q. That's his signature?

24 A. Yes.

25 Q. Is it fair to say this is the interconnect agreement

1 between Midstates and Native American Telecom?

2 A. Yes.

3 Q. This is marked as Exhibit 105.

4 MR. KNUDSON: Offer 105.

5 THE COURT: Any objection?

6 MR. SWIER: May I look at that quickly?

7 THE COURT: You may.

8 MR. SWIER: I'll object on relevancy. Beyond
9 that, if the Court admits the exhibit, may counsel be kind
10 enough to provide us a copy? I have never seen this
11 before.

12 MR. KNUDSON: It's available on the PUC website.
13 I would be happy to provide a copy.

14 THE COURT: Exhibit 105 is received. The
15 objection is overruled. Plaintiff needs to provide a copy
16 to the Defendant.

17 MR. KNUDSON: Another housekeeping matter. 102,
18 103, and 104 have not been offered, and I do now.

19 THE COURT: Any objection?

20 MR. SWIER: No.

21 THE COURT: 102, 103, and 104 are received.

22 BY MR. KNUDSON:

23 Q. Mr. Reiman, these are agreements and negotiations
24 between Midstates Communications and Native American
25 Telecom. Right?

1 A. Right.

2 Q. I would like to direct your attention to Page 14.

3 A. Mine goes 13, 11, and then 14. Okay.

4 Q. Let's look here at 6.21.3. Do you see that language
5 there? "The parties agree that this Agreement does not
6 create a consensual relationship that would subject
7 Midstate or Midstate's provisioning of any service under
8 this Agreement to the jurisdiction of any Tribal authority
9 that may be the parent of, affiliate of, or that may have
10 or develop any other business or Tribal relationship with
11 Native Telecom." Do you see that?

12 A. Yes.

13 Q. Do you have a layman's understanding of what that
14 means?

15 MR. SWIER: Objection. Obviously asks for a
16 legal conclusion as to what that means.

17 THE COURT: In light of the fact he's one of the
18 principals of Native American Telecom, he would have been
19 involved in negotiating it, I'm going to overrule the
20 objection. You may answer.

21 A. Restate the question, please.

22 MR. KNUDSON: Can we have the question read back?
23 (The requested portion of the record was read by the
24 reporter.)

25 A. My partner is an attorney. He's the one that

1 negotiated this, Gene DeJordy.

2 Q. So you have no individual understanding?

3 A. I have somewhat. I know how it reads. He's the one
4 that negotiated it.

5 Q. What is your understanding?

6 A. It does not create a consensual relationship with
7 Midstate or provisioning of any service, as it reads, or
8 any Tribal authority. So, yes, I have a layman's
9 understanding.

10 Q. In other words, this does not provide that for
11 Midstate to consent to any other relationship with any
12 Tribal Authority. Right?

13 MR. SWIER: Objection. Asks for a legal
14 conclusion.

15 THE COURT: Sustained.

16 BY MR. KNUDSON:

17 Q. Let's take a look at the top here of this page. Take
18 a look and read the whole section. I want you to focus on
19 the highlighted language, but read the whole paragraph, if
20 you would.

21 A. "Governing law."

22 Q. Don't read it out loud. Just tell me when you are
23 finished reading.

24 MR. SWIER: Your Honor, may we approach?

25 THE COURT: You may.

1 (Bench conference with Mr. Swier and Mr. Knudson:)

2 MR. SWIER: Mr. Knudson is asking him to read an
3 arbitration provision of this agreement. It's never been
4 pled in this case whatsoever that any of the parties have
5 to submit themselves to binding arbitration. That's always
6 an issue that is affirmatively pled, and I think it has to
7 be. It's never been done. We are now bringing up
8 arbitration on the first time. Midstate is not a party
9 here. The litigants here are Sprint and NAT. This doesn't
10 have any relevance to Sprint and NAT's relationship. This
11 is a totally different contract. If Midstate wants to come
12 in and intervene and they want to try to say the
13 arbitration provision applies, they can. That's not
14 relevant between these two parties.

15 THE COURT: Mr. Knudson?

16 MR. KNUDSON: I'm offering this document, because
17 I believe what will be argued later today with respect to
18 the application of the second Montana exception, which was
19 gone into in some length in direct testimony of Mr. Reiman
20 in terms of the impact on the Reservation or the Tribe.
21 The fact of the matter is, it's clear here Native American
22 Telecom is agreeable to stay out of Tribal Court and submit
23 to binding arbitration, which bears directly on the issue
24 whether the second Montana issue applies.

25 THE COURT: Mr. Swier?

1 MR. SWIER: It's not an agreement between the two
2 parties to this litigation. It doesn't say anything about
3 the fact NAT would be I believe willing to arbitrate any
4 argument between Sprint and NAT. If Midstate wants to come
5 in and say that, they have that ability. That is not a
6 contract between the parties to the litigation. We've
7 never heard anything that this has to be subject to
8 arbitration, and that should have been done in the initial
9 pleading or they waive it. It doesn't apply.

10 THE COURT: There may be some limited relevance.
11 I'll let the questioning continue. We don't have a jury
12 here. You can argue from back there.

13 (End of bench conference)

14 THE COURT: The objection is overruled.

15 BY MR. KNUDSON:

16 Q. Mr. Reiman, you are aware of the arbitration process.
17 Are you not?

18 A. How arbitration works?

19 Q. You are aware that it exists. Right?

20 A. Yes.

21 Q. And you've read then 6.20.3 then, sir?

22 A. The contract between us and Midstates? Yes.

23 Q. It calls for binding arbitration. Doesn't it?

24 MR. SWIER: Object, Your Honor. That's a
25 misstatement of what it says. It says that such disputes

1 may be submitted to binding arbitration. It's not
2 mandatory.

3 THE COURT: The objection is sustained. I can
4 read the document myself, too.

5 MR. KNUDSON: If we agree it's unambiguous, that
6 would be sufficient with respect for Exhibit 105.

7 BY MR. KNUDSON:

8 Q. Mr. Reiman, I'm handing you what's been marked for
9 identification purposes by the Clerk as Plaintiff's Exhibit
10 106. Take a moment to look at it and tell me if you can
11 identify it.

12 A. It appears to be the Joint Venture Agreement Between
13 the Crow Creek Sioux Tribe and Native American Telecom.

14 Q. Is that Native American Telecom Enterprise?

15 A. Crow Creek Sioux Tribe and Native American Telecom
16 Enterprise, LLC, and WideVoice Communications, Inc.

17 Q. If you go back and see the signature on Page 33.

18 A. Yes.

19 Q. Is that again Mr. DeJordy's signature?

20 A. I don't have one with a signature on it. I have one
21 with Brandon Sazue's signature on it.

22 Q. There should be another Page 33.

23 A. Yes. That is the signature of Gene DeJordy.

24 Q. So we agree this is a copy of that Joint Venture
25 Agreement?

1 A. Yes.

2 MR. KNUDSON: I offer 106.

3 MR. SWIER: No objection, Your Honor.

4 THE COURT: 106 is received.

5 BY MR. KNUDSON:

6 Q. All right. Let's look here at a few of these
7 provisions. Page 5, if you could turn to the last recital
8 called the "Whereas." I'm directing your attention,
9 Mr. Reiman, to what I have highlighted here. Do you see
10 the language, "an array of other telecommunication services
11 outside the exterior boundaries of the Crow Creek Indian
12 Reservation"?

13 A. Yes.

14 Q. What are the services that Native American Telecom is
15 going to provide outside the exterior boundaries of the
16 Reservation?

17 A. It's yet to be determined. Business is trying to
18 develop out there.

19 Q. But if I understand correctly, the entity that is
20 being formed here is Native American Telecom-CC.

21 A. Yes.

22 Q. Crow Creek.

23 A. Yes.

24 Q. It's going to rename Native American Telecom to Native
25 American Telecom - Crow Creek. Right?

1 A. It's Native American Telecom, LLC, yes.

2 Q. So Native American Telecom-CC is going to promote
3 services outside the exterior boundaries, and that's one of
4 the purposes of this Joint Venture. Is that right?

5 A. Yes, it has the capabilities of doing that.

6 Q. Now, let's take a look then of your understanding of
7 the deal terms here that Crow Creek Sioux Tribe, Section
8 1.03, made a capital contribution in exchange for 51
9 percent of the membership units of the LLC by contributing
10 what, sir?

11 MR. SWIER: Objection. I believe that relates to
12 the financial matters earlier discussed as to how we were
13 going to handle this.

14 THE COURT: Sustained. I will allow this
15 question at the end of the hearing.

16 MR. KNUDSON: This has already been made a public
17 record. This is one of the exhibits he filed not under
18 seal. Having to delay asking the question again.

19 MR. SWIER: Obviously the exhibit that I admitted
20 doesn't have the information for a reason, and the reason
21 is because it's proprietary.

22 THE COURT: Can you point me to where the
23 information is?

24 MR. KNUDSON: Yes, Your Honor. Let's just take a
25 look here. Section 1.03. "At the closing date, CCST will

1 contribute the necessary easements and other land rights."
2 That's the quid pro quo.

3 THE COURT: Mr. Swier?

4 MR. SWIER: It talks about easements and other
5 land rights. It doesn't talk in there specifically as to
6 what was given with easement land rights. Again, I don't
7 have any trouble if we want to have that information, but
8 let's have it all grouped together with the financial
9 issues we've discussed that we are going to do later.

10 THE COURT: Mr. Knudson, did you plan to go into
11 anything more than what is contained on Page 6?

12 MR. KNUDSON: I have a question about 1.04. I'm
13 happy to hold off the dollar amount and keep that --

14 THE COURT: I'm just trying to find out. Are you
15 just asking him to say that they can ask for necessary
16 easement and land rights, or do you want him to go into the
17 particular of what those were?

18 MR. KNUDSON: I don't need the particulars.

19 THE COURT: The objection is overruled.

20 BY MR. KNUDSON:

21 Q. Mr. Reiman, as part of the deal, the Crow Creek Sioux
22 Tribe contributed land rights and easements where you could
23 erect your equipment. In exchange, they got 51 percent of
24 the ownership membership units of the LCC. Right?

25 A. Yes.

1 Q. And if I recall your testimony earlier on direct,
2 Native American Telecom Enterprises, that is you and
3 Mr. DeJordy's deal. Correct?

4 A. Yes.

5 Q. You guys get 25 percent of the ownership. If I read
6 this correctly, your 25 percent equity comes from being the
7 managers of Native American Telecom.

8 A. Yes.

9 Q. If we go to where WideVoice comes in, Section 1.05,
10 you see they get 24 percent. Right?

11 A. Yes.

12 Q. Their contribution is they will put in enough money to
13 cover all costs of construction and implementation of the
14 network. Correct?

15 A. Yes.

16 Q. This is an interesting document, and one of the things
17 I find interesting is where does the money go? Turn to
18 Page 13. I have it up on the screen. Do you see a
19 definition of net profits? "Revenue generated from the
20 provision of service to end user customers, including
21 customer payments and universal service support." Do you
22 see that?

23 A. Yes.

24 Q. Right now there's no universal service support coming
25 in. Is there?

1 A. That is correct.

2 Q. But now net profit does not include, am I right, other
3 sources of revenue such as access charges. Correct?

4 A. Correct.

5 Q. You are a business person, Mr. Reiman. The flow of
6 money is something you would pay attention to. Isn't it?

7 A. Yes.

8 Q. Where are the access charges going?

9 A. They go to build out the system.

10 Q. But if there were surplus access charges, would there
11 be net profits?

12 A. Yes.

13 Q. Why?

14 A. We haven't got the payments, though.

15 Q. Access charges are not within net profits. Are they?

16 A. That's what it says there.

17 Q. Now, this Native American Telecom has a Board of
18 Directors. Does it not?

19 A. Yes.

20 Q. If we go to Page 17, 8.01. Do you see how it's
21 divided up? Am I correct to conclude from Section 8.01
22 that the Tribe gets to appoint three members?

23 A. Correct.

24 Q. Native American Telecom Enterprise, your and DeJordy's
25 deal, gets three. Right?

1 A. Yes.

2 Q. And the WideVoice gets three. Right?

3 A. Yes.

4 Q. It's a majority vote that controls. Right?

5 A. Yes.

6 Q. This is the Joint Venture between the Tribe, yours and
7 DeJordy's enterprise, and WideVoice. Take a look at
8 Section 16.07. Do you understand what law is going to
9 govern this agreement?

10 A. Yes.

11 Q. The law of South Dakota. Is it not?

12 A. Yes.

13 Q. If there's a dispute, you have also provided how that
14 should be resolved. Isn't it true the parties to this
15 Joint Venture Agreement, if they can't resolve their
16 dispute without formal process, they submit that dispute to
17 binding arbitration in accordance with the Rules of the
18 American Arbitration Association?

19 MR. SWIER: I'll object to relevancy of the
20 question. This is an agreement between the owners of NAT,
21 how they are going to do their disputes. The owners of NAT
22 are not in dispute here. NAT is in a dispute with Sprint.
23 So the binding arbitration provision in this case is
24 irrelevant as to why we are here today.

25 THE COURT: Overruled. You may answer.

1 BY MR. KNUDSON:

2 Q. Well, you elected binding arbitration, right, to
3 govern dispute under Joint Venture?

4 A. Yes.

5 MR. KNUDSON: No further questions at this time.

6 THE COURT: Mr. Swier?

7 REDIRECT EXAMINATION

8 BY MR. SWIER:

9 Q. Mr. Reiman, Mr. Knudson asked you some questions about
10 this exhibit. He asked you some questions about these
11 calls, conference calls from New York, we have business
12 partners in New York, Florida, and Texas. Correct?

13 A. Correct.

14 Q. They are all wanting to get together to talk via
15 conference call. Correct?

16 A. Correct.

17 Q. What they do is they are provided with a conference
18 call number.

19 A. Correct.

20 Q. NAT has these conference call numbers they make
21 available.

22 A. Yes.

23 Q. The area code is 605.

24 A. Yes.

25 Q. The prefix is 477.

1 A. Correct.

2 Q. That call then ends up at Ft. Thompson. Correct?

3 A. That is correct.

4 Q. Ft. Thompson is where the technological services are
5 to bring those parties together. Isn't it?

6 A. Yes.

7 Q. If you don't have those services at Ft. Thompson, you
8 don't have a conference call. Do you?

9 A. That is correct.

10 Q. That equipment, that high-tech equipment is on the
11 Reservation.

12 A. Yes.

13 Q. The services that you are providing, which the
14 services are, tell me if you agree, allowing these people
15 to communicate by conference call. That's the service.

16 A. That is the service.

17 Q. If NAT doesn't have this equipment on the Reservation,
18 there isn't a service to provide.

19 A. That is correct.

20 Q. So the service is being provided on the Reservation.

21 A. Yes.

22 Q. Mr. Knudson also asked you about economic development
23 on the Reservation. Instead of -- we have seven employees
24 that are employed by NAT. Correct?

25 A. Yes.

1 Q. Clarify for the Court. How many full time out of
2 those seven?

3 A. Three.

4 Q. How many part time?

5 A. Four. It comes and goes. We have day laborers that
6 come and help and stuff like that, so I could name seven,
7 but they change because people are looking for work.

8 Q. They get paid by NAT?

9 A. Yes.

10 Q. They are NAT's employees?

11 A. Yes.

12 Q. They do the work on the boundaries of the Reservation?

13 A. Yes.

14 Q. We also talked about all of these efforts that have
15 been made on the Reservation. Do these efforts require
16 construction?

17 A. Yes.

18 Q. Do they require Tribal people who have skills in
19 construction to do it?

20 A. Yes.

21 Q. Are the Tribal members doing the construction of these
22 Tribally-owned entities?

23 A. Yes.

24 Q. So not only do you have seven direct employees on the
25 Reservation, but you also employ or at least you hire

1 additional Tribal members.

2 A. Yes. Whenever we have anything to do, we hire Tribal
3 employees.

4 Q. A Tribal company having seven direct employees on the
5 Reservation, where does that put NAT as far as an employer
6 on the Reservation? Are you guys the big dog with seven
7 folks?

8 MR. KNUDSON: Objection. Relevancy.
9 Argumentative.

10 THE COURT: Overruled. You may answer.

11 A. Yes. I think the jobs we provide, when you have an
12 unemployment rate of upward around 90 percent, seven jobs
13 is a big thing.

14 Q. Are you aware of, other than a convenience store, are
15 you aware of any other privately-held company that has
16 seven employees on the Reservation?

17 A. No.

18 Q. Mr. Knudson also asked you some quick questions about
19 your original application with the Public Utilities
20 Commission of South Dakota.

21 A. Yes.

22 Q. You originally filed your Application for
23 Certification with them?

24 A. That is correct.

25 Q. Ultimately you made a Motion to Dismiss that

1 application.

2 A. Yes.

3 Q. Why did you do that?

4 MR. KNUDSON: Objection. Asked and answered.

5 THE COURT: Overruled. You may answer.

6 A. Because it would tie us in Court for probably a couple
7 years, what they would like us to do, which we're a small
8 company and can't afford to do.

9 Q. Did you also decide, based upon the structure of NAT
10 and Tribal sovereignty, that actually you filed the
11 Application with the wrong entity?

12 A. Yes.

13 Q. The correct entity would have been with the Tribal
14 Utility Authority?

15 A. Yes. The state has no say-so on what goes on on the
16 Reservation.

17 Q. Mr. Knudson also asked you in the Joint Venture
18 Agreement about this binding arbitration provision. Who is
19 the Joint Agreement between in this case?

20 A. Native American Telecom Enterprise, Crow Creek Sioux
21 Tribe, and WideVoice.

22 Q. Is it your understanding if the three of you, those
23 three entities get into a dispute, that that dispute will
24 be settled through arbitration?

25 A. Yes.

1 Q. Is Sprint a signatory on that Joint Venture Agreement?

2 A. No.

3 Q. Has NAT ever agreed to arbitrate a dispute with
4 Sprint?

5 A. No.

6 Q. My final question is around these access charges.
7 Actually I have two more questions on access charges.

8 The first is how these access charges, if they are
9 ever paid, would be distributed among the NAT owners.

10 Correct?

11 A. Correct.

12 Q. What is NAT's current plan on how these access charges
13 would be used if they are ever paid?

14 A. We go in front of the Board of Directors and decide --
15 initially we decided it would be for buildout to enable the
16 service throughout the Reservation.

17 Q. So you wanted to use those access charges to make a
18 bigger and better telecommunication system on the
19 Reservation.

20 A. I would like to see the eyes light up in other parts
21 of that Reservation by offering other services.

22 Q. Access charges would allow you to do that?

23 A. Right.

24 Q. But if you don't have the charges, you can't build
25 out?

1 A. That is right.

2 Q. Mr. Reiman, I have one more question for you. You
3 indicated earlier that Sprint is not paying the access
4 charges to NAT. Correct?

5 A. Correct.

6 Q. I don't want you to give me a specific amount, but can
7 you give the Court a general idea what nonpayment of these
8 access charges is costing NAT and the Tribe?

9 MR. KNUDSON: Objection. Foundation.

10 THE COURT: Overruled. You may answer.

11 A. Millions of dollars.

12 MR. SWIER: No further questions.

13 THE COURT: Mr. Knudson?

14 MR. KNUDSON: Your Honor, I would like to
15 approach.

16 (Bench conference with Mr. Knudson and Mr. Swier:)

17 MR. KNUDSON: We have confidential information to
18 ask about. I have one question with respect to what he
19 raised on his redirect. I don't know what your scheduling,
20 if you want to take a break for lunch.

21 THE COURT: What I was planning on was having you
22 do your redirect, clear the Courtroom, confidential
23 information, and we'd break for lunch.

24 (End of bench conference)

25 (In open Court)

1 RE-CROSS-EXAMINATION

2 BY MR. KNUDSON:

3 Q. Mr. Reiman, we went through the Joint Venture
4 Agreement just recently, and you agreed with me access
5 charges are not within the definition of net profits of the
6 Joint Venture. Didn't you?

7 A. That's what it said.

8 Q. By way of explanation from your counsel, that access
9 charges are currently planned to use for a buildout.

10 Correct?

11 A. Yes.

12 Q. And ultimately you will complete that buildout. Won't
13 you?

14 A. Depending if you pay or not.

15 Q. If you got to the point you finished your buildout,
16 those access charges then would be surpluses. Wouldn't
17 they?

18 MR. SWIER: Objection. Speculation.

19 THE COURT: Overruled. You may answer.

20 A. Twenty years from now, possibly yes.

21 Q. You don't know when. Do you?

22 A. Right, exactly.

23 Q. Then if there are net profits, in order for them to be
24 distributed, you would have to rewrite the Joint Venture
25 Agreement. Wouldn't you?

1 A. Yes.

2 Q. The control of the Joint Venture rests by majority
3 control. Correct?

4 A. Yes.

5 Q. WideVoice and Native American Telecom Enterprise, you
6 and Gene DeJordy and WideVoice are a majority of the Joint
7 Venture. Aren't you?

8 A. The Tribe and I are a majority then, too.

9 Q. My question is WideVoice and you and Gene DeJordy are
10 a majority of the Joint Venture?

11 A. We have three shares, WideVoice has three shares, and
12 the Tribe has three shares.

13 Q. If you have six votes, that's majority.

14 A. We have three votes. I am with Native American
15 Telecom Enterprises.

16 Q. Let's pair it WideVoice and Native American Telecom
17 Enterprise. They would constitute a majority. Isn't that
18 true?

19 A. They are separate companies.

20 MR. KNUDSON: He is not answering my question.
21 We need an instruction.

22 THE COURT: You need to answer the question that
23 he asked.

24 A. I agree three plus three equals six.

25 Q. That's a majority. Isn't it?

1 A. Yes.

2 MR. KNUDSON: The questions left are the
3 confidential ones.

4 THE COURT: Mr. Swier, anything further?

5 REDIRECT EXAMINATION

6 BY MR. SWIER:

7 Q. Tom, who owns the majority of Native American
8 Telecom, LLC?

9 A. Crow Creek Sioux Tribe.

10 Q. What percentage do they own?

11 A. 51 percent.

12 Q. And what percentage do you and does NAT Enterprises
13 and WideVoice own?

14 A. 49 percent.

15 Q. And is 51 percent bigger than 49 percent?

16 A. That's a majority, yes.

17 MR. SWIER: Thank you.

18 RECROSS-EXAMINATION

19 BY MR. KNUDSON:

20 Q. Since you opened the door, the profits flow through
21 the Joint Venture. Don't they?

22 A. Yes.

23 MR. KNUDSON: Nothing further.

24 THE COURT: Anything further, Mr. Swier?

25 MR. SWIER: No.

1 THE COURT: The seven employees you have, can you
2 tell me what their job duties are?

3 THE WITNESS: Let's see, we have one full-time
4 person that takes care of the Internet Library. Then we
5 have three that constructed the Internet Cafe. There are
6 three additional people, also, that helped with
7 construction out there. We are also in the process of
8 training a couple more to do installs.

9 THE COURT: The Internet Library, the
10 construction is almost finished?

11 THE WITNESS: Yes.

12 THE COURT: Will they be laid off then?

13 THE WITNESS: We hope to have other buildouts for
14 them. We have plans to expand the service and also
15 construct another Learning Facility.

16 THE COURT: Do those questions raise any
17 questions from either of you?

18 MR. KNUDSON: No, Your Honor.

19 MR. SWIER: No, Your Honor.

20 THE COURT: We need to have a hearing outside of
21 the hearing of the spectators that are here. Just a few
22 more questions of this witness. If everyone could leave
23 the Courtroom that is not an attorney, I would appreciate
24 it. We'll recess then after we're done with that and come
25 back after lunch about 1:30.

1 (The spectators left Courtroom and a hearing was held in
2 closed session, recorded in a separate sealed document.)

3 (Recess at 12:20 until 1:25)

4
5 (In open Court, all parties present)

6 THE COURT: Mr. Swier, did you have any other
7 witnesses you wanted to call?

8 MR. SWIER: No. Defendant NAT has no more
9 witnesses.

10 THE COURT: Miss Roberts?

11 MS. ROBERTS: Yes, Your Honor. However, my
12 witness just slipped out. He's here, if we could have a
13 moment. We're ready.

14 Your Honor, I'd like to call Peter Lengkeek.

15 PETER LENGKEEK,

16 called as a witness, being first duly sworn, testified as
17 follows:

18 DIRECT EXAMINATION

19 BY MS. ROBERTS:

20 Q. Please state your full name for the record.

21 A. Peter James Lengkeek.

22 THE COURT: How do you spell your last name?

23 A. L-E-N-G-K-E-E-K.

24 Q. Can you describe your current position with the Crow
25 Creek Sioux Tribe?

1 A. I am the newly elected Treasurer of the Council, the
2 governing body of the Crow Creek Sioux Tribe, one of seven
3 members.

4 Q. To give the Court a little background about who you
5 are, can you run down just a little bit of your background
6 for the Court?

7 A. I'm an enrolled member of the Crow Creek Sioux Tribe,
8 ex-military. I served in the Marine Corps and in the Army.
9 I was self-employed there on the Reservation and decided to
10 try my hand at politics and got elected onto the Council
11 this past spring.

12 Q. What are some of the endeavors you did before going on
13 the Council?

14 A. Some of my personal endeavors were I have -- I was
15 self-employed there for many years after my tour in the
16 Marine Corps and in the Army. I started a guiding business
17 called Soldier Creek Outfitters and also contracted for a
18 couple years with a business called Native American --
19 Native Builders, which I tried to form into kind of like an
20 on-the-job training type thing for our younger members,
21 kind of like a Job Corps. I don't know if anybody is
22 familiar with Job Corps.

23 I was employed with the United Methodist Church for
24 five years with an organization called Tree of Life
25 Ministry where we repaired homes on the Reservation at no

1 cost to the home owner through donations of the United
2 Methodist Church and the work of volunteers that came there
3 every summer. We did a lot of work for the elders
4 repairing homes. Government-built homes are way past their
5 life expectancy, and they are pretty much falling around
6 our people. We came in and repaired them at no cost to the
7 homeowner with volunteer help and volunteer revenue.

8 Q. Those activities, plus others -- well, let me start
9 again. Since the Marine Corps, what has been your main
10 focus in life, since you've been back to the Reservation?

11 A. My people.

12 Q. What do you mean by that?

13 A. Want to see them succeed and get out of poverty.
14 Where we live, it's the poorest county in the nation. We
15 have an average household income of \$5200, with 85 to 90
16 percent unemployment rate. Recently here one of the
17 highest suicide rates in the world.

18 Q. Describe the Crow Creek Sioux Reservation structure in
19 relationship to the Federal government.

20 A. We are a Federally recognized Tribe. That was around
21 1864, 1865 we became the Crow Creek Sioux Reservation.
22 Where we are placed now was originally a prisoner of war
23 camp. Our people originally come from the Minnesota area,
24 but we were exiled out of there by the Government to the
25 place where we are now. Been there ever since.

1 Q. What is the relationship to the State of South Dakota?

2 A. Other than we are placed in the middle of South
3 Dakota, along with eight other Reservations, there really
4 is no other relationship.

5 Q. Briefly what is your relationship to the land that
6 encompasses the Reservation?

7 A. That's Mother Earth. She is sacred. That's where our
8 blood was spilled. That's where our ancestors are buried.

9 Q. Peter, could you describe the structure of Tribal
10 Government on the Crow Creek Reservation?

11 A. We are the governing body. We are comprised of seven
12 members. The Tribal Chairman, who is at large, and one
13 district representative council member from the Big Bend
14 District, one council member from the Crow Creek District,
15 and four members of the Ft. Thompson District. We're the
16 governing body.

17 Q. How do you get elected to this position?

18 A. By the people.

19 Q. How long is your terms?

20 A. Two-year terms.

21 Q. Where does the Utility Authority, the Crow Creek
22 Utility Authority fall within the structure of Tribal
23 government?

24 A. They are underneath the Government. We appoint them
25 or -- when it was formed, I believe in 1997, it was put out

1 to the public. People applied for it, and the governing
2 body at the time went through and chose the members of it
3 and put that in place, along with all the other boards on
4 the Reservation, the Gaming Commission, the Gaming Board.
5 Yes, it's the Tribal Council, the governing body that
6 oversees all of them.

7 Q. What about the Tribal Court?

8 A. That also belongs to the Tribe. Years ago there were
9 some funding issues and they couldn't handle it, so they
10 asked the Bureau of Indian Affairs to take it and fund it,
11 and they contracted it to -- what is it called --

12 Q. Northern Plains?

13 A. Northern Plains Tribal Court of Appeals. We just
14 recently took that back into our possession.

15 Q. How did you do that?

16 A. Through resolution.

17 Q. There was some discussion earlier today about a
18 Special Judge being appointed for this case. How is that
19 done? How was that done?

20 A. The Judge is hired by the Crow Creek Sioux Council,
21 and B.J. Jones was brought in to oversee this as a Special
22 Judge, this particular case. We wanted to be above any
23 suspicion Sprint might have, like they could come back at
24 us and say, "You know, well, this Judge here, his whole job
25 depends on his decision, so of course he is going to rule

1 in your favor." We wanted to bring in a neutral Judge to
2 oversee this, one that didn't know anything about us. We
3 wanted to be above any superstition.

4 Q. I want to take you to what your knowledge is of the
5 Tribe and NAT's relationship. What was important or what
6 is important to the Tribe in developing and working with
7 NAT to develop a telephone company?

8 A. One being economic development. The other being
9 seeing our people have the same chance as everybody else in
10 the United States has. We all know today the Internet is
11 the world. We wanted our people, that same opportunity to
12 see things. We basically just wanted the same
13 opportunities as everybody else in the United States.

14 Q. Before NAT, what was the access of members of your
15 community to these services, Internet in their home, things
16 like that?

17 A. Very, very limited. As I spoke of the poverty
18 situation there, Internet was just a couple people had it.
19 Most of the public didn't have access to the Internet or
20 the phone. It's kind of monopolized there by the one phone
21 provider, phone service provider we do have. It's kind of
22 hard to come up with that bill money every month, so a lot
23 of people didn't have access to phone or Internet.

24 Q. Economic development has been mentioned before and
25 also by you. Now that NAT has been in there and people

1 have Internet, what changes have you seen in people's
2 lives?

3 A. There are a couple people there -- Native American
4 people are natural artists. There are a lot of artists on
5 our Reservation. It's hard to get that work out there and
6 get it sold for revenue for their families. It's been said
7 there are three or four families are in one house. A lot
8 of times these artists are the only income into the house.
9 There are a couple people that have opened Ebay accounts,
10 and they are able to get their artwork out and create
11 revenue for their families in their households.

12 I think there are three or four full-time employees, a
13 couple of them that work in the Internet library that is
14 there on the Reservation, which there's never been one
15 before. A lot of days there's a waiting line just to get
16 on the Internet. There are some full-time employees there
17 that sit there and help people navigate the Internet. Even
18 myself, I'm not very computer literate, but I'm learning.

19 There are a couple full-time employees that do
20 installation of the free Internet service and free phone
21 service. Right now currently they are remodeling a
22 building. There are a couple other members of the Tribe
23 there that are remodeling an old building and turning it
24 into an Educational Technical Learning Center.

25 Q. So this has all been as a result of the Tribe

1 partnering with NAT?

2 A. Yes, ma'am.

3 Q. You are familiar with the structure and ownership of
4 NAT?

5 A. Yes.

6 Q. Who is the majority owner?

7 A. The Crow Creek Sioux Tribe owns 51 percent of it.

8 Q. As a Tribal Council member, would you say that the
9 Tribe has reaped benefits?

10 A. Yes.

11 Q. And those being what you mentioned or more?

12 A. Yes. It's supposed to create a couple hundred
13 thousand dollars of revenue for the Tribe. Of course
14 Sprint hasn't paid their bills, so we don't see any of that
15 revenue. We just see the things that Mr. Reiman and them
16 have been doing there, like the Internet library and things
17 like that.

18 Q. Who owns the land, the NAT buildings and equipment and
19 all that?

20 A. Crow Creek Sioux Tribe. It was very important to us
21 that our, you know, our land is sacred. It was very
22 important to us that it was done with some type of green
23 technology. They didn't have to burrow into Mother Earth
24 to erect that tower or the building or anything.

25 Q. Would you have sold that land to them? Why didn't you

1 sell it?

2 A. No. Our land ain't for sale.

3 Q. Today you've heard a lot of talking about telephones
4 and routing and this and all of that.

5 A. Yes.

6 Q. But basically today we're here because Sprint is
7 asking the Court to grant a preliminary injunction. Do you
8 have an understanding of what that is?

9 A. Yes.

10 Q. What is your understanding?

11 A. Basically they don't acknowledge our sovereignty and
12 our jurisdiction. They went straight to the state, when it
13 should be seen there in Tribal Court. From what I
14 understand of it, they're not recognizing who we are,
15 recognizing our sovereignty and our right to self-govern
16 and self-determination.

17 Q. Do you know what would happen if this Court grants a
18 preliminary injunction, what happens to the case?

19 A. That would mean it would go to Federal Court instead
20 of seen in Tribal Court. Right? Our sovereignty is always
21 being tested. Always. I guess in the U.S. Constitution it
22 states that Treaties are the supreme law of the land. In
23 those Treaties we were granted sovereignty. I would like
24 to think the U.S. Constitution means something.

25 It would basically mean that it would hinder any

1 further economic development by any other corporations or
2 any other organizations that would want to come in there
3 and do business. There's no way for us to protect them or
4 help them, because they can just go to the state. It kind
5 of seems to us like our sovereignty don't mean anything.

6 Q. Let's go through this a little bit. If Sprint is not
7 required to exhaust Tribal remedies, what impact would that
8 have on your self-government? You kind of touched on it.
9 What impact would it have on the Tribe's self-government?

10 MR. KNUDSON: Objection. Foundation.

11 THE COURT: Overruled. You can answer.

12 A. It would put our sovereignty and jurisdiction in
13 jeopardy.

14 Q. What impact would it have on your self-determination?

15 A. We should be able to handle our own business.

16 Q. And as far as utilities, what mechanism do you have to
17 handle that?

18 A. The Utilities Authority and the governing body, which
19 is the Council of the Crow Creek Sioux Tribe.

20 Q. If Sprint is not required to exhaust Tribal remedies,
21 what impact would it have on your political security as a
22 Tribe or integrity of the Tribe?

23 MR. KNUDSON: Objection. Foundation.

24 THE COURT: Overruled. You may answer.

25 A. It would impact a lot.

1 Q. Can you give me an example of what it would mean to
2 the Council as the governing body and the Tribe?

3 A. It would mean that we don't have the protection of the
4 Constitution and the Federal government like was granted to
5 us. It would mean we can't conduct our own business. We
6 can't invite organizations, people in businesses onto our
7 Reservation, and protect them and help them in the way we
8 should.

9 Q. What impact is this going to have, by not requiring
10 Sprint to exhaust Tribal remedies, would it have on Tribal
11 resources? You mentioned they went to the state.

12 A. Yes. The State Public Utilities Commission. When it
13 should have come to the authority that we have in place.

14 Q. So what do you have to do about that? Can you just
15 ignore it? What is the Tribe doing about the South Dakota
16 PUC case? Maybe I'm being vague. Are you sitting back
17 ignoring it, or are you addressing it?

18 A. No, we are not ignoring it. We are addressing it.
19 But with Sprint not recognizing our jurisdiction and our
20 sovereignty, who else is going to? I mean it has to stop
21 somewhere.

22 Q. So how is this impacting your Tribal resources?

23 A. Pretty much doesn't give them any clout or backbone at
24 all.

25 Q. Is it having an impact financially?

1 A. Yes, it is.

2 Q. As far as a case being at the South Dakota PUC and now
3 here in Federal Court, what sort of -- can you even
4 estimate what kind of financial impact this is having
5 against your Tribe, having to run here and there to defend
6 this? If you don't know a dollar amount, that's fine.

7 A. I don't know a dollar amount right off the top of my
8 head. For those of us that are struggling, like our
9 Reservation is, and the situation of the poverty there,
10 it's very hard to do, very hard to do. It was hard for us
11 to get travel money just to come here today.

12 We have people at home, we have elders there, they
13 weren't able to pay their electric bill, so they took their
14 meter, and they are sitting there without electricity.
15 Some of them are on oxygen and nebulizers. We had to come
16 up with money to come here even today.

17 Q. Also, what impact would not, requiring Sprint not to
18 exhaust Tribal remedies, have on the orderly admission of
19 justice on the Reservation?

20 A. What impact would it have?

21 Q. To you, as a Tribe, being able to administer justice.

22 A. We really wouldn't be able to if this did happen. It
23 would -- what word am I looking for?

24 Q. We can move on. We can come back to the justice and
25 the Court. You kind of touched on perhaps the welfare of

1 the Tribe, the health and economic development.

2 A. Yes.

3 Q. Any other specific examples you would have of how, by
4 not requiring Sprint to address this in Tribal Court, how
5 that would affect the welfare, health, or economic
6 development of the Tribe?

7 A. We would -- by them not recognizing our jurisdiction
8 and our sovereignty and going right over our heads to the
9 State PUC, like I said before, it weakens our sovereignty
10 even more, weakens our jurisdiction, our right for
11 self-governing and self-determination. It weakens all of
12 that.

13 Q. What is your objection to this Court handling the
14 matter instead of Tribal Court?

15 A. It shouldn't be here.

16 Q. Why?

17 A. Because everything is happening within the boundaries
18 of the Reservation. It's ours. We're 51 percent owners of
19 it. It's sitting on Tribal land. It doesn't -- I guess
20 being utilities, it's -- utilities pretty much run this
21 country and the revenue they generate. They have a lot of
22 power. Can you say the question again?

23 Q. Why do you think the Tribal Court should handle it
24 instead of this Court was the beginning of the question?

25 A. Okay. I pretty much answered that then.

1 Q. All right. Just lastly, economic development. You've
2 spoken about it. We heard testimony today that we may be
3 talking vast amounts of money between this telephone deal.
4 That's obviously, from your testimony, an important aspect
5 to the Tribe.

6 A. Yes.

7 Q. But what is the most important aspect you want to
8 convey to the Judge today?

9 A. Recognition of our sovereignty, of our jurisdiction,
10 our right to govern, to take care of our own business. For
11 us, there's a lot at stake here. It's not just a dollar
12 amount. It's, again, our sovereignty, our right to
13 self-govern.

14 Q. Let me clarify for the Court. The Crow Creek Tribe
15 has an operable, up and running, whatever term you want to
16 use, Utility Authority. Is that correct?

17 A. Yes.

18 Q. The Tribe has a Court system that's operating, open.

19 A. Yes. It's in control of the Tribe.

20 Q. For this specific case you have placed --

21 A. B.J. Jones, who is the Judge of the Sisseton-Wahpeton
22 Tribe, also a legal professor. Yes.

23 Q. Is it your -- can the Crow Creek Sioux Tribe and the
24 different entities in place you've described handle the
25 various aspects of Tribal exhaustion?

1 A. Yes.

2 Q. No further questions.

3 A. You know, this is a -- we finally find a way to create
4 revenue for our Tribe. As always, it's taken away from us.
5 It meant a lot to us to go into this agreement, because it
6 would provide jobs, badly needed jobs, badly needed revenue
7 to operate and to put other people to work. It's very
8 upsetting that this is even here.

9 Q. That brings up a point, and just let me clarify with
10 you. You have no idea -- you have appointed a Special
11 Judge to hear this.

12 A. Yes, ma'am.

13 Q. If it came back to Tribal Court, you have no idea or
14 no control on what would happen.

15 A. No, ma'am.

16 Q. Win or lose or whether or not the Tribe ultimately
17 would decide they have jurisdiction or not, what is
18 important? What is at stake today that is so important to
19 the Tribe? Is it winning or losing this case, or is it
20 something more important?

21 A. Something more important. Like I said earlier,
22 there's a lot at stake here. How are we going to -- how
23 are other businesses going to come to our Reservation and
24 do business with us? There's a lot more at stake than just
25 money.

1 MS. ROBERTS: No further questions.

2 THE COURT: Mr. Swier?

3 MR. SWIER: Just a few. Your Honor, we --

4 A. I mean we --

5 THE COURT: Just a minute. He has to ask a
6 question.

7 A. I'm sorry. I was just going to reiterate --

8 MR. SWIER: Go ahead if you're not done.

9 MR. KNUDSON: There should be a question pending.

10 THE COURT: Sustained. You need to ask a
11 question, Mr. Swier.

12 DIRECT EXAMINATION

13 BY MR. SWIER:

14 Q. What was going to be your finishing answer to Miss
15 Roberts' previous question?

16 A. I was just going to say that it's tough there, and
17 here we finally get a chance to make money, to create
18 revenue for our Tribe, and it's being questioned now.

19 Q. Mr. Lengkeek, can I call you Peter?

20 A. Yes, sir.

21 Q. Peter, I have a few questions. I want to touch on
22 something you indicated earlier about the land being your
23 sacred land. Is that correct?

24 A. Yes, sir.

25 Q. Talk a little bit more about the sacredness that your

1 Tribe sees on your Reservation land. Why is that so
2 important?

3 A. To us, we don't believe we inherit the land. We
4 borrow it from our grandchildren. That's what we believe.
5 This is our mother. When we're done praying, we say,
6 "Mitakuye Oyasin." That means, "We're all related." That
7 doesn't mean just you and I are brother. It means we are
8 brother and sister to everything on this earth. We all
9 come from one place, that's Mother Earth. She is not to be
10 desecrated. She is not to be mutilated, like she is today.

11 Q. Along the lines of the sacred land, you're familiar
12 obviously, as part of the majority owner, you are familiar
13 with Native American Telecom. Correct?

14 A. Yes, sir.

15 Q. You're familiar with the efforts and activities of NAT
16 on your Reservation.

17 A. Yes.

18 Q. Peter, is it true that NAT's equipment is located on
19 your sacred land?

20 A. Yes.

21 Q. Is it true that NAT's technologically advanced
22 equipment is housed on your sacred land?

23 A. Yes, sir.

24 Q. Is it true NAT's services, your company's services are
25 provided on your sacred land?

1 A. Yes, sacred and Tribal.

2 Q. Is it true NAT is providing employment opportunities
3 for your members on your sacred land?

4 A. Yes, sir.

5 Q. Is it true that NAT's new Internet Cafe is located on
6 your sacred land?

7 A. Yes, sir.

8 Q. Is it important to you that new economic development
9 opportunities occur on your sacred land?

10 A. It is very important.

11 Q. Is NAT providing those economic development
12 opportunities on your sacred land?

13 A. Yes.

14 Q. Have NAT's activities led to technological
15 advancements on your sacred land?

16 A. Yes, it has. More and more of our people are learning
17 to use the Internet. More and more of our people are able
18 to stay in communication with each other, especially like
19 during emergency situations.

20 Q. That was one question, Peter, I was going to ask you.
21 Will you explain to the Judge how NAT's services are used
22 in emergency situations on your sacred land?

23 A. A lot of the people there, as I mentioned earlier,
24 cannot afford a basic phone and a telephone company that
25 comes out of Chamberlain there. When NAT came here, they

1 offered the subsidized phone, which we get free phone
2 service, free Internet service.

3 Before that, to get a hold of the ambulance or 911 or
4 the police station, you either have to run a couple doors
5 down to somebody who can afford a phone or try to get there
6 yourself to the police station or fire department on foot,
7 bike, car, horse, however you can. Now most of them people
8 pick up the phone, and emergency services are there.

9 Q. Before NAT, were those emergency services available to
10 your Tribal members?

11 A. They were available, yes. Are you talking the police
12 department, the fire department, and the EMTs?

13 Q. Yes. Before NAT described how those services were
14 limited to your members.

15 A. Really the only thing that was limited was getting a
16 hold of them when you needed them.

17 Q. What has NAT done to fill that gap?

18 A. They provided our members with free phone service.

19 Q. Describe for the Judge the technology before NAT
20 started. Describe for the Judge what the technology was
21 like on your sacred land.

22 A. Very limited. Like I said, I know some people down
23 the street would open their homes to the neighbors so they
24 could come in and get on the Internet and try to learn
25 about it or try to sell their artwork on it, or just to see

1 what resources are out there.

2 Now there's getting to be more and more of it. They
3 also provide in some instances free computers.

4 Q. Talk about that. I think Mr. Reiman testified that
5 NAT, your Tribally-owned company, is actually providing
6 hardware and software to your members for free on your
7 sacred land. Is that right?

8 A. Yes.

9 Q. Talk about that briefly. Share with the Judge what
10 that is all about.

11 A. As in -- well, are you talking about the Internet
12 Cafe?

13 Q. Sure. Start with that, Peter.

14 A. The Internet Cafe is housed in an office in the Tribal
15 building there. My office -- it used to be my office when
16 I used to be the director of the Tree of Life Ministry. I
17 gave that up so they could move in there. It's a badly
18 needed service. Like I said, that's the world now, the
19 Internet. That along with the Educational Technical
20 Learning Center, I can't wait until it's open.

21 A lot of our people are looking forward to it. A lot
22 of our people are talking about getting their GEDs through
23 there. Elders are talking about it. It's creating a lot
24 of buzz in the community.

25 Q. Positive buzz?

1 A. Oh, yeah.

2 Q. Is it safe to say, Peter, before NAT no one ever made
3 an effort to pave a technological highway for you and your
4 members on your sacred land?

5 A. It's safe to say that.

6 Q. Has NAT paved that technological highway for you?

7 A. Yes, they have.

8 Q. Peter, you talked about the Learning Center. I don't
9 know if it's in the record. Is the Learning Center also
10 placed within your Reservation boundaries on your sacred
11 land?

12 A. Yes, it is.

13 Q. Peter, describe briefly for the Judge. We talked
14 about the fact that NAT has allowed you, as the Tribe, to
15 be the majority owner of this company.

16 A. Yes.

17 Q. But outside private-company investment has been
18 necessary to get it up and running. Is that right?

19 A. Yes.

20 Q. Before NAT was formed and before you guys became the
21 majority owners, describe for the Judge what type of
22 private economic investment, outside of private companies
23 or individuals, describe what type of private investments
24 were coming onto the Reservation to make life better on
25 your sacred land.

1 A. Other than a nonIndian-owned grocery store there, I
2 can't think of too many more than that.

3 Q. Other than your Tribal government, is NAT one of, if
4 not the largest, employers on your sacred land?

5 A. Yes.

6 Q. Other than NAT, are there any other private
7 investments that are coming on to your Reservation?

8 A. No.

9 Q. We heard before testimony that the economic impact on
10 NAT, and we didn't put an exact number on it, but based on
11 your knowledge, is it millions of dollars that NAT is being
12 negatively affected?

13 MR. KNUDSON: Objection. Foundation.

14 THE COURT: Overruled. You may answer.

15 A. Yes.

16 Q. You don't know the exact numbers, but millions is in
17 the ballpark.

18 A. Yes. It's cost millions already so far.

19 Q. What could your people do with millions of dollars to
20 invest on your sacred land?

21 A. Oh, geez.

22 Q. Is it almost unfathomable?

23 A. Yes, it is. Our people have been forced to do this
24 since the late 1800s by the Government. That's all we know
25 now.

1 Q. In other words, to hold out your hands --

2 A. To beg for everything we need and want. That's all
3 our people know now. Our young people, that's all they
4 know. This is one of the mechanisms to get away from that,
5 to instill pride, to instill dignity, to work and be able
6 to -- a young father to buy diapers and food for his baby.
7 This is what we want to get away from is holding our hand
8 out for everything we need. This is one of the things that
9 will help get us away from that.

10 Q. As a Tribal member and majority owner of NAT, are you
11 afraid to compete with off-Reservation companies?

12 A. No.

13 Q. Do you think, if given the opportunity, that you can
14 provide services and compete and take you and your people
15 to a different economic level?

16 A. Why can't we? Shouldn't we have that right? There
17 again, our sovereignty and jurisdiction is being tested
18 right now.

19 Q. The Tribal Utility Authority, which you talked about
20 earlier, they ordered that Sprint pay these fee payments.
21 Is that right?

22 A. Yes.

23 Q. To the best of your knowledge, has your Tribally-owned
24 company, NAT, received any of these payments?

25 A. No. Isn't that how we were able to remodel the

1 building? There had to be -- to tell you the truth, I
2 don't really know. I'm not involved in the everyday
3 workings of NAT.

4 Q. Peter, you talked about the impact of millions of
5 dollars on the Reservation. You can obviously buy more
6 bottles and diapers than you can ever imagine with a
7 million dollars.

8 But what other impact would that amount of money have
9 for the greater good of your people on your sacred land?

10 MR. KNUDSON: Objection. Speculation.

11 THE COURT: Sustained.

12 BY MR. SWIER:

13 Q. Peter, in your view has Sprint entirely ignored the
14 Tribe's Tribal sovereignty here?

15 A. Yes.

16 Q. And everything that NAT is doing is taking place on
17 your sacred land. Is that correct?

18 A. Yes, it is.

19 Q. And it's made a difference.

20 A. Yes.

21 Q. And you expect it to continue to make a difference, if
22 you get paid.

23 A. Yes, and I guess it will be based on a decision today.

24 I mean where does it say that we can't -- show me in
25 writing where it says we can't have the same opportunity as

1 everybody else in this country?

2 Q. Peter, you are simply asking to compete in the same
3 marketplace of ideas as other companies, but you are doing
4 it on your sacred land. Is that right?

5 A. We're trying to make our own way.

6 MR. SWIER: No further questions.

7 THE COURT: Thank you. Mr. Knudson?

8 MR. KNUDSON: We'll pass on cross.

9 THE COURT: You can be excused.

10 (Witness excused)

11 THE COURT: Miss Roberts, any further witnesses?

12 MS. ROBERTS: No, Your Honor.

13 THE COURT: Mr. Knudson, any rebuttal?

14 MR. KNUDSON: No, Your Honor. I would just refer
15 to the Affidavit and evidentiary evidence we submitted
16 along with our Motion and Memorandum of Law.

17 THE COURT: All right. Then, Mr. Knudson, we'll
18 do argument, and we'll take a break after you are finished.

19 MR. KNUDSON: Notwithstanding the testimony you
20 just heard, Your Honor, the question here is relatively
21 straightforward. With respect to what Sprint is
22 requesting, in contravention to what NAT is asking, we
23 believe this Court has a primary jurisdiction, that
24 exhaustion is not required, and, therefore, this Court
25 should enjoin the Tribal Court from further proceedings

1 against Sprint brought by NAT. There are a number of
2 well-settled principles that lead to that result.

3 We take a look first at one of the leading cases on
4 the issue of Tribal exhaustion, *A-1 Contractors v. Strate*,
5 decided in 1997, authored by Justice Ginsburg, unanimous
6 decision 9 to 0. It establishes that where there is no
7 grant of Federal authority over a nonmember, there is no,
8 as a general rule, jurisdiction of a Tribal Court or a
9 Tribe to have adjudicatory or regulatory power over a
10 nonmember. *Strate* was applying the two exceptions also
11 found in *Montana versus United States*. I would like to
12 address those two limited exceptions later.

13 But as a general proposition, the rule is that Tribes
14 do not have regulatory or adjudicatory power over
15 nonmembers. So absent the Federal grant, there is simply
16 no way for this Tribal Court to resolve NAT's complaint
17 against Sprint. It's significant if we look at *Strate*, and
18 what Justice Ginsburg said at the end of the opinion in
19 Footnote 14, where there is no Federal jurisdiction and
20 that issue is clear, exhaustion, as a requirement, must
21 give way.

22 I find it interesting that NAT has not mentioned
23 *Strate* in its Brief to this Court here in response to our
24 Motion for a Preliminary Injunction. I also want to point
25 out about *Strate* that it involved a situation, this was a

1 traffic accident on Fort Berthold Reservation in North
2 Dakota. The injured Tribal members brought suit in Tribal
3 Court. Jurisdiction was contested. It was affirmed on
4 appeal by the Tribal Court of Appeals.

5 Before the Tribal Court could get to the merits, the
6 Defendants in that action brought a suit in Federal
7 District Court seeking a declaration there was no Tribal
8 Court jurisdiction. Ultimately the Supreme Court
9 determined there was no Tribal Court jurisdiction, and in
10 that circumstance exhaustion was not required.

11 Then we go to Hicks, Nevada v. Hicks, a 2001 decision,
12 authored by Justice Scalia. It's not unanimous in terms of
13 the opinion, but it's unanimous in terms of the judgment
14 that's reached in that case. Hicks reaffirms Strate and
15 says that Strate expanded the exceptions to exhaustion that
16 were first articulated with Iowa Mutual and National
17 Farmers Union cases.

18 What held in Hicks was that Strate, in its exhaustion
19 rule, applied the conduct on both Tribal land as well as
20 fee land. So what happened in Hicks was a situation where
21 Nevada Game Wardens obtained a warrant in State Court and
22 also a warrant in Tribal Court, and went onto the
23 Reservation looking for evidence of one of the Tribal
24 members who lived on Tribal land had taken an endangered
25 species in violation of state law. The person subject to

1 the search ultimately brought a Section 1983 claim against
2 the Game Warden Officers.

3 Hicks established the rule that Tribal Courts are not
4 courts of general jurisdiction. They do not have the power
5 to adjudicate Section 1983 claims against nontribal
6 members. I think, similarly, you find a situation here
7 where the Tribal Court lacks adjudicatory power under
8 47 USC 207 to hear NAT's complaint against Sprint.

9 So if you look at the governing principles of Strate
10 and Hicks, which are also applied in Atkinson, that one can
11 conclude in this circumstance, there being no Federal grant
12 of jurisdiction of the Tribal Court over Sprint, and the
13 Montana exceptions not applying, there's no power for the
14 Tribal Court to adjudicate NAT's claim against Sprint in
15 Tribal Court.

16 Another important point here is we talk about the
17 starting proposition, absent Federal grant. What we have
18 here, in contrast, is an expressed provision in 47 USC 207
19 to divest both State Courts and Tribal Courts of any
20 jurisdiction involving the Federal Communications laws.

21 Sprint's complaint in this Court alleges unreasonable
22 practices in violation of Federal law, which must be
23 brought into Federal Court or under 207 before the Federal
24 Communications Commission and nowhere else.

25 So let's take a look at the AT&T case that is cited in

1 their Brief. It's a Ninth Circuit decision, where the
2 Tribal Court ordered AT&T to provide toll-free service,
3 allowing people off the Reservation, as well as on the
4 Reservation, to use that toll-free number for access to
5 what was going to be a Native American Lottery.

6 THE COURT: You are referencing AT&T vs.
7 Coeur D'Alene Tribe case?

8 MR. KNUDSON: Yes. Notwithstanding, Tribal Court
9 went forth and ordered AT&T to comply and to provide that
10 service. The Ninth Circuit is unambiguous in its decision
11 that the Tribal Court lacks jurisdiction. It construes
12 47 USC 207 and simply holds that the Tribal Court in that
13 instance lacked jurisdiction.

14 If we take the AT&T-Coeur D'Alene decision construing
15 207, we get to the question addressed in Footnote 14 of
16 Strate; where the lack of Tribal Court jurisdiction is
17 clear, requiring exhaustion would serve no other purpose
18 but delay, and, therefore, this prudential rule of comity
19 must give way.

20 THE COURT: So in your brief right before you
21 cited the AT&T vs. Coeur D'Alene case, you cited Alltel
22 Communications vs. Oglala Sioux Tribe. That's Judge
23 Viken's case. In that case he did not grant the
24 preliminary injunction, and indicated that the Tribal Court
25 would exhaust their remedies first. He maintained

1 jurisdiction over the case.

2 Why would this Court not follow that same rationale,
3 based on the case you cited in your brief?

4 MR. KNUDSON: I understand. The distinction here
5 is what Judge Viken was addressing was an issue of
6 arbitrability, and there were two portions of that case
7 that dealt with different arbitration issues. But he
8 looked at one particular arbitration provision, and said
9 with respect to that one, it's sort of unambiguous. Under
10 the Federal Arbitration Act, that no exhaustion would be
11 required. He quotes this Coeur D'Alene case with approval.
12 So I think it's fair to interpret that decision in the
13 Alltel case to provide support for the proposition we're
14 articulating here.

15 THE COURT: You are arguing because Section 207
16 expressly puts jurisdiction either before the FCC or the
17 Federal Court, that that is different than the arbitration
18 provisions which don't designate what Court would have
19 jurisdiction.

20 MR. KNUDSON: I think we have to step back and
21 look at what Congress has provided. What Congress has
22 provided in Section 207 is unambiguous. There can be no
23 dispute. When you bring a question of Federal
24 Communications law, the challenge under Section 201, 203,
25 206 of Title 47, you must bring that in Federal Court or

1 before the Federal Communications Commission. That is the
2 holding in the Ninth Circuit decision in Coeur D'Alene.

3 I would argue it's easier and simpler and clearer to
4 look at the Ninth Circuit decision, look at Section 207,
5 and I think there can be only one conclusion. There's no
6 point to sending us back to Tribal Court when Congress has
7 divested both the State Courts and the Tribal Courts of any
8 jurisdiction over these Federal laws. Congress has
9 preempted it, expressly so. So there isn't any room for
10 debate on that point.

11 THE COURT: So if you are arguing there is field
12 preemption, you would make that same argument whether the
13 entity was trying to go into State Court as compared to
14 trying to go into Tribal Court here?

15 MR. KNUDSON: Yes. Now, there's a distinction
16 with respect to the proceeding we brought before the Public
17 Utilities Commission. That distinction is there is clearly
18 a delineation in the Federal Communications law allowing
19 State Public Utilities Commission to regulate intrastate
20 service of the traditional sort, the legacy services.

21 THE COURT: Do you have any idea of the
22 percentage of traffic here that is intrastate as compared
23 to interstate?

24 MR. KNUDSON: No, we don't. Our traffic analysis
25 was all the traffic flowing through the South Dakota

1 Network switch ultimately to the Ft. Thompson phone number.
2 How much of that traffic would be traditional intrastate
3 service, we couldn't determine from that analysis. But as
4 you heard today, I mean it's all going to Los Angeles. So
5 in all probability, it's all Federal. We don't have a
6 determination yet and no discovery on that particular point
7 to find out.

8 If the PUC proceeding ends up finding there isn't any
9 intrastate traffic, as such, I suppose we would be forced
10 to dismiss our action there. But the PUC is entitled to
11 exercise its regulatory authority over the area of
12 communication services that Congress has left to the states
13 to regulate.

14 We think if NAT had sued under the FCC tariff, which
15 we have attached to our Federal Complaint, there shouldn't
16 be any doubt that that must be brought in Federal Court or
17 before the FCC. Instead, it tries to do a run-around
18 Section 207 by suing Sprint under its so-called Tribal
19 tariff.

20 But I think if you examine the Tribal tariff, you will
21 see the language of the tariff creates a scope that
22 attempts to regulate all traffic into, out of, and within
23 the State of South Dakota. It overreaches any possible
24 regulatory authority of the Tribal Utility Authority, or
25 the power of the Tribal Utility Authority would be limited

1 to traffic that starts and ends within the exterior
2 boundaries of the Reservation and to only members of the
3 Tribe.

4 But it doesn't limit itself in that fashion. And what
5 we saw today from Mr. Williams' testimony, which was
6 reaffirmed by Mr. Reiman, that this traffic has little to
7 do with the Reservation, except for the fact that they put
8 a piece of electronic device apparently in Ft. Thompson.
9 We can have people from Massachusetts, New York, Texas, and
10 Florida talking to each other. Apparently their voices go
11 through this device so they can talk to each other. But to
12 say that's a service only within the Reservation to me is
13 sophistry.

14 THE COURT: So if you had a conference call of
15 people between Pierre, Sioux Falls, and Rapid City calling
16 into this number, that would be an intrastate.

17 MR. KNUDSON: It would appear to be so, yes.

18 THE COURT: Although the people do not live on
19 the Crow Creek Indian Reservation, do you believe the
20 Tribal Utility Authority would have power to regulate that
21 intrastate call?

22 MR. KNUDSON: No. Because the power of the
23 Tribal Utility Authority ends at the exterior boundaries of
24 the Reservation.

25 THE COURT: So if it were calls of three people

1 in Ft. Thompson doing a conference call, would the Tribal
2 Utility Authority have power to regulate that call?

3 MR. KNUDSON: It might, if those three people on
4 that call were all enrolled members of the Tribe. The
5 distinction, and I think if you look at Cheyenne River and
6 the Western Wireless FCC decision, you draw a distinction
7 between -- even if you are within the boundaries of a
8 Reservation, as to whether or not the people being
9 regulated are members of a Tribe or nonmembers of a Tribe,
10 and that the state retains regulatory jurisdiction for
11 nonmembers living within a Reservation.

12 Therefore, the PUC would have some power to regulate
13 NAT's activities to the extent they purport to provide
14 service to nonmembers within the Reservation. You heard
15 Mr. Reiman say they don't limit their services purely to
16 enrolled members of the Crow Creek Tribe.

17 So given the type of tariff the Tribe purports to
18 enforce, it must come along, too, into Federal Court,
19 because it really attempts to regulate the same type of
20 traffic as the Federal tariff.

21 I think there's another important point drawn out with
22 both the testimony of Mr. Williams and Mr. Reiman. Why
23 there is an important Federal question that extends beyond
24 the tariff itself. You heard Mr. Reiman say that what they
25 are providing is information service, the Skype,

1 opportunity to create an Internet classroom. You heard
2 Mr. Williams testify that when you go the third leg, that's
3 the one after it gets to Los Angeles on WideVoice's switch,
4 it comes back as Internet protocol signal.

5 This is important because Congress has set up two
6 regulatory regimes for interstate telecommunication
7 services. If it's a legacy telecommunications service,
8 it's regulated under the old tariff regime. But when
9 Congress passed legislation in 1996, it attempted to open
10 up the marketplace and the newer forms of services. You
11 heard Mr. Williams and Mr. Reiman talk about the new
12 technology and how progressive it was.

13 The new technology that Congress is dealing with in
14 1996 was to be regulated through competitive activities; in
15 other words, for the VoIP, the Voice Over Internet Protocol
16 Service, for the Skype service, for all these other
17 activities that are nontraditional. That's everything that
18 is going into the Ft. Thompson switch or Ft. Thompson
19 device, the WiMax device. Congress has said if NAT wants
20 to collect a charge, a fee for terminating service, it has
21 to negotiate with the long-distance carriers from whom it
22 wants to collect that fee.

23 So if we are going to get to the merits of whether NAT
24 can collect what it's been charging Spring, we are now
25 addressing important questions of Federal Communication

1 law. Section 207 speaks to that. It says it's in Federal
2 Court or to the FCC.

3 In addition, the WiMax service they talk about, that
4 plainly looks to be able to go beyond the borders of the
5 Reservation. So it raises both state law questions of
6 providing service off the Reservation, as well as again
7 whether it's subject to tariff access charges or
8 competitively negotiated fees.

9 THE COURT: Although at this time with regard to
10 WiMax, the witness testified it only has a two-mile radius.
11 I know the Crow Creek Indian Reservation is much bigger
12 than two miles when this is set up to serve Ft. Thompson.
13 As it currently exists, it doesn't go beyond the borders of
14 the Reservation.

15 MR. KNUDSON: Well, Mr. Williams said it could go
16 as far as 20 miles. Certainly if Mr. Reiman's expansion
17 plans follow, they will have to put that signal in places
18 where it clearly could go across the Reservation
19 boundaries. And he didn't deny that.

20 THE COURT: But don't I look at the case as the
21 technology currently exists, rather than what the future
22 capacity may be?

23 MR. KNUDSON: Well, yes and no. Yes, obviously
24 if they are 500-foot radius, they could say that's safely
25 confined to the Reservation boundaries. But let me point

1 out, that raises to the type of service and how it gets
2 regulated and how NAT can collect for so-called termination
3 services.

4 But also, as we've indicated, there are nonmembers
5 living on the Reservation. There is fee land on the
6 Reservation. This signal can go on those properties and
7 could go to nonmembers. Mr. Reiman said they are perfectly
8 able to serve nonmembers with their service.

9 THE COURT: So under the FCC regulations with
10 regard to nonlegacy traffic, and it's negotiated with the
11 long-distance carrier, does that normally result in a
12 contract entered into between the two parties, or what's
13 the end result of those negotiations?

14 MR. KNUDSON: The end result is that under that
15 regime, you have to negotiate a competitive access price.
16 It's subject to bargaining between the parties.

17 We cited a number of cases, Pay-Tel being one of the
18 leading ones that we've cited, indicating that's the regime
19 we are talking about. That applies to this commercial
20 radio service, applies to voice over Internet protocol,
21 anything where we talk about an information service. I
22 think Mr. Reiman said that's what they are providing.

23 So I think what we have here is the tariff regime they
24 want to use does not apply. Certainly that's a Federal
25 question, and not a Tribal Court question. That's why I

1 believe the Tribal Court should be enjoined from proceeding
2 further. This is an important question of Federal law
3 where Congress wants some relative uniformity of result.

4 Then I think it's also important, if we could move on
5 to another reason why exhaustion is not required. Sprint's
6 activities are not on the Reservation. I don't think
7 there's any doubt now, as Amy Clouser testified in her
8 Affidavit, but confirmed by Mr. Williams and Mr. Reiman,
9 the traffic that ultimately goes to Ft. Thompson, the first
10 leg coming into South Dakota ends at the switch in
11 Sioux Falls owned and operated by South Dakota Network.

12 What we ultimately heard was after it goes through
13 this convoluted routing to Los Angeles and back again, it
14 hits the South Dakota Network equipment and goes over South
15 Dakota Network's fiberoptic into Ft. Thompson.

16 Sprint simply is not on the Reservation, has no
17 equipment on the Reservation. It provides no services on
18 the Reservation. If it's not on the Reservation, there is
19 no Tribal Court jurisdiction over it.

20 We have two cases that I think are compelling on that
21 particular point. It's the Hornell case, for one, decided
22 by Judge Lay, where the Court of Appeals held the conduct
23 that was subject of the lawsuit did not take place on the
24 Reservation, and remanded back to the District Court with
25 instructions to vacate the Referral Order that the District

1 Court issued, referring, yet again, the question of Tribal
2 Court jurisdiction to the Tribal Court to determine whether
3 it had jurisdiction.

4 Now, Hornell involved the Crazy Horse, malt liquor
5 dispute. The allegations in that case brought by the
6 Plaintiffs in Tribal Court included tort claims that one
7 would argue indicated injury taking place on the
8 Reservation. Nevertheless, the Court of Appeals said that
9 does not place Hornell, as a brewing company, on the
10 Reservation. Likewise, the Internet marketing the brewery
11 didn't do so. The fact that the brewery may have had some
12 other products that were sold on the Reservation did not
13 create or invest the Tribal Court with jurisdiction over
14 the complaint about this particular product the brewery was
15 making.

16 We have the Christian Children's Fund case decided by
17 Judge Kornmann. That's an interesting one, but because we
18 had a Virginia charity, Christian Children's Fund, engaged
19 with a South Dakota nonprofit called Hunkpati, and
20 Christian Children's Fund hired Hunkpati to provide
21 services on the Crow Creek Reservation. Ultimately there
22 was a falling out, and Christian Children's Fund elected
23 not to continue using Hunkpati for those services.

24 Hunkpati sued in Tribal Court. Ultimately the Federal
25 District Court concluded there was no jurisdiction in

1 Tribal Court, because the activities complained of occurred
2 off the Reservation. Among the factors the Court looked at
3 was that the decision to terminate the relationship was
4 made off the Reservation. Another factor was that payment
5 to Hunkpati took place off the Reservation.

6 So even though there were some activities that might
7 have been done on the Reservation, the Court looked at
8 Atkinson and Plains Commerce Bank, although that was
9 decided later, but Atkinson set forth sort of this
10 aphorism, that you are not in for a penny for a pound
11 sympathy because you might have some contact with the
12 Reservation. The activities that lead to the lawsuit have
13 to occur on the Reservation.

14 Now, here we overlap now with what we think is really
15 the first Montana exception to the general rule. The first
16 exception deals with the establishment of a consensual
17 relationship between the parties that would vest the Tribal
18 Court with jurisdiction.

19 I don't think there's any dispute as to how this
20 dispute happened or got started. There's testimony from
21 Amy Clouser in her Affidavit that Sprint received two
22 invoices from a company called CABS Agent. CABS Agent is a
23 billing company that bills for various local exchanges or
24 competitive local exchange carriers. So it's an entity
25 with whom Sprint is familiar.

1 CABS Agent is based in Austin, Texas. The first two
2 invoices sent to Sprint were sent to Sprint in Overland
3 Park. They were payable to CABS Agent and sent to Austin,
4 Texas. So like Christian Children's Fund, we have payment
5 off the Reservation.

6 I think it's interesting that NAT would hire CABS
7 Agent to do this, because it's further indication of how
8 remote much of NAT's activity is from the Reservation, and
9 particularly the managerial decisions of NAT. The
10 principal office of NAT, according to the papers on file
11 with the Secretary of State of South Dakota, places its
12 principal office in Sioux Falls, apparently where
13 Mr. Reiman lives.

14 So once Sprint determined that while the third invoice
15 came in, it was much larger than the previous one, that
16 engendered a review. That review determined that in
17 Sprint's view this was a traffic-pumping activity. In
18 Sprint's view, traffic pumping is not legitimate local
19 access service. Therefore, it disputed the previous two
20 payments and refused to pay the next, and it continues in
21 that position.

22 THE COURT: I know that's Sprint's position, not
23 only in this case, but in multiple other cases.

24 MR. KNUDSON: Yes, Your Honor. You've had three
25 others, I believe, before you.

1 THE COURT: I think more than that.

2 MR. KNUDSON: So, in fact, in our Brief we cite
3 to a number of cases going back to 2007. So this issue has
4 been percolating around. People like Mr. Reiman, who are
5 knowledgeable in the telecommunications industry, surely
6 were aware of this issue when they engaged in a business
7 model where they knew the interexchange carriers would not
8 go along with. There's certainly an assumption of risk
9 here that the atmospherics that have been painted here
10 about a poor Tribe, and I don't dispute the Crow Creek
11 Tribe is poor, need to be taken with a grain of salt.

12 This whole thing originates with people who are not
13 members of the Tribe, who are familiar with the
14 telecommunications industry and the regulatory regime, and
15 also know this is something that the interexchange carriers
16 don't go along with. So they put together this business
17 plan, knowing full well that they are not going to get
18 cooperation from the long-distance carriers once they
19 figure out what is going on.

20 The point of that history is to say, look, there is no
21 consensual relationship being formed by the nature of two
22 invoices being billed through a third-party agent in Texas,
23 paid for out of Kansas and delivered to Texas. We didn't
24 form a consensual relationship with someone on the
25 Reservation.

1 Also, we've cited authority that merely offering
2 telecommunication services that may end up to a customer on
3 the Reservation is not forming a consensual relationship
4 with someone on the Reservation, as both the Reservation
5 Telephone Cooperative, the District of North Dakota, and
6 then the Ottertail Power Company case cited by the North
7 Dakota Supreme Court.

8 In order to form a consensual relationship, there has
9 to be some knowledge and awareness and a knowing decision.
10 I don't think you can infer that from two invoices that
11 were paid inadvertently, in which NAT is holding there was
12 a consensual relationship formed.

13 In the absence of a consensual relationship, you have
14 to find some other way to hold Tribal Court jurisdiction
15 over Sprint. That would be the second exception in
16 Montana.

17 THE COURT: It seems to me that's the exception
18 that the Tribe is putting forth or primarily putting forth.

19 MR. KNUDSON: That's what we heard a lot about
20 today. What I'd like to say about that first is we don't
21 need to go there, because as Hornell teaches, that has to
22 be on the Reservation. It's the same conclusion in
23 Christian Children's Fund. Montana addresses the situation
24 where there's activity within the confines of the
25 Reservation.

1 What we have seen here today is that this conference
2 bridge traffic, and they don't dispute it's 99.98 percent
3 of all that is being delivered to this 477 exchange,
4 involves people anywhere in the country. They want to
5 create a regulatory regime where Sprint and its
6 shareholders will subsidize the business model and business
7 plan that Gene DeJordy and Tom Reiman came up with. Unless
8 there's actually activity on the Reservation, we don't need
9 to get to the second Montana exception.

10 What we heard from Mr. Reiman and the last witness,
11 the Treasurer of the Tribal Council --

12 MR. SWIER: Peter.

13 MR. KNUDSON: I know it's Peter. I wanted to
14 call him by his last name, but I didn't want to
15 mispronounce it.

16 It's one thing to say we have plans, and we have a
17 business plan we might be able to get some revenue from
18 someone else to finance it. But I think we don't have a
19 situation here where we meet the second Montana exception.

20 First, I want to refer the Court back to Justice
21 Ginsburg's opinion in *Strate*. She says that this exception
22 can be misperceived. I think her observation there is very
23 important. She is looking back at the precedent upon which
24 Montana relied to come up with that second exception. It
25 largely involved efforts by the Tribe to regulate the

1 activities of its own members.

2 So if you look at, for example, how Justice White
3 characterizes the exception in the Brendale decision, which
4 is the Yakima Reservation case, Justice White talks about
5 activities that imperil the existence of the Tribe.

6 Now, that's been further interpreted by the Cohen
7 treatise on Federal Indian law. Cohen says that the
8 conduct has to be catastrophic and threaten the very
9 existence of the Tribe. The fact that we challenge the
10 Tribal Court's jurisdiction to adjudicate NAT's dispute
11 with Sprint doesn't reach that high threshold.

12 The Tribal Council Treasurer may talk about the
13 Tribe's ability to self-regulate, to accomplish its goals,
14 to manage its own affairs. Well, that's fine. But what
15 NAT is doing is suing Sprint over a business charge that
16 Sprint isn't paying, and would prefer to litigate that
17 issue in a Federal District Court where Congress said it
18 should be.

19 So the fact we challenged Tribal Court jurisdiction
20 isn't by itself relevant to the Montana second exception,
21 because anytime a party challenges Tribal Court
22 jurisdiction, if we follow that argument we're hearing
23 here, it would necessarily imperil or challenge Tribal
24 sovereignty.

25 But in Hicks, Supreme Court said Tribal Courts are not

1 courts of general jurisdiction. Therefore, they don't have
2 unlimited power over nonmembers. By calling into question
3 that power, you are not threatening the integrity of the
4 Tribe. The Tribe can regulate lots of activities. It can
5 regulate perhaps a true Tribal telecommunication service.

6 But it can't reach out beyond the exterior boundaries
7 of the Reservation to nonmembers and say, hey, this is a
8 dispute over a business entity and a business plan and a
9 business program that reaches outside the Reservation
10 boundaries. It doesn't matter they put a piece of
11 equipment in Ft. Thompson that might allow these people in
12 Massachusetts, Florida, Texas, New York, to talk to each
13 other. That's not a Tribal activity that can be regulated
14 by the Tribal Utility Authority. That belongs in Federal
15 Court or the FCC.

16 Likewise, Cheyenne River and the Western Wireless
17 cases said, look, just because we are asserting
18 jurisdiction over some of these activities doesn't
19 implicate the second Montana exception. The FCC looked at
20 this, who is getting argument from the Tribe on this
21 particular point, the FCC says our ruling on the ETC
22 decision, eligible telecommunication carrier, does not
23 impair all the Tribe. It doesn't reach the high standard
24 of the second Montana exception. So it went ahead and
25 reached the merits.

1 I want to address some of the other facts here that
2 talk about why in this particular instance you don't have
3 to look at the particulars of NAT itself to say Sprint's
4 business dispute with NAT is a business dispute. We think
5 it should be decided -- Congress has deregulated that
6 particular service. Congress has said that question is a
7 question of Federal law, and under Section 207, Title 47,
8 it has to be decided in a Federal tribunal.

9 But notwithstanding their argument that but for NAT,
10 they wouldn't have all these activities on the Reservation,
11 I mean these activities are occurring without Sprint paying
12 those charges. It's pretty clear that all the telecoms,
13 the interexchange carriers who are paying these charges,
14 adding up to a significant sum of money, we looked at the
15 Joint Venture Agreement, those are access charges they want
16 to collect.

17 They don't become net profits of NAT, absent an
18 Amendment of the Joint Venture Agreement, which is under
19 the control of NAT Enterprise, that is, Gene DeJordy and
20 Tom Reiman and WideVoice, so it would take an agreement of
21 nonmembers to share those profits in some way directly to
22 the Tribe.

23 So the idea somehow there is a direct connection
24 between the nonpayment of access charges and all those
25 hoped-for Tribal activities, there is still a barrier that

1 has to be jumped over by people who invested in this deal
2 for a profit. So we have a ways to go before anything the
3 Tribal Treasurer talked about is even at issue.

4 THE COURT: Although under the agreement, the
5 money that is now net profits, according to the testimony,
6 is being used to improve the infrastructure of the Tribe.
7 So the Tribe may not be benefiting by cash, but they are
8 certainly benefiting by having their infrastructure
9 improved.

10 MR. KNUDSON: The money for that is coming from
11 WideVoice. WideVoice is putting money in there to make a
12 profit. More important --

13 THE COURT: But if Sprint was paying the bills
14 that were sent to them, that money would be going in to
15 improving the infrastructure.

16 MR. KNUDSON: At this point they would say we're
17 going to use it for buildout. Again, I say whether they
18 are entitled to charge Sprint for those services and use it
19 for that purpose is still a question of Federal law and
20 should be decided in this Courtroom or the FCC.

21 So what they would like to use that for, and we don't
22 know what their ultimate overall investment plan is or how
23 much they really need, I mean a million dollars goes a long
24 ways when you are only serving a Reservation, even
25 including nonmembers, of just over two thousand people.

1 So to put everyone on a wireless system shouldn't cost
2 two million dollars, if it's approximately a hundred
3 dollars to put one of these ATA pieces in a home, which is
4 what we heard Mr. Williams say.

5 So take a look at the Joint Venture Agreement. Let's
6 talk again about what we were hearing by way of the threat
7 to Tribal sovereignty and the challenged Tribal Court
8 jurisdiction. This is why I brought in the Joint Venture
9 Agreement and the Midstate Interconnection Agreement. Both
10 of these agreements elect arbitration.

11 The Joint Venture Agreement speaks to binding
12 arbitration. What that means is that parties that are
13 entering into an agreement with the Tribe are telling the
14 Tribe, "We don't want to be part of the Tribal Court
15 system." The Tribe or NAT, in terms of the Midstate deal,
16 are voluntarily electing to go along with that position.
17 So it follows they cannot argue today that Sprint's
18 challenge to Tribal Court jurisdiction somehow implicates
19 Tribal sovereignty or Tribal self-government.

20 THE COURT: Isn't that an exercise itself of
21 Tribal sovereignty, that you make the choice to waive
22 sovereignty in some instances, or you make the choice to
23 agree to arbitration in other instances, that that in and
24 of itself is an act of Tribal self-governance? That they
25 are involved in making that choice?

1 MR. KNUDSON: The point being is it is not so
2 essential to Tribal self-government to the existence of the
3 Tribe. They are willing to go along with it for business
4 reasons to meet the Montana second exception. Their
5 willingness to agree to that must mean that willingness to
6 waive Tribal Court jurisdiction doesn't threaten
7 catastrophic implications to Tribal survival. It doesn't
8 imperil Tribal self-government. So the high threshold that
9 they claim to meet is belied by their own willingness to
10 voluntarily agree to binding arbitration off the
11 Reservation under South Dakota law, which is what they
12 elect, or Federal law in some circumstances.

13 So what we have here is a situation where they are
14 entering into voluntary agreements saying, okay, we don't
15 need to be in Tribal Court. It's not that important.
16 Well, my point is the same. Challenging Tribal Court
17 jurisdiction, where we are being involuntarily hailed into
18 Tribal Court, likewise doesn't threaten Tribal Court
19 jurisdiction. Otherwise no one could ever challenge Tribal
20 Court jurisdiction.

21 That argument, you would always run up to what we are
22 hearing today. If that's the rule, there's no point to
23 Strate, because it would be an imperative. Strate says
24 it's not an imperative. It's a prudential rule of comity.
25 If it's a prudential rule in comity, it's not automatic.

1 Therefore, Strate controls here, because 207 plainly,
2 unambiguously says jurisdiction belongs in Federal Court or
3 the FCC. Likewise, with no conduct on the Reservation, we
4 don't get to the second Montana exception.

5 THE COURT: Let's say the Court finds all of the
6 claim here falls under 207. Do I need to address other
7 issues if I find there's then field preemption?

8 MR. KNUDSON: If you hold that Section 207 vests
9 this Court with exclusive jurisdiction over this dispute,
10 that gets us the resolution of where this case goes
11 forward. The Court should issue an injunction against
12 further proceedings in Tribal Court.

13 THE COURT: My question is would I then need to
14 address A-1 Contractors, Nevada v. Hicks, Montana?

15 MR. KNUDSON: You wouldn't need to look to A-1
16 Contractors v. Strate and Hicks, because they have alleged
17 this Court should stay because of the exhaustion rule.
18 Strate says where jurisdiction so clearly doesn't rest in
19 Tribal Court, you don't need to exhaust because it would
20 just be delay. So that rule of exhaustion falls away.

21 I think you would analytically have to reach Strate
22 and Hicks, but you would be looking towards the
23 jurisdiction prerogative Congress set up putting
24 jurisdiction over this dispute in Federal Court or the FCC.

25 We wouldn't need to get to Montana as a result. It

1 would be unnecessary to address the consensual part of it
2 or the second Montana exception. You could do as an
3 alternative holding, since we're not on the Reservation,
4 Hornell controls. Likewise, there's no need to refer to
5 Tribal Court. Hornell did direct the District Court to
6 vacate the Referral Order, because the conduct wasn't on
7 the Reservation.

8 THE COURT: What if I find this traffic doesn't
9 fall under 207? I find, for some reason, 207 doesn't
10 apply?

11 MR. KNUDSON: If you find 207 doesn't control,
12 you have to address the question of whether or not the
13 conduct is on the Reservation or off. If it's off, Hornell
14 controls it. Back with Strate, saying exhaustion is not
15 required.

16 The final analysis is assuming there's some conduct on
17 the Reservation, even if it's not consensual, then you go
18 to the second Montana exception. Absent presence on the
19 Reservation, you don't need to get there either.

20 I just want to conclude that they talked about other
21 businesses coming on the Reservation. This is an issue
22 limited to telecommunications activities. There was an
23 existing incumbent local exchange carrier. Businesses that
24 think they can make a profit doing business on the
25 Reservation don't need free service to come onto the

1 Reservation. So the idea of attracting off-Reservation
2 investments doesn't depend on NAT's existence. It depends
3 on market activities that might otherwise exist. They
4 could use Midstate or Venture Cooperative as local exchange
5 carriers for their service. So the idea that this is going
6 to cause people --

7 THE COURT: But both of those entities have been
8 there for a long time and have not provided the service.
9 Why would they now?

10 MR. KNUDSON: What we heard, even from the
11 Treasurer, isn't that they don't provide the service, is
12 that --

13 THE COURT: The members can't afford their
14 service.

15 MR. KNUDSON: Their price is too high. But when
16 we are talking about parties coming from outside the
17 Reservation and looking for business activities, if they
18 perceive one, it isn't because there's free telephone
19 service. The telephone service from Midstates or Venture
20 Cooperative was available and they could set up and had
21 interstate access, if they needed it as part of their
22 business, coming onto the Reservation. I think it
23 overstates the case. Somehow NAT's free service to a
24 hundred Tribal members or the people living on the
25 Reservation somehow opens up this Reservation to new

1 economic investment, because that opportunity was
2 available, but before the fact. So I think they exaggerate
3 when they say that.

4 I find it important that the Universal Service Funds
5 they've turned down. It's clear they don't want Federal
6 regulatory oversight. They don't want the Federal
7 government looking at what the business plan is, because it
8 opens a can of worms. This is a very important issue which
9 even the FCC is taking a hard look at what this means with
10 respect to the overall implications for the local access
11 service charge regime under the legacy system.

12 So, yet again, belies and undercuts their argument
13 that something NAT is doing is critical to Tribal survival.
14 That is not the case. Why would you turn down free money?
15 All I can say is they are turning down free money because
16 they don't want to be under the glare of the Federal
17 Communications Commission for their services.

18 I think with respect to the other aspects of our
19 Preliminary Injunction Motion, we believe we meet the
20 Dataphase factors of irreparable harm, balance of harm, and
21 the public interest. If Congress has said Section 207
22 controls, then Congress has said where the public interest
23 lies and where this should be decided.

24 Sprint will undergo irreparable harm if it is forced
25 to litigate in a forum where it has -- basically Congress

1 says it's entitled to a Federal forum under Section 207.
2 We have serious reservations, notwithstanding what the
3 Tribal Council has done, as to the due process we would
4 receive in Tribal Court. Clearly they've switched Judges
5 in the middle of this, and hired somebody from North Dakota
6 who is not a telecommunications expert to take a look at
7 this. We do worry about going forward in that particular
8 Tribunal.

9 THE COURT: But Judge Jones is a very experienced
10 Tribal Judge and a Law Professor at the University of North
11 Dakota School of Law.

12 MR. KNUDSON: He is also an advocate for Tribal
13 causes. The neutrality that we would hope for is also
14 something we worry about. I don't doubt his intellectual
15 acumen at all.

16 THE COURT: Well, what is the irreparable harm
17 Sprint would have if Tribal Court determined they had
18 jurisdiction, and if this Court stayed the matter until
19 that determination was made, and ultimately decided whether
20 or not -- whether Tribal Court did have jurisdiction, what
21 would be the irreparable harm to Sprint at that point?

22 MR. KNUDSON: Well, I think it's the same
23 analysis we're entitled to a ruling now under Hornell,
24 under Strate. We're not required to endure the delay of
25 getting a resolution of this case. So a prompt resolution

1 of where we stand is important. Denying us that
2 opportunity would constitute irreparable harm.

3 THE COURT: As I understand it, you are not
4 paying the bills that are being sent to you, anyway.

5 MR. KNUDSON: We have hanging over us a claim
6 which they say is very substantial. They also have brought
7 punitive damages claims in Tribal Court. There's a lot of
8 uncertainty that sits here.

9 I go back again to what Justice Ginsburg said in
10 *Strate*. Exhaustion must give way if jurisdiction is clear
11 that it doesn't exist in Tribal Court. That being a
12 prudential rule, you are causing Sprint to endure another
13 round of litigation in a forum, denying it an opportunity
14 to decide this in a forum that Congress has set up and said
15 Sprint is entitled to use, and forcing it to go through a
16 tribunal where Judge Jones is subject to serve at the
17 pleasure of the Tribal Council. That's clear in the Tribal
18 ordinances that create that position.

19 So that's where our irreparable harm comes from is
20 what the Supreme Court said in *Strate*, and what it
21 amplified in *Hicks*, and what Judge Lay said to the District
22 Court in *Hornell*. If it doesn't belong in Tribal Court,
23 don't go through the exercise of having the Tribal Court
24 conclude otherwise, and then come back to this Court for
25 relief.

1 On that basis we would argue we would suffer
2 irreparable harm if we were forced to continue litigation
3 in Tribal Court. That concludes our argument. I would
4 like to reserve some rebuttal, if I may.

5 THE COURT: You may. Thank you. Mr. Swier?

6 MR. SWIER: Your Honor, with the Court's
7 indulgence, could Ms. Roberts make her short argument
8 first, and then I could conclude?

9 THE COURT: Sure. Ms. Roberts?

10 MS. ROBERTS: Thank you, Your Honor. A party can
11 challenge Tribal Court jurisdiction all they want. What we
12 would like the opportunity for them to do is to do it in
13 Tribal Court.

14 THE COURT: So why do you think Section 207
15 doesn't exclusively give jurisdiction to either Federal
16 Court or to the FCC?

17 MS. ROBERTS: Your Honor, the reason NAT brought
18 suit in Tribal Court was to enforce a Tribal Utility
19 Authority Order. The Tribal Utility Order addressed this
20 to begin with. It was being ignored. Instead of Sprint
21 coming to talk, discuss, attend a hearing, any of the
22 above, they went and ignored the Utility Authority Order.

23 THE COURT: Isn't the Utility Authority Order
24 claiming damages based on a common carrier?

25 MS. ROBERTS: Your Honor, I think this is where

1 it comes down to.

2 THE COURT: I mean you would agree Sprint is a
3 common carrier.

4 MS. ROBERTS: Yes.

5 THE COURT: And you are trying to get damages
6 against a common carrier.

7 MS. ROBERTS: Your Honor, that in itself goes to
8 the very merits of the case. For a moment, and we're not
9 even to the point of arguing the merits of the case.

10 THE COURT: This is just a jurisdictional
11 statute, 207. It doesn't go to the merits of who wins
12 what. It goes to who has jurisdiction of the claim. That
13 is the issue you are addressing is you think it should be
14 Tribal Court. I want to know why you think 207 doesn't
15 apply.

16 MS. ROBERTS: I'm not arguing where jurisdiction
17 lies. That is for the Court to decide. I am hoping it's
18 the Tribal Court to decide where jurisdiction lies. Just
19 because this is argued in Tribal Court doesn't mean Tribal
20 Court will assume jurisdiction. It can go in front of
21 Judge Jones, which I would like to state for the record,
22 would in no way -- the --

23 THE COURT: Insinuation.

24 MS. ROBERTS: Thank you. Of counsel that in some
25 way his rulings would be determined because he's been hired

1 by Tribal Council or in some way his rulings would be
2 biased is offensive. He is one of the most outstanding --
3 it would be like him coming in and questioning you
4 yourself. I am appalled by what I heard him saying.

5 THE COURT: Well, and I have no doubt Judge Jones
6 would be very fair. I have known Judge Jones for a long
7 time. He's extremely competent, very bright, and
8 everything I've read he's written has been very well
9 briefed and fair to all of the parties that are in front of
10 him. I don't think there's any question he wouldn't be a
11 competent Judge to hear this case in Tribal Court.

12 The issue I have to look at is if you apply the
13 principles of A-1 Contractors and Nevada v. Hicks, and if
14 there's no question that either Federal Court or the FCC
15 has jurisdiction, then this Court would not wait until
16 Tribal Court exhausted their remedies. That's why I'm
17 trying to think why you think Section 207 doesn't apply.
18 Or if it does apply, why would Tribal Court have
19 jurisdiction over this matter?

20 MS. ROBERTS: Your Honor, maybe if I could
21 explain it in a roundabout way. The fundamental issue
22 today, I believe, in front of this Court is not whether
23 Tribal Court has jurisdiction, but whether or not Tribal
24 Court should address the question of where jurisdiction
25 lies. Congress has made it very clear that they should

1 have first initial exclusive jurisdiction over actions
2 arising within the Reservation. That's the point.

3 We're hearing arguments today over what is happening
4 on the Reservation or what would apply to give jurisdiction
5 and whatnot. Those types of arguments argue against Tribal
6 Court jurisdiction, but do it in the forum and give them,
7 as Congress has outlined in the Tribal Court exhaustion, to
8 address that very argument.

9 Basically they should be able to -- when it involves
10 Indian parties or non-Indian parties, when it involves
11 Reservation affairs, they need to expend all Tribal
12 remedies. In the National Farmers Union case they listed
13 the three reasons for it. That was there is a very strong
14 Congressional policy of strengthening Tribal
15 self-government. The second one is to serve the orderly
16 administration of justice. Thirdly, to provide the parties
17 in Court involved with the benefit of Tribal Court
18 expertise, as they outlined in National Farmers Union.

19 All three of these purposes for exhaustion are aimed
20 at strengthening the Tribal system. That is something the
21 Federal government has continually and strongly encouraged.

22 I am not arguing who has jurisdiction. What I am
23 arguing is that it should be fought out in Tribal Court.
24 They may decide they don't have jurisdiction, but to give
25 them the respect, because when counsel argues none of this

1 took place on the Reservation and that it doesn't deeply
2 impact their actual existence, and he kind of mocked that
3 or poo-pooed the idea that it has consequences, that simply
4 is not true.

5 This involves a Tribally-owned company. It involves
6 actions on and within the exterior boundaries of the
7 Reservation. It involves the Tribal Utility Authority's
8 regulatory authority that is being questioned. They don't
9 even want to acknowledge it. It acknowledges the Tribal
10 Court's adjudicating authorities. It involves the Tribe's
11 financial stability, as you heard in the testimony.

12 It involves the Tribe's economic development effort.
13 As counsel was saying, "I don't think free phone service is
14 going to attract another business to come on on economic
15 development." That is not the point at all. We're not
16 talking about that.

17 We're talking about why in the world would any other
18 business risk investment, time, energy, to come on and try
19 to start something when they could be hauled to Federal
20 Court like this, when if they set something in motion, if
21 there's some sort of in the Tribal code or some sort of
22 regulation the Tribe has made, you just can ignore it. You
23 have bills? Don't pay it because the Tribal Authority,
24 they can't do anything about it. Counsel can't do anything
25 about it. Utility Authority can't do anything about it.

1 You can't take them to Tribal Court. So you get hauled to
2 Federal Court.

3 It's not that NAT giving away free phones is what
4 attracts businesses. It's the absolute disaster and
5 destruction of a friendly economic environment for
6 entrepreneurs and for businesses to come on to the
7 Reservation. No one would risk going on that Reservation
8 if this is the way disputes are handled, and when Sprint
9 can just walk over every part of Tribal government.

10 THE COURT: But under National Farmers Union,
11 which is one of the cases you just relied on, it recognizes
12 three exceptions to exhaustion. The second one is where
13 the case is patently violative of expressed jurisdictional
14 prohibitions. That's why I keep going back to Section 207,
15 which indicates where a person claiming to be damaged by a
16 common carrier files a complaint, that it has to be handled
17 either by the FCC or by Federal Court.

18 So under National Farmers Union, how do you get around
19 that second exception?

20 MS. ROBERTS: I would love to have it in front of
21 me to address it. It does. I'll leave that up to
22 Mr. Swier to address it, if you don't mind, Your Honor.

23 THE COURT: Okay. I would think when you are
24 representing the Tribal Court, I thought the question was
25 appropriate for you, because you are trying to argue that

1 there should be exhaustion first before this Court would
2 decide. It seemed really relevant for you to address that
3 issue.

4 MS. ROBERTS: It is, and I apologize. Maybe I'm
5 just not understanding exactly what you are asking and
6 where you are coming. I'm not understanding exactly --

7 THE COURT: Well, you were arguing National
8 Farmers Union indicates this Court should not decide in the
9 first instance whether the Tribal Court has jurisdiction,
10 that the Tribal Court should be able to exhaust that issue
11 themselves to decide whether or not they have their own
12 jurisdiction.

13 But National Farmers Union established three
14 exceptions to that exhaustion doctrine. The second
15 exception to that exhaustion doctrine was if the case is
16 patently violative of expressed jurisdictional
17 prohibitions. Here the Plaintiffs are arguing there is
18 field preemption because of Section 207. That would make
19 it that there is an expressed jurisdictional prohibition
20 with regard to Tribal Courts handling these matters.

21 So I'm wondering why, under the case you cited,
22 National Farmers Union, why that second exception to
23 exhaustion wouldn't apply? Are you arguing it doesn't fall
24 under Section 207? What is your position as to why there
25 is not field preemption under Section 207?

1 MS. ROBERTS: I would either argue there would
2 not be, and I would also argue the other exceptions and
3 provisions outlined by the Court would preempt -- they need
4 to be addressed before.

5 I think that the Courts have made it clear that
6 disputes such as this go to the very heart of
7 self-government and self-determination, and Congress has
8 over and over made it very clear that that is a perfect
9 case for Tribal exhaustion to occur. I don't know if that
10 particularly answers your questions, and Mr. Swier can more
11 fully address it.

12 But the one, I think, point that case law makes clear
13 is that the first opportunity to evaluate these factual
14 issues that you are addressing and the legal basis for the
15 challenge, such as what we've been talking about today is
16 in Tribal Court. The risk of what is happening today and
17 the procedural nightmare that's happening, when it's in
18 Tribal Court and in the South Dakota PUC and it's here, are
19 exactly the types of situations that the exhaustion remedy
20 or doctrine seeks to remedy.

21 THE COURT: I guess the thing that concerns me is
22 I've had many cases in this same posture where I have
23 stayed my ruling and allowed the Tribal Court to exhaust
24 the determination of whether they have jurisdiction or not.
25 I've done that multiple times.

1 I've never had a case before, though, where there was
2 a statute that indicated if that statute applied, the
3 jurisdiction lied only in Federal Court or in a Federal
4 regulatory agency.

5 So that's what I'm trying to figure out. When there's
6 field preemption under a statute, why would I allow the
7 Tribal Court to exhaust?

8 MS. ROBERTS: I would argue that doesn't. What
9 I'm also arguing is -- I guess I would argue that it would
10 not.

11 THE COURT: I understand your position. Why are
12 you taking that position? That would be more helpful to
13 me. I can't just write in there, "The Tribe says it
14 doesn't apply." I have to articulate why it doesn't apply.

15 MS. ROBERTS: I understand, Your Honor.
16 Basically what we have here is a dispute over a bill not
17 being paid. That is the fundamental dispute. I don't
18 think that we even get to the rest until basically they
19 bring in all the FCC and telecommunications and Federal law
20 and whatnot, which is a new position of theirs, because
21 they started over in South Dakota PUC addressing this
22 issue.

23 But it fundamentally comes down to, and I think they
24 are just using that to muddy the water, it is a dispute
25 over whether or not they need to pay a bill for services.

1 That is a simple matter that can be addressed in Tribal
2 Court, if that's where it stops.

3 THE COURT: If it's just a dispute about a bill
4 not being paid, that's why I'm concerned Section 207
5 applies. That says if it's any person claiming to be
6 damaged by a common carrier, that's when Section 207
7 applies. That's basically what it is is a dispute about a
8 bill not being paid by a common carrier. You'll have to
9 explain to me why Section 207 doesn't apply then.

10 MS. ROBERTS: Your Honor, the reason why it
11 wouldn't apply is because -- my argument or the Tribe's
12 argument is to get it back into Tribal Court, so these
13 facts can be laid out. It's more than just whether or not
14 a bill is being disputed. It's that NAT used the Tribal
15 Utility Authority. They used the Authority that was in
16 place to make a complaint. They issued an order. That has
17 been ignored.

18 So NAT has gone and sought the next remedy in that
19 jurisdiction, which is Tribal Court, to come and address
20 these issues. If once it's in Tribal Court and the Judge
21 determines there is an injury caused by a common carrier or
22 whatnot, then at that point they would have to say this
23 Court wouldn't have jurisdiction.

24 But the main point of this whole dispute is the Tribal
25 Court gets to take first look at these issues. Just

1 because it ends up in Tribal Court does not mean, of
2 course, they will accept jurisdiction.

3 Before we get to the merits of whether or not someone
4 has been injured by a common carrier, it should go back to
5 Tribal Court or be allowed to progress through Tribal
6 Court, so that those facts can come out.

7 The more important issue before this Court -- yes, the
8 ultimate question is jurisdiction, whether this case should
9 be heard in this Court or Tribal Court. That is the
10 ultimate question. However, the first question that needs
11 to be addressed is exhaustion. Who should make the initial
12 decision on the ultimate decision?

13 We have a policy that's encouraging Tribal
14 self-government. We recognize Indian Tribes, and that they
15 retain the attributes of sovereignty over their members,
16 their territory, and in Court cases it's been made clear
17 over nonmembers, as well, in civil matters. This is an
18 important matter of Tribal sovereignty.

19 THE COURT: So if this Court did stay its
20 decision and allow the Tribal Court to exhaust, how long of
21 a time period would that take for the Tribal Court to
22 exhaust?

23 MS. ROBERTS: Well, Your Honor, the Tribal Court
24 has already set a briefing schedule in this matter. As far
25 as I know, the briefing schedule extends into November, and

1 then I believe there will be an evidentiary hearing simply
2 on, from my understanding, simply on the jurisdiction issue
3 alone. Not on the merits of the case.

4 The Tribal Court first has to determine whether they
5 have jurisdiction. They may say they don't, if they come
6 to the conclusion that a common carrier has caused the
7 injury. But that's going to the ultimate question of who
8 has jurisdiction. I apologize for stumbling over your
9 inquiries.

10 But before we even get to that question, there's a
11 first question of whether or not this is the very
12 appropriate case for Tribal exhaustion. That's the first
13 question. Whether or not who has jurisdiction is the
14 ultimate question, which then that would apply.

15 But in this case, if I just could point out, Sprint is
16 attacking the legitimacy of the Tribal Court, a
17 Tribally-owned limited liability company, services within
18 the boundaries of the Reservation, a Tribal Authority's
19 ability to plan and oversee utility services, the Tribe's
20 own telecommunications plan, the Utility Authority's Order,
21 their economic stability, their political stability, their
22 financial stability.

23 This dispute does go to the very heart of their
24 self-determination, their resources, and the administration
25 of justice. Sprint's actions do directly threaten and

1 affect the political integrity, political security, health
2 and welfare of the Tribe. All of those are satisfied, and
3 all of those point towards Tribal exhaustion.

4 In asking questions of whether it's a common carrier
5 and if that common carrier has injured somebody, that is
6 already addressing who has jurisdiction. What I'm asking
7 the Court for today is to allow Tribal Court to determine
8 jurisdiction.

9 THE COURT: You agree that Sprint is a nonmember?

10 MS. ROBERTS: Yes, Your Honor. I also believe
11 there is plenty of case law that allows in some civil
12 disputes the Tribe to exercise jurisdiction over
13 nonmembers. It would be like saying -- I want to come up
14 with an example, but I don't have one coming quickly to
15 mind. Nonmembers are in Tribal Court all the time in civil
16 matters of divorce or custody. They exercise jurisdiction.

17 THE COURT: Where they are married to a member?

18 MS. ROBERTS: Yes.

19 THE COURT: You wouldn't have two nonmembers
20 coming into Tribal Court for a divorce or custody issue?

21 MS. ROBERTS: You can if they submit. That's
22 different. I was struggling to come up with the exact
23 example. Simply because they are not a member, they are --
24 their presence is on the Reservation and they are doing
25 business with a company, NAT, that's 51 percent owned by

1 the Tribe.

2 THE COURT: How do you distinguish this case from
3 A-1 Contractors?

4 MS. ROBERTS: In this case I believe you have all
5 the prongs, all the elements necessary that satisfies every
6 area. As far as you have Sprint, the telephone, you know,
7 getting into the merits perhaps. But they have to use each
8 other's lines. Everyone does use everyone's lines. AT&T
9 uses Sprint's lines. NAT uses other people's lines and
10 provides services, and there's this back and forth use of
11 business. They are conducting business together. That's
12 just the way it is.

13 If you cross over from one place to the other -- even
14 NAT. Some of the sections of lines are owned by someone.
15 They have to pay them. Another section is owned by someone
16 else. They have to pay them. Sprint is doing business
17 with NAT, and NAT is 51 percent owned by the Tribe. This
18 is not two nontribe -- this is not a nontribal entity in
19 this case. It is a Tribal business. It is governed by the
20 Tribe. There is a presence on the Tribe.

21 Just because Sprint doesn't have any facilities on the
22 boundaries of the Reservation does not mean they are not
23 doing business with NAT, like there would be with Sprint or
24 AT&T. It's the exact same instance. Just because Sprint
25 doesn't have facilities or an office on the Reservation

1 doesn't change the facts. They may not -- I don't know if
2 this is true or not. They may not have an office or lines
3 within the State of South Dakota, but they still use
4 people's lines across the State of South Dakota.
5 Therefore, they have a presence in South Dakota, and
6 they're doing business in South Dakota.

7 THE COURT: Thank you. Anything further?

8 MS. ROBERTS: Your Honor, just with the
9 preliminary injunction, you brought it up with the other
10 counsel. This should only be issued in cases clearly
11 warranting it. Not doubtful cases. They could not come up
12 with a threat of irreparable harm. I would argue if you do
13 grant it, it would cause irreparable harm to the Tribe.

14 The movant bears the burden of proof for all the
15 factors. I do not believe they met that burden and did not
16 have any specifics of where harm could be by requiring them
17 to exercise Tribal exhaustion.

18 So we would ask that the Court deny Sprint's Motion
19 for an Injunction and require them to exercise Tribal
20 exhaustion in this matter. Thank you.

21 THE COURT: Mr. Swier? We're going to take a
22 10-minute recess.

23 (Recess from 3:37 until 3:52)

24 THE COURT: Mr. Swier?

25 MR. SWIER: Your Honor, I presume the Court is

1 going to ask me the preemption question on Section 207. I
2 am going to get right to that.

3 First of all, I think we have to keep in mind what we
4 are here for today. Sprint has filed a Complaint
5 requesting a Preliminary Injunction be issued. That is why
6 we are here today. NAT's Motion for a Stay based on Tribal
7 exhaustion is pending, but that issue has not been resolved
8 through the briefing. I am still allowed to issue my reply
9 brief to that.

10 So I think, even though we're going to talk about it,
11 I think for today it's incredibly premature for the Court
12 to decide on anything other than the preliminary injunction
13 issue. We're going to talk about the exhaustion, but I
14 don't think today, because the parties can still submit
15 some briefing on the issue, that unless the Court deems it
16 appropriate, I don't think that issue can be foreclosed
17 today or decided.

18 THE COURT: I gave both sides an opportunity to
19 file their reply brief. So I won't decide either issue
20 today until I've gotten both of those reply briefs in. But
21 I think you can tell the issue with Section 207 is an issue
22 you need to focus on in your reply brief, and if you can
23 address it today, I would appreciate that, too.

24 MR. SWIER: I will. Let me tell you why Section
25 207 does not apply in this case.

1 Number one is the Federal Communications Commission
2 and Congress has never foreclosed on a Tribe's sovereign
3 authority to regulate its own telecommunications system.
4 Let me go through that once more. The FCC and Congress has
5 never foreclosed on a Tribe's sovereign authority to
6 regulate its own telecommunications system.

7 Here is why that's important, especially when we are
8 dealing with telecommunications and FCC laws and
9 regulations. First of all, the FCC has always recognized
10 that telecommunications are absolutely critical to Tribal
11 development.

12 Next, the FCC has always recognized that Tribal
13 governments, quote, have the right to set their own
14 telecommunication priorities and goals for the welfare of
15 their membership. These policy statements and these
16 policies by the FCC are included in our Brief in Opposition
17 to Preliminary Injunction.

18 So that I think takes this entire telecommunications
19 area, when we're dealing with a Tribe, and puts it in its
20 own unique genre. That is different from just a flat-out
21 textual reading of Section 207. Let me give you an
22 example.

23 Probably the seminal Tribal exhaustion case in the
24 Eighth Circuit is the Bruce Lien case, 93 F.3d 1412. That
25 was a case decided by the Eighth Circuit in 1996.

1 In that case the parties were fighting about an issue
2 that undoubtedly came under the Indian Gaming Regulatory
3 Act, IGRA, which I know this Court is familiar with. In my
4 job in the Attorney General's office, I became extremely
5 familiar with IGRA. The argument, of course, that the
6 nontribal entity made was this. They said that IGRA
7 entirely preempted the field of Indian gaming, and it
8 directs -- excuse me, and it divests Tribal Courts of
9 jurisdiction. That was the company's argument, that this
10 gaming dispute cannot be in Tribal Court, because IGRA
11 encompasses all Tribal gaming issues. So they said because
12 IGRA preempts, you can't do anything in Tribal Court
13 regarding Tribal gaming. It has to be in Federal Court
14 under IGRA.

15 Here is what the Court said on that. It said, "IGRA
16 says nothing about divesting Tribal Courts of jurisdiction
17 regarding" -- this is the key -- "Reservation affairs."
18 The field of Indian gaming under IGRA has as big or even a
19 larger preemption umbrella than does the Federal
20 Communications Act.

21 THE COURT: So do you think *Strate vs. A-1*
22 Contractors in any way affects the holding in *Bruce Lien*?
23 That came the following year.

24 MR. SWIER: It did. My answer is no. Here is
25 why. The *Strate* case, we were talking about everybody was

1 a non-Indian party. No Indians involved in that case at
2 all. And it involved a car accident on the Reservation.
3 The key is that the Strate case was entirely non-Indian
4 parties.

5 In this case NAT is a majority Tribally-owned company.
6 Without question, without any reasonable question, all the
7 activities are occurring on the Reservation. Now, whether
8 we want to bicker about that or not, that would be an issue
9 regarding jurisdiction in the Montana exceptions. But A-1
10 Contractors v. Strate I feel is entirely inapplicable.
11 Again, you are dealing with non-Indian parties and a car
12 accident case.

13 Nevada v. Hicks is one of the other five cases Sprint
14 relied on. Nevada v. Hicks was a civil rights and tort
15 claim case which arose from state officials trying to serve
16 process for an off-Reservation crime. Again, the unique
17 facts in this case, nothing even remotely similar to what
18 was in Strate and Nevada vs. Hicks. Entirely different
19 factual scenarios.

20 The other cases that Sprint relied on, the Christian
21 Children's Fund case. That was a 2000 decision here in
22 South Dakota. In that case it makes our argument even
23 stronger. In Christian Children's Fund, Tribal remedies
24 were actually exhausted. They went through the Tribal
25 exhaustion process there. We were dealing in that case

1 with all non-Indian parties again. No Indians were
2 involved in that case. The Tribe was not a party to any
3 agreement in that case, unlike the facts here. There were
4 no Tribal relations or activities whatsoever in the
5 Children's Fund case.

6 THE COURT: You said "unlike the facts here."
7 The Tribe is a party to an agreement here? Is there
8 actually an agreement between the Tribe and any of the
9 entities here?

10 MR. SWIER: I think the Tribe, as the majority
11 owner of NAT, the Tribe is a party here, because the Tribe
12 is a majority owner of NAT.

13 THE COURT: I guess what I mean, is there an
14 agreement between the Tribe and Sprint? Any agreements
15 with Sprint?

16 MR. SWIER: Not any written agreements. I don't
17 know this for sure, but I don't think that Sprint has an
18 official written agreement with every single competitive
19 local exchange carrier and local exchange carrier in the
20 country. This routing of these calls is how this works.

21 THE COURT: What about Sprint's argument that
22 because it's a nonlegacy, the last link is a nonlegacy
23 link, that there needs to be a negotiated agreement.

24 MR. SWIER: I think, Your Honor, if we're going
25 to get all the way to the point that we are talking about

1 trunk links and line sides, that goes to the incredibly
2 complex merits of the case. But that doesn't go to the
3 issue we're talking about today of preliminary injunctive
4 relief or of Tribal exhaustion.

5 THE COURT: It does go to the issue of whether
6 there is an agreement.

7 MR. SWIER: I'm aware of no written agreement
8 Sprint and NAT have. However, Sprint has customers who
9 make calls. Sprint does not have the infrastructure around
10 the country to keep its customers' calls entirely on its
11 privately-owned infrastructure. They need the local
12 exchange carrier up in Aberdeen, or they need the local
13 exchange carrier out in Winner to carry their calls. They
14 pay for those. They pay the tariff rates for those.

15 But now because we're dealing with an exchange carrier
16 that's Tribally-owned and based within the boundaries of
17 the Reservation, they don't want to pay. What's the
18 difference between those calls getting routed up to Winner
19 and those get paid, and the calls going to Ft. Thompson and
20 those calls getting paid? There is no difference, other
21 than the fact that it's a Tribal entity that is supposed to
22 be paid, and it occurs within the exterior boundaries of
23 the Reservation.

24 So I don't think Sprint has a written contract between
25 Sprint and let's say Northern Valley Communications up by

1 Aberdeen. I think if you are going to be a common carrier
2 and deliver calls, you pay your tariffs. Under the filed
3 rate doctrine, once those tariffs are accepted by either
4 the FCC or by the Utility Authority, there is an implied
5 agreement there that you pay those tariffs.

6 THE COURT: Although I know they are not paid the
7 Northern Valley tariff either, since you threw their name
8 out.

9 MR. SWIER: I know that, too, because I'm
10 involved in that now, also. But you can see where I'm
11 going. There are tariffs, of course, that are paid to
12 Northern Valley. It's just that these tariffs they say
13 comes from the majority of traffic pumping are the ones
14 they aren't paying. They are paying the other ones.
15 That's because to play ball in this area, that's how it's
16 done. You make your payments.

17 Otherwise a Sprint customer would try to call from
18 Omaha, Nebraska, up to Groton, and let's say Sprint has
19 facilities in Omaha. Great. Well, as soon as Sprint's
20 facilities end in Omaha and they don't have facilities in
21 Groton, their customer can't make a call from Omaha to
22 Groton, because it relies on that infrastructure in between
23 Omaha and Groton, and those tariffs are paid, because
24 Sprint then uses the infrastructure of other companies.

25 To compensate those other companies for their

1 infrastructure investments, they pay the tariffs. That's
2 why the direct contract issue between Sprint and NAT is
3 really a red herring. I don't see that applicable here at
4 all. They presented no evidence that they have individual
5 contracts with every CLEC or LEC in the country. I don't
6 think that's how it works.

7 THE COURT: I interrupted you on the discussion
8 about the Christian Children's Fund. Do you want to go
9 back to why you think that's different?

10 MR. SWIER: Here is why it's different. Four
11 reasons. Number one, of course, you had that case where
12 Tribal remedies were actually exhausted in that case. The
13 parties went through the exhaustion procedure.

14 Number two, we're talking in Christian Children's
15 about nontribal parties, entirely nontribal parties in
16 Christian Children's.

17 Number three, the Tribe was not a party in that case
18 to any agreement. Again, it may be an implied agreement
19 between Sprint and NAT, but there's an agreement. In
20 Christian Children's, no agreement whatsoever.

21 Finally, Your Honor, the fourth reason this Children's
22 Fund case is different is there were no Tribal activities
23 or relations whatsoever. Everything took place off site of
24 the Tribe. It wasn't on the Reservation. It didn't
25 involve Tribal members. That's why Christian Children's

1 Fund not only doesn't help Sprint, but I think it helps my
2 case because exhaustion was gone through.

3 The other case, Your Honor, if I may, the Hornell
4 Brewing case. That's a case that's been relied on by
5 Sprint heavily here. In that case I only think one fact is
6 relevant that totally differentiates that case. In that
7 case the brewery did not conduct any activities on the
8 Reservation. Pure and simple. The Court found you can't
9 bring the brewery into Tribal Court, because the brewery
10 didn't conduct any activities on the Reservation. There
11 were no Reservation activities.

12 Again, as we've shown today, dozens and dozens of
13 activities in this case take place on the Reservation by
14 Tribally-owned company. So that's how the Hornell Brewing
15 case can be differentiated from this case.

16 Finally, Your Honor, the AT&T vs. Coeur D'Alene Tribe
17 case, Ninth Circuit case. That also involved IGRA. That
18 was an IGRA case, just like the Eighth Circuit's decision
19 in the Bruce Lien case. It was an Indian gaming case. It
20 was a case where the Tribe was seeking an enforcement of a
21 Tribal Court judgment. In that case, probably key again
22 for our side is that Tribal exhaustion was done. The
23 Tribal remedies were exhausted in that case.

24 So that case leads again to the fact that in these
25 type of circumstances, the cases relied upon by Sprint

1 either, number one, show Tribal exhaustion was actually
2 proceeded with, or, number two, are so factually distinct
3 that they really don't have any precedential value when it
4 comes to this unique set of circumstances.

5 THE COURT: Are you familiar with El Paso Natural
6 Gas Company case, a U.S. Supreme Court opinion?

7 MR. SWIER: Your Honor, I'm familiar with it.
8 I'm not familiar with it to a point that I could provide
9 the Court a detailed analysis, like I could in the others,
10 but in our brief to the Court I could certainly address
11 that at that time. What was that case, Your Honor?

12 THE COURT: El Paso Natural Gas Company. It's at
13 526 U.S. 473, a 1999 U.S. Supreme Court opinion.

14 MR. SWIER: I will address that. Your Honor,
15 just at that point, I think that NAT has a very good
16 argument that Section 207 does not provide exclusive
17 jurisdiction in Federal Court or in front of the FCC.
18 Again, it says nothing about divesting Tribal Court
19 jurisdiction.

20 THE COURT: So are you drawing a distinction
21 between complete preemption and field preemption when you
22 say it doesn't totally divest?

23 MR. SWIER: Well, I think that's subject to
24 interpretation on that case. Again, that's something that
25 because we are getting into a very technical part of total

1 preemption, field preemption, at this point, because of the
2 late stage we tried to get this whole hearing done today, I
3 would like to give the Court a reasoned analysis through
4 the briefing instead of something off the top of my head,
5 if that's all right with the Court.

6 THE COURT: Sure.

7 MR. SWIER: Here is why I also think this is
8 different. Again, the Federal Communications Commission
9 has said this, "The FCC recognizes Indian Tribes exercise
10 sovereign authority over their members and their
11 territory." So the FCC itself has said, "We recognize
12 sovereign authority of the Tribe over their members and
13 their territory."

14 In this case we are dealing with the Crow Creek Tribe
15 members, and we are definitely dealing, as Peter said, with
16 their sacred land on the Reservation. The FCC recognizes
17 that. The FCC also promotes Tribal "self-sufficiency and
18 economic development."

19 As the Court can see from the testimony and from the
20 filings, this is the biggest economic development issue
21 that's hit Crow Creek probably forever. Again, the FCC
22 recognizes the importance of that on the Reservations,
23 which again makes this situation unique in regard to
24 Section 207.

25 Next, Your Honor, and this is very important. The FCC

1 is "steadfastly committed to promoting
2 government-to-government relations between the FCC and
3 Indian Tribes." What possible better way to promote
4 government-to-government relations and to recognize
5 sovereignty than to allow the Tribally-owned company, based
6 exclusively on Tribal ground, to put a telephone company
7 together and to enforce what it thinks is improper conduct
8 by a carrier.

9 Finally, Your Honor, the FCC recognizes "the
10 importance of Tribes exercising their sovereignty and
11 self-determination."

12 So when you look at Section 207 in light of the FCC's
13 policy, in light of the fact of the Bruce Lien divestiture
14 argument, when you differentiate the cases Sprint has
15 relied on from what is actually happening in this case, I
16 think that's a pretty strong argument why Section 207 does
17 not apply when we are dealing with Indian Tribes with
18 telecommunication issues, which we're dealing with here
19 owned by a Tribal corporation exclusively on Tribal
20 jurisdiction and Tribal ground. That's where I think 207
21 can be looked at a little bit differently.

22 May I continue with another issue?

23 THE COURT: You may.

24 MR. SWIER: Again, Issue 1, the Tribal exhaustion
25 doctrine. As the Eighth Circuit has made clear, that has

1 to be decided before the Court can issue any preliminary
2 injunction relief, and as we've said, we're still briefing
3 that issue. And I think based on Sprint's testimony today
4 with the Dataphase factors, which I'll talk about, I almost
5 think they have taken that argument and thrown it away
6 because they realize the four factors of Dataphase aren't
7 met here.

8 Nonetheless, I would like to talk about again real
9 quickly the Tribal exhaustion issue. Here is what Sprint
10 is attacking, and here is why Tribal exhaustion is proper.
11 Number one, we are dealing with a majority Tribally-owned
12 LLC. Sprint is also attacking high-speed telecommunication
13 services on the Reservation. Sprint is also attacking the
14 Tribal Utility Authority, their governmental authority,
15 along with the telecommunications plan that the Tribal
16 Utility Authority issued years ago, which the Court again
17 in our filings has a copy of. Sprint also attacks the
18 Tribal Utility Authority and their attempt to improve the
19 health and safety of Tribal residents.

20 Sprint is also attacking, if not ignoring, the
21 enforcement of the Tribal Utility Authority's Order that
22 says, "Sprint, you have to pay." They are ignoring that
23 order. They are attacking the very sovereignty of that
24 Utility Authority by just ignoring it.

25 They are also attacking the tariffs that were issued

1 by the Tribal Utility Authority. What Sprint is saying is,
2 "Hey, those folks on the Reservation don't have any
3 authority to be issuing tariffs." I don't see anywhere
4 where it says that. They are a governmental body, a
5 quasi-governmental body under the Tribal Council. They
6 have the ability to issue tariffs, just like the South
7 Dakota PUC can, and they've done that. Those Tribal
8 tariffs are now being attacked by Sprint.

9 No. 7. Sprint is attacking one of the first
10 Tribally-owned telephone systems in the United States.

11 No. 8. Sprint is attacking over 100 high-speed
12 broadband and telephone installations on the Reservation in
13 a place that before NAT had little, if any, of those type
14 of services.

15 No. 9. Sprint is attacking the Internet Library for
16 Tribal members, which was built and paid for by NAT and
17 placed on Tribal Court -- excuse me, within the boundaries
18 of the Reservation.

19 Sprint is next attacking any future construction of
20 state-of-the-art communications facilities on the
21 Reservation. They are attacking that.

22 Next, Sprint is attacking economic development
23 opportunities for the Tribe, undoubtedly. As Peter said,
24 before NAT, there was absolutely no outside private
25 investment coming into the Crow Creek Reservation. NAT has

1 not only brought those private investments onto the
2 Reservation, but they have actually flourished that
3 business with those. So they are attacking private
4 investment.

5 THE COURT: Rather than attacking all of these
6 things, aren't they, in essence, questioning whether the
7 tariff applies to this particular type of traffic?

8 MR. SWIER: They are. They are questioning the
9 tariff, but by questioning the tariff, they are saying all
10 these things don't count.

11 THE COURT: If the tariff doesn't apply, don't
12 they have the right to question its application?

13 MR. SWIER: They have the right to question its
14 application, sure. But they do not have the right to
15 self-help, which is what they are doing. Because of their
16 illegal self-help actions, it's affecting this laundry list
17 of everything that's going on on the Reservation. So in a
18 way the two issues dovetail. Because by not paying the
19 tariff and using self-help, which is supposed to be
20 improper, all of these are being affected.

21 Whether we want to use affect or attack, of course
22 that's semantics. That's why this is important. This is
23 the result of their self-help actions. Again, the
24 self-help is affecting the Tribal company and all of these
25 Tribal interests. That's why I think this laundry list is

1 important, and from our view it is an attack.

2 Your Honor, I thought it was probably most telling and
3 somewhat ironic that Sprint is attacking NAT because it's
4 not accepting government handouts and government subsidies.
5 For hundreds of years -- I know when I used to work for
6 Senator Johnson, one of his primary roles was to try to
7 increase economic activity on the Reservation, and it's a
8 tough, tough job. Mostly the way it can be done is through
9 the Government giving handouts. As Peter said, that's the
10 way it's been done, that's what they've become used to on
11 the Reservation.

12 For NAT to say we're not going to accept subsidies,
13 we're not going to accept Universal Service Funds, and then
14 to have that used against them somehow I think is not only
15 disingenuous, but it just defies logic on what NAT is
16 trying to do out there. They want to be a self-sustaining
17 competitive business, not having to rely on government
18 handouts. So to say that somehow reflects negatively on
19 NAT, I guess I just don't understand that. I don't
20 understand that.

21 Finally, NAT and Sprint are competitors. They compete
22 in the conference calling business. As the Court is well
23 aware, in reviewing the other cases that are pending, this
24 is their modus operandi. Sprint is one of the largest
25 companies in the country, if not the world. They compete

1 with companies like NAT who have a really unique and kind
2 of cool business model and have an opportunity to make
3 money. And Sprint brings them into Court and crushes them
4 down, because eventually the little guys will run out of
5 money. That's what happened throughout the country.

6 Luckily, NAT has put their foot down and has some
7 resources that they can fight this. But that's the modus
8 operandi is to wipe out competition. Any reasonable view
9 of how Sprint has reacted to this, that's the only
10 reasonable way you can look at it. That's what's
11 happening. NAT is owed millions of dollars on the
12 Reservation, which, as Peter said, can buy a heck of a lot
13 of diapers.

14 Mr. Knudson made the comment, "Well, isn't a million
15 dollars enough? Can't you do a lot with a million dollars?
16 How much more money do you need?" How much money does
17 Sprint need? Are we going to put a cap on what they can
18 make? Are we going to say, "Sprint, five million dollars
19 is a big enough profit for you, your shareholders, and
20 executives." But that's what they are proposing. A
21 million dollars is enough for those folks out there. You
22 can buy your hundred dollar cell phone and diapers and
23 food, but a million dollars is enough.

24 The reason for that is because they don't want the
25 competition. They don't want to see this entity succeed.

1 They know what they are doing is not illegal, because they
2 are working in Congress right now to try to get the laws
3 changed.

4 I've been out there. We have talked with the
5 Congressional delegation. We have talked with my former
6 boss' office, Senator Johnson. They are trying to get that
7 changed right now.

8 The only illegal activity that is going on is they are
9 not paying. They are using self-help, and they can't do
10 that. But because no one has the resources until this
11 point to call them on that, that's what they continue to
12 do.

13 So what in reality they are doing, in addition to
14 attacking all the Reservation contacts, they are attacking
15 a competitor. NAT is the competitor, and they don't want
16 to go to Tribal Court, and whatever else they don't want to
17 do, but the facts are that. That is a very reasonable way
18 to view what's going on here.

19 As I said before, we think the Tribal exhaustion issue
20 has to be decided first, because it's the threshold
21 jurisdictional issue.

22 Let's talk about real quickly the exhaustion
23 exceptions, if I may. Of course Montana -- excuse me.
24 Farmers Union, National Farmers Union set forth the three
25 basic exceptions for exhaustion. Bad faith, which, of

1 course, we don't have here. I don't think there's any way
2 you can reasonably argue that.

3 The second exception is the futility exception.
4 Again, doesn't apply here whatsoever.

5 The third, which is the one we were talking about, is
6 the Federal preemption exception. I think we have shown
7 why that Federal preemption exemption to the exhaustion
8 doctrine doesn't apply in these unique circumstances.

9 So because of that, Your Honor, I think, without
10 question, the Tribal exhaustion doctrine applies here. The
11 Eighth Circuit has been very steadfast that Tribal
12 exhaustion is appropriate, if not mandatory, in situations
13 such as this. That's why Christian Children's Fund,
14 Hornell, Hicks, Strate simply do not apply. We're in a
15 unique set of circumstances here.

16 THE COURT: So if you are under Montana then --
17 are you arguing that there is both a consensual
18 relationship exception that applies and Tribal health and
19 welfare exception?

20 MR. SWIER: I think they both apply. Here is
21 why. We go now to the Montana exceptions, as the Court
22 said. Of course we have the two exceptions. The
23 consensual activity. Let's talk about the consensual
24 activity.

25 Sprint provides telecom services on the Reservation.

1 Sprint has customers on the Reservation. If a Sprint
2 customer from New York City calls the Crow Creek
3 Reservation, that is a Sprint customer in New York City who
4 is trying to call a resident on Ft. Thompson. The way they
5 get that call, under some circumstances, is to go through
6 NAT's equipment on Ft. Thompson. If that equipment doesn't
7 exist, Sprint's call potentially can't go through.

8 So to say Sprint and their customers are not customers
9 of NAT is wrong. Otherwise those calls can't get to
10 Ft. Thompson, especially conference calling. If Sprint has
11 three customers, business clients, and they are given the
12 605-477 number, those calls go to the equipment in
13 Ft. Thompson. If that equipment is not there, that call
14 doesn't go through. It doesn't go through.

15 So to say that Sprint doesn't provide services on the
16 Reservation is wrong when you look at the scheme of how
17 telecommunications works now and how it's going to rapidly
18 change in the future. So there is a consensual
19 relationship.

20 Second consensual relationship is Sprint admits they
21 paid NAT's first bills. They say, "Well, we paid these
22 because NAT gave these to us under color of darkness. They
23 snuck these bills by us." Your Honor, Sprint is one of the
24 largest companies in the United States. If I have a
25 contract with someone and I make them a payment, I can't

1 come back and say, "Oops, I guess you snuck that by me. I
2 guess we don't have any type of relationship."

3 They paid the first few tariffs. To say it was all a
4 mistake, I think, number one, is disingenuous. Number two,
5 from a legal standpoint, they paid. They created a
6 consensual relationship by paying.

7 THE COURT: If it's a consensual relationship
8 that they entered into by paying, aren't they able to end
9 that consensual relationship by not paying?

10 MR. SWIER: Under the FCC laws they can't,
11 because they can't use self-help. When they made the
12 initial couple of payments, they were doing everything
13 according to the law.

14 THE COURT: If they hadn't made the first two
15 payments, isn't it still self-help?

16 MR. SWIER: Absolutely it's self-help.

17 THE COURT: So how does the fact they made two
18 payments turn it into a consensual relationship?

19 MR. SWIER: By banking the two payments to NAT,
20 they created a relationship where NAT provide services on
21 the Reservation, and in exchange for those services, they
22 are paid by Sprint for providing those services to their
23 customers. It may be an implied consensual relationship.
24 NAT provided a service. In exchange for that service,
25 Sprint paid NAT. Typical commercial transaction. It was

1 consensual. Again, to play this game and how these routing
2 calls work, that's what you do.

3 So that creates a consensual relationship right there,
4 so we have two of them.

5 For them to say -- they used this example of this
6 company in Texas, CABS I think is the name of it. CABS is
7 a billing company for NAT and numerous other telecom
8 companies in the United States. They do their billing. It
9 would be like if you and I had a law practice, and we sent
10 our billings over to Pullen McGladrey here in town, one of
11 the accounting firms. You and I did the legal work. We're
12 just having McGladrey & Pullen do our bookkeeping and our
13 billing for us.

14 THE COURT: I'm assuming the bill reflects NAT
15 was the provider?

16 MR. SWIER: You know, I don't know that. I don't
17 know. I can find that out for the Court. I'm not a
18 hundred percent sure on that.

19 THE COURT: Your argument only makes sense if
20 CABS identifies each individual provider. If they lumped
21 them all together, your argument wouldn't hold as much
22 weight.

23 MR. SWIER: We can find that out as part of the
24 briefing. I don't know the answer to that right now. I
25 don't want to make an improper and unknowing representation

1 to the Court.

2 THE COURT: Mr. Knudson may know, since he was
3 making that argument initially.

4 MR. SWIER: But to somehow say using CABS under
5 the cloak of darkness billing company, again, that's simply
6 incorrect. So the first Montana exception, the consensual
7 exception. We think we have that. Again, number one, if
8 the services aren't available on the Reservation, Sprint's
9 customers can't call the Reservation. So the services
10 aren't being provided. They couldn't be completed without
11 NAT's services.

12 THE COURT: So between the consensual
13 relationship exception and Tribal health and welfare
14 exception, which do you think is a stronger argument?

15 MR. SWIER: I think consensual relationship is
16 strong. I think the second Montana exception is incredibly
17 strong. I say that knowing that the Supreme Court and the
18 Federal Appellate and District Courts have always been
19 extremely limiting on that second Montana exception.

20 However, if you look at political integrity, if you
21 look at that issue -- political integrity, political
22 security, health, safety and welfare. That's our second
23 Montana exception. Based on the testimony that's been
24 provided and based on our filings, how can you not find
25 that what NAT is doing and what Sprint is doing doesn't

1 have an impact on the political integrity, political
2 security, health, safety, and welfare of Tribal residents?

3 THE COURT: But when you are arguing for
4 exhaustion, wouldn't the Tribe always have an argument that
5 political integrity is at stake here? In that event,
6 wouldn't they always win under the second exception to
7 Montana?

8 MR. SWIER: That's why very few Tribes have one
9 under that second exception, because it has been so tightly
10 limited by the Courts. But if that exception is going to
11 have any type of meaning whatsoever, I can't imagine any
12 facts that would be more damaging to the political
13 integrity, political security, et cetera, than what we have
14 seen here. This is the textbook case that the second
15 Montana exception attempts to encompass. We've gone
16 through the laundry list, and you have that in front of
17 you.

18 But when you look at everything this affects on the
19 Crow Creek Tribe, textbook exception under here. If this
20 doesn't meet that exception, I don't know what would.

21 THE COURT: So you are saying it's all of the
22 things you listed, not just the integrity of Tribal Court.

23 MR. SWIER: Absolutely, because it talks about
24 political integrity. This entire phone system is majority
25 owned by the Crow Creek Tribe. We've heard how it has an

1 impact on the health, safety and welfare of Tribal members.
2 Again, if these laundry list of facts don't meet the second
3 Montana exception, then that exception really has no
4 meaning whatsoever, and it's simply dicta.

5 Mr. Knudson also indicated, he talked about the, I
6 believe it was the Plains Commerce case. Talked about that
7 the second Montana exception required a catastrophic impact
8 on the Tribe. First of all, I think that's an incorrect
9 reading of the case. I think the catastrophic language
10 used was dicta, and was not meant to be read as Mr. Knudson
11 read it. That can be subject to interpretation.

12 But even if it is. Let's say catastrophic is one of
13 the qualifiers for exception. What could be more
14 catastrophic to this Tribe than to continue going along
15 with what's happening? When millions of dollars are not
16 being paid, whether it's noble reasons Sprint may put up,
17 or whether it's more the nefarious ones that we happen to
18 think is why they are doing this. But what could be more
19 catastrophic? We don't think catastrophic applies. But,
20 again, if it does, this is the textbook case.

21 Your Honor, I want to very briefly talk about what we
22 are really here for today, and that is the preliminary
23 injunction. As the Court knows, the Dataphase case has
24 four factors. Of course the preliminary injunction, first
25 of all, is an extraordinary remedy. It's not something the

1 Court issues on a whim and a prayer. It's an extraordinary
2 remedy.

3 The first factor under Dataphase is irreparable harm.
4 That has been cited by the Courts as probably the most
5 crucial factor when issuing a preliminary injunction.

6 For the Court's information, we had a hearing in front
7 of Judge Jones yesterday in Tribal Court. There was a
8 briefing schedule issued by the Court. Sprint appeared
9 telephonically, as did all parties for this hearing.

10 THE COURT: So what is the briefing schedule?

11 MR. SWIER: The briefing schedule is Judge Jones
12 wants to know everybody's view on the preemption issue,
13 first of all. So he went to the exact issue this Court
14 did. Where are we at with preemption? He gave me I
15 believe 30 days in which to present our preemption
16 argument, and I believe he gave Sprint an additional 30 for
17 their response. So we had a hearing.

18 THE COURT: So you are looking at the middle of
19 September? Do you have a chance to do a reply brief, or is
20 it just the two briefs?

21 MR. SWIER: I think I will have a chance to do a
22 reply brief, which would probably be like a 15-day time.

23 THE COURT: So getting towards the end of
24 December.

25 MR. SWIER: Probably, yes. That's barring any

1 extensions.

2 MR. WHITING: Your Honor, may I interject? If
3 counsel is going to go into somehow Sprint waived their
4 denial of jurisdiction, that absolutely didn't occur. I
5 made it very plain. The Judge said he would put it in the
6 order that this was a special appearance we were making
7 yesterday. Nothing beyond that.

8 MR. SWIER: Mr. Whiting is exactly right. I
9 don't contest they waived jurisdiction by appearing
10 yesterday at all. What I'm showing through that is we had
11 this hearing. Dates were scheduled by the Court, and the
12 world didn't come to an end. There was no irreparable harm
13 that occurred because we are in Tribal Court right now, in
14 addition to this Court.

15 THE COURT: Did Judge Jones schedule any type of
16 evidentiary hearing then?

17 MR. SWIER: Judge Jones, and Mr. Whiting can
18 clarify if I'm wrong on this, but Judge Jones indicated he
19 thought an evidentiary hearing may be necessary on that
20 issue, but until the briefing was completed, he didn't want
21 to schedule an evidentiary issue.

22 MR. WHITING: The exact words were, Your Honor,
23 that he would give the parties until the 15th of December
24 to stipulate to all the facts. And if they didn't, he
25 would want to have an evidentiary hearing after that. That

1 was under the Montana Exception No. 2 is what he was
2 speaking about.

3 MR. SWIER: Your Honor, under irreparable harm.
4 So we've had a hearing in Tribal Court which they've tried
5 to stop. There's been no irreparable harm. I think the
6 most ironic part of this entire Preliminary Injunction
7 Motion is that Sprint is alleging irreparable harm. If
8 anything, I should have brought a Preliminary Injunction
9 Hearing in Tribal Court. Because who is suffering
10 irreparable harm? It's NAT losing millions of dollars in
11 revenue because Sprint won't pay. If anybody is suffering
12 irreparable harm, it's this company, who may go out of
13 business eventually, because Sprint is using improper
14 self-help.

15 THE COURT: But what about Mr. Knudson's argument
16 that irreparable harm arises based on a combination of the
17 reading of Strate, Hicks, and Hornell, that they shouldn't
18 have to go through Tribal Court to determine jurisdiction,
19 that it should be determined here, if, in fact, there's no
20 basis for Tribal Court jurisdiction?

21 MR. SWIER: If the facts in those three cases
22 would be anything even in the facts of the ballpark we have
23 here, I may agree to that. Those cases are so different
24 from the facts in this case, that I don't know how you can
25 take those facts and that reasoning and extrapolate it to

1 what we have here. That to me is a very large leap in
2 logic.

3 THE COURT: So, in essence, what you are saying
4 is those three cases didn't recognize that that would be
5 irreparable harm?

6 MR. SWIER: I think what I'm saying there is I
7 believe in those cases -- what I'm saying is I think in
8 those cases, again, we are dealing with different facts and
9 issues than here. I think those cases can be easily
10 differentiated as opposed to a Tribally-owned
11 telecommunications company.

12 Of course some of those cases that were cited, like
13 Christian Children's, actually went through the exhaustion
14 process. The AT&T vs. Coeur D'Alene case, Tribal remedies
15 were exhausted there.

16 So for Sprint to come in today and argue they are
17 going to suffer irreparable harm, compared to the harm
18 suffered from NAT, is ironic, at best.

19 Also, they say the Tribal Court is biased. The Tribal
20 Judge is biased. We're going to have our due process and
21 equal protection rights violated if we have to go to Court
22 in Crow Creek. Eighth Circuit has said plainly: Unless
23 you can present evidence, other than mere speculation, the
24 fact you think the Court or the Judge or jury might be
25 biased, that does not constitute the suffering of

1 irreparable harm. I guess I'm not going to comment anymore
2 on those bias and equal protection claims.

3 Your Honor, that's the irreparable harm factor. Not
4 only does that not weigh in favor of Sprint's position, the
5 irreparable harm actually weighs much more in favor of our
6 case here. So under the irreparable harm factor, Sprint's
7 Preliminary Injunction Motion has to be denied.

8 Balance of Harms, same thing. I provided the Court
9 with the analysis there.

10 The next factor, probability of success on the merits,
11 again, that's what exhaustion is for. I don't think
12 anybody can say with a hundred percent what the probability
13 of success here is going to be.

14 Finally, the public interest. Again, the public
15 interest is in observing Tribal sovereignty, of observing
16 the sovereignty of a Tribally-owned telecommunications
17 company and all the activities that are going on out there.
18 The public interest is giving people on the Reservations
19 phone and Internet and broadband service, when no one,
20 including Sprint, had ever done that before, and they've
21 had centuries almost to do it, and no one has done it but
22 NAT.

23 Finally, Sprint indicated the Federal Communications
24 Act, when it was amended back in 1996, was designed to,
25 quote, open up the marketplace for telecommunications.

1 That was the policy behind the new Communications Act.
2 That is exactly what NAT is doing. It has opened up a
3 brand new marketplace on the Reservation. Sprint may not
4 like the competition, but the fact is what NAT is doing is
5 consistent with the open market theory of the new
6 Telecommunications Act.

7 Your Honor, why does NAT exist? It exists to provide
8 opportunities for the Crow Creek Tribe and the Tribal
9 members, which it's doing. It's a Tribally-owned entity,
10 which luckily has received private investment from private
11 companies who have the capital to invest, or like
12 Mr. Reiman, has the brain power to know how a
13 telecommunications company could exist and thrive on the
14 Reservation.

15 That, Your Honor, is what the open market was designed
16 to do. That's what has been done here. Again, competition
17 sometimes isn't well-liked. But in this case, as you can
18 see, what it's done for the Tribe and its members has been
19 incredible. Thank you, Your Honor.

20 THE COURT: Thank you, Mr. Swier. Mr. Knudson?

21 MR. KNUDSON: Yes, thank you. In view of the
22 lateness of the day, I'll be brief.

23 THE COURT: And you will get a chance to do your
24 reply brief in writing, too.

25 MR. KNUDSON: I understand. If the Court has

1 recognized, the legal lay of the land changed with Strate.
2 Before I address that further, the comments Mr. Swier made
3 about that, I would like to clarify that Sprint is entitled
4 to seek to protect its legal rights. If it has a good
5 faith basis to believe the nature of a traffic scheme,
6 their conference calling bridge doesn't constitute
7 legitimate terminating accessing service, it is entitled to
8 seek relief in Federal Court to protect itself. It's done
9 so numerous times.

10 This is not the first one of these that has happened.
11 NAT is not the first competitive local exchange carrier to
12 try to attack what the long-distance carrier's position is
13 with respect to these types of schemes.

14 THE COURT: Based on my own caseload, I can vouch
15 for that.

16 MR. KNUDSON: What is at issue here, I think the
17 Court has zeroed in on the critical question. I noticed
18 you reference El Paso. That case was the Price-Anderson
19 Act. There the Supreme Court in a 1999 decision overturned
20 the Ninth Circuit, which held exhaustion was required.
21 There was an issue with respect to claims being brought
22 against uranium mines on Tribal territory.

23 The Court said Congress had to, "express an
24 unmistakable preference for a Federal forum at the behest
25 of the defending party, both for litigating a

1 Price-Anderson claim on the merits, and for determining
2 whether a claim falls under Price-Anderson when the removal
3 is contested."

4 That's authority for when Congress has decided where a
5 case should be. This Court then should follow that
6 authority, because Congress in Section 207 has clearly
7 written a statute that says any person, which would be NAT,
8 claiming to be damaged, that's what they are claiming, by
9 any common carrier, which is Sprint, that shall be brought
10 to the Commission or to any District Court of the United
11 States of Competent Jurisdiction.

12 Congress knows how to write a provision like that to
13 exclude Indian Tribes from its application. It has done so
14 with age discrimination claims, sex discrimination claims.
15 It didn't do so in 1996.

16 THE COURT: Do you think the Price-Anderson Act
17 is field preemption or complete preemption?

18 MR. KNUDSON: I think with respect to what is
19 before the Court, it probably doesn't matter. I think
20 Price-Anderson would have probably been complete
21 preemption.

22 THE COURT: Here we have field preemption.

23 MR. KNUDSON: Probably, because we do have
24 some --

25 THE COURT: So is there a distinction as a result

1 of that?

2 MR. KNUDSON: Not with respect to exhaustion,
3 Your Honor.

4 THE COURT: Are there any exhaustion cases that
5 address the difference between field and complete
6 preemption?

7 MR. KNUDSON: Not that I'm aware of, Your Honor.
8 I think it's because the issue seems to be so clear with
9 what Congress wrote in Section 207, that it shouldn't
10 necessarily come up very often.

11 The only Appellate authority we have found so far is
12 the Coeur D'Alene case. There, although counsel tries to
13 characterize that as an IGRA case, what was involved, first
14 of all, was whether or not AT&T could be required by a
15 Tribal Court to provide a service that amounted to a
16 telecommunication service, a toll-free number that would
17 facilitate the development of this national Indian lottery.

18 On the telecom side of things, the Ninth Circuit is
19 unmistakably clear and compelling. It said there was no
20 jurisdiction in the Tribal Court to hail AT&T and to
21 adjudicate whether or not it was required to offer that
22 toll-free service. It went on, over a vigorous dissent, to
23 address the IGRA question. But that isn't the issue in
24 this case.

25 What we are talking about is an interpretation of

1 47 USC 207. On that point, the Coeur D'Alene case is
2 unequivocal.

3 THE COURT: Except it's not binding on this Court
4 because it's a Ninth Circuit. It is certainly something I
5 would look at.

6 MR. KNUDSON: I understand that. It's very
7 persuasive authority. But if you then take a look at the
8 question following Hicks, which says that Tribal Courts are
9 courts of limited jurisdiction. One has to examine what
10 authority they have.

11 The Hornell case, seems to me, would be binding on
12 this Court, because it holds if it's off the Reservation,
13 there is no Tribal Court jurisdiction, and you don't let
14 the Tribal Court decide that in the first instance. That
15 was the directive back down to the District Court.

16 THE COURT: But because the phone calls -- let's
17 take the conferencing phone calls -- come to the Tribe to
18 use equipment that's located within the Tribal
19 jurisdiction, can it properly be characterized as being off
20 the Reservation?

21 MR. KNUDSON: Yes.

22 THE COURT: Why?

23 MR. KNUDSON: Because the people involved on that
24 call are off the Reservation. The phone currents that
25 travel back and forth are off the Reservation. This piece

1 of equipment that is apparently housed in Ft. Thompson
2 could be housed right next to WideVoice's equipment in
3 Los Angeles. It could be located anywhere. So it raises a
4 question of Federal law.

5 Therefore, however you look at it, the question of
6 where that service is being provided is a question of
7 Federal Communications law, and under 207 must be decided
8 in a Federal forum. Congress has decided that. If you
9 conclude it's off Reservation, Hornell would say we don't
10 need to address that. If you say it's on the Reservation,
11 you still fall back to the Section 207 issue, which I
12 believe compels this Court to enjoin the Tribal Court from
13 proceeding further.

14 We talk about irreparable harm. But if you look at
15 Strate and Hicks, you look at Hornell, those cases have
16 little meaning -- take a look at the footnote Justice
17 Ginsburg wrote in Strate. If jurisdiction is so clearly
18 absent in Tribal Court, then the rule of comity, and that's
19 what it is, gives way. The only reason to require parties
20 to go through Tribal Court is delay.

21 So by extension, that's a conclusion that it's
22 irreparable harm, forcing Sprint to have to litigate in
23 Tribal Court, when there is no jurisdiction, is a violation
24 of its rights to be in Federal Court and, therefore,
25 irreparable harm, by definition.

1 Now, there's also the issue of delay. Let's look at
2 the Plains Commerce case. That case ultimately came down,
3 and exhaustion was not required. That was in 2008.

4 THE COURT: Going back to irreparable harm. If
5 the Court found because of comity, a matter should go into
6 Tribal Court, wouldn't the party seeking a preliminary
7 injunction always be able to argue there would be delay and
8 costs and that would be the irreparable harm? Let's say
9 Section 207 didn't exist.

10 MR. KNUDSON: Well, if Section 207 is not in this
11 case, then we would be looking at a situation like Hornell.
12 The conclusion is there's nothing on the Reservation,
13 Hornell would say no jurisdiction to adjudicate.
14 Therefore, no exhaustion is required.

15 You can get to that result either way, but Congress
16 has enacted 207. That's the first point is it directs
17 jurisdiction into this Court. Strate says in circumstances
18 like that, there's no point to delay. So it follows, as a
19 matter of logic, that that must be the irreparable harm.
20 We are being denied our venue for reasons that don't apply.
21 The comity argument is unnecessary.

22 So what they've done, the Supreme Court has done in
23 Strate, Hicks, Atkinson, is carve out a large exception to
24 National Farmers, Iowa Mutual in terms of exhaustion. They
25 are saying you don't have to go to Tribal Court to get a

1 ruling on its jurisdiction. We don't have to spend years
2 of litigation, because if we're in Tribal Court, we have an
3 evidentiary hearing on jurisdiction, and then we're into
4 the merits and then up to an appeal before we get back to
5 this Court to see whether or not there was ever
6 jurisdiction in this case. It could be an extensive and
7 expensive process, which Congress has said is unnecessary,
8 and the Supreme Court said in *Strate* it only accommodates
9 delay and is unnecessary. So the exhaustion rule must give
10 way on that basis.

11 A couple other points. I find it interesting that
12 they say the services are being provided to these callers
13 on the Reservation merely because there's bridge equipment
14 being located on the Reservation. These people don't care
15 where the equipment is located. They only like the fact
16 it's free, and they find out what number to call.

17 We think that's an issue where we need a clear Federal
18 rule. That's been the issue that's been presented to this
19 Court and other Courts. Whether that's a legitimate
20 service, given Federal Telecom policy as to promoting local
21 exchange services, how far do you go with this kind of
22 activity before you transgress what Congress and the FCC
23 have intended.

24 I think then you are back to the 207 situation. It
25 should be decided in this Court or the Federal

1 Communications Commission.

2 Again, I agree with the Court's inference here that
3 there's no expressed contract between Sprint and Native
4 American Telecom with respect to these calls that were
5 billed by CABS Agent.

6 I point out with respect to Christian Children's Fund
7 a couple of points here. It said exhaustion was not
8 necessary. It's not distinguishable on the grounds
9 exhaustion took place. It stands for the proposition that
10 exhaustion is unnecessary in those facts, which if they had
11 been able to get to a Federal Court early enough, they
12 would have enabled the Court to say, "Stop, Tribal Court,
13 this belongs in Federal Court." And where the payments
14 took place is one of the dispositive factors in Christian
15 Children's Fund.

16 THE COURT: Did you know the answer to my
17 question on the billing that came from CABS, whether it
18 identified it was from the Defendants?

19 MR. KNUDSON: CABS Agent billed a large number of
20 CLECs at one time. There was probably a line item that
21 said submitted by Ft. Thompson, a dollar amount in the ten
22 to fifteen thousand dollar range, the first two invoices
23 that were paid. What happened on the third was it went up
24 by nearly 700 percent, and that's when Sprint took a hold
25 of it. So in the ordinary course, it wasn't large enough

1 to raise any red flags, so you can't say that was a
2 consensual relationship, from that circumstance.

3 THE COURT: So you don't know for sure if it
4 identified NAT as the carrier or if it just had
5 Ft. Thompson?

6 MR. KNUDSON: I don't. If that's a dispositive
7 fact, we could supplement with our reply on that particular
8 detail and address it for the Court.

9 THE COURT: I'm not sure it's dispositive, but I
10 never know for sure what the one thing may be.

11 MR. KNUDSON: So, yes, you would like us to
12 resolve that. Very good. I could go on, but I would
13 prefer not to, and I think you would like to finish up,
14 too.

15 THE COURT: Thank you. I will wait to get both
16 of your reply briefs. This is a different posture than
17 usual where we have the evidentiary hearing before the
18 reply briefs, but I actually think it works out pretty
19 well. You know what the issues are on my mind, and you can
20 address them in the reply briefs and weave in the evidence
21 we heard today. I'll issue a ruling shortly after I get
22 your reply briefs. Mr. Swier?

23 MR. SWIER: One question. I was looking at the
24 dates, and it looks like my reply brief to our Motion to
25 Stay Based on Exhaustion is due on either Monday or

1 Tuesday. I need to look for sure. I think in light of
2 what's been presented here today and some of the narrow
3 focus I think the Court wants on this reply, would the
4 Court be willing to grant me an extension, and then
5 obviously, in turn, I wouldn't have any objection if they
6 needed an extension, also. I think to get this done by
7 Monday, in light of what has gone on here today, may be
8 somewhat unreasonable.

9 The other reason is my sister-in-law partner is
10 getting married this weekend. I don't think she would be
11 very happy with me if I was doing an exhaustion brief
12 during the wedding.

13 THE COURT: How about if I give you both until
14 next Friday to do your reply briefs. Is that agreeable?

15 MR. KNUDSON: I believe the rules provide I get
16 two weeks, and the brief was filed yesterday.

17 THE COURT: Okay. Mr. Swier, I'll give you until
18 Friday. Did you want any extra time?

19 MR. SWIER: So my reply on the exhaustion issue
20 would be due Friday?

21 THE COURT: A week from tomorrow. Does that give
22 you enough time, Mr. Swier?

23 MR. SWIER: We can get it done, Your Honor.

24 THE COURT: Anything else anybody wanted to bring
25 up today? If not, I'll wait to hear from you. We'll be

1 adjourned.

2 (End of proceedings at 5:01 p.m.)

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1 UNITED STATES DISTRICT COURT
2 DISTRICT OF SOUTH DAKOTA :SS CERTIFICATE OF REPORTER
3 SOUTHERN DIVISION

4 I, Jill M. Connelly, Official United States
5 District Court Reporter, Registered Merit Reporter,
6 Certified Realtime Reporter, and Notary Public, hereby
7 certify that the above and foregoing transcript is the
8 true, full, and complete transcript of the above-entitled
9 case, consisting of Pages 1 - 239.

10 I further certify that I am not a relative or
11 employee or attorney or counsel of any of the parties
12 hereto, nor a relative or employee of such attorney or
13 counsel, nor do I have any interest in the outcome or
14 events of the action.

15 IN TESTIMONY WHEREOF, I have hereto set my hand
16 this 19th day of October, 2010.

17 /s/ Jill M. Connelly

18 _____
19 Jill M. Connelly, RMR, CRR
20 Court Reporter
21 United States Courthouse
22 400 S. Phillips Avenue
23 Sioux Falls, SD 57104
24 Phone: (605) 330-6669
25 E-mail: Jill_Connelly@sdd.uscourts.gov

Receipt Number: 1626539

File Number **DL017257**



ARTICLES_OF_ORGANIZATION

For

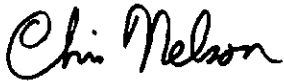
NATIVE AMERICAN TELECOM, LLC

Filed at the request of:

TANIA LEMUS
LEGALZOOM.COM INC
7083 HOLLYWOOD BVD STE 18
LOS ANGELES CA 90028

*State of South Dakota
Office of the Secretary of State*

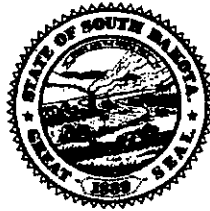
Filed in the office of the Secretary of State on: **Friday, August 29, 2008**



Secretary of State

Fee Received: \$125.00

State of South Dakota



OFFICE OF THE SECRETARY OF STATE

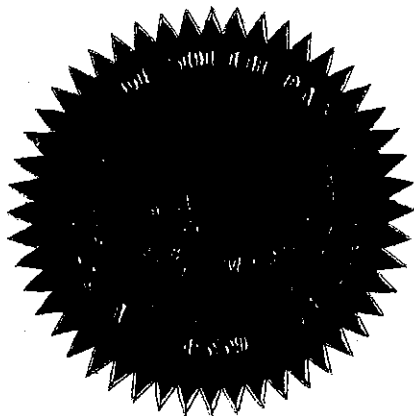
Certificate of Organization Limited Liability Company

ORGANIZATIONAL ID #: DL017257

I, Chris Nelson, Secretary of State of the State of South Dakota, hereby certify that the Articles of Organization of **NATIVE AMERICAN TELECOM, LLC** duly signed and verified, pursuant to the provisions of the South Dakota Limited Liability Company Act, have been received in this office and are found to conform to law.

ACCORDINGLY and by virtue of the authority vested in me by law, I hereby issue this Certificate of Organization and attach hereto a duplicate of the Articles of Organization.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Great Seal of the State of South Dakota, at Pierre, the Capital, this August 29, 2008.



Chris Nelson

Chris Nelson
Secretary of State

Cert of Organization LLC Merge

359 3497 09/03/2008

SECRETARY OF STATE
STATE CAPITOL
500 E. CAPITOL AVE.
PIERRE, S.D. 57501
605-773-4845

**ARTICLES OF ORGANIZATION
OF A
DOMESTIC LIMITED LIABILITY COMPANY**

**RECEIVED
AUG 29 2008
S.D. SEC. OF STATE**

1. The name of the Limited Liability Company is: Native American Telecom, LLC

2. The duration of the company if other than perpetual is: _____

3. The address of the initial designated office is: _____
6710 E. Split Rock Circle, Sioux Falls, South Dakota 57110

Filed this 29th day of

4. The name and street address of the initial agent for service of process is: _____
Thomas J. Reiman

Aug. 2008

6710 E. Split Rock Circle, Sioux Falls, South Dakota 57110

Chris Nelson
SECRETARY OF STATE

5. The name and address of each organizer:
LegalZoom.com, Inc., 7083 Hollywood Blvd., Suite 180, Los Angeles, CA 90028

6. If the company is to be a manager-managed company rather than a member-managed company, the name and address of each initial manager is:

7. Whether one or more of the members of the company are to be liable for its debts and obligations under SDCL 47-34A-303 (c).
Gene DeJordy, 6710 E. Split Rock Circle, Sioux Falls, South Dakota 57110
Thomas J. Reiman, 6710 E. Split Rock Circle, Sioux Falls, South Dakota 57110

8. Any other provisions not inconsistent with law, which the members elect to set out in the articles of organization.

The Articles of Organization must be signed by the organizers and must state adjacent to the signature the name and capacity of the signer.

Date: 8/25/2008

(Signature and Title)
LegalZoom.com, Inc., Organizer By: Tania Lemus, Secretary

(Signature and Title)

(Signature and Title)

The Consent of Appointment below must be signed by the registered agent.

CONSENT OF APPOINTMENT BY THE REGISTERED AGENT

I, Thomas J. Reiman, hereby give my consent to serve as the
(name of registered agent)

registered agent for Native American Telecom, LLC
(limited liability company name)

Dated 8/26/08

Thomas J. Reiman President
(signature)

FILING INSTRUCTIONS:

One or more persons may organize a Limited Liability Company
One original and one exact or conformed copy must be submitted
FILING FEE \$125

DL 17257
577

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF SOUTH DAKOTA
3 SOUTHERN DIVISION
4 * * * * *
5 Case Civ. 10-4110
6 SPRINT COMMUNICATIONS COMPANY, L.P.,
7 Plaintiff,
8 -vs-
9 NATIVE AMERICAN TELECOM, LLC;
10 B.J. JONES, in his official capacity
11 as Special Judge of Tribal Court; and
12 CROW CREEK SIOUX TRIBAL COURT,
13 Defendants.
14 U.S. District Courthouse
15 Sioux Falls, SD
16 March 3, 2011, 9:00 a.m.
17 * * * * *
18 MOTION HEARING
19 * * * * *
20 BEFORE: The Honorable Karen E. Schreier
21 U.S. District Court Judge
22 APPEARANCES:
23 Mr. Scott G. Knudson
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28 -and-
29 Mr. Tommy Drake Tobin
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1 INDEX TO EXHIBITS
2 OFFERED RECEIVED
3 Exhibit 1 26 27
4 (First Dakota Bank statement, 8-31-09)
5 Exhibit 2 26 27
6 (First Dakota Bank statement, 9-30-09)
7 Exhibit 3 26 27
8 (First Dakota Bank statement, 10-30-09)
9 Exhibit 4 26 27
10 (First Dakota Bank statement, 11-30-09)
11 Exhibit 5 26 27
12 (First Dakota Bank statement, 12-31-09)
13 Exhibit 6 26 27
14 (First Dakota Bank statement, 1-29-10)
15 Exhibit 7 26 27
16 (First Dakota Bank statement, 2-26-10)
17 Exhibit 8 26 27
18 (First Dakota Bank statement, 3-31-10)
19 Exhibit 9 26 27
20 (First Dakota Bank statement, 4-20-10)
21 Exhibit 10 26 27
22 (First Dakota Bank statement, 5-28-10)
23 Exhibit 11 26 27
24 (First Dakota Bank statement, 6-30-10)
25 Exhibit 12 26 27
26 (First Dakota Bank statement, 7-30-10)
27 Exhibit 13 26 27
28 (First Dakota Bank statement, 8-31-10)
29 Exhibit 14 26 27
30 (First Dakota Bank statement, 9-30-10)
31 Exhibit 15 26 27
32 (First Dakota Bank statement, 10-31-10)
33

1 APPEARANCES: (Continued)
2
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8
9
10
11
12
13
14 INDEX TO WITNESS
15 Witness Direct Cross Redirect Recross
16 DEFENDANTS'
17 Carlos Cestero 9 64 110 123
18 130
19 By The Court 103
20 Peter Lengkeek 135 160 172 179
21
22 PLAINTIFF'S
23 Amy Clouser 182 190
24
25

1 Exhibit 16 26 27
2 (First Dakota Bank statement, 10-31-10)
3 Exhibit 17 26 27
4 (First Dakota Bank statement, 10-31-10)
5 Exhibit 18 26 27
6 (First Dakota Bank statement, 10-31-10)
7 Exhibit 19 26 27
8 (Wells Fargo Bank statement, 7-31-10)
9 Exhibit 20 26 27
10 (Wells Fargo Bank statement, 8-31-10)
11 Exhibit 21 26 27
12 (Wells Fargo Bank statement, 9-30-10)
13 Exhibit 22 26 27
14 (Wells Fargo Bank statement, 10-31-10)
15 Exhibit 23 26 27
16 (Wells Fargo Bank statement, 11-30-10)
17 Exhibit 24 26 27
18 (Wells Fargo Bank statement, 12-31-10)
19 Exhibit 25 26 27
20 (Wells Fargo Bank statement, 1-31-11)
21 Exhibit 26 44 44
22 (Balance Sheet for NAT, 12-31-10)
23 Exhibit 27 48 49
24 (Support for amount on Balance Sheet due)
25 Exhibit 28 52 52
26 (Balance Sheet for NAT, 1-31-11)
27 Exhibit 29 201 201
28 (Jobs created by NATS)
29 Exhibit 30 201 201
30 (Access Service, Regulations Rates and Charges, etc)
31
32
33

			5
1	Exhibit A	71	71
2	(NAT's responses - Bates 0001 through 00083)		
3	Exhibit B	82	83
	(Affidavit of Carlos Cestero)		
4	Exhibit C	91	91
	(NAT's Answers to Plaintiff's First Set of Interrogatories)		
5	Exhibit D	99	99
6	(Profit/Loss Statement for NAT, January 2011)		
7	Exhibit E	101	101
	(Pages from bank statements)		
8	Exhibit F	186	186
9	(Terminating OCN 424F, Type FGD, dialed telephone numbers, 12-1 through 12-31-10)		
10			
11			
12			
13			
14			
15			
16			
17			
18			
19			
20			
21			
22			
23			
24			
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1 rule on our opposition.

2 THE COURT: All right. Then the Motion to Amend

3 the Answer and to add Counterclaims is granted.

4 One other issue I wanted to raise, in Sprint's

5 Objections to the Motion for Preliminary Injunction, one of

6 the arguments that you had raised was that Native American

7 Telecom didn't have any claim for relief that was pending.

8 So, therefore, the Court couldn't grant preliminary

9 injunction.

10 I was wondering if the fact they have now amended

11 their Answer and added the Counterclaims, does that moot

12 out that issue, or do you still have that particular issue?

13 MR. KNUDSON: I believe that resolves that issue.

14 THE COURT: Okay. Now that we've dealt with

15 those procedural things. Since Native American Telecom is

16 the moving party, you have the burden of proof. So you can

17 go ahead and proceed, Mr. Swier.

18 MR. SWIER: Thank you, Your Honor. If it's

19 appropriate with the Court, I think that there's no need

20 for an opening statement, because the Court is familiar.

21 with the case. So if we could start with our witnesses, I

22 would ask the Court to do that.

23 THE COURT: All right. Mr. Knudson, did you have

24 something?

25 MR. KNUDSON: Well, there were a Motion for

6

1 THE COURT: This is the time scheduled for a

2 hearing in the matter entitled United States of America vs.

3 Sprint -- I'm sorry, Sprint Communications Company vs.

4 Native American Telecom. I'm used to the United States

5 being a party. It just came out.

6 Would counsel please note their appearances for

7 the record?

8 MR. SWIER: Good morning, Your Honor. Scott

9 Swier, appearing on behalf of the Defendant in this case,

10 Native American Telecom, an LLC.

11 MR. KNUDSON: Scott Knudson and Tom Tobin for the

12 Plaintiff, Sprint Communications, and with us, before the

13 rail, is Bret Lawson, in-house counsel for Sprint

14 Communications.

15 THE COURT: Thank you. Before I take up the

16 Motion for a Preliminary Injunction, I wanted to raise an

17 issue.

18 The Native American Telecom filed a Motion to Amend

19 its Answer and to add Counterclaims. I know this was just

20 filed within the last week. I was wondering if Sprint was

21 going to be objecting to that, or if you would need the

22 rest of your time to determine whether you would be

23 objecting.

24 MR. KNUDSON: Your Honor, we would stipulate to

25 its filing. That would obviate the need for the Court to

8

1 Protective Order and a corresponding Motion to Compel that

2 had been filed before. I don't know if the Court intends

3 to bring those up or address those today, as well.

4 THE COURT: I didn't plan on addressing those

5 today. I was just going to allow the parties to respond in

6 normal course, and then I would enter a written ruling on

7 those.

8 MR. KNUDSON: Then I will address those issues in

9 my argument later today then.

10 THE COURT: Okay. Mr. Swier?

11 MR. SWIER: Thank you. Your Honor, at this time

12 I would ask if the parties have any witnesses for their

13 case in chief, that those witnesses be sequestered, please.

14 THE COURT: The Motion to Sequester all witnesses

15 is granted, except for the corporate representative would

16 be allowed to stay in. I assume he is the corporate

17 representative.

18 MR. KNUDSON: He is.

19 THE COURT: Okay.

20 MR. SWIER: Your Honor, if I may, Mr. Lengkeek is

21 serving as the corporate representative today, and he will

22 also be one of my witnesses. May he be allowed to sit with

23 me?

24 THE COURT: He may.

25 MR. KNUDSON: Excuse me. What is Mr. Lengkeek's

1 status then?

2 THE COURT: He is the corporate representative.

3 Is he also your first witness?

4 MR. SWIER: He'll be my second witness,

5 Your Honor. At this time I'll ask Carlos Cestero to please

6 take the stand.

7 Your Honor, what I've done is I've provided

8 Mr. Cestero with the original exhibits. I've also provided

9 copies of the exhibits both to the Court and to opposing

10 counsel, so everyone is working off the same page.

11 THE COURT: All right.

12 CARLOS CESTERO,

13 called as a witness, being first duly sworn, testified as

14 follows:

15 DIRECT EXAMINATION

16 BY MR. SWIER:

17 Q. Good morning, Mr. Cestero. Would you please introduce

18 yourself to the Court?

19 A. Sure. My name is Carlos Cestero.

20 Q. And would you, please, spell your name for the Court

21 and the court reporter?

22 A. Sure. C-A-R-L-O-S. Last name is C-E-S-T-E-R-O.

23 Q. I'll refer to you as Carlos. Is that all right?

24 A. That's fine.

25 Q. Carlos, what's your business address?

1 A. 110 West Ocean Boulevard, Suite A, Long Beach,

2 California 90802.

3 THE COURT: Counsel, if I could just remind you,

4 anytime you have somebody give their complete business

5 address, you'll have to do a redaction of the transcript.

6 So unless there's a real need to have their entire business

7 address, and unless you really want to do redactions to the

8 transcript, you don't need to ask for a formal address.

9 MR. SWIER: I will not ask again, Your Honor.

10 Thank you.

11 BY MR. SWIER:

12 Q. Carlos, would you share with the Court your

13 educational background, please?

14 A. Sure. After high school, I went to college at

15 California State University Long Beach, where I graduated

16 with an accounting degree.

17 Q. What year did you graduate with your accounting

18 degree?

19 A. 1994.

20 Q. Since you graduated Cal State Long Beach in '94, have

21 you been working in your related accounting field?

22 A. Yes, I have.

23 Q. Carlos, would you share with us your employment

24 history since you graduated from college?

25 A. Sure. My first job out of college was at a company

1 called Balboa Capital. I worked there for about nine and a

2 half years.

3 Q. What did you do at Balboa Capital?

4 A. I had a variety of different things. I was an

5 accountant. I handled the securitization accounting, cash

6 management. I handled the funding operations, as well as I

7 was the COO during the last few moments of my tenure there.

8 Q. Just remember, for the court reporter, please slow

9 down.

10 A. All right.

11 Q. Carlos, what did Balboa do?

12 A. They are an equipment leasing company.

13 Q. You shared with us your duties there. How long were

14 you with Balboa?

15 A. About nine and a half years.

16 Q. When did you leave Balboa?

17 A. About 2005.

18 Q. Why did you leave Balboa?

19 A. I found another position at another company.

20 Q. When you left Balboa, what was your next employment

21 opportunity?

22 A. It was a company called Nationwide Funding.

23 Q. What does Nationwide Funding do?

24 A. Equipment leasing.

25 Q. What were your duties at Nationwide?

1 A. I was the CFO.

2 Q. What duties entailed the CFO position?

3 A. That would involve managing all the accounting

4 records, the bookkeeping, journal entries, reconciliations,

5 anything related to a normal controller/CFO type of

6 position.

7 Q. How long were you in that position?

8 A. About two years.

9 Q. After you left, was it Nationwide?

10 A. Yes.

11 Q. After you left Nationwide, what was your next

12 employment opportunity?

13 A. I went to work for a company called Strada Capital

14 Corporation.

15 Q. Can you spell that, please?

16 A. S-T-R-A-D-A C-A-P-I-T-A-L Corporation.

17 Q. What did you do at Strada?

18 A. Strada, I was their chief operating officer, as well

19 as their controller.

20 Q. How long were you at Strada?

21 A. For about three years almost.

22 Q. Describe for us your day-to-day duties at Strada.

23 A. I managed the books, handled the operational side of

24 the business, did the reconciliations, did all the record

25 keeping. Normal controller/CFO-type responsibilities.

13

1 Q. And you left Strada when?

2 A. **2009.**

3 Q. Why did you leave Strada in 2009?

4 A. **For another opportunity.**

5 Q. What was that opportunity?

6 A. **Free Conferencing Corporation.**

7 Q. And is Free Conferencing Corporation your current

8 employer?

9 A. **Yes, they are.**

10 Q. Is Free Conferencing Corporation located in

11 Long Beach, California?

12 A. **That's correct.**

13 Q. Carlos, since graduating with your accounting degree

14 in 1994, how many years of experience do you have in the

15 accounting and controller type business?

16 A. **About 16 years.**

17 Q. Carlos, when did you begin your controller duties at

18 FreeConferenceCall?

19 A. **September of 2009.**

20 Q. Real briefly for the Court, what does the controller

21 of FreeConferenceCall do? What do you do?

22 A. **I maintain the books, I do all the reconciliations,**

23 **prepare the financial statements, record cash receipts,**

24 **payables, typical controller duties.**

25 Q. You are the bean counter.

14

1 A. **So to speak, yes.**

2 Q. Carlos, who do you get paid by each month?

3 A. **Free Conferencing Corporation.**

4 Q. So Free Conferencing Corporation is the entity that

5 actually pays your salary?

6 A. **That's correct.**

7 Q. In addition to your duties with FreeConferenceCall, do

8 you also serve as the controller for any other entities?

9 A. **I do.**

10 Q. We're going to go through those in a second. Are you

11 paid any type of money to do the work for those entities?

12 A. **No, I'm not.**

13 Q. Let's talk about those other entities you serve in

14 this role. What would be the first one?

15 A. **Free Conferencing Corporation.**

16 Q. You told us what you do for that.

17 A. **Yes.**

18 Q. What other entities do you serve as the controller or

19 the bookkeeper?

20 A. **Native American Telecom.**

21 Q. Native American Telecom, LLC, the party that's a

22 Defendant in this case?

23 A. **Yes.**

24 Q. Carlos, just for sake of shortening things up, if I

25 refer to Native American Telecom, LLC, as NAT, is that

15

1 sufficient?

2 A. **Yes.**

3 Q. You'll know what I'm talking about?

4 A. **Yes.**

5 Q. What other entities do you serve as the controller?

6 A. **WideVoice Communications.**

7 Q. What other groups?

8 A. **FreeConferenceCall Global.**

9 Q. Anyone else?

10 A. **Wyde Voice, spelled slightly different, W-Y-D-E. They**

11 **are a conferencing bridge company.**

12 Q. Just to make clear, there are two companies called

13 WideVoice.

14 A. **That sound the same, yes.**

15 Q. One is spelled W-Y-D-E?

16 A. **Correct.**

17 Q. Any other entities you serve as controller for?

18 A. **Yes. HDPSTN.**

19 Q. Can you say that one more time?

20 A. **HDPSTN.**

21 Q. I want to talk about what you do for WideVoice

22 Communications, the W-I-D-E Voice Communications. What's

23 the purpose of WideVoice Communications?

24 A. **They are a telephone carrier.**

25 Q. What is the purpose of FreeConferenceCall Global?

16

1 A. **It's a conferencing company.**

2 Q. What is the purpose of Wyde Voice with a Y?

3 A. **It's a conferencing bridge company.**

4 Q. What's the purpose of HDPSTN?

5 A. **They are a telephone company.**

6 Q. Do you know what HDPSTN is the acronym for?

7 A. **Yes.**

8 Q. What is that?

9 A. **It's High Definition Public Switch Telephone Network.**

10 Q. So, Carlos, at this time, just to make sure we

11 clarify, your actual job that you get paid for is to act as

12 the controller of FreeConferenceCall. Correct?

13 A. **Correct.**

14 Q. But you also serve as the controller for these other

15 entities that we've discussed?

16 A. **That's correct.**

17 Q. As an accountant, do you keep separate books for each

18 of those respective entities?

19 A. **Absolutely.**

20 Q. Explain to the Court the mechanics of how that's done.

21 A. **First, we maintain separate databases. We also have**

22 **separate file cabinets, separate file folders. Basically**

23 **everything is separated.**

24 Q. Explain to the Court why that separation between the

25 entities is important.

1 **A. Well, to maintain the proper internal controls.**
 2 **Q.** What do you mean by "proper (internal controls)"?
 3 **A. You want to make sure nothing is mixed in with**
 4 **anything else. You want to keep things separated and**
 5 **segregated from one another.**
 6 **Q.** When you are dealing with multiple entities like that,
 7 is that a fundamental purpose of accounting practice, to
 8 make sure you keep that separation very strict?
 9 **A. Yes.**
 10 **Q.** Carlos, in your 16 years of accounting and controller
 11 experience, have you ever deviated from those fundamental
 12 separation principles?
 13 **A. No.**
 14 **Q.** Not once?
 15 **A. No.**
 16 **Q.** Since you started working for FreeConferenceCall in
 17 2009, and for the other entities later on, have you always
 18 followed those fundamental separation principles?
 19 **A. Yes.**
 20 **Q.** Carlos, one of the entities you do the accounting work
 21 for is, of course, NAT, Native American Telecom. Is that
 22 right?
 23 **A. Yes.**
 24 **Q.** Explain to Judge Schreier what you do for NAT.
 25 **A. I maintain the books, record all the cash receipts,**

1 **maintain the payables, reconcile the accounts, prepare the**
 2 **financial statements, normal controller/accounting**
 3 **responsibilities.**
 4 **Q.** When did you take over that role for NAT?
 5 **A. It was in late July of 2010.**
 6 **Q.** So about eight months ago?
 7 **A. About, yes.**
 8 **Q.** Why did you take over that controller role for NAT?
 9 **A. It was basically to -- it was a cost efficiency move,**
 10 **and it allowed for us to maintain the proper controls.**
 11 **Q.** Before you took over the book work for NAT -- strike
 12 that question. So you did it for a cost effectiveness and
 13 efficiency purpose. Is that right?
 14 **A. Sure, yes.**
 15 **Q.** Carlos, I want to talk about NAT a little bit. Will
 16 you describe for us what you understand the ownership
 17 structure of NAT to be?
 18 **A. Would I describe it?**
 19 **Q.** Yes. How is the ownership structure of NAT set up?
 20 **A. There's three separate entities. Would you like me**
 21 **to --**
 22 **Q.** So there's three separate entities. Who is the
 23 majority owner of NAT?
 24 **A. The Crow Creek Sioux Tribe.**
 25 **Q.** Do you know what percentage of NAT the Tribe owns?

1 **A. Yes.**
 2 **Q.** What is that percentage?
 3 **A. 51 percent.**
 4 **Q.** So they are the majority owner?
 5 **A. Yes.**
 6 **Q.** You said there were three total entities?
 7 **A. Yes.**
 8 **Q.** We have the first one. What is the second entity that
 9 owns NAT?
 10 **A. WideVoice Communications.**
 11 **Q.** What percentage of NAT does WideVoice Communications
 12 own?
 13 **A. 24 percent.**
 14 **Q.** Again, WideVoice Communications, their purpose, or
 15 what do they do, Carlos?
 16 **A. They are a telephone carrier. They transport traffic.**
 17 **Q.** What is the third entity that has an ownership
 18 interest in NAT?
 19 **A. Native American Telecom Enterprise.**
 20 **Q.** What does that entity own, what percentage?
 21 **A. They have 25 percent.**
 22 **Q.** Just so we're clear, because the names start to get
 23 confusing, Native American Telecom Enterprise, is that a
 24 separate and distinct entity from NAT?
 25 **A. Yes, it is.**

1 **Q.** They own what percentage again, Native American
 2 Telecom Enterprise?
 3 **A. 25 percent.**
 4 **Q.** Carlos, I want to talk a little bit about the record
 5 keeping and the books you maintain for NAT. Who has access
 6 to NAT's financial books?
 7 **A. Myself.**
 8 **Q.** What if something happens to you? Are there codes set
 9 up with another person so they could access the financials?
 10 **A. Yes, my assistant.**
 11 **Q.** Tell me how that code thing works. Is it kind of a
 12 backup?
 13 **A. Yes, it's a backup.**
 14 **Q.** Is that standard in the accounting industry?
 15 **A. Yes. You want to make sure someone can access things**
 16 **if you're absent or something happens to you.**
 17 **Q.** Carlos, do you receive any payment for the services
 18 you provide to NAT?
 19 **A. No, I do not.**
 20 **Q.** Do you understand why that is?
 21 **A. Native American Telecom cannot afford to pay for an**
 22 **outside accountant.**
 23 **Q.** I want to talk about these internal controls a little
 24 bit, and let's go back to the entities you do work for.
 25 FreeConferenceCall. Who has check-writing authority

1 for FreeConferenceCall?
 2 **A. David Erickson and Sue Erickson.**
 3 **Q.** Does David Erickson serve as the CEO for
 4 FreeConferenceCall?
 5 **A. Yes, he does.**
 6 **Q.** Who is Sue Erickson?
 7 **A. His wife.**
 8 **Q.** You also do accounting work for WideVoice, W-I-D-E
 9 Voice. Who has check-writing authority for that entity?
 10 **A. Dave Erickson, Sue Erickson, and Patrick Chicas.**
 11 **That's spelled C-H-I-C-A-S.**
 12 **Q.** For FreeConferenceCall Global, who has the
 13 check-writing authority for that entity?
 14 **A. David Erickson and Sue Erickson.**
 15 **Q.** Who has check-writing authority for Wyde Voice with a
 16 Y?
 17 **A. David Erickson and Sue Erickson.**
 18 **Q.** Who has check-writing authority for HDPSTN?
 19 **A. David Erickson and Sue Erickson.**
 20 **Q.** For Native American Telecom, for NAT, who has the
 21 check-writing authority for that entity?
 22 **A. Myself and Jeff Holoubek. H-O-L-O-U-B-E-K.**
 23 **Q.** Does David Erickson have any check-writing authority
 24 for NAT?
 25 **A. No, he does not.**

1 **Q.** Does Sue Erickson have any check-writing authority for
 2 NAT?
 3 **A. No, she does not.**
 4 **Q.** Does Mr. Chicas have any check-writing authority for
 5 NAT?
 6 **A. No, he does not.**
 7 **Q.** Carlos, in front of you are a number of exhibits. I
 8 would like you to take a look at those exhibits, if you
 9 would, please.
 10 **A. Sure.**
 11 **Q.** I would first like you to take a look at Defendant's
 12 Exhibit No. 1. Can you tell the Court what that exhibit
 13 shows?
 14 **A. Sure. It's the bank statements for Native American**
 15 **Telecom for the First Dakota National Bank ending**
 16 **8-31-2009.**
 17 **Q.** Let's clarify this. Since Native American Telecom
 18 became an entity, how many checking accounts has NAT had?
 19 **A. Two.**
 20 **Q.** Was the First Dakota National Bank checking account
 21 the first one?
 22 **A. Yes, it was.**
 23 **Q.** First Dakota National Bank is obviously based here in
 24 South Dakota?
 25 **A. Yes, it is.**

1 **Q.** Carlos, I'd like you to take a look at Defendant's
 2 Exhibit 1, because I want to show some of the financial
 3 status of NAT. What is the date of Exhibit 1?
 4 **A. It's 8-31-2009.**
 5 **Q.** For this bank statement, what is the deposit?
 6 **A. We're showing a deposit of \$100.**
 7 **Q.** Carlos, are you aware of what switched access fees
 8 are?
 9 **A. Yes.**
 10 **Q.** What are they?
 11 **A. It's the payments that are made for traffic generated.**
 12 **Q.** Is that the business that NAT is involved in, part of
 13 their business?
 14 **A. Yes.**
 15 **Q.** Carlos, can you tell, by looking at these bank
 16 statements, if the deposits NAT receives come from those
 17 switched access fees?
 18 **A. Should be able to, yes.**
 19 **Q.** The hundred dollars that's in Exhibit 1, is that from
 20 a switched access fee payment?
 21 **A. No.**
 22 **Q.** Do you know where that comes from?
 23 **A. I can't tell from here, but I know it's not a switched**
 24 **access.**
 25 **Q.** So the first month of operation, there's a hundred

1 dollar deposit. Is that right?
 2 **A. Yes.**
 3 **Q.** I would like you now to look at Defendant's Exhibit
 4 No. 2. This is another banking statement from First
 5 Dakota?
 6 **A. Yes.**
 7 **Q.** What's the date of Exhibit 2?
 8 **A. 9-30-2009.**
 9 **Q.** What does that bank statement show for a deposit?
 10 **A. It shows a deposit of \$50.**
 11 **Q.** Based on your knowledge, is that a deposit that was
 12 derived from receiving switched access fees?
 13 **A. No, it was not.**
 14 **Q.** If you would now take a look at Defendant's Exhibit
 15 No. 3. What is the date of this banking statement?
 16 **A. October 30, 2009.**
 17 **Q.** What type of deposit did NAT receive in that month?
 18 **A. They received \$140.**
 19 **Q.** Based on your review of Exhibit 3, did that \$140
 20 derive from switched access fees?
 21 **A. No, it did not.**
 22 **Q.** If you'd now please take a look at Defendant's Exhibit
 23 No. 4. What is the date of that banking statement?
 24 **A. November 30, 2009.**
 25 **Q.** What is the deposit under Exhibit 4?

1 **A. \$65.**
 2 **Q.** Again, based on your review, did that \$65 derive from
 3 any type of switched access fees?
 4 **A. No, it did not.**
 5 **Q.** Defendant's Exhibit No. 5. What's the date of that
 6 bank statement?
 7 **A. 12-31-2009.**
 8 **Q.** The deposit in Exhibit 5 shows how much?
 9 **A. It shows total deposits of \$5,040.**
 10 **Q.** Can you tell, by looking at the bank statement, where
 11 the large majority of that money came from?
 12 **A. Yes.**
 13 **Q.** Where?
 14 **A. It came from WideVoice. It was a loan to NAT.**
 15 **Q.** So that \$5,000 of that \$5,040 was a loan from
 16 WideVoice?
 17 **A. Correct.**
 18 **Q.** Do you know if that loan WideVoice made to NAT was
 19 ever paid back?
 20 **A. Yes, it was.**
 21 **Q.** When was it paid back?
 22 **A. I believe it was paid back in February sometime.**
 23 **Q.** Of?
 24 **A. 2010.**
 25 **Q.** The extra \$40 of that \$5,040, did that derive from

1 switched access fees?
 2 **A. No, it did not.**
 3 **MR. KNUDSON:** Your Honor, is he going to offer
 4 these as exhibits?
 5 **MR. SWIER:** I was going to offer them at the end.
 6 I can offer each one individually, if you'd like.
 7 **MR. KNUDSON:** I just wanted clarification, since
 8 he's testifying from the exhibits before they are admitted.
 9 I don't have any objection to their admission.
 10 **THE COURT:** Why don't you offer them all at this
 11 point. Then if he has an objection, I can take up the
 12 objection.
 13 **MR. SWIER:** Thank you. Your Honor, at this time
 14 I would move to admit Defendant's Exhibits 1 through I
 15 believe it's 29.
 16 **THE COURT:** Why don't we just do the bank records
 17 at this point.
 18 **MR. SWIER:** Then, Your Honor, we would offer
 19 Defendant's Exhibits 1 through 25.
 20 **THE COURT:** Any objection to 1 through 25?
 21 **MR. KNUDSON:** Before I respond, Your Honor, I
 22 would like to add that I will also be using an exhibit that
 23 will be the same records, but they are numbered, and I will
 24 be referring to them by that identification number so it
 25 will move my interrogation along more quickly. I don't

1 object to his exhibits as to bank records.
 2 **THE COURT:** All right. Exhibits 1 through 25 are
 3 received.
 4 **MR. SWIER:** Thank you, Your Honor.
 5 **BY MR. SWIER:**
 6 **Q.** Carlos, I would now like you to look at Exhibit 6.
 7 What's the date of that banking statement?
 8 **A. January 29, 2010.**
 9 **Q.** What does that bank statement show as far as deposits
 10 for NAT?
 11 **A. Zero.**
 12 **Q.** Now I'd like you to look at Defendant's Exhibit No. 7.
 13 What is the date of that banking statement?
 14 **A. February 26, 2010.**
 15 **Q.** Does that banking statement reflect any deposits?
 16 **A. Yes, it does.**
 17 **Q.** What amount of a deposit does Exhibit 7 show?
 18 **A. \$114,138.47.**
 19 **Q.** So we've gone from a very minimal amount for the first
 20 four or five months to now we're talking some real money?
 21 **A. Yes.**
 22 **Q.** Carlos, can you tell, from looking at that banking
 23 statement, where that \$114,000 derived from?
 24 **A. Yes.**
 25 **Q.** Where?

1 **A. It came from our billing agent. They're called CABS**
 2 **Agent.**
 3 **Q.** Briefly how does that work with CABS Agent? What is
 4 it?
 5 **A. They basically bill on behalf of NAT for the traffic**
 6 **that's generated, and they collect on its behalf.**
 7 **Q.** Is using an agent like CABS a standard method of
 8 billing in the telecommunications industry?
 9 **A. It is...**
 10 **Q.** Carlos, again, based on your review of Exhibit 7, that
 11 \$114,000, did that derive from switched access fees that
 12 were paid by carriers?
 13 **A. Yes.**
 14 **Q.** Just to clarify, in February of 2010, that's when NAT
 15 started to be paid for switched access fees?
 16 **A. That is correct.**
 17 **Q.** Carlos, I would like you to look at Defendant's
 18 Exhibit No. 8. What's the date on that bank statement?
 19 **A. March 31, 2010.**
 20 **Q.** What does it show for NAT's deposits?
 21 **A. Shows total deposits of \$149,601.40.**
 22 **Q.** Can you tell from that banking statement how much of
 23 that amount derived from switched access payments from
 24 carriers?
 25 **A. Yes, I can.**

1 Q. How much?
 2 A. **\$142,043.72.**
 3 Q. Carlos, do you know of those payments, did some of
 4 those payments come from switched access fees that were
 5 paid by Sprint?
 6 A. **I do not know.**
 7 Q. Carlos, now look at Exhibit No. 9. What is the date
 8 of that banking statement?
 9 A. **April 30, 2010.**
 10 Q. What does that exhibit show as far as access fees that
 11 were received?
 12 A. **Access fees?**
 13 Q. Yes.
 14 A. **\$7,909.88.**
 15 Q. Can you explain the downward trend between the
 16 previous month, which was \$142,000, and now we're down to
 17 \$7,000 or so? Did a payment come in late?
 18 A. **I believe so.**
 19 Q. Now I'd like you to look at Exhibit 10. What is the
 20 date of that banking statement?
 21 A. **It is May 28, 2010.**
 22 Q. Does that show that NAT received a deposit?
 23 A. **Yes, it does.**
 24 Q. How much was the deposit NAT received?
 25 A. **\$217,877.45.**

1 Q. How much?
 2 A. **\$158,955.70.**
 3 Q. If you'd now look at Exhibit 13, please. What's the
 4 date of that banking statement?
 5 A. **August 31, 2010.**
 6 Q. Does that banking statement reflect a deposit made by
 7 NAT?
 8 A. **Yes, it does.**
 9 Q. How much?
 10 A. **\$128,855.42.**
 11 Q. Is that amount derived totally from switched access
 12 payments?
 13 A. **Yes.**
 14 Q. Just to clarify, Carlos, you can tell that by looking
 15 at the deposit on the banking statement. Is that right?
 16 A. **By the description.**
 17 Q. Carlos, if you would now look at Exhibit 14, please.
 18 What's the date of that banking statement?
 19 A. **It is September 30, 2010.**
 20 Q. What type of deposit is shown there?
 21 A. **Zero.**
 22 Q. Is that approximately when you took over the
 23 controlling function for NAT?
 24 A. **It's about that time, yes.**
 25 Q. Let's explain to the Court. When you started to take

1 Q. Can you tell, by looking at that document, if that
 2 amount derived from switched access payments from carriers?
 3 A. **Yes, it did.**
 4 Q. If you'd now look at Exhibit No. 11. What is the date
 5 of that bank statement?
 6 A. **It is June 30, 2010.**
 7 Q. Does that exhibit show that NAT received a deposit or
 8 made a deposit?
 9 A. **Yes, it does.**
 10 Q. How much is that deposit, Carlos?
 11 A. **They made \$243,779.29.**
 12 Q. Of that amount, how much of that derived from switched
 13 access fees paid by carriers?
 14 A. **\$239,879.58.**
 15 Q. If you'd now look at Exhibit 12, please. What is the
 16 date of that banking statement?
 17 A. **It is July 30, 2010.**
 18 Q. Does that show -- does that banking statement show
 19 money received by NAT?
 20 A. **Yes, it does.**
 21 Q. How much?
 22 A. **It shows total deposits of \$162,029.60.**
 23 Q. Can you tell us, of that amount, how much derived from
 24 switched access fee payments?
 25 A. **Yes.**

1 over the controlling functions for NAT, did you switch the
 2 checking account?
 3 A. **Yes. We opened up a new account.**
 4 Q. Where did you open up that account?
 5 A. **With Wells Fargo.**
 6 Q. So, Carlos, Exhibits 14, 15, 16, 17, and 18, are those
 7 the final statements you've received for NAT from First
 8 Dakota Bank?
 9 A. **Yes, they are.**
 10 Q. And they would show what in deposits?
 11 A. **Zero in each.**
 12 Q. Is that because any revenue NAT received from
 13 approximately October of 2010 forward went into the
 14 Wells Fargo checking account?
 15 A. **From September forward, I believe.**
 16 Q. Excuse me. When you took over the books, we switched
 17 to Wells Fargo.
 18 A. **Yes.**
 19 Q. Carlos, so the First Dakota Bank account, is that
 20 really a dormant account? Nothing goes through there?
 21 A. **It doesn't have any activity anymore.**
 22 Q. Besides the First Dakota account and the new account
 23 with Wells Fargo, does NAT have any other checking accounts
 24 or money accounts out there?
 25 A. **No.**

1 Q. These are the only two?
 2 A. Yes.
 3 Q. Carlos, if you would now look at Exhibit 19. What
 4 does this document show?
 5 A. **This is the bank statement for Wells Fargo for the**
 6 **period ending July 31, 2010, for Native American Telecom.**
 7 Q. Is this the first banking statement NAT has with
 8 Wells Fargo?
 9 A. Yes, it is.
 10 Q. Does Exhibit 19 show any type of deposit?
 11 A. No, it does not.
 12 Q. Is that because it's just a brand-new account?
 13 A. **I just opened the account, yes.**
 14 Q. You can now look at Exhibit 20, please. What is the
 15 date on that Wells Fargo Bank statement?
 16 A. **It's August 31, 2010.**
 17 Q. What does that statement show as any deposits that
 18 were received by NAT?
 19 A. **It's transfers that were initiated from the First**
 20 **Dakota Bank to the Wells Fargo.**
 21 Q. I want to go through this real quickly, so we can stay
 22 on the same page.
 23 On Exhibit 20 where it says "posted date," Do you see
 24 that about halfway down?
 25 A. I do.

1 A. **Yes, it received three.**
 2 Q. What is the total of those deposits?
 3 A. **\$38,765.67.**
 4 Q. Do you know where that amount of money derived from?
 5 A. **From switched access.**
 6 Q. So we're back to receiving switched access payments
 7 from the carriers?
 8 A. Yes.
 9 Q. Carlos, if you would now take a look at Exhibit 22,
 10 please. What's the date on that Wells Fargo statement?
 11 A. **October 31, 2010.**
 12 Q. What does it show for NAT's deposits for that
 13 statement?
 14 A. **Shows \$6.54. I take that back. There's a total of**
 15 **\$6,006.54.**
 16 Q. Do you know where that amount derived from?
 17 A. Yes.
 18 Q. Where?
 19 A. **\$6.54 came from switched access; and \$6,000 was a loan**
 20 **from WideVoice.**
 21 Q. To NAT?
 22 A. **To NAT, yes.**
 23 Q. Before we go any further, are you familiar with the
 24 loan agreement between WideVoice and NAT?
 25 A. **The loan agreement between --**

1 Q. We have a posted date of August 4 of 2010. Is that
 2 right?
 3 A. Yes.
 4 Q. How much was the amount that was transferred into this
 5 Wells Fargo checking account?
 6 A. **\$75,000.**
 7 Q. Explain where that \$75,000 came from.
 8 A. **It came from the existing balances in the First Dakota**
 9 **National Bank account.**
 10 Q. So you closed the First Dakota account down and took
 11 whatever was in there and gave it to the Wells Fargo
 12 account. Is that right?
 13 A. Yes.
 14 Q. There is also, Carlos, an amount of approximately
 15 \$128,855. What does that represent?
 16 A. **That's the switch carrier payments we received in the**
 17 **First Dakota Bank that I transferred from First Dakota Bank**
 18 **to the Wells Fargo Bank.**
 19 Q. So both of those items are just transferred from
 20 First Dakota to Wells Fargo?
 21 A. Right.
 22 Q. Carlos, I want you to look at Exhibit No. 21. What is
 23 the date on that Wells Fargo statement?
 24 A. **September 30, 2010.**
 25 Q. Does that statement show that NAT received a deposit?

1 Q. Do you know if there's any terms for that loan
 2 agreement or anything?
 3 A. **I don't know specific terms.**
 4 Q. Fair enough. So under this statement, NAT received
 5 \$6.54 of access fees. Correct?
 6 A. Yes.
 7 Q. Carlos, you're obviously aware of the various
 8 lawsuits, including this one we're currently in. Correct?
 9 A. Yes.
 10 Q. Can you tell the Court what happened around this time
 11 where your access fees have gone from hundreds of thousands
 12 down to \$6.54?
 13 MR. KNUDSON: Objection. Vague as to time.
 14 THE COURT: Sustained. Rephrase your question.
 15 BY MR. SWIER:
 16 Q. Approximately October of 2010, Carlos, the same time
 17 as this statement, can you tell the Court what was going on
 18 with the legal status of the cases here in South Dakota?
 19 A. **Yes. Sprint brought suit to Native American Telecom.**
 20 Q. When Sprint brought suit against Native American
 21 Telecom, I would presume that all the other carriers, at
 22 least, kept paying you. Didn't they?
 23 A. **No, they didn't.**
 24 Q. Well, who stopped paying you?
 25 A. **Most of them.**

1 Q. Other than \$6.54?
 2 A. **That's correct.**
 3 Q. Carlos, if you would now look at Exhibit 23, please.
 4 What's the date on that banking statement?
 5 A. **November 30, 2010.**
 6 Q. What does it show for deposits that were received from
 7 NAT?
 8 A. **Total deposits?**
 9 Q. Total deposits first.
 10 A. **Total deposits, we've got \$58,077.69.**
 11 Q. Of that amount, how much of it derives from switched
 12 access fees NAT received?
 13 A. **\$7,077.69.**
 14 Q. In Exhibit 23 there are also a couple references to a
 15 couple rather large numbers that says "online transfer
 16 loans." Do you see that?
 17 A. **I do.**
 18 Q. Will you share with the Court what those numbers
 19 reflect?
 20 A. **Those are loans from WideVoice to Native American**
 21 **Telecom.**
 22 Q. How much was the loan amount WideVoice made to NAT
 23 that month?
 24 A. **\$51,000.**
 25 Q. As the controller of NAT and being familiar with the

1 the date on that banking statement?
 2 A. **January 31, 2011.**
 3 Q. What does it show for deposits for NAT?
 4 A. **Shows total deposits of \$45,031.02.**
 5 Q. Of that amount, what constitutes switched access fees
 6 received by NAT?
 7 A. **\$31.02.**
 8 Q. Where did the other \$45,000 derive?
 9 A. **Loans from WideVoice to Native American Telecom.**
 10 Q. Why did WideVoice make those loans?
 11 A. **For the same reason. Couldn't afford -- didn't have**
 12 **any money to pay their operating expenses.**
 13 Q. The switched access fee payments stopped?
 14 A. **Yes.**
 15 Q. Carlos, if you would, would you, please, take a look
 16 at Exhibit No. 26?
 17 A. **Sure.**
 18 Q. I'll give you a minute. Are you familiar with that
 19 document?
 20 A. **I am.**
 21 Q. What is that document?
 22 A. **This represents the Balance Sheet for Native American**
 23 **Telecom as of December 31, 2010.**
 24 Q. I want to run through this very quickly with you.
 25 Look under the "Checking and Savings" column. Do you see

1 financials of both WideVoice and NAT, why was that loan
 2 made from WideVoice to NAT?
 3 A. **To cover operating expenses.**
 4 Q. Because the switched access payments relatively
 5 stopped?
 6 A. **That's correct. Didn't have enough funds to cover its**
 7 **own expenses.**
 8 Q. If you would now look at Exhibit No. 24. What is the
 9 date on that banking statement?
 10 A. **December 31, 2010.**
 11 Q. What does that statement show regarding deposits from
 12 NAT?
 13 A. **Shows total deposits of \$47,519.77.**
 14 Q. Did NAT receive any switched access fees from the
 15 carriers, and if so, how much?
 16 A. **They did. They received \$3,519.77.**
 17 Q. And the remainder of that amount came from who?
 18 A. **Loans from WideVoice to Native American Telecom.**
 19 Q. Why did WideVoice make the loan to Native American
 20 Telecom?
 21 A. **Again, to cover the expenses Native American Telecom**
 22 **couldn't pay.**
 23 Q. Because the access fee payments stopped?
 24 A. **That's correct.**
 25 Q. Carlos, if you would now look at Exhibit 25. What's

1 that?
 2 A. **Yes.**
 3 Q. How much money remains in that First Dakota checking
 4 account?
 5 A. **\$1,814.19.**
 6 Q. How much cash is in the Wells Fargo account that you
 7 opened when you first started doing the controller
 8 function?
 9 A. **\$10,043.06.**
 10 Q. So as of December 31, 2010, just a couple months ago,
 11 what were NAT's total current assets in those two accounts?
 12 A. **\$11,857.25.**
 13 Q. If we go down under the "Fixed Assets," we have a line
 14 item that talks about "Computer Equipment." Will you
 15 explain to us, please, what that is?
 16 A. **Sure. That's computer equipment related to the**
 17 **Communications Center and Internet Library at the**
 18 **Crow Creek Reservation.**
 19 Q. Those are fixed assets from NAT that were placed on
 20 the Reservation?
 21 A. **Correct.**
 22 Q. There's also a line there that says "Furniture and
 23 Equipment" for \$617.00. What's that?
 24 A. **That also goes towards the Communications Center and**
 25 **Internet Library located on the Reservation.**

41

1 Q. Then we have a big number. We have a \$216,000 number
 2 for "Wi-Max Equipment." What does that represent?
 3 A. **That's the cost of the communications tower that was**
 4 **put on the Reservation.**
 5 Q. That's all the hardware and software that goes with
 6 that?
 7 A. **Yes.**
 8 Q. So, Carlos, total fixed assets as of December 31,
 9 2010, are what?
 10 A. **\$224,914.85.**
 11 Q. Now if we look under the "Liabilities and Equity"
 12 column, do you see that?
 13 A. **I do.**
 14 Q. It says "Current Liabilities," and then it says "Other
 15 Current Liabilities," and then it gets down to, it says
 16 "Due to WideVoice Communications." Do you see that?
 17 A. **Yes.**
 18 Q. What does that represent?
 19 A. **It's a combination of two things. It's a combination**
 20 **of expenses that WideVoice has paid on behalf of Native**
 21 **American Telecom, as well as loans it made directly to**
 22 **Native American Telecom.**
 23 Q. That total amount due to WideVoice, either through
 24 them paying for equipment or giving loans, is how much?
 25 A. **\$474,949.38.**

42

1 Q. Do you remember when WideVoice started either paying
 2 for things on behalf of NAT or started to provide the
 3 loans? Do you remember when all of that started?
 4 A. **I do.**
 5 Q. When was that?
 6 A. **It was around June of 2009.**
 7 Q. Then, Carlos, there are a couple things under
 8 "Equity." The first item is "Retained Earnings" for
 9 approximately \$75,000. Explain to the Court what that
 10 represents, please.
 11 A. **Retained earnings is the losses from the prior year.**
 12 Q. "Shareholder distributions." What does that
 13 represent?
 14 A. **Those are expenses that -- or transactions that took**
 15 **place throughout the years that we classified as**
 16 **shareholder distributions that were incurred by members of**
 17 **Native American Telecom Enterprise that we classified as**
 18 **shareholder distributions, because we weren't exactly sure**
 19 **if we wanted to classify those as expenses on the books of**
 20 **Native American Telecom until everybody had a chance to**
 21 **figure out if they wanted to allocate those in that manner.**
 22 Q. Does NAT have an independent tax accountant?
 23 A. **Independent tax accountant?**
 24 Q. **Yes.**
 25 A. **Yes.**

43

1 Q. Do you know who that person is?
 2 A. **As of which date?**
 3 Q. As of today.
 4 A. **As of today? Yes.**
 5 Q. Who is that?
 6 A. **It would be Kolpfstin & Kapur.**
 7 Q. Could you spell that, the best you can?
 8 A. **K-O-L-P-F-S-T-I-N and K-A-P-U-R.**
 9 Q. That's an accounting firm from where?
 10 A. **They're located in Irvine, California.**
 11 Q. Does that accounting firm have any type of ownership
 12 interest in NAT?
 13 A. **None whatsoever.**
 14 Q. Does that accounting firm have any type of ownership
 15 interest in any of the other various entities that you do
 16 accounting work for?
 17 A. **None whatsoever.**
 18 Q. So they come in and do your taxes?
 19 A. **Yes. They are completely independent.**
 20 Q. Carlos, there's also a line item there for "Net
 21 Income" for approximately minus \$134,000. What does that
 22 represent?
 23 A. **Those are the losses for the period from January**
 24 **through December of 2010.**
 25 Q. You took about a \$135,000 loss?

44

1 A. **Yes.**
 2 Q. "Total Equity" of minus \$238,000, approximately.
 3 Where does that number derive?
 4 A. **That's the cumulative total of the equity, retained**
 5 **earnings, shareholder distributions, and the net income of**
 6 **this year.**
 7 Q. So total liabilities and equities of course always add
 8 up to the total assets. What does that show, Carlos, the
 9 "Total Liabilities and Equity"?
 10 A. **\$236,772.10.**
 11 Q. Just as a matter of accounting, your total liabilities
 12 and equity and your total assets, those numbers come out
 13 that mirror each other. Correct?
 14 A. **Yes. It's called a Balance Sheet. Everything is**
 15 **supposed to balance.**
 16 MR. SWIER: Your Honor, at this time I would move
 17 Defendant's Exhibit 26.
 18 THE COURT: Any objection?
 19 MR. KNUDSON: No objection.
 20 THE COURT: 26 is received.
 21 BY MR. SWIER:
 22 Q. Carlos, if you would now, please, take a look at
 23 Defendant's Exhibit 27. Can you please tell the Court what
 24 this document is?
 25 A. **Sure. This is the support for the amount on the**

1 **Balance Sheet that's due to WideVoice Communications.**
 2 Q. Let's go through some of those items real quickly.
 3 Let's take, for instance, if you look at the third column
 4 over where it says "Num."
 5 A. Yes.
 6 Q. What does that stand for?
 7 A. **That's the journal number.**
 8 Q. Under "Name," it says "Wirefree Communications." Is
 9 that right?
 10 A. Yes.
 11 Q. You have a memo that describes what that is. What is
 12 the amount under that line item, and what was it for?
 13 A. **The amount is \$47,750. It was for the first payment**
 14 **for the installation of the antenna of the communications**
 15 **tower on the Indian Reservation.**
 16 Q. That was necessary to put the hardware and software
 17 and everything up probably?
 18 A. Yes.
 19 Q. Carlos, if you look at the next line -- excuse me, two
 20 down, there is an amount of \$32,775. Do you see that?
 21 A. Yes, I do.
 22 Q. What does that amount reflect? What payment does that
 23 reflect?
 24 A. **That's another payment for the installation of the**
 25 **communications tower.**

1 that right?
 2 A. **Yes. In November?**
 3 Q. Yes.
 4 A. **Yes.**
 5 Q. What does that reflect?
 6 A. **That's a loan from WideVoice, so that's a cash**
 7 **transfer.**
 8 Q. Do you know why that was needed?
 9 A. **To be able to allow Native American Telecom to pay its**
 10 **expenses.**
 11 Q. It says to cover payroll, too. Is that right?
 12 A. **Yes.**
 13 Q. You have another circuit charge. Then you have an
 14 amount for \$26,000. Do you see that?
 15 A. I do.
 16 Q. What is that for?
 17 A. **Again, another transfer to Native American Telecom to**
 18 **allow Native American Telecom to pay its expenses.**
 19 Q. Who is that from?
 20 A. **WideVoice Communications.**
 21 Q. Then we have another entry for approximately \$30,000.
 22 What does that reflect?
 23 A. **Another loan to Native American Telecom to cover its**
 24 **expenses.**
 25 Q. Carlos, at that time, is that the very middle of the

1 Q. The next item, we have a payment of \$80,290.28.
 2 Correct?
 3 A. **Correct.**
 4 Q. What is that for?
 5 A. **Again, it's another payment for the installation of**
 6 **the communications tower on the Reservation.**
 7 Q. Then we go down a couple lines where we have an amount
 8 of \$26,970.93. Correct?
 9 A. **Correct.**
 10 Q. What's that for?
 11 A. **Those are the circuit charges for the transporting of**
 12 **the traffic.**
 13 Q. Do you understand that circuit thing at all?
 14 A. **No, I don't.**
 15 Q. You know you need circuits to do this work.
 16 A. **Correct.**
 17 Q. Carlos, we have an amount of \$14,341. Is that also
 18 for circuit payments?
 19 A. **Yes.**
 20 Q. Then we have some charges for approximately \$10,000
 21 also for circuit charges. Correct? Quite a few of those
 22 actually.
 23 A. **Yes.**
 24 Q. Carlos, if you then go down to where we have an amount
 25 of \$20,000, which is a loan to Native American Telecom. Is

1 period where the carriers, after Sprint brought suit here,
 2 all the other carriers stopped paying NAT?
 3 A. **That's about the same time.**
 4 Q. Then we have the last entry there is for \$12,000.
 5 Correct?
 6 A. **Yes.**
 7 Q. What does that reflect?
 8 A. **A loan from WideVoice to Native American Telecom to**
 9 **cover its expenses.**
 10 Q. Why did WideVoice have to make that loan to Native
 11 American Telecom?
 12 A. **It didn't have enough money. It wasn't getting paid.**
 13 Q. So, Carlos, when you look at the final column, the
 14 balance column that has a balance of \$474,949.38, what does
 15 that number reflect?
 16 A. **That's the amount due from NAT to WideVoice**
 17 **Communications for the amounts that were loaned by**
 18 **WideVoice Communications.**
 19 Q. That's debt NAT owes to WideVoice?
 20 A. **It is, yes.**
 21 Q. Carlos, as of December 31 of 2010, is that a true and
 22 accurate transaction account for NAT?
 23 A. **Yes, it is.**
 24 MR. SWIER: Your Honor, I would move to admit
 25 Exhibit 27, please.

1 MR. KNUDSON: No objection.
 2 THE COURT: 27 is received.
 3 MR. SWIER: Thank you, Your Honor.
 4 BY MR. SWIER:
 5 Q. Carlos, if you'd now take a look at Exhibit 28,
 6 please. What is the date on that Balance Sheet?
 7 A. **It is January 31, 2011.**
 8 Q. I skipped ahead. I'm sorry. What is this document,
 9 Exhibit 28?
 10 A. **It represents the Balance Sheet for Native American**
 11 **Telecom as of January 31, 2011.**
 12 Q. So about a month ago. Correct?
 13 A. **Correct.**
 14 Q. Is this the most up-to-date Balance Sheet Native
 15 American Telecom has?
 16 A. **Yes.**
 17 Q. Did I ask you to prepare this so you could give the
 18 Court the most updated information?
 19 A. **Yes.**
 20 Q. Carlos, let's look at Exhibit 28 real quickly. Again,
 21 under the "Checking and Savings" account, we have the First
 22 Dakota National account for approximately \$1,800. Correct?
 23 A. **Correct.**
 24 Q. And that one is just sitting dormant. There's no
 25 activity there.

1 A. **That's the cumulative losses that NAT has incurred for**
 2 **the periods from 2009 through 2010.**
 3 Q. "Shareholder Distributions," you commented on that
 4 earlier. Is that the same?
 5 A. **That's the same.**
 6 Q. The "Net Income" of a negative \$42,000, approximately.
 7 What does that show?
 8 A. **That's the current month's losses.**
 9 Q. So "Total Equity," Carlos, shows what?
 10 A. **Negative \$280,258.24.**
 11 Q. Just to make sure we have these numbers straight,
 12 under this Balance Sheet, NAT shows they had about \$25,516
 13 in the bank. Is that right?
 14 A. **That's correct.**
 15 Q. And its liabilities that were owed to WideVoice were
 16 approximately \$530,000. Is that right?
 17 A. **That's correct.**
 18 Q. Carlos, did I ask you to check on what's in the
 19 checking account as of last night?
 20 A. **You did, yes.**
 21 Q. Share with the Court what NAT's account balance is as
 22 of last evening?
 23 A. **It's just a little over \$6,000.**
 24 Q. Why did we go from having \$25,000 in the checking
 25 account last month to now we're down to a little over

1 A. **There's no activity on there.**
 2 Q. Then we show approximately \$23,702 in the Wells Fargo
 3 account. Is that right?
 4 A. **Yes.**
 5 Q. So our total checking and savings between those two
 6 accounts is what?
 7 A. **A total of \$25,516.34.**
 8 Q. Then we go down under "Fixed Assets," "Computer
 9 Equipment, Furniture and Equipment, and Wi-Max Equipment."
 10 Is that the same as you testified to in the yearly Balance
 11 Sheet a few minutes ago?
 12 A. **Yes.**
 13 Q. Now let's go down -- so "Total Assets," it looks like,
 14 is how much, Carlos?
 15 A. **\$250,431.19.**
 16 Q. Now let's look at the "Liability" section. As of
 17 approximately a month ago, how much does NAT owe to
 18 WideVoice Communications?
 19 A. **It shows \$530,689.43.**
 20 Q. The "Total Liabilities" for NAT are that amount, too?
 21 A. **Yes, they are.**
 22 Q. Then we go under "Equity," the "Retained Earnings."
 23 We have a negative \$210,592.66. Correct?
 24 A. **Correct.**
 25 Q. What does that reflect?

1 \$6,000?
 2 A. **Because it still hasn't received any payments, and**
 3 **it's had certain expenses that it's paid.**
 4 MR. SWIER: Your Honor, if I have not done so, I
 5 would move Exhibit 28 into evidence.
 6 THE COURT: Any objection?
 7 MR. KNUDSON: No objection, Your Honor.
 8 THE COURT: 28 is received.
 9 BY MR. SWIER:
 10 Q. Carlos, as the controller of NAT, are you aware of a
 11 Marketing Fee Agreement that Native American Telecom has
 12 with FreeConferenceCall?
 13 A. **Yes, I am.**
 14 Q. Based only on your knowledge, but what do you
 15 understand that agreement between NAT and
 16 FreeConferenceCall to be?
 17 A. **My understanding is that Native American Telecom gets**
 18 **to keep 25 percent of the access charges received.**
 19 Q. Native American Telecom gets to keep 25 percent of the
 20 gross or the net access fees?
 21 A. **The gross.**
 22 Q. In your role as a controller for these companies, and
 23 based on the knowledge and experience you've gained, have
 24 you had an opportunity to review multiple marketing
 25 agreements between FreeConferenceCall and other companies

1 around the country?
 2 **A. I'm familiar with other arrangements.**
 3 **Q.** Does FreeConferenceCall enter into these type of
 4 Marketing Fee Agreements with other local exchange
 5 carriers?
 6 **A. Yes.**
 7 **Q.** And is the Marketing Fee Agreement between
 8 FreeConferenceCall and Native American Telecom, does that
 9 pretty much replicate the other agreements that you are
 10 familiar with?
 11 **MR. KNUDSON:** Objection. Foundation.
 12 **A. Yes.**
 13 **THE COURT:** Overruled. You may answer. Or the
 14 answer will stand.
 15 **BY MR. SWIER:**
 16 **Q.** "Yes," you said?
 17 **A. Yes.**
 18 **Q.** Carlos, you indicated earlier you also served as the
 19 controller for WideVoice, W-I-D-E Voice. Correct?
 20 **A. Yes.**
 21 **Q.** I want to go back to October of 2010. That is when
 22 the switched access revenues for NAT went from hundreds of
 23 thousands down to almost nothing. Is that right?
 24 **A. That's correct.**
 25 **Q.** You indicated that was approximately the time that

1 payment from AT&T?
 2 **A. Recently?**
 3 **Q.** Yes.
 4 **A. Yes.**
 5 **Q.** When did NAT receive that AT&T payment?
 6 **A. It was in late January of 2011.**
 7 **Q.** So about a month ago?
 8 **A. About a month ago, yes.**
 9 **Q.** How much did AT&T pay NAT for its switched access
 10 fees?
 11 **A. About \$150,000.**
 12 **Q.** When NAT received that money from AT&T, what did NAT
 13 do with it?
 14 **A. NAT had to pay WideVoice back for the debt it had on**
 15 **its books.**
 16 **Q.** So of that \$150,000, how much was paid to repay
 17 WideVoice for the loans?
 18 **A. \$140,000.**
 19 **Q.** So NAT retained about \$10,000 of that?
 20 **A. Correct.**
 21 **Q.** That amount is now down to about \$6,000 in the
 22 checking account?
 23 **A. Correct.**
 24 **Q.** Hold on here, because I have a question. Under the
 25 Marketing Fee Agreement that you talked about a few minutes

1 Sprint started bringing suits, lawsuits against NAT?
 2 **A. Yes.**
 3 **Q.** At that same time did WideVoice Communications start
 4 to have problems with carriers like Sprint not paying their
 5 switched access fees?
 6 **A. Sure.**
 7 **MR. KNUDSON:** Objection. Relevancy.
 8 **THE COURT:** Overruled.
 9 **A. Shortly after, yes, they did start receiving problems**
 10 **with payments.**
 11 **BY MR. SWIER:**
 12 **Q.** Describe that, please.
 13 **A. Many of the carriers just simply stopped paying.**
 14 **Q.** What, they cut their payments in half, or what did
 15 they do?
 16 **A. Some just stopped paying altogether.**
 17 **Q.** Was Sprint one of those that stopped paying
 18 altogether?
 19 **A. Yes.**
 20 **Q.** So, Carlos, what we had then at the same time, tell me
 21 if this is right, we had the switched access fees, payments
 22 stopped to both WideVoice and to NAT. Is that right?
 23 **A. That's correct.**
 24 **Q.** There was a recent development over the last couple
 25 weeks regarding NAT. Did NAT receive a switched access fee

1 ago, isn't 75 percent of those switched access fees
 2 supposed to go to FreeConferenceCall for the work they do
 3 for NAT?
 4 **A. It is.**
 5 **Q.** Then I presume you honored the contract and paid
 6 FreeConferenceCall their 75 percent of that \$150,000.
 7 Didn't you?
 8 **A. We did not.**
 9 **Q.** How come?
 10 **A. Because WideVoice demanded their payment from NAT.**
 11 **Q.** So now we have a situation where NAT owes both
 12 WideVoice for loans, and it also, under its contract with
 13 FreeConference, owes them?
 14 **A. Correct.**
 15 **Q.** Why doesn't NAT just write out a check to
 16 FreeConferenceCall and abide by your contractual agreement?
 17 **MR. KNUDSON:** Objection. Speculation.
 18 **THE COURT:** Overruled. You may answer.
 19 **A. NAT demanded their payment.**
 20 **BY MR. SWIER:**
 21 **Q.** WideVoice?
 22 **A. I'm sorry. WideVoice demanded their payment from NAT.**
 23 **Q.** Well, can't NAT just write a check out of its checking
 24 account to pay FreeConferenceCall?
 25 **A. It doesn't have any more money.**

1 Q. So you received that payment from AT&T the end of
 2 January, about a month ago. Correct?
 3 A. Correct.
 4 Q. When that payment came -- have you received any other
 5 payments from any other carriers?
 6 A. No, we haven't.
 7 Q. Have you received five cents from Sprint?
 8 A. No.
 9 Q. Does NAT continue to provide service to Sprint's
 10 customers?
 11 A. Yes, it does.
 12 Q. Does Sprint accept that service from NAT?
 13 A. Yes, it does.
 14 Q. But it just doesn't pay you.
 15 A. Right.
 16 Q. If AT&T made a payment to NAT back the end of January,
 17 if AT&T is going to start making consistent payments, would
 18 that make a huge difference for NAT?
 19 A. Yes.
 20 Q. Carlos, if AT&T would have made its payment a few days
 21 ago, the end of the month, like it was supposed to, would
 22 that help NAT?
 23 A. Yes.
 24 Q. Carlos, did AT&T make their regular monthly payment
 25 this month or in February?

1 A. No, they did not.
 2 Q. You've been in South Dakota for a few days. Correct?
 3 A. Yes.
 4 Q. When was the last time you checked to see if, indeed,
 5 AT&T is continuing to make its payments?
 6 A. I checked last night.
 7 Q. And I'm sure they paid?
 8 A. They did not.
 9 Q. Has Sprint paid?
 10 A. No.
 11 Q. You indicated of the \$150,000 AT&T payment, \$140,000
 12 went to WideVoice to start to pay the loans back?
 13 A. Yes.
 14 Q. Why was that? Why did you pay WideVoice? Why did you
 15 start paying their loan back?
 16 MR. KNUDSON: Objection. Cumulative.
 17 THE COURT: Sustained.
 18 BY MR. SWIER:
 19 Q. Carlos, you are familiar with the financial status of
 20 WideVoice Communications?
 21 A. Yes.
 22 Q. Based on your knowledge as WideVoice's controller,
 23 based on their financial status, is WideVoice
 24 Communications going to continue to loan NAT money?
 25 MR. KNUDSON: Objection. Foundation. Hearsay.

1 THE COURT: Sustained.
 2 BY MR. SWIER:
 3 Q. Are you familiar with WideVoice's financial status?
 4 A. Yes.
 5 MR. KNUDSON: Objection. Relevance.
 6 THE COURT: Overruled.
 7 A. Yes.
 8 BY MR. SWIER:
 9 Q. WideVoice Communications isn't in a position to keep
 10 paying NAT these loans. Is it?
 11 MR. KNUDSON: Objection. Leading.
 12 THE COURT: Sustained as leading.
 13 BY MR. SWIER:
 14 Q. Are they in a position to continue to pay these loans?
 15 A. No.
 16 MR. KNUDSON: Objection. Foundation.
 17 THE COURT: Overruled. The answer will stand.
 18 BY MR. SWIER:
 19 Q. Does NAT have any other source of income to keep
 20 afloat if WideVoice discontinues its financial assistance?
 21 A. It does not.
 22 Q. Carlos, are you familiar with the fact that Native
 23 American Telecom has filed two access fee tariffs with the
 24 Federal Communications Commission?
 25 A. Yes.

1 Q. You don't know the details. You just know they filed.
 2 Is that right?
 3 A. I'm aware of the filings.
 4 Q. Do you know when NAT filed its first access revenue
 5 tariff with the Federal Communications Commission?
 6 A. The first tariff?
 7 Q. Yes.
 8 A. I'm not one hundred percent certain.
 9 Q. Let me narrow it down. Approximately the winter of
 10 2010. Would that jog your memory?
 11 A. That would be about right.
 12 Q. To the best of your knowledge, has --
 13 THE COURT: Are you talking about January through
 14 March of 2010, or November, December of 2010, since those
 15 are both winter months?
 16 MR. SWIER: We're talking from February 2010,
 17 Your Honor, up until today. Of course they are, as you
 18 know, two separate tariffs.
 19 BY MR. SWIER:
 20 Q. So, Carlos, let's do this. Under those two tariffs
 21 NAT has, so from February of 2010 to January of 2011, have
 22 you calculated how much Sprint owes to NAT under NAT's
 23 switched access tariffs?
 24 A. Yes, I have.
 25 Q. Would you please share with the Court what that

1 outstanding amount is?
 2 **A. Sure. It's about \$557,000.**
 3 **Q.** That doesn't include anything for February yet?
 4 **A. No, it does not. It's through the November 10th**
 5 **billing -- I mean, January 10th billing. Excuse me.**
 6 **Q.** So it will be more as of today?
 7 **A. Yes.**
 8 **Q.** Carlos, are you familiar with the second tariff that
 9 NAT filed back in November?
 10 **A. Yes.**
 11 **Q.** I'm going to, for clarity, I'll refer to that as the
 12 high-volume access tariff. Is that okay?
 13 **A. That's fine.**
 14 **Q.** The high-volume access tariff, are you aware the
 15 high-volume access tariff is written a little bit
 16 differently than the initial tariff?
 17 **A. Yes.**
 18 **Q.** Again, I know you don't know the details, so I won't
 19 ask you. Since that high-volume access tariff went into
 20 place, which would be November 30 of 2010, have you
 21 calculated what Sprint owes to NAT, not under all the past
 22 debt they owe, but since November 30 of 2010 up until
 23 today's date? How much does Sprint owe NAT under that
 24 high-volume access tariff?
 25 **MR. KNUDSON:** Objection. Vague at this point.

1 I'm not sure if he's asking for the total, or if this is a
 2 subset of the \$530,000 he testified to earlier.
 3 **THE COURT:** If you could clarify. Is it in
 4 addition to or is it already a part of the \$557,000?
 5 **BY MR. SWIER:**
 6 **Q.** Carlos, would you clarify? First of all, under the
 7 high-volume access tariff from November 30 to the present
 8 date, what is the amount that Sprint owes under that
 9 tariff?
 10 **A. \$127,000.**
 11 **Q.** Now, is that \$127,000 number included in the \$557,000
 12 number?
 13 **A. Part of it is.**
 14 **Q.** Okay. Since that high-volume access tariff went into
 15 play a few months ago, how much has Sprint paid of that
 16 \$127,000?
 17 **A. None of it.**
 18 **Q.** Zero?
 19 **A. Zero.**
 20 **Q.** Has payment been demanded by NAT or your agent?
 21 **A. Yes.**
 22 **Q.** Do you hear anything from them?
 23 **A. No.**
 24 **Q.** Your check didn't come?
 25 **A. It has not come.**

1 **Q.** When is the last time Sprint paid NAT for the switched
 2 access fees? Do you know?
 3 **A. It was around February of 2010.**
 4 **Q.** So almost exactly a year ago?
 5 **A. Yes.**
 6 **Q.** Carlos, through your 16 years of experience in doing
 7 accounting and controller-like actions, you are familiar
 8 with business plans and how businesses come and go. Aren't
 9 you?
 10 **A. Yes.**
 11 **Q.** Based on your experience, what are NAT's options at
 12 this point to move forward?
 13 **MR. KNUDSON:** Objection. Foundation.
 14 **THE COURT:** Overruled. You may answer.
 15 **A. What options?**
 16 **BY MR. SWIER:**
 17 **Q.** What options do they have?
 18 **A. One option is to close their doors.**
 19 **Q.** Would they have another option?
 20 **A. Yes. Another option would be to file for bankruptcy**
 21 **protection.**
 22 **Q.** Has NAT reached out to a bankruptcy attorney? If you
 23 know, has NAT reached out to a bankruptcy attorney here in
 24 South Dakota?
 25 **A. They have.**

1 **Q.** So NAT can file bankruptcy. They can just close its
 2 doors. Do they have any other options?
 3 **A. If Sprint would pay, they could continue to operate.**
 4 **Q.** And if Sprint would pay their debt owed, would that
 5 keep NAT afloat for the time being?
 6 **A. It would.**
 7 **MR. SWIER:** Your Honor, if I may have a minute.
 8 **THE COURT:** You may.
 9 **MR. SWIER:** Thank you. Your Honor, I believe
 10 that's all the questions I have. Thank you.
 11 **THE COURT:** Mr. Knudson?
 12 **MR. KNUDSON:** Yes, Your Honor. Did you want to
 13 start right away?
 14 **THE COURT:** Why don't we take a 10-minute break.
 15 We'll be in recess until 25 to 11:00.
 16 **(Recess at 10:26 until 10:40)**
 17 **THE COURT:** Mr. Knudson?
 18 **MR. KNUDSON:** Thank you, Your Honor.
 19 **CROSS-EXAMINATION**
 20 **BY MR. KNUDSON:**
 21 **Q.** Good morning, Mr. Cestero. You recall we met two days
 22 ago.
 23 **A. Yes.**
 24 **Q.** We had the pleasure of doing a deposition on Tuesday.
 25 Do you recall that?

1 **A. I do.**
 2 **Q.** Do you recall when your deposition was taken, you were
 3 sworn to tell the truth. Do you remember?
 4 **A. Yes.**
 5 **Q.** Just like you were sworn by the Court today to tell
 6 the truth. Correct?
 7 **A. Yes.**
 8 **Q.** I would like to ask you a few questions about your
 9 testimony today and what you said on Tuesday. One thing I
 10 think we should clarify is, isn't it a fact in 2010 NAT
 11 reported a gross income of \$1,148,925.84?
 12 **A. It did.**
 13 **Q.** It is also true, is it not, that NAT paid as marketing
 14 expenses on its P&L \$794,307.49 in 2010?
 15 **A. I don't have the P&L in front of me, but it sounds**
 16 **about right.**
 17 **Q.** Before we get into those numbers, I'd like to clarify
 18 something you testified to about WideVoice with an I. You
 19 say that's a carrier.
 20 **A. Yes.**
 21 **Q.** Then Wyde Voice with a Y. That's a conference bridge
 22 equipment manufacturer?
 23 **A. Yes.**
 24 **Q.** Free Conferencing Corporation, that provides free
 25 conferencing service. Correct?

1 **Q.** In fact, he's the majority owner of WideVoice with
 2 an I. Is that true?
 3 **A. Yes.**
 4 **Q.** That's a Nevada Sub S corporation?
 5 **A. It is.**
 6 **Q.** Then Wyde Voice with a Y, David Erickson is the
 7 majority owner of that, too. Isn't he?
 8 **A. Yes.**
 9 **Q.** And Free Conferencing Corporation, David Erickson is
 10 the founder and chief owner of that, as well?
 11 **A. Yes.**
 12 **Q.** Likewise, Free Conferencing Global, David Erickson is
 13 the majority owner of that, as well. Correct?
 14 **A. Yes.**
 15 **Q.** HDPSTN, is he also the majority owner of that company?
 16 **A. Yes.**
 17 **Q.** Now, you said today, if I understood this correctly,
 18 just confirm it for me, that you serve as the controller
 19 for these entities?
 20 **A. I serve the function of a controller.**
 21 **Q.** You don't have the title. Just the function?
 22 **A. I don't have a title. It's just a title I use, to**
 23 **keep things simple.**
 24 **Q.** So you're not the controller of Native American
 25 Telecom?

1 **A. Correct.**
 2 **Q.** Free Conferencing Global. That also provides free
 3 conferencing services. Correct?
 4 **A. Yes.**
 5 **Q.** HDPSTN is a telephone company, you say?
 6 **A. Yes.**
 7 **Q.** Where does it do business?
 8 **A. Where does HDPSTN?**
 9 **Q.** Yes.
 10 **A. It's a start-up company. It's not actually conducting**
 11 **business.**
 12 **Q.** I think the common theme in your testimony on direct
 13 was that David Erickson had check-signing authority in all
 14 these companies. Is that right?
 15 **MR. SWIER:** Objection, Your Honor. Mistakes the
 16 facts.
 17 **THE COURT:** Overruled. You may answer.
 18 **A. Not for Native American Telecom, it does not.**
 19 **BY MR. KNUDSON:**
 20 **Q.** I didn't list that. WideVoice with an I, Wyde Voice
 21 with a Y, Free Conferencing Corporation, Free Conferencing
 22 Global, and HDPSTN, the common theme between all those
 23 companies is that David Erickson has check-signing
 24 authority. Correct?
 25 **A. He has signing authority.**

1 **A. I'm not employed by anybody, other than Free**
 2 **Conferencing Corporation as the controller.**
 3 **Q.** So you're the controller of Free Conferencing
 4 Corporation then?
 5 **A. Yes.**
 6 **Q.** Now, who do you report to at Free Conferencing
 7 Corporation?
 8 **A. Jeff Holoubek.**
 9 **Q.** What is Jeff Holoubek's title at Free Conferencing
 10 Corporation?
 11 **A. He's the Director of Legal and Finance.**
 12 **Q.** Mr. Holoubek reports to David Erickson?
 13 **A. I don't know.**
 14 **Q.** But David Erickson is the President and CEO of
 15 Free Conferencing Corporation. Is that true?
 16 **A. Yes, it is.**
 17 **Q.** Your understanding is Jeff Holoubek is now the
 18 President of Native American Telecom?
 19 **A. He is.**
 20 **Q.** Do you know when that took place?
 21 **A. I don't know the exact date. No.**
 22 **Q.** Was it in 2010?
 23 **A. I believe so.**
 24 **Q.** Would it have taken place when you assumed the duties
 25 of controller for NAT?

69

- 1 **A. Excuse me?**
 2 **Q.** Would Mr. Holoubek have become the President of NAT
 3 when you assumed the duties of the controller for NAT?
 4 **A. I don't know when he became President of NAT.**
 5 **MR. KNUDSON:** If I may approach, Your Honor.
 6 **THE COURT:** You may.
 7 **BY MR. KNUDSON:**
 8 **Q.** Mr. Cestero, I'm handing you what's been marked
 9 Plaintiff's Exhibit No. 1. Mr. Cestero, take a moment to
 10 look at this. I think you've seen it before, but tell me
 11 if you recognize it.
 12 **A. Yes, I have.**
 13 **Q.** Can you identify it for us, please?
 14 **A. It's NAT's Responses to Sprint's Document Request**
 15 **No. 1 through 18.**
 16 **Q.** It's numbered NAT 00001 through NAT 00083. Is that
 17 correct?
 18 **A. Yes.**
 19 **Q.** Do you recognize most of this Exhibit 1 contains the
 20 bank statements from First Dakota and Wells Fargo?
 21 **A. Yes, it does.**
 22 **Q.** You recognize those as the banking statements of NAT.
 23 Correct?
 24 **A. Yes.**
 25 **Q.** And previously on your direct, they were used by

70

- 1 Mr. Swier in your examination. Correct?
 2 **A. Yes.**
 3 **Q.** What is the first page of this Exhibit NAT 00001?
 4 **A. This represents the minutes generated at NAT.**
 5 **Q.** So, in other words, this is the minutes of usage by
 6 month for NAT?
 7 **A. Yes.**
 8 **Q.** Do you recognize that as something generated from
 9 NAT's business records?
 10 **A. Yes.**
 11 **Q.** Go back to the very end of this exhibit, and look at
 12 Page 82. That's the Balance Sheet. Isn't it?
 13 **A. It is.**
 14 **Q.** This is what was previously admitted. Look at the
 15 screen, if you need to.
 16 **A. Oh, yes.**
 17 **Q.** Look at Page 83. That's the Profit and Loss
 18 Statement. Is it not?
 19 **A. Yes, it is.**
 20 **Q.** If it's easier for you to look at the paper
 21 document --
 22 **A. That's a little blurry.**
 23 **Q.** The Profit and Loss Statement, that's something you
 24 generated. Is it not?
 25 **A. Yes, it is.**

71

- 1 **Q.** This is from NAT's business records?
 2 **A. Correct.**
 3 **MR. KNUDSON:** I would offer Exhibit 1.
 4 **THE COURT:** Any objection?
 5 **MR. SWIER:** No objection.
 6 **THE COURT:** Exhibit 1 is received.
 7 **BY MR. KNUDSON:**
 8 **Q.** Before we dig into that, I would like to -- let's go
 9 back to Page 83, if you would.
 10 **THE COURT:** Can I make a suggestion? Since the
 11 other exhibits are 1 through whatever, can we have this
 12 Exhibit A?
 13 **MR. KNUDSON:** That's fine. Let's relabel it
 14 Plaintiff's A.
 15 **BY MR. KNUDSON:**
 16 **Q.** Do you have Page 83 in front of you now?
 17 **A. I do.**
 18 **Q.** Now, you heard reference to Free Conferencing
 19 Corporation getting 75 percent of the gross revenues from
 20 NAT's receipts from carriers paying for terminating
 21 services. Correct?
 22 **A. Yes.**
 23 **Q.** Is that then shown here on the P&L as the marketing
 24 expenses?
 25 **A. That's correct.**

72

- 1 **Q.** These marketing expenses were paid to Free
 2 Conferencing Corporation. Isn't that true?
 3 **A. Yes.**
 4 **Q.** Now, I believe it's also the case you have not seen
 5 any written agreement between NAT and Free Conferencing
 6 Corporation setting forth the terms by which NAT is
 7 obligated to pay Free Conferencing Corporation 75 percent
 8 of their gross revenues?
 9 **A. I have not seen the document, no.**
 10 **Q.** Do you know if one exists?
 11 **A. I do not know.**
 12 **Q.** You were in charge of making these transfers to Free
 13 Conferencing Corporation, were you not?
 14 **A. Yes.**
 15 **Q.** You did so at the direction of Jeff Holoubek. Did you
 16 not?
 17 **A. Yes. He explained the relationship NAT has with Free**
 18 **Conferencing Corporation.**
 19 **Q.** Free Conferencing Corporation, that's located in
 20 Long Beach at the address you gave earlier. Isn't it?
 21 **A. Yes.**
 22 **Q.** If we look at the banking statements, beginning with
 23 the Wells Fargo statements, they all start going to the
 24 same address. Do they not?
 25 **A. Yes.**

1 Q. Turn to Page 1 of Exhibit 1. What were the minutes of
 2 usage for NAT for all carriers for December 2010?
 3 A. **About 8.4 million.**
 4 Q. Then what happened in January of 2011?
 5 A. **They went up to 12 million.**
 6 Q. Your understanding that Free Conferencing
 7 Corporation's share of NAT's revenues came from what
 8 Mr. Holoubek told you. Is that correct?
 9 A. **He explained the relationship, the agreement that NAT**
 10 **has with Free Conferencing Corporation.**
 11 Q. So he told you it was 75 percent?
 12 A. **Yes.**
 13 Q. He is the President of NAT. Correct?
 14 A. **Correct.**
 15 Q. He is also Director of Legal and Finance at
 16 Free Conferencing Corporation. Correct?
 17 A. **Yes.**
 18 Q. You followed his directives to pay this share of
 19 Free Conferencing Corporation's share of NAT's revenues to
 20 Free Conferencing Corporation in 2010. Didn't you?
 21 A. **Yes.**
 22 Q. Did you ever endeavor to find if there was a written
 23 agreement between NAT and Free Conferencing Corporation
 24 regarding the 75 percent revenue split?
 25 A. **I didn't find it necessary.**

1 up on the budget or Balance Statement for NAT? Page 82 of
 2 Exhibit 1.
 3 A. **About \$216,000.**
 4 Q. Turn to Defendant's 27. Do you have that handy?
 5 A. **What am I looking at?**
 6 Q. What was previously admitted as Defendant's 27.
 7 A. **I have it, yes.**
 8 Q. The \$216,000 is reflected in this exhibit. Is that
 9 right, sir?
 10 A. **Part of it would be, yes.**
 11 Q. Part of the additional loan, if you will, you say is
 12 payments to South Dakota Network. Correct?
 13 A. **Among other.**
 14 Q. Then there's a direct loan to NAT itself. Correct?
 15 A. **Yes. There are several loans to NAT.**
 16 Q. So at the end of 2010, NAT reported owing WideVoice
 17 almost \$480,000?
 18 A. **At the end of 2010?**
 19 Q. Yes. Page 82.
 20 A. **\$474,000. Yes.**
 21 Q. Did you ever determine whether there was a written
 22 loan agreement between WideVoice and NAT?
 23 A. **No. I'm not familiar.**
 24 Q. Now, some of what WideVoice purchased was part
 25 equipment to locate on the Reservation. Correct?

1 Q. You just followed Mr. Holoubek's directive on that
 2 point?
 3 A. **He's my direct supervisor.**
 4 Q. So that's yes?
 5 A. **Yes.**
 6 Q. I believe then it's the case that NAT's business
 7 records are in Long Beach at the same location as
 8 Free Conferencing Corporation?
 9 A. **Yes.**
 10 Q. Is your understanding that WideVoice is a member of
 11 NAT?
 12 A. **Correct.**
 13 Q. They have 24 percent interest. Correct?
 14 A. **Correct.**
 15 Q. Have you ever looked at the Joint Venture Agreement
 16 between WideVoice and Native American Telecom Enterprise
 17 and the Crow Creek Tribe to see how NAT is formulated?
 18 Have you looked at the Joint Venture Agreement?
 19 A. **I've seen the Operating Agreement.**
 20 Q. So if you understand from the Operating Agreement,
 21 then WideVoice was responsible for the buildout of the
 22 Wi-Max infrastructure on the Reservation. Is that right?
 23 A. **I'm not entirely familiar with the Operating Agreement**
 24 **as to that specific item.**
 25 Q. But the cost of that buildout, how much does it show

1 A. **Yes.**
 2 Q. Do you know if WideVoice took out a security interest
 3 in that equipment?
 4 A. **I do not know.**
 5 Q. Did you ever see a Promissory Note between NAT and
 6 WideVoice reflecting the terms and conditions by which
 7 WideVoice loaned money to NAT?
 8 A. **I have not.**
 9 Q. Take a look at the Income Statement, if you would,
 10 Page 83 of Exhibit 1.
 11 MR. SWIER: Exhibit A, Scott?
 12 MR. KNUDSON: I'm sorry, Exhibit A.
 13 BY MR. KNUDSON:
 14 Q. Looking at that, do you see anywhere that there's a
 15 payment of interest to WideVoice in 2010?
 16 A. **No.**
 17 Q. Let's go back to the Balance Sheet now, Page 83 of
 18 Exhibit A. I would like to look at this \$27,584 in
 19 shareholder distributions. I think you testified on direct
 20 that those were distributions to people in NAT, such as
 21 Tom Reiman and Gene DeJordy?
 22 A. **They are members of Native American Telecom**
 23 **Enterprise.**
 24 Q. So these were distributions to those two gentlemen
 25 that show up on the Balance Sheet for NAT. Is that

77

1 correct?

2 **A. Yes. They were expenses that were incurred by those**

3 **two that we classified as shareholder distributions.**

4 **Q.** In other words, by classifying them as "shareholder

5 distributions," that's money Mr. Reiman and Mr. DeJordy

6 took out of NAT. Correct?

7 **A. Yes. They used as certain expenses, and we decided to**

8 **classify those as shareholder distributions until we could**

9 **figure out how to appropriately account for those.**

10 **Q.** Now, Reiman and DeJordy had debit cards for which they

11 could draw funds out of the First Dakota accounts.

12 Correct?

13 **A. They did.**

14 **Q.** They had no check-signing authority at the Wells Fargo

15 account. Did they?

16 **A. They did not.**

17 **Q.** Well, let's look at a few of the expenses that were

18 classified as "shareholder distributions." Would you take

19 a look at Page 42 of Exhibit A?

20 **A. Okay.**

21 **Q.** Do you see those that are boxed with a notation,

22 "S/H Distribution Note"?

23 **A. Yes.**

24 **Q.** Is that your handwriting?

25 **A. That is my handwriting, yes.**

78

1 **Q.** Looking at these, I think we talked about this on

2 Tuesday. There is an ATM withdrawal, something

3 "NCL-PEARL," which could be the Norwegian Cruiseline ship,

4 Pearl in Miami. Right?

5 **A. It could be many things.**

6 **Q.** But it's expenses incurred, it says here on this

7 listing, in Miami, Florida. Correct?

8 **A. I've seen charges that show Miami, and charges in**

9 **California. I can't verify that.**

10 **Q.** In your handwriting, you are determining that those

11 are shareholder distributions to either Reiman or DeJordy.

12 Did you not?

13 **A. Yes. As I stated before, we classified all these**

14 **expenses as shareholder distributions.**

15 **Q.** What business purpose would NAT have incurring

16 expenses in Miami, Florida?

17 **A. You don't know those are in Miami. I don't know.**

18 **Q.** Let's take a look at some other expenses then. Turn

19 to Page 67. Is there not an entry for a limousine charge,

20 Fairfield, Connecticut? That's not allocated as a

21 shareholder distribution. Is it?

22 **A. I would classify as a shareholder distribution. Just**

23 **because I didn't write it down, doesn't mean I didn't**

24 **classify it.**

25 **Q.** So you think it is a shareholder distribution?

79

1 **A. I would classify that as a shareholder distribution.**

2 **Q.** Do you know that Gene DeJordy lives in Fairfield,

3 Connecticut?

4 **A. I don't know exactly where he lives.**

5 **Q.** What business purpose would he have in taking a

6 limousine for \$153.00?

7 **A. I wouldn't begin to speculate.**

8 **Q.** Now, let's go back to 67. What was the date of this

9 bank statement?

10 **A. What was the date?**

11 **Q.** Yes.

12 **A. July 30, 2010.**

13 **Q.** That's shortly before this account was drained and the

14 money shifted over to Wells Fargo. Correct?

15 **A. It was about the time we transferred over to**

16 **Wells Fargo.**

17 **Q.** In fact, you opened the Wells Fargo account on

18 July 23. Didn't you?

19 **A. Correct.**

20 **Q.** Once the money was in Wells Fargo, Mr. Reiman and

21 Mr. DeJordy had no access to it. Correct?

22 **A. Correct.**

23 **Q.** Now, these two accounts are the only two accounts that

24 NAT has. Correct? First Dakota, which has about \$1,800

25 still, and the Wells Fargo account having, you said just

80

1 now, \$6,000. The only two signers for the Wells Fargo

2 account are Mr. Holoubek and yourself. Correct?

3 **A. Yes.**

4 **Q.** And for First Dakota, it's DeJordy and Reiman.

5 Correct?

6 **A. Yes.**

7 **Q.** There are no members of the Crow Creek Tribe that have

8 signing authority on either account. Correct?

9 **A. Correct.**

10 **Q.** Another one for you. Take a look at Page 66, if you

11 would. Do you see the expenses in Bismarck there on

12 July 19, \$129 for a hotel?

13 **A. Yes.**

14 **Q.** Does NAT provide any services in Bismarck, North

15 Dakota?

16 **A. I don't know.**

17 **Q.** Do you know what business purpose there would be in

18 going to Bismarck, North Dakota?

19 **A. I would not know.**

20 **Q.** How about New Town, Cache Restaurant, on July 20,

21 \$31.90? Do you know where New Town is?

22 **A. I don't know where New Town is.**

23 **Q.** That's in North Dakota, though. That's what it says.

24 Do you know what the business purpose was there for

25 someone to be drawing funds out of the First Dakota Bank

81

1 account?

2 **A. I don't know.**

3 **Q.** Did you ever ask Mr. DeJordy or Mr. Reiman why they

4 incurred these expenses?

5 **A. I do not.**

6 THE COURT: Are you implying you would go to

7 Bismarck or New Town for fun?

8 MR. KNUDSON: I spent a lot of time in Bismarck.

9 I would agree, probably not.

10 BY MR. KNUDSON:

11 **Q.** I would like to know how it ties up to doing business

12 in Crow Creek, as well.

13 **A. I do not know.**

14 **Q.** Isn't it true that once the money was only flowing

15 through the Wells Fargo account, that that gave Free

16 Conference Corporation control over the money?

17 **A. It allowed us to manage NAT.**

18 **Q.** And control the flow of funds through NAT, as well.

19 Correct?

20 **A. For proper accounting.**

21 **Q.** But the only people who controlled those funds were

22 employed by Free Conferencing Corporation. Correct?

23 **A. Yes.**

24 **Q.** You recall you gave an Affidavit in this case. Did

25 you not?

82

1 **A. I did.**

2 **Q.** Handing you what has been marked for identification as

3 Plaintiff's Exhibit B. Take a look at Exhibit B, sir, and

4 tell me if you recognize it.

5 **A. I recognize it.**

6 **Q.** What is it?

7 **A. It is the Affidavit of Carlos Cestero. Do you want me**

8 **to read the entire thing?**

9 **Q.** No, I don't. It has been previously submitted to the

10 Court as part of the moving papers of NAT.

11 MR. KNUDSON: I would offer for purposes of this

12 hearing Exhibit B.

13 THE COURT: Any objection?

14 MR. SWIER: No objection.

15 THE COURT: B is received.

16 BY MR. KNUDSON:

17 **Q.** Let me ask you about the accounting practices of NAT.

18 It's a cash basis taxpayer. Correct?

19 **A. Yes.**

20 **Q.** Its method of accounting is also the cash method of

21 accounting. Correct?

22 **A. Yes.**

23 **Q.** Isn't it true, with the cash method of accounting,

24 that you record income when received. Correct?

25 **A. Correct.**

83

1 **Q.** So if you received income in the month of January, you

2 should post it as received revenue in January. Correct?

3 **A. We record it when we deposit the check.**

4 **Q.** Deposit versus receipt?

5 **A. Yes.**

6 **Q.** So do you recall when you received payment from AT&T?

7 **A. It was in late January.**

8 **Q.** Late January was what day in January?

9 **A. I don't know. I don't remember the exact date.**

10 **Q.** When were the funds deposited into NAT's bank account?

11 **A. February of 2011.**

12 **Q.** What date?

13 **A. The very beginning, around the 2nd.**

14 **Q.** The 2nd of February?

15 **A. Yes.**

16 **Q.** Let's take a look at your Affidavit, Paragraph 12.

17 Would you read that for us, please?

18 **A. Yes. "Because of Sprint's conduct, NAT's current**

19 **financial condition is perilous and NAT has been forced to**

20 **exhaust its credit limits to keep operations running."**

21 **Q.** I would like, first of all, to establish the credit

22 limits. Is there a Loan Agreement with any lender for NAT?

23 **A. I'm not aware of an agreement.**

24 **Q.** Does WideVoice have a written Loan Agreement with NAT?

25 **A. I don't know.**

84

1 **Q.** Does NAT have any line of credit with any lender?

2 **A. I don't know.**

3 **Q.** So what credit limits were you referring to in

4 Paragraph 12?

5 **A. It would be WideVoice's desire to loan money to NAT.**

6 **Q.** But they didn't have an expressed limit on what it

7 would loan. Did it?

8 **A. I'm not aware of any limits.**

9 **Q.** I'm looking at the phrase at the beginning of

10 Paragraph 12 of your Affidavit. "Because of Sprint's

11 conduct." Do you see that, sir?

12 **A. I do.**

13 **Q.** I think it's your testimony that because Sprint

14 refused to pay, other carriers refused to pay. Is that

15 right?

16 **A. That's correct.**

17 **Q.** But the timing of that doesn't tie out to the revenues

18 received by NAT. Does it?

19 **A. It does.**

20 **Q.** When was the last time Sprint paid NAT?

21 **A. Sprint paid NAT in February of 2010.**

22 **Q.** I think Mr. Swier ran you through the revenues being

23 received by NAT after February of 2010. Didn't he? Do you

24 recall that testimony?

25 **A. Yes.**

1 Q. You recall that money continued to come in from
 2 carriers throughout the summer of 2010. Correct?
 3 A. **From various carriers, but some had stopped paying.**
 4 Q. And some continued to pay, as well. Is that true?
 5 A. **Some had stopped.**
 6 Q. And some continued to pay. Isn't that true?
 7 A. **We received little bits here and there.**
 8 Q. How much did Sprint pay you in 2010?
 9 A. **About \$29,000.**
 10 Q. How much did the other carriers in total pay you?
 11 A. **I don't recall exactly.**
 12 Q. Should I refresh your recollection? Let's look at
 13 NAT 83. How much did the other carriers pay NAT in 2010?
 14 A. **About \$1,120,000.**
 15 Q. I would like to look at this number. It says, "CABS
 16 Collection Income." "CABS," that refers to CABS Agent,
 17 does it?
 18 A. **Yes.**
 19 Q. That was the original billing agent for NAT. Correct?
 20 A. **No. It stands for the Carrier Access Billing. It
 21 contains some of the CABS Agent collections, in addition to
 22 our latest --**
 23 Q. You've switched billing agents, haven't you?
 24 A. **Yes.**
 25 Q. Who do you use now?

1 Q. Is this part of the ledger detail that would be used
 2 to determine who was paying and who was not?
 3 A. **No. These are loans.**
 4 Q. This is the "Transactions by Account" for WideVoice,
 5 Isn't that true?
 6 A. **These are the loans made to NAT from WideVoice.**
 7 Q. So this Exhibit 27, that ties to your Balance Sheet,
 8 does it not?
 9 A. **Yes.**
 10 Q. And the \$474,949 listed as owing WideVoice shows up on
 11 the Balance Sheet. Correct?
 12 A. **Correct.**
 13 Q. Well, I was asking you the other day about the support
 14 for the income on the P&L. Is there detail that supports
 15 how you determine that there was \$1.148 million in revenue
 16 in NAT?
 17 A. **I have the detail.**
 18 Q. You have the detail. It's available to you?
 19 A. **Yes.**
 20 Q. That would show which carriers you're paying. Would
 21 it not?
 22 A. **It would.**
 23 Q. And by date?
 24 A. **It would.**
 25 Q. And by amount?

1 A. **CDG Communications Data Group.**
 2 Q. When did you switch?
 3 A. **Sometime mid 2010.**
 4 Q. Looking at your Affidavit again. Isn't it true that
 5 because of Sprint's conduct, Sprint stopped paying in
 6 February, but other carriers continued to pay throughout
 7 2010 up and over \$1.1 million. Isn't that true?
 8 A. **Yes.**
 9 Q. Let's take a look at Paragraph 13. Could you read
 10 that for us, please?
 11 A. **Sure. "NAT is currently unable to meet its financial
 12 obligations because of Sprint's refusal to pay NAT's
 13 interstate switched access service charges."**
 14 Q. Now, there are other carriers that aren't paying NAT,
 15 as well. Isn't that true?
 16 A. **There are.**
 17 Q. Is Verizon paying NAT?
 18 A. **I don't know.**
 19 Q. Is Qwest paying NAT?
 20 A. **I don't know.**
 21 Q. How would you know? Are there financial records at
 22 NAT that would let us know?
 23 A. **I would have to look at the ledgers.**
 24 Q. Well, do you have Defendant's Exhibit 27 handy?
 25 A. **Yes.**

1 A. **Yes.**
 2 Q. And you also have records of NAT that shows what was
 3 invoiced of those carriers. Do you not?
 4 A. **Yes.**
 5 Q. Those are business records of NAT. Correct?
 6 A. **They are.**
 7 Q. They are part of the determination of how much revenue
 8 NAT made in 2010. Correct?
 9 A. **How much revenue it received, yes.**
 10 Q. And whether or not they are paying also bears on
 11 whether or not NAT has revenue sufficient to stay in
 12 business. Correct?
 13 A. **Rephrase that. I'm sorry.**
 14 Q. Whether or not the carriers are paying has an impact
 15 on whether NAT continues to stay in business. Correct?
 16 A. **Yes.**
 17 Q. So when you prepared your Affidavit, you signed it on
 18 January 11. Is that correct?
 19 A. **Yes.**
 20 Q. Within a couple of weeks, NAT had \$150,000 from AT&T?
 21 A. **Yes, at the tail end of January.**
 22 Q. Did NAT and AT&T reach an agreement for AT&T to start
 23 paying the invoices from NAT?
 24 A. **I don't know.**
 25 Q. Did NAT sue AT&T?

1 **A. I don't know.**
 2 **Q.** Has NAT sued any other carrier for unpaid invoices?
 3 **MR. SWIER:** Your Honor, if I may object, please.
 4 The objection is who has NAT sued? In this lawsuit Sprint
 5 is the Plaintiff. They sued NAT in this case. I want the
 6 record to reflect who is the Plaintiff and the Defendant
 7 here. Thank you.
 8 **THE COURT:** The record will so reflect. You need
 9 to answer the question.
 10 **A. I don't know.**
 11 **BY MR. KNUDSON:**
 12 **Q.** Have you asked Mr. Holoubek, Director of Legal and
 13 Regulatory at Free Conference Corporation, whether NAT has
 14 sued any other carriers for nonpayment?
 15 **A. No.**
 16 **Q.** Did you reference in your Affidavit the fact that
 17 other carriers were not paying?
 18 **A. I don't believe so.**
 19 **Q.** Now, I think you were testifying, based on the earlier
 20 exhibits, about what you could determine when things were
 21 coming into Wells Fargo. Do you recall that testimony,
 22 sir?
 23 **A. I do.**
 24 **Q.** Let's take a look here at Exhibit A, Page 5. That's
 25 the statement for September of 2010. Do you see the

1 but I would be without one.
 2 **THE COURT:** Okay.
 3 **BY MR. KNUDSON:**
 4 **Q.** Tell me if you recognize Exhibit C, sir.
 5 **A. I do.**
 6 **Q.** What is it?
 7 **A. It is the Defendant Native American Telecom Answers to**
 8 **Plaintiff Sprint Communications First Set of**
 9 **Interrogatories.**
 10 **Q.** Is your signature on Page 10 of this exhibit?
 11 **A. Yes, it is.**
 12 **Q.** You reviewed and signed on behalf of Native American
 13 Telecom?
 14 **A. Yes.**
 15 **MR. KNUDSON:** I'd offer Exhibit C.
 16 **THE COURT:** Any objection?
 17 **MR. SWIER:** No objection, Your Honor.
 18 **THE COURT:** C is received.
 19 **BY MR. KNUDSON:**
 20 **Q.** We've been talking about the support for the P&L
 21 Statement, the detail. You recall that Defendant's 27 was
 22 the detail that supports the Balance Sheet information on
 23 the amount owing WideVoice.
 24 Let's take a look at Interrogatory No. 7. The
 25 question, it's on the screen, Your Honor, "Identify all

1 deposits there totaling \$38,000 and change?
 2 **A. Yes.**
 3 **Q.** Was it your testimony that these were deposits from
 4 carriers paying for terminating access service?
 5 **A. Yes.**
 6 **Q.** I believe you testified on Tuesday that you couldn't
 7 tell from this whether or not those were payments from
 8 carriers. Correct?
 9 **A. Not from the statement, I couldn't tell.**
 10 **Q.** What did you do to investigate then?
 11 **A. I looked to see if those were payments.**
 12 **Q.** What records did you examine?
 13 **A. Our internal records.**
 14 **Q.** Such as the detail which would back up the total gross
 15 revenues posted on the P&L for 2010. Correct?
 16 **A. Sure, support for the cash receipts.**
 17 **Q.** And you did that between Tuesday and today. Is that
 18 correct?
 19 **A. I did.**
 20 **MR. KNUDSON:** If I may approach, Your Honor?
 21 **THE COURT:** You may.
 22 **BY MR. KNUDSON:**
 23 **Q.** Handing you what's been marked as Plaintiff's
 24 Exhibit C.
 25 **MR. KNUDSON:** I'd give you a copy, Your Honor,

1 interexchange carriers whom NAT has invoiced under any of
 2 its tariffs, including the name of the interexchange
 3 carrier, the amounts invoiced, and the payments received,
 4 if any."
 5 **MR. SWIER:** Your Honor, I'm sorry. I don't have
 6 that page on the exhibit I was given. I go from 4 to 6.
 7 (Discussion off the record)
 8 **BY MR. KNUDSON:**
 9 **Q.** Now, that information that's being sought from
 10 Interrogatory No. 7, that's contained in the business
 11 records of NAT. Is that correct?
 12 **A. Yes.**
 13 **Q.** Did you provide an answer to that Interrogatory
 14 answering who was invoiced, which carriers paid, and how
 15 much?
 16 **A. I did not.**
 17 **Q.** Is that information in that answer?
 18 **A. It is not.**
 19 **MR. KNUDSON:** In fact, the answer, Your Honor, is
 20 objected to on the grounds it's protected by the
 21 attorney-client privilege and the work-product doctrine.
 22 It's further objected to as being overly broad and unduly
 23 burdensome. It's further objected to as seeking
 24 information that is beyond the permissible scope of
 25 discovery and that it is not reasonably calculated to lead

1 to the discovery of admissible evidence.
 2 I would submit that objection is unfounded. We were
 3 entitled to this information before this hearing, and we
 4 didn't get it.
 5 MR. SWIER: Your Honor, may I comment on that?
 6 THE COURT: Why don't we take argument later.
 7 This should really be limited to questions and answers, and
 8 not argument by either counsel.
 9 BY MR. KNUDSON:
 10 Q. We didn't get that information, did we, Mr. Cestero?
 11 A. **You didn't.**
 12 Q. After Sprint stopped paying in February and the
 13 revenues NAT received continued to climb, did it peak at
 14 about \$240,000 in July of 2010?
 15 A. **Did it peak?**
 16 Q. Come to its highest point?
 17 A. **Yes.**
 18 Q. Then after August 6, 2010, when NAT received over
 19 \$128,000 from carriers, the revenue declined dramatically.
 20 Correct?
 21 A. **Correct.**
 22 Q. This was months and months after Sprint stopped
 23 paying. Isn't that true?
 24 A. **It is.**
 25 Q. I'm wondering whether NAT instituted any cost-cutting

1 A. **Yes.**
 2 Q. As far as you understand, that's necessary to complete
 3 the signal or call all the way to NAT's equipment in
 4 Ft. Thompson?
 5 A. **I'm not a circuit expert. I don't know exactly their**
 6 **true function.**
 7 Q. Circuit expenses connected to the usage of that
 8 circuit. Correct?
 9 A. **It's required is my understanding. Circuits are**
 10 **required to communicate.**
 11 Q. The more you use a circuit, the more you pay for it.
 12 Isn't that true?
 13 A. **Yes.**
 14 Q. The 12 million minutes of use you reported for January
 15 of 2011, there would be circuit expenses associated with
 16 those minutes of use. Isn't that true?
 17 A. **There would be.**
 18 Q. You have a number of carriers that aren't paying that.
 19 Isn't that true?
 20 A. **Yes.**
 21 Q. Has NAT ever attempted to stop service to these
 22 carriers that are not paying?
 23 A. **I don't know.**
 24 Q. Is that you don't know, or is the answer no?
 25 A. **I don't know.**

1 measures to reduce its operating expenses in the face of
 2 its declining revenues?
 3 A. **Is that a question?**
 4 Q. Yes. Did it?
 5 A. **It certainly has. It's tried to limit its amount of**
 6 **expenses by contracting me to do the books.**
 7 Q. Is there a written contract between you and NAT for
 8 that purpose?
 9 A. **No.**
 10 Q. If you would, take a look at the Profit and Loss again
 11 for 2010. That's NAT 83. You mentioned there's a circuit
 12 expense. On Defendant's 27 that's an expense paid to SDN
 13 Communications.
 14 A. **Where are you looking?**
 15 Q. Look first at Defendant's 27, if you would.
 16 A. **Got it.**
 17 Q. If you would, just look at Entry No. 11, 12, 13. Do
 18 you see those, sir?
 19 A. **I do.**
 20 Q. That's for SDN Communications?
 21 A. **Yes.**
 22 Q. What was that for?
 23 A. **Those are circuit charges that WideVoice paid on**
 24 **behalf of Native American Telecom.**
 25 Q. That was circuit charges paid to SDN Communications?

1 Q. Who would know?
 2 A. **I don't know.**
 3 Q. Look at another line item here besides circuit
 4 expenses. That would be Exhibit A. Let's look at the
 5 collection and billing expense. Is that a percentage of
 6 the billings?
 7 A. **I do not know.**
 8 Q. You've never investigated how that number is
 9 determined?
 10 A. **I don't recall. I've seen the invoices. I just don't**
 11 **recall how it's calculated.**
 12 Q. Would there be that detail in NAT's business records,
 13 how it would be calculated?
 14 A. **Yes.**
 15 Q. You spent over \$96,000 in 2010 for billing expenses.
 16 Did you ever investigate whether you were overcharged for
 17 any of those expenses?
 18 MR. SWIER: Objection, Your Honor. Irrelevant.
 19 THE COURT: Overruled. You may answer.
 20 A. **I did not.**
 21 BY MR. KNUDSON:
 22 Q. So do you have a calculator, sir?
 23 A. **Not with me.**
 24 Q. Could you determine what percentage of the gross
 25 revenues went out as an expense to the billing agent?

1 **A. I don't know.**
 2 **Q.** It's at least, almost \$97,000. Is it not?
 3 **A. I see the amount, \$97,000.**
 4 **Q.** Is that eight percent?
 5 **A. Whatever the math comes out to be.**
 6 **Q.** It's a simple calculation you could do if you had a
 7 calculator.
 8 **A. Sure.**
 9 **Q.** Circuit expenses, you would agree that's more than 10
 10 percent of the gross revenues. Would you not?
 11 **A. More than 10 percent?**
 12 **Q.** Yes.
 13 **A. It would be less than.**
 14 **Q.** If you multiply \$126,000 by 10, what do you get?
 15 **A. Where do you get the -- I'm sorry, yes. Yes.**
 16 **Q.** Now, if I understand correctly, who are the members of
 17 the Board of NAT? Do you know?
 18 **A. I do not know all the members, no.**
 19 **Q.** How about people from WideVoice or Free Conference
 20 Corporation? Who are members of the Board of NAT?
 21 **A. From which entity?**
 22 **Q.** Free Conference Corporation.
 23 **A. David Erickson.**
 24 **Q.** How about Jeff Holoubek?
 25 **A. And Jeff Holoubek.**

1 **Q.** Anyone else?
 2 **A. That's all I know.**
 3 **Q.** Now, you testified earlier today that in late January
 4 AT&T paid NAT \$150,000. Is that right?
 5 **A. Correct.**
 6 **Q.** And then \$140,000 went to pay down WideVoice.
 7 Correct?
 8 **A. Correct.**
 9 **Q.** You've testified there's no written agreement between
 10 WideVoice and NAT?
 11 **A. I'm not aware of any agreement.**
 12 **Q.** There are no other creditors of NAT, to your
 13 knowledge?
 14 **A. Not to my knowledge.**
 15 **Q.** Was there any provision in the Joint Venture Agreement
 16 that permitted NAT to pay the \$140,000 to WideVoice?
 17 **A. I'm not that familiar with the Operating Agreement.**
 18 **Q.** Was there a vote of the NAT Board to authorize that
 19 payment?
 20 **A. Excuse me?**
 21 **Q.** Was there a vote of the Board of NAT to authorize that
 22 payment to WideVoice?
 23 **A. I don't know.**
 24 **Q.** You just did it because you were told to do so. Is
 25 that correct?

1 **A. Correct.**
 2 **Q.** And you were directed to by Mr. Holoubek?
 3 **A. Yes.**
 4 **MR. KNUDSON:** May I approach, Your Honor?
 5 **THE COURT:** You may.
 6 **BY MR. KNUDSON:**
 7 **Q.** I'm handing you what's been marked Plaintiff's
 8 Exhibit D. Do you recognize that?
 9 **A. I do.**
 10 **Q.** What is it?
 11 **A. It's the Profit and Loss Statement for Native American**
 12 **Telecom for January of 2011.**
 13 **Q.** That's from the same business records of NAT that lets
 14 you produce the Balance Sheet for January of 2011.
 15 Correct?
 16 **A. Correct.**
 17 **MR. KNUDSON:** I offer Plaintiff's Exhibit D.
 18 **MR. SWIER:** No objection.
 19 **THE COURT:** D is received.
 20 **MR. KNUDSON:** If I may again, Your Honor?
 21 **THE COURT:** You may.
 22 **BY MR. KNUDSON:**
 23 **Q.** Look at Plaintiff's Exhibit E.
 24 **MR. KNUDSON:** I apologize, Your Honor. It seems
 25 my extra copy has gone astray. Here it is.

1 **BY MR. KNUDSON:**
 2 **Q.** Tell me if you recognize Plaintiff's Exhibit E, sir.
 3 **A. I do.**
 4 **Q.** What is it?
 5 **A. It's the bank statement for First Dakota for Native**
 6 **American Telecom for the period ending 1-29-2010.**
 7 **Q.** That's the first page. The second page is a May 28,
 8 2010 --
 9 **A. I'm sorry. Then there's another page for the period**
 10 **ending 5-28-2010, which is Page 2. Then a statement ending**
 11 **July 30, 2010, Page 9.**
 12 **Q.** I would explain that these are -- do you recall that
 13 we had a discussion about redactions on the bank
 14 statements?
 15 **A. Yes.**
 16 **Q.** In fact, you removed your handwriting and other
 17 handwriting from the statements. Correct?
 18 **A. These were internal notes that I didn't think you**
 19 **needed.**
 20 **Q.** But you subsequently produced an unredacted copy of
 21 your bank statements?
 22 **A. Yes, I did.**
 23 **Q.** Exhibit E is a selection of a few pages from that. Is
 24 that right?
 25 **A. Correct.**

101

1 MR. KNUDSON: I would offer Exhibit E.
 2 MR. SWIER: No objection.
 3 THE COURT: E is received.
 4 BY MR. KNUDSON:
 5 Q. Let's take a look at the first page of Exhibit E.
 6 There seems to be two different persons' handwriting on
 7 that page. Is that true?
 8 A. Yes.
 9 Q. You can recognize your handwriting, can you not?
 10 A. Yes.
 11 Q. Which is your handwriting?
 12 A. The darker.
 13 Q. It says, "Utilities - central electric, shareholder
 14 distribution - Nate," for three for Tom. Is that right?
 15 A. Yes.
 16 Q. Another "Shareholder Distribution - Nate," as well?
 17 A. Yes.
 18 Q. The shareholder distributions, according to the
 19 entries here for the bank statement, they show a transfer
 20 to Tom's account. Is that correct?
 21 A. Yes.
 22 Q. So how much money had he transferred to his own
 23 account?
 24 A. I don't recall.
 25 Q. Does it add up to \$2,400?

102

1 A. I don't know.
 2 Q. It's \$1,000 and \$500 --
 3 A. Oh, on this page?
 4 Q. Yes, this page.
 5 A. Oh, \$2,400.
 6 Q. The next page, you recall our question about whether
 7 these expenses were on the cruiseship in Miami. That's
 8 your handwriting, though, is it not?
 9 MR. SWIER: Your Honor, I'll object to that. The
 10 foundation was never laid for what the purpose of the Miami
 11 charges were.
 12 THE COURT: The objection is overruled. You may
 13 continue on with your question.
 14 BY MR. KNUDSON:
 15 Q. Mr. Cestero, there's handwriting. Do you recognize
 16 the other handwriting?
 17 A. I do.
 18 Q. Whose is it?
 19 A. Tom Reiman's.
 20 Q. Tom wrote down those were his expenses?
 21 A. He provided the statements to me.
 22 Q. With his handwriting on them?
 23 A. Yes.
 24 Q. Did he explain to you why these were associated with
 25 his withdrawals?

103

1 A. No. I did not ask him.
 2 Q. But you concluded this was a shareholder distribution
 3 for Nate. Correct?
 4 A. As I mentioned before, there were several transactions
 5 reported to shareholder distributions, this being a few of
 6 them.
 7 Q. Let's look at the next page. There are a series of
 8 debit card transactions. Do you know what business purpose
 9 there was to incur \$433.51 in lodging expenses in
 10 Washington, D.C., for NAT?
 11 A. I do not know.
 12 Q. So you never questioned why that was a business
 13 expense?
 14 A. I do not know.
 15 Q. My question is did you question anybody whether it was
 16 appropriate?
 17 A. No.
 18 MR. KNUDSON: I have nothing further at this
 19 time, Mr. Cestero. Thank you.
 20 THE COURT: I have a couple questions before I
 21 have Mr. Swier ask his.
 22 On that document, Exhibit A, there was an expense for
 23 telephone and circuit expenses. Can you tell me what
 24 that's for?
 25 THE WITNESS: On which page?

104

1 THE COURT: Page 83 of Exhibit A.
 2 THE WITNESS: The telephone and circuit expenses?
 3 THE COURT: Right.
 4 THE WITNESS: Those are the circuit costs.
 5 THE COURT: Are those one-time expenses or
 6 ongoing?
 7 THE WITNESS: No, they're ongoing.
 8 THE COURT: Is it based on the amount of traffic
 9 that's happening?
 10 THE WITNESS: I'm not exactly sure what they are
 11 based on. They are monthly invoices that are sent to
 12 Native American Telecom.
 13 THE COURT: You don't know if it's the same flat
 14 fee, no matter how much traffic there is, and it's an
 15 ongoing expense, or if it's directly related to the amount
 16 of traffic?
 17 THE WITNESS: I don't know.
 18 THE COURT: And before you began doing NAT's
 19 accounting, who did the accounting work for NAT?
 20 THE WITNESS: There was a company Tom hired,
 21 Stern Accounting, I believe is their name.
 22 THE COURT: You indicated that NAT has reduced
 23 their costs by eliminating that accounting expense and
 24 having you do their accounting for free?
 25 THE WITNESS: Yes.

1 THE COURT: Have there been any other
 2 cost-cutting measures that have been taken by NAT that you
 3 are aware of?
 4 THE WITNESS: When we switched out the CABS
 5 Agent.
 6 THE COURT: What difference did that make?
 7 THE WITNESS: Substantial. I don't know the
 8 exact amount that we saved, but we're saving money by using
 9 a different CABS Agent or collection service.
 10 THE COURT: So when I did the math, it looked
 11 like CABS' collection and billing expense ended up being
 12 about eight percent of the gross revenue. Are you saying
 13 CABS was at a higher rate than that? Since this was for
 14 the full year, part of it would be the new billing agent?
 15 THE WITNESS: There were two billing agents in
 16 2010. I don't know when one stopped and the other one
 17 began. But the current one they are using is less
 18 expensive than the previous one.
 19 THE COURT: But you don't know the rate either
 20 entity charged?
 21 THE WITNESS: Not with me, no.
 22 THE COURT: You said that Sprint last paid in
 23 February of 2010?
 24 THE WITNESS: Yes.
 25 THE COURT: The tariff was filed in February of

1 2010?
 2 THE WITNESS: I don't know exactly when the
 3 tariff was filed.
 4 MR. KNUDSON: Could we clarify which tariff we're
 5 referring to; 1 or 2?
 6 THE COURT: I thought when Mr. Swier questioned
 7 you on direct examination, you said the first tariff was
 8 filed in the winter of 2010. I then asked: "Is that
 9 January or February of 2010, or is it the end of 2010 when
 10 we also have winter?" I thought the representation was it
 11 was filed in February of 2010. So you're now saying you
 12 don't know when it was filed?
 13 THE WITNESS: I didn't specify the actual month.
 14 You asked about the time, and I said around that time. I
 15 don't know the exact month.
 16 THE COURT: So you really don't know when it was
 17 filed?
 18 THE WITNESS: No, I don't.
 19 THE COURT: Well, when Sprint made that payment
 20 in February of 2010, was it pursuant to the tariff, to the
 21 first tariff?
 22 THE WITNESS: I believe so. I don't know. I
 23 believe so.
 24 THE COURT: Did they make more than one payment
 25 or just one payment?

1 THE WITNESS: They made two payments, totaling
 2 \$29,000.
 3 THE COURT: When was the other payment?
 4 THE WITNESS: In January of 2010.
 5 THE COURT: On Exhibit 25, which shows -- it's
 6 the bank account record, the Wells Fargo Bank account
 7 record.
 8 THE WITNESS: Yes.
 9 THE COURT: It's for January, January 1 through
 10 January 31. You testified that AT&T paid NAT \$150,000 in
 11 late January of 2011.
 12 THE WITNESS: We deposited the funds in February.
 13 We received the check in late January, but it didn't go
 14 into the bank until February. That's why it doesn't show
 15 up on the January statement.
 16 THE COURT: On the First Dakota National Bank
 17 statements, for example, Exhibit 13, it indicates the
 18 payments that were made from the phone companies were a
 19 direct pay, so it would be a direct deposit into the
 20 account.
 21 THE WITNESS: Yes, that's from the CABS Agent.
 22 The CABS Agent would collect the payments on behalf of
 23 Native American Telecom and submit one payment for all the
 24 carriers.
 25 THE COURT: The new group you have doing that

1 sends you checks from the carrier?
 2 THE WITNESS: That's correct. They actually just
 3 collect the checks and forward the checks to us. They do
 4 not deposit the checks.
 5 THE COURT: When did you switch?
 6 THE WITNESS: Sometime in the middle of the year.
 7 I don't recall exactly.
 8 THE COURT: Before or after July?
 9 THE WITNESS: It would be around that time. It
 10 would be around the time where the direct pays were posted
 11 into the account, and then we started receiving the
 12 individual checks.
 13 THE COURT: You're saying you did receive
 14 individual checks from the new agent?
 15 THE WITNESS: Yes. CDG sends us checks.
 16 THE COURT: I see a deposit into your account
 17 that is a direct pay --
 18 THE WITNESS: Into which account?
 19 THE COURT: August 31, so during the month of
 20 August: It's Defendant's Exhibit 13. For \$128,000. I'm
 21 assuming that would be under the old billing agent.
 22 THE WITNESS: Yes. I guess there's overlap
 23 between the time that we switched over to the new carrier
 24 -- or to the billing agent. The old billing agent would
 25 have billed, and they would have for, say, the two months

1 prior, would have collected those payments. In the
2 meantime we would have switched over to the new service.
3 The new service would bill, and then we'd receive payments
4 thereafter.

5 THE COURT: So that August statement shows a
6 direct deposit of \$128,000 from the old billing agent. I
7 don't see any other payments after that. So you switched
8 to a new billing agent, and you didn't receive any new
9 payments?

10 THE WITNESS: Right.

11 THE COURT: I thought you just told me that you
12 did.

13 THE WITNESS: We did, but the new billing agent
14 took over where the old agent left off. So they billed for
15 those payments that she had not yet received.

16 THE COURT: But you said those were not direct
17 deposits into the account. Those were checks sent to that
18 billing agent, and those were then forwarded on to you.

19 THE WITNESS: Correct.

20 THE COURT: My question is I'm looking at the
21 bank statements, and I don't see any more deposits.

22 THE WITNESS: Not for First Dakota Bank, because
23 everything goes to the Wells Fargo Bank.

24 THE COURT: I'm looking at both of them.

25 THE WITNESS: They won't show up as direct pays.

1 They would show up just as deposits.

2 THE COURT: I've looked through those, too. I
3 don't see any significant deposits.

4 THE WITNESS: You're right, because most of the
5 people stopped paying. The deposits that you can see, if
6 you look at January 31st on Exhibit 25, you'll see two
7 deposits on 1-18, one for \$27.61 and another one for \$3.41.
8 Those are the payments that we received that were forwarded
9 from the new billing agent for the CABS. You would see
10 similar entries on the other Wells Fargo statements.

11 THE COURT: For instance, Exhibit 24 shows a
12 deposit of \$3,519.77. You are saying that is what the new
13 billing agent was able to collect for you?

14 THE WITNESS: That's correct. That's what was
15 paid by the carriers.

16 THE COURT: All right. Thank you. Mr. Swier?

17 REDIRECT EXAMINATION

18 BY MR. SWIER:

19 Q. Carlos, Mr. Knudson asked you on cross-examination
20 about the marketing fee payments that NAT has made to
21 FreeConferenceCall. Is that right?

22 A. Yes.

23 Q. Those payments are pursuant to a contract between NAT
24 and FreeConferenceCall. Is that correct?

25 A. That's correct.

1 Q. So NAT has a legal contractual relationship to make
2 those marketing fee payments. Correct?

3 MR. KNUDSON: Objection. Foundation. Calls for
4 a legal conclusion.

5 THE COURT: Sustained.

6 A. Yes.

7 BY MR. SWIER:

8 Q. Based on your knowledge --

9 MR. KNUDSON: Motion to strike the answer.

10 THE COURT: The motion to strike is granted. If
11 I sustain an objection, then you don't get to answer it.

12 THE WITNESS: Oh, I'm so sorry.

13 BY MR. SWIER:

14 Q. To the best of your knowledge, there's a contract
15 between FreeConferenceCall and Native American Telecom that
16 FreeConferenceCall's marketing fees are paid. Correct?

17 MR. KNUDSON: Objection. Foundation. Misstates
18 his prior testimony.

19 THE COURT: Sustained.

20 BY MR. SWIER:

21 Q. Carlos, you were asked about the percentage of that
22 contract between FreeConferenceCall and Native American
23 Telecom. You indicated earlier that you are familiar with
24 the contracts that FreeConferenceCall has with other
25 companies like NAT. Correct?

1 MR. KNUDSON: Objection. Assumes a fact not in
2 evidence.

3 THE COURT: Overruled.

4 A. Correct.

5 BY MR. SWIER:

6 Q. And are those agreements that FreeConferenceCall has
7 with the other telephone companies the same or similar as
8 what FreeConferenceCall has with Native American Telecom?

9 A. Yes, they are.

10 Q. So that's a standard contract that FreeConferenceCall
11 has with its other telephone companies?

12 A. Yes, very similar.

13 MR. KNUDSON: Objection. Misstates his prior
14 testimony. Lack of foundation.

15 THE COURT: Overruled. Now you can answer.

16 A. Yes.

17 BY MR. SWIER:

18 Q. Carlos, you were asked by Mr. Knudson about some
19 charges that Native American Telecom has paid out, is that
20 correct; that were payments made for the deal in Miami.
21 Can you remember that?

22 A. Yes.

23 Q. And North Dakota. Correct?

24 A. Yes.

25 Q. Does FreeConferenceCall do business all over the

113

1 world?

2 **A. Yes.**

3 **Q.** Do you know what the purpose of Mr. Reiman being in

4 Miami was on that particular day?

5 **A. I do not.**

6 **Q.** As far as you know, it could be related to the

7 business?

8 **MR. KNUDSON:** Objection. Speculation.

9 Foundation.

10 **THE COURT:** Sustained.

11 **MR. SWIER:** May I approach, Your Honor?

12 **THE COURT:** You may.

13 **BY MR. SWIER:**

14 **Q.** Carlos, I'll show you what has been marked as Sprint's

15 Exhibit A. I'm looking at what's designated as NAT 00042

16 on the bottom right-hand corner. Do you see that?

17 **A. I do.**

18 **Q.** Mr. Knudson asked you about the charges Mr. Reiman had

19 in Miami. There are some other charges on here, also, for

20 Washington, D.C. Are there not?

21 **A. Yes.**

22 **Q.** Do you know why NAT had to travel to Washington, D.C.,

23 for a business-related purpose?

24 **A. I'm familiar with certain trips they've taken.**

25 **Q.** Why is it NAT had to take certain trips to Washington,

114

1 D.C.?

2 **MR. KNUDSON:** Objection. Foundation as to this

3 particular trip.

4 **THE COURT:** Overruled. You may answer.

5 **A. My understanding is they've gone to Washington, D.C.,**

6 **to meet with the Senators and Representatives regarding the**

7 **Native American Tribe.**

8 **Q.** So it's your understanding they've gone to talk to

9 *South Dakota's Congressional* delegation?

10 **A. In addition to others.**

11 **Q.** Regarding the nonpayment issue? Do you know?

12 **A. I believe so.**

13 **Q.** According to your knowledge, has NAT also traveled to

14 Washington, D.C., to visit with the Federal Communications

15 Commission?

16 **A. Yes.**

17 **Q.** Do you know what the purpose of those trips were?

18 **A. I do not know the exact purpose.**

19 **Q.** Would you consider, as an accountant, would you

20 consider traveling to Washington, D.C., to lobby

21 administrative agencies in South Dakota's Congressional

22 *delegation, based on these nonpayment issues, would be a*

23 reasonable business expense?

24 **MR. KNUDSON:** Objection. Foundation.

25 Speculation.

115

1 **THE COURT:** Overruled. You may answer.

2 **A. Yes, I would.**

3 **BY MR. SWIER:**

4 **Q.** Carlos, the Court asked you a good question earlier

5 about NAT's expenses. Approximately how much each month

6 are Native American Telecom's expenses, just as a total,

7 first of all?

8 **A. About \$40,000 a month.**

9 **Q.** Can you share with us a breakdown of the \$40,000

10 number and what that monthly amount goes to?

11 **A. Sure. If you look at the January --**

12 **Q.** Which exhibit are you referring to?

13 **A. Plaintiff's Exhibit D.**

14 **MR. SWIER:** May I approach, Your Honor?

15 **THE COURT:** You may.

16 **BY MR. SWIER:**

17 **Q.** Carlos, I'm looking at Plaintiff's Exhibit D. This is

18 the most recent Profit and Loss Statement of NAT from a

19 *month ago, January of 2011. Is that right?*

20 **A. Correct.**

21 **Q.** Does this Profit and Loss Statement show a typical

22 month of expenses for NAT?

23 **A. It would.**

24 **Q.** Let's go through those a moment. How much did NAT

25 receive from the carriers?

116

1 **A. \$31.00.**

2 **Q.** So what was your gross profit?

3 **A. We lost \$42,000.**

4 **Q.** No, I'm talking your gross profit from the carrier

5 payments.

6 **A. Oh, \$31.00.**

7 **Q.** Now let's look at the expenses. Bank service charges.

8 How much is that every month?

9 **A. \$28.00.**

10 **Q.** In your professional opinion is that reasonable?

11 **A. Yes.**

12 **Q.** CABS collection and billing expense. How much was

13 that?

14 **A. \$771.00.**

15 **Q.** Based on what you know, has NAT attempted to minimize

16 that collection as much as they possibly can in the

17 industry?

18 **A. Absolutely.**

19 **Q. Consulting expenses of \$3,000. Share with the Court**

20 **what those consulting expenses are for.**

21 **A. Those are payments to Tom Reiman to assist with the**

22 **operations of the Reservation.**

23 **Q.** What's your understanding of what Mr. Reiman's role is

24 on a daily basis for NAT?

25 **A. They vary. I mean they go and make sure everything is**

1 **operating smoothly. If people have problems, he goes by.**
 2 Q. Is Mr. Reiman NAT's conduit or the person who deals
 3 with the Tribe?
 4 A. **Yes.**
 5 Q. You are paying him a fee each month of \$3,000 to do
 6 that?
 7 A. **That's correct.**
 8 Q. Payroll expenses of \$1,906. What do those represent?
 9 A. **Those are people that work in the Internet Library,**
 10 **Communications Center.**
 11 Q. Are those Tribal members that you pay on a monthly
 12 basis for their services?
 13 A. **They are.**
 14 Q. Do you know what you pay those folks an hour?
 15 A. **I don't recall exactly.**
 16 Q. Do you have a ballpark? Do they get paid by the hour?
 17 A. **Yes.**
 18 Q. What's a number?
 19 A. **I believe it's \$10.00 an hour.**
 20 Q. \$10.00 an hour?
 21 A. **Yes.**
 22 Q. Do you think earning a couple dollars above minimum
 23 wage is reasonable?
 24 A. **Yes.**
 25 MR. KNUDSON: Objection. Argumentative.

1 Q. So last month, in order to maintain this litigation,
 2 NAT paid your attorneys \$23,000.
 3 A. **Yes.**
 4 Q. If you don't fight this in Court, what happens to NAT?
 5 A. **It goes out of business.**
 6 Q. Do you think, based on the work you received from your
 7 legal professionals, that in order to go through this case,
 8 that that's a reasonable amount?
 9 A. **Yes.**
 10 MR. KNUDSON: Objection. Foundation.
 11 THE COURT: Overruled. The answer will stand.
 12 BY MR. SWIER:
 13 Q. The next item is taxes, Federal taxes. I think it's
 14 self-explanatory, but what is that?
 15 A. **Those are the Federal taxes we have to pay.**
 16 Q. You are required to pay those every month?
 17 A. **Not every month, but every quarter.**
 18 Q. Are those consistent?
 19 A. **Yes.**
 20 Q. Then we have \$10,765 for telephone and circuit
 21 expenses. You've kind of talked about this a little bit,
 22 but are those monthly expenses that are needed for NAT to
 23 run?
 24 A. **That's my understanding without them, you couldn't**
 25 **have it.**

1 THE COURT: Overruled. The answer will stand.
 2 BY MR. SWIER:
 3 Q. Payroll tax of \$358.00. What's that?
 4 A. **That's the taxes related to the payroll.**
 5 Q. Is NAT required to pay those?
 6 A. **Yes.**
 7 Q. Or you will go to jail?
 8 A. **Yes.**
 9 Q. Postage and postal charges. How much?
 10 A. **\$125.00.**
 11 Q. Why do we need postage expenses for NAT?
 12 A. **It's the P.O. box.**
 13 Q. So you can get mail?
 14 A. **So we can get mail, yes.**
 15 Q. Is it standard in the industry for a company to have a
 16 mailbox?
 17 A. **Yes.**
 18 Q. Is that a reasonable amount in your opinion?
 19 A. **For a P.O. box? Yes.**
 20 Q. Then you have professional fees of \$23,543. This is
 21 the most interesting item in the whole bunch. Explain to
 22 the Court what those professional fees reflect.
 23 A. **Those are legal fees.**
 24 Q. Legal fees for what?
 25 A. **To help us fight everything that's going on.**

1 Q. Based on your knowledge of the circuits, which is
 2 limited, but you know what they cost, is that a reasonable
 3 amount for telephone and circuit expenses?
 4 A. **Yes.**
 5 Q. We have \$720 for travel expenses. Do you know what
 6 those travel expenses would be for?
 7 A. **I don't know exactly, but they more likely would be**
 8 **for trips to Washington, D.C.**
 9 Q. To do what?
 10 A. **Meet with the FCC and other lobbying efforts.**
 11 Q. So, Carlos, in January of 2011, if you add all those
 12 up, what are NAT's total expenses?
 13 A. **\$42,000.**
 14 Q. Where is the fat in there in your opinion?
 15 MR. KNUDSON: Objection. Argumentative.
 16 THE COURT: Overruled. You may answer.
 17 A. **There isn't any. It's as lean as it gets.**
 18 BY MR. SWIER:
 19 Q. Can you not pay your attorneys?
 20 A. **We want to be represented.**
 21 Q. You want to have good counsel?
 22 A. **We want the best.**
 23 Q. Do you have to pay those telephone and circuit
 24 expenses?
 25 A. **Absolutely.**

1 Q. Do you think you need to pay the Federal taxes?
 2 A. Yes.
 3 Q. Do you need to pay the company that collects your
 4 bills for you?
 5 A. Yes.
 6 Q. Why?
 7 A. **If they didn't bill, we wouldn't have any chance of**
 8 **collecting.**
 9 Q. You're not getting paid, anyway.
 10 A. **We're not getting paid, but they still need to get**
 11 **billed.**
 12 Q. Carlos, Mr. Knudson asked you questions about the
 13 loans that have been made from WideVoice Communications to
 14 NAT. Is that correct?
 15 A. Yes.
 16 Q. What have been the total amount of those loans as of
 17 today's date?
 18 A. **Total amount that they've lent?**
 19 Q. Yes.
 20 MR. KNUDSON: Objection. I think this is
 21 ambiguous. Are we talking about total lent or current
 22 balance outstanding?
 23 MR. SWIER: I'll clarify.
 24 THE COURT: Rephrase.
 25 BY MR. SWIER:

1 MR. KNUDSON: Also speculation.
 2 A. Yes.
 3 THE COURT: Overruled. The answer will stand.
 4 BY MR. SWIER:
 5 Q. What was the answer, Carlos?
 6 A. Yes.
 7 MR. SWIER: Your Honor, I don't have any further
 8 questions. Thank you.
 9 THE COURT: Mr. Knudson?
 10 RECROSS-EXAMINATION
 11 BY MR. KNUDSON:
 12 Q. Mr. Cestero, your understanding on what WideVoice
 13 would or would not do is based on what other people told
 14 you. Is that not correct?
 15 A. **Amongst other conversations I was made a part of.**
 16 Q. You are not a decision-maker of WideVoice. Correct?
 17 A. I am not.
 18 Q. So whatever WideVoice intends to do is something
 19 somebody else told you. Correct?
 20 A. **It's what I've heard, and that's my understanding of**
 21 **it.**
 22 Q. There's no fixed plan to do anything at this point in
 23 time. Is there?
 24 A. **I can't predict the future.**
 25 Q. So you are speculating on what WideVoice might do.

1 Q. What is the outstanding debt that NAT owes to
 2 WideVoice?
 3 A. **About \$395,000.**
 4 Q. That's as of today?
 5 A. **As of today.**
 6 Q. And you've indicated that based on the conversations
 7 you've had with your bosses, that WideVoice, because of
 8 their financial status, is now going to discontinue
 9 payments or loans to NAT?
 10 MR. KNUDSON: Objection. Hearsay.
 11 THE COURT: Sustained.
 12 BY MR. SWIER:
 13 Q. Carlos, what's your understanding of WideVoice's
 14 future intentions regarding loans to NAT?
 15 MR. KNUDSON: Same objection.
 16 THE COURT: Overruled. You may answer.
 17 A. **They've indicated they are no longer going to fund NAT**
 18 **if they lose this.**
 19 MR. KNUDSON: Your Honor, I still object. This
 20 is clearly based on hearsay. Move to strike.
 21 THE COURT: Overruled. The answer will stand.
 22 BY MR. SWIER:
 23 Q. Based on your familiarity with WideVoice's financial
 24 statements, based on your experience, is that a reasonable
 25 financial decision for WideVoice?

1 Right?
 2 A. **It's my understanding what would happen.**
 3 Q. You can't predict the future, so you are just guessing
 4 about what would happen. Correct?
 5 A. **It's an educated guess.**
 6 Q. But still a guess, though. Right?
 7 A. Yes.
 8 Q. Okay. Let's go back to Plaintiff's Exhibit D. I'll
 9 direct your attention to payroll expenses. You can look at
 10 it on the screen.
 11 I will take your answer that the people, the four
 12 employees NAT has on the Reservation are paid about \$10.00
 13 an hour. Are you with me on that?
 14 A. Yes.
 15 Q. I think this is pretty easy arithmetic here. If you
 16 divide 10 into \$1,906, how many hours of work would you get
 17 out of that if you are paying \$10.00 an hour?
 18 A. **How many hours?**
 19 Q. Yes.
 20 A. **Nineteen?**
 21 Q. You are an accountant.
 22 A. **That was basic. I'm sorry. What was the question?**
 23 **If I divided by 10?**
 24 Q. Let me rephrase the question.
 25 THE COURT: 190.

1 **A. 190.**
 2 **BY MR. KNUDSON:**
 3 **Q.** If you pay \$10.00 an hour and your total payroll
 4 expense is \$1,906, how many hours of work did you purchase
 5 for \$1,906?
 6 **A. I'm sorry. I'm not doing the math in my head. I**
 7 **apologize.**
 8 **Q.** Would you agree it's 190 hours?
 9 **A. Yes.**
 10 **Q.** So for the month of January the amount of payroll
 11 expenses, that's for the four people at the Internet Cafe
 12 on the Reservation, came to \$1,900. That's 190 hours of
 13 work. Are you with me on that?
 14 **A. Yes.**
 15 **Q.** You would agree with that statement?
 16 **A. Yes. It's not necessarily just hourly. It's also**
 17 **other expenses that go in.**
 18 **Q.** In other words, there may be some incidental expenses
 19 that are not wages?
 20 **A. Well, let me retract that. That would be -- that**
 21 **specific line item would be for payroll, for hours. Yes.**
 22 **Q.** You bought 190 hours worth of work in January.
 23 Correct?
 24 **A. Yes.**
 25 **Q.** Are you aware that South Dakota Network has a tariff?

1 MR. SWIER: Objection. Beyond the scope of
 2 cross-examination.
 3 MR. KNUDSON: No, not at all.
 4 MR. SWIER: Let me make my objection, please.
 5 Your Honor, I would object as that being beyond the scope
 6 of my redirect. We never talked about South Dakota Network
 7 on redirect.
 8 THE COURT: Mr. Knudson?
 9 MR. KNUDSON: South Dakota Network came up both
 10 in direct and cross. Also, it was raised and opened the
 11 door when he started talking about circuit expenses on his
 12 redirect.
 13 THE COURT: I think that it is included in
 14 circuit expenses, so it was discussed in redirect. So the
 15 objection is overruled.
 16 **BY MR. KNUDSON:**
 17 **Q.** Are you aware that South Dakota Network has a tariff
 18 by which it charges circuit expenses per minute of use to
 19 NAT?
 20 MR. SWIER: Objection. Irrelevant.
 21 THE COURT: Overruled.
 22 **A. I'm not exactly sure how they are tied in.**
 23 **BY MR. KNUDSON:**
 24 **Q.** If South Dakota Network charges NAT per minute of use,
 25 then the charges South Dakota Network submits to NAT would

1 vary by the amount of minutes of use. Correct?
 2 **A. I don't know.**
 3 **Q.** Well, try my question.
 4 MR. SWIER: Objection, Your Honor. Asking for
 5 speculation. He's testified he doesn't know.
 6 **A. Yeah, don't know.**
 7 THE COURT: Sustained.
 8 **A. I'm not a circuits expert.**
 9 THE COURT: Just a minute. I sustained the
 10 objection. Ask a new question.
 11 **BY MR. KNUDSON:**
 12 **Q.** If South Dakota Network charges per minute of usage.
 13 Are you with me there?
 14 **A. Yes.**
 15 **Q.** And the amount, that means the amount South Dakota
 16 Network charges NAT, varies by the minutes of usage.
 17 Correct?
 18 MR. SWIER: Objection. It's been asked, and he
 19 indicated he doesn't know the answer.
 20 THE COURT: Sustained.
 21 **BY MR. KNUDSON:**
 22 **Q.** So you're unaware whether or not South Dakota Network
 23 has a tariff in place for minutes of use charged to NAT.
 24 Correct?
 25 MR. SWIER: Objection. Asked and answered.

1 THE COURT: Overruled. You may answer.
 2 **A. I don't know.**
 3 **BY MR. KNUDSON:**
 4 **Q.** Do you know if anybody at NAT has gone to South Dakota
 5 Network to try to get a lower price on the circuit service
 6 South Dakota Network charges?
 7 **A. I don't know.**
 8 **Q.** Now, this P&L for January 2011, that's a cash basis
 9 again. You indicated even though, in fact, AT&T had paid
 10 you \$150,000 in January, you received a check from your
 11 billing agent in January. Right?
 12 MR. SWIER: Objection, Your Honor. Beyond the
 13 scope of redirect.
 14 THE COURT: Overruled. It was an area that I
 15 went into. So both parties can go into anything that I
 16 brought up in my questioning. So it's proper. You can go
 17 ahead.
 18 **A. Ask the question. I'm sorry.**
 19 **BY MR. KNUDSON:**
 20 **Q.** AT&T paid NAT \$150,000 in January. Correct?
 21 **A. We received the payment in January.**
 22 **Q.** You received the payment. So you had the funds
 23 available as soon as you deposited it into the bank.
 24 Right?
 25 **A. It's not available until you deposit it into the bank.**

1 Q. So your cash basis method of accounting is when it
 2 goes into the bank. Right?
 3 A. Right.
 4 Q. But then the operating profit, if I understand, for
 5 February, there would have been \$150,000 minus this
 6 approximately \$40,000 in monthly expenses. Correct?
 7 A. It would have been, but we would have had to pay
 8 \$140,000 back to WideVoice.
 9 Q. That's a different question in issue. The operating
 10 profit, before paying off a loan, correct, would have been
 11 \$110,000?
 12 A. Sure.
 13 Q. And NAT could have kept that \$110,000 in its bank
 14 account. Correct?
 15 A. They could have, but it needed it. WideVoice needed
 16 the money.
 17 Q. Is there any term or condition of a Loan Agreement
 18 between WideVoice and NAT that required payment in
 19 February?
 20 MR. SWIER: Objection, Your Honor. Again, beyond
 21 the scope, I believe, of everyone's redirect, and it's been
 22 asked and answered previously on cross.
 23 THE COURT: Overruled. You may answer.
 24 A. Can you re-ask the question?
 25 MR. KNUDSON: Let's have it read back.

1 A. That would be perfectly fine with NAT.
 2 Q. And you've received one of those payments in the last
 3 month?
 4 A. Yes.
 5 Q. You have not received any other payment, when it
 6 should have already been received, if they were going to
 7 continue payments. Right?
 8 MR. KNUDSON: Objection.
 9 A. Right.
 10 THE COURT: Based on?
 11 MR. KNUDSON: "Should have." That means
 12 foundation. They haven't established when the payments are
 13 due.
 14 THE COURT: Sustained.
 15 BY MR. SWIER:
 16 Q. Carlos, are you familiar with when you receive
 17 switched access payments from AT&T?
 18 A. Yes.
 19 Q. Have you received a switched access payment from AT&T
 20 within the last few days?
 21 A. No.
 22 Q. Based on their standard of conduct, if they were going
 23 to continue to pay that amount, would NAT have received the
 24 check by now?
 25 A. Yes.

1 (The requested portion of the record was read by the
 2 reporter.)
 3 A. Is there any term or condition that required payment?
 4 BY MR. KNUDSON:
 5 Q. Yes.
 6 A. I don't know.
 7 Q. So if AT&T pays in March, you don't know whether or
 8 not NAT would keep that money, do you?
 9 MR. SWIER: Objection. Speculation.
 10 THE COURT: Overruled. You may answer.
 11 A. If AT&T pays?
 12 BY MR. KNUDSON:
 13 Q. In March.
 14 A. Would what now?
 15 Q. If AT&T pays NAT in March, you don't know whether NAT
 16 would keep that money. Do you?
 17 A. I don't.
 18 MR. KNUDSON: No further questions.
 19 THE COURT: Mr. Swier? Anything?
 20 FURTHER REDIRECT EXAMINATION
 21 BY MR. SWIER:
 22 Q. Carlos, if Sprint or AT&T, or whatever carrier, would
 23 be willing to pay you and guarantee you payment of \$150,000
 24 until the end of these lawsuits, would that be okay with
 25 NAT?

1 MR. KNUDSON: Objection. Foundation.
 2 THE COURT: Overruled. The answer will stand.
 3 MR. SWIER: Thank you. I don't have anything
 4 further, Your Honor.
 5 THE COURT: Mr. Knudson? Anything?
 6 MR. KNUDSON: Nothing, Your Honor.
 7 THE COURT: You can be excused. Thanks.
 8 (Witness excused)
 9 THE COURT: We'll take a lunch break. But I'm
 10 wondering how we're doing on timing for today. Mr. Swier,
 11 how many more witnesses do you have?
 12 MR. SWIER: Your Honor, it really will depend a
 13 little bit on what the Court would like to do.
 14 Mr. Lengkeek, during our October 14 preliminary injunction
 15 hearing, did testify substantially under oath, and I
 16 believe under the Rules, the Court is well within its right
 17 to take judicial notice of his prior testimony and apply it
 18 to the facts in this case.
 19 If the Court would be willing to do that, then
 20 Mr. Lengkeek's remaining testimony would be very brief,
 21 like 10 or 15 minutes. If the Court would not take notice
 22 of that, then we would probably have a couple hours. For
 23 expediency sake, we're fine if the Court wants to just
 24 review his prior testimony. It will be similar, if we put
 25 him on the stand.

1 THE COURT: Mr. Knudson, any objection to me¹
 2 doing that?
 3 MR. KNUDSON: None, Your Honor. Do I understand
 4 you would still intend to call Mr. Lengkeek?
 5 MR. SWIER: If the Court takes judicial notice,
 6 I'm going to decide over the noon hour if I need to call
 7 him.
 8 MR. KNUDSON: I would still want to cross him. I
 9 don't have much, maybe 10 minutes.
 10 MR. SWIER: Well, if I don't call him as a
 11 witness, there's no cross.
 12 THE COURT: He can call him himself in his case
 13 in chief.
 14 MR. KNUDSON: In terms of our testimony, we have
 15 Amy Clouser here to testify. We could reach an
 16 understanding as to what she would say. There's an exhibit
 17 that she would lay the foundation for, which basically
 18 establishes the minutes of usage attributable to Sprint's
 19 Call Detail Record database. In other words, it's the same
 20 thing she said in her Affidavits three times, that based on
 21 the Call Detail Records that Sprint maintains, in the case
 22 of December 2010, 99.94 percent of the usage that Sprint
 23 records went to conference calling numbers. That's what
 24 her testimony would establish. We could take the exhibit,
 25 if they would stipulate to it, and that would support her

1 testimony, which is in already by way of Affidavit.
 2 THE COURT: My only question was if we were going
 3 to get finished today.
 4 MR. KNUDSON: I understand. That's in an effort
 5 to move it along.
 6 THE COURT: I would just as soon hear from her in
 7 person than trying to understand the Affidavits on what is
 8 a pretty technical area.
 9 MR. KNUDSON: Absolutely. I understand.
 10 THE COURT: With regard to Mr. Lengkeek, I will
 11 take judicial notice, since there hasn't been an objection
 12 from the other side. I'll leave it up to either of you if
 13 you want to call him for anything in addition to what he
 14 previously testified to.
 15 MR. SWIER: Your Honor, I will call him briefly.
 16 THE COURT: Okay. Then let's take a recess until
 17 1:15. We'll see you back here then.
 18 (Noon recess at 12:10 until 1:15)
 19 THE COURT: Mr. Swier, you may call your next
 20 witness.
 21 MR. SWIER: Thank you, Your Honor. NAT would
 22 call Peter Lengkeek.
 23 Your Honor, thank you for taking judicial of that
 24 testimony. It will save us time.
 25

1 PETER LENGKEEK,
 2 called as a witness, being first duly sworn, testified as
 3 follows:
 4 DIRECT EXAMINATION
 5 BY MR. SWIER:
 6 Q. Peter, would you please introduce yourself to the
 7 Court?
 8 A. My name is Peter James Lengkeek.
 9 Q. Would you spell your last name for us, please?
 10 A. L-E-N-G-K-E-E-K.
 11 Q. Peter, do you live in Ft. Thompson on the Crow Creek
 12 Sioux Tribe Reservation?
 13 A. Yes.
 14 Q. Peter, share with us your educational background,
 15 please.
 16 A. I graduated from high school in 1991 in Chamberlain,
 17 South Dakota, and picked up a few other credits while I was
 18 in the Marine Corps.
 19 Q. After graduating from Chamberlain High School in 1991,
 20 what did you do?
 21 A. I went into the Marine Corps shortly afterwards.
 22 Q. How long were you in the Marine Corps?
 23 A. Six years.
 24 Q. What was your highest rank in the Marine Corps?
 25 A. E-5 Sergeant.

1 Q. What type of things, Peter, did you do as an E-5
 2 Sergeant in the Marine Corps?
 3 A. I was a Platoon Sergeant. I was responsible for
 4 between 60 and 80 Marines.
 5 Q. How long did you serve as an E-5, Peter?
 6 A. The final year, one year.
 7 Q. You served six years in the Marines?
 8 A. Yes, sir.
 9 Q. Were you honorably discharged?
 10 A. Yes.
 11 Q. You did your duty.
 12 A. Yes.
 13 Q. Peter, after you were discharged from the Marine
 14 Corps, what did you do?
 15 A. I worked road construction with a couple different
 16 outfits that come into the area, and we built roads. Did
 17 some guiding for hunters and fishermen. Then got a job
 18 with the United Methodist Church as a volunteer group
 19 construction manager.
 20 Q. Peter, who is your current employer?
 21 A. The Crow Creek Sioux Tribe.
 22 Q. What position do you have with the Tribe?
 23 A. I am the Treasurer of the Tribe.
 24 Q. Is that an elected position?
 25 A. Yes, by the people.

1 Q. When did the people of the Crow Creek Tribe elect you
 2 to the Treasurer position?
 3 A. **Oh, about nine months ago, I suppose.**
 4 Q. Coming up on that one-year anniversary?
 5 A. **Yes.**
 6 Q. Do you like it?
 7 A. **Yes.**
 8 Q. Peter, what are your duties as the Treasurer of the
 9 Tribe?
 10 A. **Safeguarding the funds of the Tribe, along with many,**
 11 **many, many other hats that I wear as a Tribal leader.**
 12 Q. Describe for us what the makeup of the Tribal Council
 13 is.
 14 A. **It is made up of seven elected officials that make up**
 15 **the governing body of the Crow Creek Sioux Tribe, one**
 16 **Chairman and six Councilmen. Myself and three other**
 17 **Councilmen represent the Ft. Thompson District of the**
 18 **Reservation, one other Councilman represents the Big Bend**
 19 **District, and one Councilman represents the Crow Creek**
 20 **District.**
 21 Q. Are all seven of those members of the Council elected
 22 amongst the people?
 23 A. **Yes.**
 24 Q. How long is your term, Peter, as an elected Treasurer?
 25 A. **Two years.**

1 LLC?
 2 A. **Yes, sir.**
 3 Q. Will you share with the Court what your understanding
 4 is of NAT?
 5 A. **It's basically a phone company.**
 6 Q. Where is it based?
 7 A. **They are on the Reservation in Ft. Thompson.**
 8 Q. What is your understanding as to the ownership
 9 structure of NAT?
 10 A. **The Crow Creek Sioux Tribe owns 51 percent of NAT, and**
 11 **WideVoice owns 24 percent, and Native American Telecom**
 12 **Enterprise owns 25 percent.**
 13 Q. But the Tribal entity is the majority shareholder. Is
 14 that right?
 15 A. **Yes.**
 16 Q. Who serves as the Tribal representative on NAT's Board
 17 of Directors?
 18 A. **Myself, Eric Big Eagle, and Shannon Shields.**
 19 Q. How long has Miss Shields been a board member of NAT,
 20 if you know?
 21 A. **About the same time I -- we all got on there about the**
 22 **same time, maybe late October, early November.**
 23 Q. Of what year?
 24 A. **2010.**
 25 Q. So you've served on the NAT Board for five or six

1 Q. So you are about halfway through?
 2 A. **Yes.**
 3 Q. Peter, are you familiar with the Crow Creek Sioux
 4 Tribe's Tribal Utility Authority?
 5 A. **Yes.**
 6 Q. Do you know when the Tribal Utility Authority started?
 7 A. **I think it began in 1997.**
 8 Q. Well before you were a Council member.
 9 A. **Yes.**
 10 Q. Do you know what the purpose was or purpose is with
 11 the Tribal Utility Authority?
 12 A. **Basically to oversee all utility functions on the**
 13 **Reservation.**
 14 Q. Kind of self-explanatory.
 15 A. **Exactly.**
 16 Q. Now, Peter, are you a member of the Tribal Utility
 17 Authority?
 18 A. **No.**
 19 Q. You are just a member -- you are one of the seven
 20 elected members of the Council?
 21 A. **Yes.**
 22 Q. The Council, are they the governmental entity that
 23 oversees the affairs of the Tribe?
 24 A. **Yes.**
 25 Q. Peter, are you familiar with Native American Telecom,

1 months?
 2 A. **Something like that, yes.**
 3 Q. Enjoy your service so far?
 4 A. **Yes. Learning a lot.**
 5 Q. It's your understanding that the other members of the
 6 Board are made up of WideVoice and Native American Telecom
 7 Enterprise representatives?
 8 A. **Yes.**
 9 MR. KNUDSON: Objection. Leading.
 10 THE COURT: Overruled.
 11 BY MR. SWIER:
 12 Q. Peter, how did you become a Board member of NAT?
 13 A. **We were pretty much appointed by the Council members,**
 14 **by the rest of the Council.**
 15 Q. Didn't have a choice?
 16 A. **Something like that, but I also volunteered to sit**
 17 **there, also.**
 18 Q. Describe for the Court what your role as a NAT Board
 19 member is.
 20 A. **I am there to look out for the best interests of the**
 21 **Tribe.**
 22 Q. And as a Tribal-elected Treasurer, do you take that
 23 role seriously?
 24 A. **Very.**
 25 Q. Do you think you, based on your experience and

1 position, are qualified to play that role?
 2 **A. Yes.**
 3 **Q.** Peter, before you became a Board member of NAT, what
 4 did you know about telecom?
 5 **A. Nothing.**
 6 **Q.** Before you became an NAT Board member, what did you
 7 know about switched access fees?
 8 **A. Nothing.**
 9 **Q.** Do you know a little bit about it now?
 10 **A. A little more than I did then.**
 11 **Q.** You heard earlier that Jeff Holoubek currently serves
 12 as the President of NAT. Is that right?
 13 **A. Yes.**
 14 **Q.** And you know Mr. Holoubek?
 15 **A. Yes.**
 16 **Q.** Even though the Tribe is majority owner of NAT, are
 17 you okay with Mr. Holoubek currently serving as President
 18 of NAT?
 19 **A. Yes.**
 20 **Q.** Why?
 21 **A. He has a high knowledge in that field. He's very**
 22 **experienced.**
 23 **Q.** So as somewhat the guardian for the Tribe, you are
 24 okay with Mr. Holoubek?
 25 **A. Yes.**

1 **Q.** Peter, you said you served on the Board for five or
 2 six months.
 3 **A. Yes.**
 4 **Q.** Do you have a general idea of NAT's finances?
 5 **A. A general idea, yes.**
 6 **Q.** Based on your knowledge, do your other Board members
 7 have an idea what NAT's finances are?
 8 **A. Yes.**
 9 MR. KNUDSON: Objection. Foundation.
 10 THE COURT: Overruled.
 11 **A. Yes.**
 12 **BY MR. SWIER:**
 13 **Q.** At this point, as the Treasurer for the Tribe, are you
 14 comfortable with the level of knowledge you have about the
 15 financials and how things work?
 16 **A. Yes.**
 17 **Q.** Earlier today Mr. Knudson brought up the fact that NAT
 18 so far has generated and received a little bit over a
 19 million dollars in revenue. Is that right?
 20 **A. Yes.**
 21 **Q.** And you were aware, at least generally, of that
 22 number?
 23 **A. Yes.**
 24 **Q.** Peter, are you familiar with how businesses work?
 25 **A. Yes.**

1 **Q.** Do new businesses always have start-up expenses?
 2 **A. Yes.**
 3 **Q.** Has NAT had start-up expenses?
 4 **A. Yes.**
 5 **Q.** The start-up expenses that NAT so far has spent, is it
 6 true that a majority, if not all, has been either the
 7 switched access fees you were temporarily receiving, or
 8 through loans from one of your partners, WideVoice?
 9 **A. Yes.**
 10 **Q.** If NAT hadn't received those loans from WideVoice,
 11 would NAT have been able to survive this long?
 12 MR. KNUDSON: Objection. Foundation.
 13 THE COURT: Overruled. You may answer.
 14 **A. No.**
 15 **BY MR. SWIER:**
 16 **Q.** They kept you afloat?
 17 **A. Yes.**
 18 **Q.** Peter, you've seen the financials and all the various
 19 charges. Based on your experience, and, again, as the
 20 Treasurer for the Tribe, do you believe those start-up
 21 expenses are reasonable?
 22 MR. KNUDSON: Objection. Foundation.
 23 THE COURT: Overruled. You may answer.
 24 **A. Yes.**
 25 **BY MR. SWIER:**

1 **Q.** Did it cause you any heartburn?
 2 **A. No.**
 3 **Q.** You have to spend money to make money?
 4 **A. Yes, sir.**
 5 **Q.** Peter, are you familiar with the Marketing Fee
 6 Agreement between Native American Telecom and
 7 FreeConferenceCall?
 8 **A. I haven't seen the agreement personally, but I know**
 9 **there is one.**
 10 **Q.** Do you know who would have signed that agreement?
 11 **A. I believe our current -- our previous Chairman at the**
 12 **time and Mr. Erickson.**
 13 **Q.** Who is that? I'm sorry, who was your previous
 14 Chairman that signed the contract?
 15 **A. Brandon Sazue.**
 16 **Q.** And Mr. Sazue is no longer your Chair?
 17 **A. No.**
 18 **Q.** Who is your current Chairman?
 19 **A. Mr. Duane Big Eagle.**
 20 **Q.** And it's your understanding the contract was signed
 21 between then Chairman Sazue and who else?
 22 **A. Mr. Erickson.**
 23 MR. KNUDSON: Objection. I'm confused. Are they
 24 saying this is an agreement between the Tribe and
 25 FreeConference, or is it an agreement between NAT and

1 FreeConference? I don't think it's been established which
 2 it is.
 3 THE COURT: Mr. Swier, if you could clarify that.
 4 BY MR. SWIER:
 5 Q. Peter, is this an agreement between Native American
 6 Telecom and FreeConferenceCall?
 7 A. **Native American Telecom and FreeConferenceCall.**
 8 Q. And you said Mr. Sazue signed the agreement on behalf
 9 of Native American Telecom?
 10 A. **As our Chairman.**
 11 Q. And Mr. Erickson signed the agreement on behalf of
 12 FreeConferenceCall?
 13 A. **Yes.**
 14 Q. Peter, what's your understanding of that Marketing Fee
 15 Agreement between Native American Telecom and
 16 FreeConferenceCall? How does it work?
 17 A. **My understanding of it is that NAT gets 25 percent of**
 18 **the gross, and 75 percent goes to FCC.**
 19 Q. Do you know why FCC gets that 75 percent, and the
 20 Tribe receives 25 percent of the gross?
 21 MR. KNUDSON: Objection. Misstates what the
 22 agreement says.
 23 THE COURT: Overruled.
 24 MR. KNUDSON: No, Your Honor. It's not the Tribe
 25 that gets the 25 percent.

1 THE COURT: That's an area for cross-examination.
 2 Overruled. The answer will stand.
 3 MR. SWIER: I'll clarify.
 4 BY MR. SWIER:
 5 Q. Native American Telecom receives 25 percent of the
 6 gross revenue. Correct?
 7 A. **Yes.**
 8 Q. *And the Crow Creek Sioux Tribe owns how much of Native*
 9 *American Telecom?*
 10 A. **51 percent.**
 11 Q. Thank you. Peter, now that you know about the
 12 financial situation and these agreements, again, as the
 13 *Treasurer for the Tribe, are you comfortable with the terms*
 14 *of that agreement?*
 15 A. **Yes.**
 16 Q. Do you want to keep that relationship you have between
 17 your partners, WideVoice and Native American Telecom
 18 *Enterprises?*
 19 A. **Yes.**
 20 Q. Is it a good deal for the Tribe?
 21 A. **I believe so.**
 22 MR. KNUDSON: Objection. Speculation.
 23 THE COURT: Overruled.
 24 BY MR. SWIER:
 25 Q. Is it a good deal for the Tribe?

1 A. **Yes.**
 2 Q. Do you want to keep your relationship that you have --
 3 do you want to keep NAT's relationship with
 4 FreeConferenceCall?
 5 A. **Yes.**
 6 Q. Why?
 7 A. **Well, if it wasn't for FreeConferenceCall, there**
 8 **really wouldn't be a NAT.**
 9 Q. Because --
 10 A. **Because of the world marketing they do, and they do**
 11 **all the work.**
 12 Q. So without FCC, zero percent of zero would be zero.
 13 Is that right?
 14 A. **Exactly.**
 15 Q. Peter, you touched on this previously back in October,
 16 but I want to have you update the Court on NAT's efforts on
 17 the Reservation.
 18 A. **Okay.**
 19 Q. *Share with the Court the benefits that NAT provides to*
 20 *your Tribal members.*
 21 A. **There's a number of different benefits. Because of**
 22 **the poverty there and the close to 90 percent unemployment,**
 23 **a lot of our people cannot provide a phone or pay for a**
 24 **phone. Because of NAT, you know, them services are**
 25 **available, also with the Internet.**

1 Q. Let's talk about that. Describe for the Judge the
 2 facility, the Internet facility that NAT has built on the
 3 Reservation.
 4 A. **Are you talking the Internet Library?**
 5 Q. Yes, the Internet Library, the Internet Cafe. They're
 6 interchangeable.
 7 A. **Yes.**
 8 Q. Talk about that. Describe that for us.
 9 A. **It's an office in a Tribal administration building**
 10 **that NAT refurbished. Provided probably -- I can't**
 11 **remember the exact number -- maybe seven or eight computers**
 12 **with a couple printers and monitors, seven or eight**
 13 **monitors. It's free to the public. Anybody can come in**
 14 **there and get access to the computer and do whatever they**
 15 **need to do in there. There's always somebody there.**
 16 **Sometimes there's people waiting in line to get on there.**
 17 Q. Before NAT built that Internet Library, did anything
 18 like that exist on the Reservation?
 19 A. **No.**
 20 Q. Did Sprint ever make efforts to put that type of
 21 infrastructure at the Reservation?
 22 MR. KNUDSON: Objection. Irrelevant.
 23 THE COURT: Sustained.
 24 BY MR. SWIER:
 25 Q. Are there any more physical structures that NAT has

1 built for the Tribe and its members?
 2 **A. Yes. There is a Learning Center there that was almost**
 3 **completely refurbished.**
 4 **Q.** What did it used to be, Peter? What did the shell of
 5 the building used to be?
 6 **A. It used to be the old ambulance building, and the**
 7 **ambulance moved out of there, and it became a regular**
 8 **storage facility.**
 9 **Q.** What has NAT taken with that old building and done
 10 with it?
 11 **A. They completely refurbished it, the outside and**
 12 **inside. They are turning it into a Learning Center where**
 13 **people can have access to online classes and get their GED**
 14 **through there. They can learn computer technical skills**
 15 **and a number of other things.**
 16 **Q.** Before NAT, were those opportunities ever available on
 17 the Reservation?
 18 **A. No.**
 19 **Q.** Peter, I want to talk about the Learning Center. Did
 20 the Learning Center -- was the Learning Center going to
 21 open a few months ago?
 22 **MR. KNUDSON:** Objection, Your Honor. This is all
 23 prior testimony now.
 24 **MR. SWIER:** Your Honor, if I may.
 25 **THE COURT:** Overruled. You may answer.

1 **Q.** Describe how the facilities provided by NAT have
 2 assisted your Tribal artisans.
 3 **A. Some of the people have been able to sell their**
 4 **artwork online there in various parts of the country and**
 5 **maybe around the world.**
 6 **Q.** Before NAT came, were those opportunities available to
 7 your tribal members?
 8 **A. Very few. Very few.**
 9 **Q.** This has made it much better for them?
 10 **A. Yes, a lot easier.**
 11 **Q.** Peter, talk about from an emergency communications
 12 perspective. How have NAT's efforts assisted the Tribe and
 13 its members with emergency services?
 14 **A. There's probably 115 installations of the free phone**
 15 **service and free Internet service. I'll give you one**
 16 **instance of how that helped here recently.**
 17 **Right now my Reservation is in the middle of a suicide**
 18 **epidemic. I got a call -- because of the recent suicide**
 19 **epidemic, myself and concerned community members of the**
 20 **Reservation there formed a Suicide Prevention Committee.**
 21 **About two weeks ago I got a call about 2:30 in the**
 22 **morning from a young gentleman who was contemplating**
 23 **suicide. He called me on one of those phones.**
 24 **Q.** On one of NAT's phones?
 25 **A. Yes. Before that I don't believe they were able to**

1 **A. From what I understand or what I remember, it was**
 2 **supposed to open in October, but since Sprint hasn't paid**
 3 **their bills, it's kind of in limbo right now.**
 4 **BY MR. SWIER:**
 5 **Q.** There's no money to pay to open?
 6 **A. No.**
 7 **Q.** Peter, I want to talk about NAT's efforts and how
 8 they've assisted with economic development on the
 9 Reservation. Can you explain that to the Court, please?
 10 **A. They are actually one of the employers of the**
 11 **Reservation. There aren't very many employers there as it**
 12 **is. But over the summer when they were doing installations**
 13 **of the free phone service, free Internet service, I think**
 14 **they employed a total of maybe 10 people for a couple**
 15 **months there in the summer. They were local enrolled**
 16 **members, with the instruction of Tom Reiman and his son,**
 17 **who was training our people on how to install these. I**
 18 **think currently there is a total of four employees that**
 19 **help oversee the Internet Library.**
 20 **Q.** Before NAT made these efforts on the Reservation, had
 21 that ever happened before?
 22 **A. No.**
 23 **Q.** Peter, I know you are proud of your people being very
 24 good artisans. Correct?
 25 **A. Yes.**

1 **afford a phone. I got up and got out of bed and rushed**
 2 **over there and prayed with him and talked with him. Pretty**
 3 **much talked him out of doing what he was trying to do.**
 4 **Q.** You were successful?
 5 **A. Yes. But then there's some of our people, you know,**
 6 **they are able to call the ambulance service, the police**
 7 **station, and any other emergency facility there on the**
 8 **Reservation.**
 9 **Q.** Before NAT, were those type of services available to
 10 your members?
 11 **A. Very few.**
 12 **Q.** When you say "very few," why is that?
 13 **A. Because of the poverty there. It's hard to pay the**
 14 **phone bills or pay any bills, as a matter of fact.**
 15 **Q.** Because of the poverty on the Reservation, it would be
 16 extremely difficult for most of your members to pay a
 17 standard Verizon cell phone fee?
 18 **A. Yes.**
 19 **Q.** Would it be difficult, if not impossible, for your
 20 members to afford a Sprint cell phone package?
 21 **A. Yes.**
 22 **MR. KNUDSON:** Objection. Foundation.
 23 **THE COURT:** Overruled.
 24 **A. Yes.**
 25 **BY MR. SWIER:**

1 Q. Would it be difficult for your members to afford
 2 really any type of commercial cell phone package?
 3 A. Yes.
 4 Q. So what role does NAT then, to fill that gap, what
 5 role do they play?
 6 A. **In a lot of instances they play a big role, because**
 7 **it's a free phone service.**
 8 Q. And that's subsidized by NAT?
 9 A. Yes.
 10 Q. As Treasurer of the Council and a Board member of NAT,
 11 do you think that's a reasonable expenditure of funds?
 12 A. Yes.
 13 Q. Peter, you indicated the makeup of NAT's Board is the
 14 Tribe as majority owner and two privately held companies,
 15 WideVoice and Native American Telecom Enterprise. Is that
 16 right?
 17 A. Yes.
 18 Q. Before NAT, describe for the Court the level of Tribal
 19 and private entity partnerships that occurred on the
 20 Reservation.

21 MR. KNUDSON: *Objection. This is definitely from*
 22 *prior testimony. Cumulative.*
 23 THE COURT: Overruled. You may answer.
 24 A. **I only know of one. That has to be the only grocery**
 25 **store there on the Reservation, between the Tribe and the**

1 available on the Reservation?
 2 A. Yes.
 3 Q. But, again, why can't that be used by the majority of
 4 members?
 5 A. **Because of the high unemployment rate.**
 6 Q. Can people afford to pay for that commercial service?
 7 A. **Most of them, no. I'm not aware of any, anyway.**
 8 Q. Do you know which commercial companies provide cell
 9 coverage on the Reservation?
 10 A. **I believe Alltel is the biggest one, Verizon, and**
 11 **maybe a little bit of AT&T.**
 12 Q. Peter, are you aware of what are called Universal
 13 Service Funds or USF?
 14 A. Yes.
 15 Q. Generally are you aware of those?
 16 A. **That's pretty much a government handout.**
 17 Q. It's a subsidy from the government?
 18 A. Yes.
 19 Q. Let me ask you this: If the Tribe can receive
 20 subsidies for some of these services, why don't you?
 21 A. **Because we want to make our own way. We're tired of**
 22 **handouts. Like I said in the last hearing, we're tired of**
 23 **standing there in front of the government with our hand**
 24 **out, begging for everything we need. We want to stand on**
 25 **our own two feet. We want financial freedom. We basically**

1 private entity.
 2 BY MR. SWIER:
 3 Q. Since NAT came on the Reservation, have there been any
 4 other opportunities like that that have arisen?
 5 A. No.
 6 Q. Peter, I think you said this before, but how many
 7 high-speed broadband and telephone installations has NAT
 8 installed on the Reservation?
 9 A. **I believe right around 115.**
 10 Q. Before NAT, were any of those broadband installations
 11 and telephone installations available?
 12 A. No.
 13 Q. Did Tribal members receive any type of free
 14 telecommunication services before NAT?
 15 A. No.
 16 Q. Who covers the cost of those services, Peter?
 17 A. **What do you mean?**
 18 Q. Who subsidizes these services for your Tribal members?
 19 A. **The NAT services?**
 20 Q. Yes.
 21 A. **Native American Telecom.**
 22 Q. Were any of those services you've described ever
 23 provided by anyone previously?
 24 A. No.
 25 Q. Peter, other than NAT, is there cell phone coverage

1 want to make our own way.
 2 Traditionally our people were highly adaptable,
 3 extremely resourceful, and extremely hard working. There's
 4 a movement across Indian Country to get back to that.
 5 Q. So if you had a choice between receiving a government
 6 handout and running a private business, what would the
 7 Tribe choose?
 8 A. **We'd run a private business.**
 9 Q. Peter, what's the general consensus of your members
 10 regarding NAT and its efforts?
 11 A. **They are all very happy they're present there, and**
 12 **very fortunate to get the services that NAT provides.**
 13 MR. SWIER: May I approach, Your Honor?
 14 THE COURT: You may.
 15 BY MR. SWIER:
 16 Q. Peter, I'm going to show you what has been marked
 17 Defendant's Exhibit 29. Do you see that?
 18 A. Yes.
 19 Q. I'll put that up on the screen for you. Peter, you
 20 talked earlier, just touched on it, about employment
 21 opportunities for your members through NAT. Is that
 22 correct?
 23 A. Yes.
 24 Q. And what is Exhibit 29? Can you read what it says at
 25 the top of Exhibit 29?

157

1 **A. "Jobs created by NAT."**
 2 **Q.** Let's look at that Exhibit 29 a moment. Tell me if
 3 I'm reading this wrong. In February of 2010 it looks like
 4 NAT employed approximately two full-time employees. Is
 5 that right?
 6 **A. Yes.**
 7 **Q.** In March of 2010 it looks like about three.
 8 **A. Yes.**
 9 **Q.** Same in April, same in May. Correct?
 10 **A. Yes.**
 11 **Q.** In June it looks like we have four full-time
 12 employees. Is that right?
 13 **A. Yes.**
 14 **Q.** In July we have 10. Correct?
 15 **A. Yes.**
 16 **Q.** August, we have nine. September, it looks like we
 17 have eight. October, seven. Then as it gets colder in the
 18 winter, probably the construction jobs decrease. Is that
 19 right?
 20 **A. Yes.**
 21 **Q.** And it's your understanding that as of February 11 of
 22 2011, just a week or two ago, how many full-time employees
 23 does NAT provide on the Reservation?
 24 **A. Four.**
 25 **Q.** In terms of a private employer on the Reservation, is

158

1 anybody bigger than NAT?
 2 **A. Other than the grocery store there and a gas station**
 3 **there that is owned by a Tribal member, no.**
 4 **Q.** Any privately-held company, other than that one, do
 5 you have any other employment on the Reservation?
 6 **A. No.**
 7 **Q.** So anywhere from two to ten private jobs. Is that a
 8 big deal on the Crow Creek Reservation?
 9 **A. It's huge.**
 10 **Q.** There was a comment made earlier during Mr. Cestero's
 11 testimony that it looked like your members were paid
 12 approximately \$1,900 in payroll last month. Do you
 13 remember that?
 14 **A. Yes.**
 15 **Q.** I think we figured those jobs come out to about \$10 an
 16 hour. Do you remember that?
 17 **A. I think so, yes.**
 18 **Q.** Is a private job that pays your members \$10 an hour a
 19 big deal on the Reservation?
 20 **A. Yes, it is.**
 21 **Q.** Are those jobs available through anyone other than
 22 NAT?
 23 **A. No, not at \$10 an hour.**
 24 **Q.** Peter, I know you are going to get asked this
 25 question, so I'm just going to ask it. You talked about

159

1 the economic development impact on the Reservation. Has
 2 the Tribe or NAT hired a third-party consultant to do any
 3 type of formal economic analysis of NAT?
 4 **A. No.**
 5 **Q.** Why?
 6 **A. Can't afford it.**
 7 **Q.** As the Treasurer of the Tribe, can you see the
 8 economic advantages that NAT has provided?
 9 **A. Yes.**
 10 **Q.** Any doubt?
 11 **A. No.**
 12 **Q.** It's not coming from anywhere else?
 13 **A. No.**
 14 **Q.** Peter, you talked earlier about that the Learning
 15 Center was hopefully going to open in October of 2010.
 16 Correct?
 17 **A. Yes.**
 18 **Q.** You said it didn't open. Is that right?
 19 **A. Right.**
 20 **Q.** Do you know how many full-time jobs the Learning
 21 Center would have provided for your members?
 22 **MR. KNUDSON:** Objection. Foundation.
 23 **THE COURT:** Overruled. You may answer.
 24 **A. If I remember right, six to eight.**
 25 **BY MR. SWIER:**

160

1 **Q.** Is that full-time?
 2 **A. Yes.**
 3 **Q.** Peter, what would be the impact on your Reservation
 4 for an additional six to eight full-time privately-paid
 5 jobs?
 6 **A. That would be a huge impact.**
 7 **Q.** Has NAT done everything they told you they were going
 8 to do so far with infrastructure and buildouts and
 9 investment?
 10 **A. Yes.**
 11 **Q.** Is NAT a big deal on the Reservation?
 12 **A. Yes, it is.**
 13 **Q.** Based on the current economic conditions, is NAT
 14 irreplaceable on the Reservation?
 15 **A. Yes.**
 16 **MR. SWIER:** I don't have any further questions.
 17 Thank you.
 18 **THE COURT:** Mr. Knudson?
 19 **MR. KNUDSON:** Thank you, Your Honor.
 20 **CROSS-EXAMINATION**
 21 **BY MR. KNUDSON:**
 22 **Q.** Mr. Lengkeek, pleasure to see you again. We met
 23 yesterday. Do you recall?
 24 **A. Yes, sir.**
 25 **Q.** During that meeting, I took your deposition. Do you

1 remember that?
 2 **A. Yes.**
 3 **Q.** In that deposition you were sworn to tell the truth.
 4 Isn't that right?
 5 **A. Yes.**
 6 **Q.** You were sworn today to tell the truth.
 7 **A. Yes, sir.**
 8 **Q.** I believe you testified in response to Mr. Swier's
 9 questions that NAT is based on the Reservation. Is that
 10 your testimony?
 11 **A. Excuse me?**
 12 **Q.** I believe you testified that you understood that NAT
 13 is based on the Reservation. Correct?
 14 **A. Yes.**
 15 **Q.** Do you understand, from listening to the prior
 16 testimony of Carlos Cestero, the financial records are kept
 17 in Long Beach, California?
 18 **A. Yes.**
 19 **Q.** And Tom Reiman, who is one of the founders of NAT,
 20 lives in Sioux Falls. Correct?
 21 **A. Yes.**
 22 **Q.** And Mr. Gene DeJordy, another one of the founders,
 23 lives out of state, as well. Correct?
 24 **A. Yes, sir.**
 25 **Q.** Now, do you know who the Native American Telecom

1 Enterprise members are on the Board of NAT?
 2 **A. I believe Tom Reiman and Gene DeJordy.**
 3 **Q.** They are entitled to three, aren't they? Native
 4 American Telecom Enterprise is entitled to three members?
 5 **A. Yes.**
 6 **Q.** Who is the third member for Native American Telecom
 7 Enterprise?
 8 **A. I believe Native American Telecom Enterprise is**
 9 **Tom Reiman and Gene DeJordy. Native American Telecom, LLC,**
 10 **is myself, Eric Big Eagle, and Shannon Shields.**
 11 **Q.** Doesn't the Joint Venture Agreement bringing the
 12 Tribe, Enterprise, and WideVoice together call for a Board
 13 of nine members?
 14 **A. Yes.**
 15 **Q.** So DeJordy and Reiman are entitled to another member
 16 on the Board. Are they not?
 17 **A. To tell you the truth, I believe I've only seen their**
 18 **names on there for Enterprise.**
 19 **Q.** Now, you were asked a little bit how comfortable you
 20 are with Jeff Holoubek running NAT today. Right?
 21 **A. Yes.**
 22 **Q.** Now, isn't it true, when I took your deposition, that
 23 you didn't recognize Mr. Holoubek when you saw him?
 24 **A. No. That's the first time I met him face to face**
 25 **yesterday.**

1 **Q.** You only talked to him on the phone?
 2 **A. Yes, sir.**
 3 **Q.** So I believe you also testified yesterday, with
 4 respect to the Learning Center that Mr. Swier just
 5 inquired, that you, in fact, have never seen the building.
 6 Have you?
 7 **A. I've seen the outside of it. I haven't walked up and**
 8 **looked on the inside.**
 9 **Q.** Didn't you testify you hadn't been inside the Learning
 10 Center?
 11 **A. Yes, that's what I just said. I haven't been inside**
 12 **of it.**
 13 **Q.** So since you've become a Board member of NAT, you've
 14 never gone inside the Learning Center?
 15 **A. No. It hasn't been opened yet.**
 16 **Q.** You haven't gone inside to see the status of the
 17 construction. Have you?
 18 **A. No.**
 19 **Q.** Before you became a Board member, I think you
 20 testified the other two Board members of NAT from the Tribe
 21 also joined on in November of 2010?
 22 **A. Yes.**
 23 **Q.** Before that, who were the Tribal members on the Board
 24 of NAT?
 25 **A. I don't know who was on before that.**

1 **Q.** You don't know who you replaced?
 2 **A. No.**
 3 **Q.** I think you testified that Midstate Communications
 4 provides services to the Crow Creek Reservation. Correct?
 5 **A. Yes, sir.**
 6 **Q.** That's a traditional land line?
 7 **A. Yes, sir.**
 8 **Q.** In fact, I believe you testified they provide kind of
 9 a lifeline service to the Reservation?
 10 **A. Yes.**
 11 **Q.** They can get services as low as five dollars a month?
 12 **A. For the elders with disabilities or sicknesses.**
 13 **Q.** And also people who are in poverty, as well?
 14 **A. That's not my understanding of it.**
 15 **Q.** When I asked you about Universal Service Funding
 16 yesterday, you testified you never heard of the term
 17 before. Isn't that true?
 18 **A. True.**
 19 **Q.** So, likewise, since you hadn't heard of it before, no
 20 one at NAT had ever recommended that Tribal members apply
 21 for Universal Service Funding. Correct?
 22 **A. Say that again.**
 23 **Q.** Well, since you hadn't heard of Universal Service
 24 Funding before, is it also fair to say you never heard
 25 anyone from NAT recommend that Tribal members apply for

1 Universal Service Funding support?
 2 **A. Yes.**
 3 **Q.** And are you aware you can get subsidized telephone
 4 service through Universal Service Funding from Verizon
 5 Wireless?
 6 **A. I wasn't aware of that.**
 7 **Q.** Do you know how much it costs to purchase services
 8 from Sprint?
 9 **A. No.**
 10 **Q.** Do you know how much it would cost to purchase
 11 services from AT&T for cell phone service on the
 12 Reservation?
 13 **A. No.**
 14 **Q.** Now, I believe you testified there are four people
 15 working full-time at the Internet Cafe?
 16 **A. Yes.**
 17 **Q.** The hours of operation are from 8:00 to 5:00?
 18 **A. Yes.**
 19 **Q.** Monday through Friday?
 20 **A. Yes.**
 21 **Q.** So it's open approximately 40 hours a week. Is that
 22 correct?
 23 **A. Yes.**
 24 **Q.** All four people that work for NAT are there at the
 25 same time?

1 **A. Yes.**
 2 **BY MR. KNUDSON:**
 3 **Q.** So you are quite dependent on what the Free Conference
 4 Corporation people tell you about the state of affairs of
 5 NAT. Isn't that true?
 6 **A. Yes.**
 7 **Q.** Now, you testified that about 10 people are seeking to
 8 sell their art or craftwork on the Internet today?
 9 **A. About that, yes. I don't know the exact number.**
 10 **That's from what I was told.**
 11 **Q.** So you only heard that secondhand then?
 12 **A. Yes.**
 13 **Q.** You haven't independently tried to verify that number?
 14 **A. No.**
 15 **Q.** Of these people you heard were selling their arts and
 16 crafts on the Internet today, didn't some of them sell
 17 their arts and crafts before NAT arrived?
 18 **A. Just there locally. You don't receive the good prices**
 19 **on the artwork selling locally versus selling state-wide,**
 20 **country-wide, or even internationally.**
 21 **Q.** Have you ever looked into, you personally, have you
 22 ever tried to measure how much these artists' sales have
 23 increased since NAT arrived?
 24 **A. No.**
 25 **Q.** Before NAT arrived, was there Internet on the

1 **A. No.**
 2 **Q.** At least four members. How many hours per month do
 3 they work for NAT?
 4 **A. I have no idea. I don't involve myself with the**
 5 **day-to-day workings of the Internet Library.**
 6 **Q.** You're a member of the Board of NAT, and you never
 7 inquired as to how many hours each one of these Tribal
 8 members works for NAT?
 9 **A. No. Like I said earlier, I wear many, many hats**
 10 **there. I just can't concentrate on NAT's day-to-day**
 11 **workings on a daily and all-day basis.**
 12 **Q.** What are your other duties on the Reservation that
 13 keep you so busy?
 14 **A. Tribal leader. That entails everything from**
 15 **safeguarding the funds, looking for economic stimulus,**
 16 **economic progress. Just generally trying to make the**
 17 **Reservation a better place.**
 18 **Q.** Would it be fair to say you devote the majority of
 19 your time towards Tribal affairs versus those of NAT?
 20 **A. Yes.**
 21 **Q.** Would you say the same is true for the other Tribal
 22 members or Board members of NAT?
 23 **MR. SWIER:** Objection. Speculation.
 24 **THE COURT:** Overruled. You may answer, if you
 25 know.

1 Reservation?
 2 **A. Yes.**
 3 **Q.** Who provided that service?
 4 **A. Midstate.**
 5 **Q.** Anyone else?
 6 **A. No. Just Midstate, I believe.**
 7 **Q.** Do you know if Midstate provided broadband services?
 8 **A. I guess I don't -- I don't think it was broadband. I**
 9 **think it was the old type, you know, the -- I can't even**
 10 **think of the name of what they used to call it. I think**
 11 **now it's the DSL.**
 12 **Q.** So they had DSL service on the Reservation before NAT?
 13 **A. On the northern part of the Reservation.**
 14 **Q.** And that was provided by Midstate?
 15 **A. No, that was provided by --**
 16 **Q.** Another carrier?
 17 **A. No, I don't. Not right offhand.**
 18 **Q.** It was another carrier, though, obviously.
 19 **A. Not all across the Reservation. Just on a certain**
 20 **part of the Reservation that's closer to the capital in**
 21 **Pierre.**
 22 **Q.** Now, tell me what you understand Free Conferencing
 23 Corporation to do.
 24 **A. They are basically out there marketing for us.**
 25 **Q.** What do they market?

1 **A. Native American Telecom.**
 2 **Q.** What kind of service does Free Conference Corporation
 3 provide?
 4 **A. What kind of service?**
 5 **Q.** Yes.
 6 **MR. SWIER:** Asked and answered, Your Honor. He
 7 answered they provide marketing service.
 8 **THE COURT:** Overruled. You can answer.
 9 **A. They provide marketing service for Native American**
 10 **Telecom.**
 11 **BY MR. KNUDSON:**
 12 **Q.** Have you ever heard they might be offering a
 13 conference bridge service to people outside the
 14 Reservation?
 15 **A. Yes. I've heard something like that.**
 16 **Q.** Well, could you pick up what's been marked as
 17 Plaintiff's Exhibit A?
 18 **MR. KNUDSON:** May I approach?
 19 **THE COURT:** You may.
 20 **BY MR. KNUDSON:**
 21 **Q.** Mr. Lengkeek, I can help you to move this along. Here
 22 is the exhibit. I'll ask you to turn your attention to the
 23 very last page of it, Page 83.
 24 **A. Yes, sir.**
 25 **Q.** Can you see Page 83, sir?

1 Corporation was taking in 75 percent of the revenues of
 2 NAT?
 3 **A. Yes.**
 4 **Q.** Isn't it also true that the Tribe has not received any
 5 money from NAT?
 6 **MR. SWIER:** Objection, Your Honor. That's a
 7 misstatement of the facts. We've already talked about the
 8 infrastructure investment that's been made on the
 9 Reservation through NAT.
 10 **THE COURT:** Overruled. You may answer.
 11 **A. What was the question?**
 12 **BY MR. KNUDSON:**
 13 **Q.** Isn't it true the Tribe has received no money from
 14 NAT?
 15 **A. No actual dollar bills. But we have received the**
 16 **refurbishing of a building for the Learning Center. We**
 17 **have received the Internet Library.**
 18 **Q.** My question to you was, isn't it true the Tribe has
 19 received no money from NAT. Isn't that correct?
 20 **A. Yes.**
 21 **Q.** Isn't it also the case that the Tribal Utility
 22 Authority didn't have any members on the Board until
 23 September of 2010?
 24 **A. If I remember right, the Tribal Utility Authority was**
 25 **put in place years ago, 1997, and from my understanding,**

1 **A. Yes.**
 2 **Q.** Do you see the income that NAT has recorded on its
 3 Profit and Loss Statement for 2010?
 4 **A. Yes.**
 5 **Q.** It's \$1,148,000 and change. Correct?
 6 **A. Yes.**
 7 **Q.** Isn't it true you didn't know until yesterday that NAT
 8 reported that much income for 2010?
 9 **A. Yes.**
 10 **Q.** So until yesterday, you hadn't heard that information,
 11 and today is the first time you've seen this Profit and
 12 Loss Statement. Isn't that true?
 13 **A. Yes.**
 14 **Q.** In fact, you only recently learned that Free
 15 Conference Corporation received 75 percent of the gross
 16 revenues of NAT. Isn't that true?
 17 **A. Yes.**
 18 **Q.** You were told that when, sir?
 19 **A. I received a lot of the financial documents probably**
 20 **two weeks ago, and the rest of the Board members have all**
 21 **received them, but because I'm so busy, I haven't been able**
 22 **to take in on most of the conference calls and conference**
 23 **meetings that goes on with the Board. I would probably**
 24 **have to say a couple weeks ago.**
 25 **Q.** Only two weeks ago you learned Free Conference

1 **when this was first brought to the prior Council, probably**
 2 **18 to 20 months ago, there were members placed on there.**
 3 **Then when the new Council took over, which I am a part of,**
 4 **we appointed four members to that Utilities Council.**
 5 **Q.** Isn't it true September 9, 2010, a Tribal Council
 6 adopted a Resolution appointing four members to the Tribal
 7 Utility Authority Board?
 8 **A. Yes.**
 9 **Q.** And there were no Board members before that action.
 10 Isn't that true?
 11 **A. I don't even know their names.**
 12 **Q.** My question to you is, were there really any Board
 13 members on the Board of the Tribal Utility Authority before
 14 this Resolution was adopted September 9, 2010?
 15 **A. To my understanding, there was, but I don't know who**
 16 **they were. It don't seem right to have a Board with no**
 17 **members.**
 18 **MR. KNUDSON:** No further questions, Your Honor.
 19 **THE COURT:** Thank you. Mr. Swier?
 20 **REDIRECT EXAMINATION**
 21 **BY MR. SWIER:**
 22 **Q.** Peter, Mr. Knudson asked you a series of questions.
 23 I'm going to take them in the order he gave them to you.
 24 He indicated, of course, the books, the financial books of
 25 NAT, those are kept for you in Long Beach, California.

1 Aren't they?
 2 **A. Yes.**
 3 **Q.** Who keeps those books for you?
 4 **A. WideVoice.**
 5 **Q.** Who, in particular?
 6 **A. Mr. Cestero.**
 7 **Q.** Peter, are you okay, as a Board member, with the bean
 8 counting of NAT being done with experienced accountants in
 9 Long Beach?
 10 **A. Yes.**
 11 **Q.** Do you think that's unreasonable?
 12 **A. No.**
 13 **Q.** Peter, how were you chosen to be on the Board again of
 14 NAT?
 15 **A. I volunteered for it, and at the same time I was**
 16 **appointed by the rest of the Council members.**
 17 **Q.** You indicated that you had some predecessors who
 18 served on the Board of NAT before you. Is that right?
 19 **A. Yes.**
 20 **Q.** Peter, Mr. Knudson also asked you about Universal
 21 Service Funds or USF handouts. Explain to the Court again
 22 why you don't want to accept those government handouts.
 23 **MR. KNUDSON:** Objection. Cumulative.
 24 **THE COURT:** Sustained.
 25 **BY MR. SWIER:**

1 **Q.** Describe for the Court what Sprint has ever done on
 2 the Crow Creek Reservation.
 3 **MR. KNUDSON:** Objection. Irrelevant.
 4 **THE COURT:** Overruled. You may answer.
 5 **A. Nothing.**
 6 **BY MR. SWIER:**
 7 **Q.** What has AT&T ever done on your Reservation?
 8 **A. Nothing.**
 9 **Q.** What has Verizon ever done on your Reservation?
 10 **A. Nothing.**
 11 **Q.** What has Alltel ever done on your Reservation?
 12 **A. Nothing.**
 13 **Q.** What has NAT done on your Reservation?
 14 **A. They've provided jobs. They provided phone access,**
 15 **Internet access, access to emergency services, and**
 16 **hopefully if Sprint and the other carriers pay their bills,**
 17 **they will provide revenue.**
 18 **Q.** Peter, are you comfortable with your business partners
 19 with NAT?
 20 **A. Yes.**
 21 **Q.** Peter, are you a smart guy?
 22 **A. I like to think so.**
 23 **Q.** Are you stupid?
 24 **A. Well, not all the time.**
 25 **Q.** Depends if I ask your wife? Okay. Peter, can

1 **Q.** Mr. Knudson also asked you about Sprint and their
 2 services or some of the other big carriers' services on the
 3 Reservation. Is that right?
 4 **A. Yes.**
 5 **Q.** What do those big carriers do to market their services
 6 to the members of your Tribe?
 7 **A. I haven't seen any of them there doing anything.**
 8 **Q.** Why do you think that is?
 9 **MR. KNUDSON:** Objection. Speculation.
 10 **THE COURT:** Overruled. You may answer, if you
 11 know.
 12 **A. I would say because there's no opportunity there, or**
 13 **very little opportunity for customers and for people to pay**
 14 **their bills.**
 15 **BY MR. SWIER:**
 16 **Q.** In other words, it doesn't help the carriers, bottom
 17 line. Is that right?
 18 **MR. KNUDSON:** Objection. Foundation.
 19 **THE COURT:** Sustained as leading.
 20 **BY MR. SWIER:**
 21 **Q.** Based on the poverty rate of your people, do you think
 22 Sprint can make any money out on the Reservation?
 23 **MR. KNUDSON:** Objection. Leading. Foundation.
 24 **THE COURT:** Sustained as leading.
 25 **BY MR. SWIER:**

1 somebody from outside the Reservation come and take you by
 2 the hand and simply lead you to wherever in the galaxy you
 3 want to go?
 4 **MR. KNUDSON:** Objection. Argumentative.
 5 Speculation.
 6 **THE COURT:** Sustained.
 7 **BY MR. SWIER:**
 8 **Q.** Peter, can out-of-Reservation companies come in and
 9 pull the wool over your eyes regarding a business venture?
 10 **MR. KNUDSON:** Same objection.
 11 **THE COURT:** Sustained.
 12 **BY MR. SWIER:**
 13 **Q.** What are your thoughts of how you, as a Board member,
 14 and your fellow Tribal Board members, handle your duties
 15 for NAT?
 16 **MR. KNUDSON:** Objection as to foundation as to
 17 the other members.
 18 **THE COURT:** Sustained as to the other members.
 19 But he can go ahead and answer regarding himself.
 20 **A. Can you repeat that?**
 21 **MR. SWIER:** Jill, can you read that back, please?
 22 (The requested portion of the record was read by the
 23 reporter.)
 24 **A. What are my thoughts on how we handle the duties of**
 25 **NAT?**

1 **BY MR. SWIER:**
 2 **Q.** Are you engaged?
 3 **A. Yes.**
 4 **Q.** Are you engaged, to the best of your ability, based on
 5 the other numerous duties you told Mr. Knudson you do?
 6 **A. As much as I can, yes.**
 7 **Q.** Do you believe your fellow Board members are of that
 8 same thing?
 9 **MR. KNUDSON:** Objection. Same. Foundation.
 10 **THE COURT:** Sustained.
 11 **BY MR. SWIER:**
 12 **Q.** Peter, do you have monthly Board of Director meetings
 13 for NAT?
 14 **A. In the past it was monthly. But here recently, they**
 15 **are starting to meet weekly.**
 16 **Q.** Is it your understanding that your predecessors on the
 17 Board during the meetings received financials?
 18 **A. Yes.**
 19 **Q.** So the financials have been provided to your Board
 20 members since pretty much when NAT became a telephone
 21 provider. Is that fair?
 22 **MR. KNUDSON:** Objection. Leading.
 23 **THE COURT:** Sustained as leading.
 24 **BY MR. SWIER:**
 25 **Q.** To the best of your knowledge, have your previous

1 **A. Yes, sir, very hard.**
 2 **Q.** When you work, when you provide a service to someone,
 3 do you expect to be paid?
 4 **A. Yes.**
 5 **Q.** Is NAT providing a service to Sprint?
 6 **A. Yes.**
 7 **Q.** Is NAT being paid for the service it provides Sprint?
 8 **A. No.**
 9 **Q.** Do you feel Sprint should pay for the service that NAT
 10 provides?
 11 **A. Why not? Everybody in this room, they provide a**
 12 **service. They expect to get paid. You are supposed to pay**
 13 **your bills.**
 14 **Q.** Has Sprint paid its bills?
 15 **A. No.**
 16 **MR. SWIER:** No further questions.
 17 **THE COURT:** Mr. Knudson?
 18 **REXCROSS-EXAMINATION**
 19 **BY MR. KNUDSON:**
 20 **Q.** Didn't you just testify that Alltel has done nothing
 21 on your Reservation?
 22 **A. Yes.**
 23 **Q.** You have an Alltel cell phone, don't you?
 24 **A. Yes.**
 25 **Q.** It works on the Reservation, doesn't it?

1 Board members been kept apprised of the financials of NAT?
 2 **A. To the best of my knowledge, yes.**
 3 **Q.** So we have monthly Board calls, conference calls, that
 4 have now turned into weekly calls. Right?
 5 **A. Yes.**
 6 **Q.** Are you comfortable with those weekly calls?
 7 **A. Yes.**
 8 **Q.** Do you think that's a good thing?
 9 **A. Yes.**
 10 **Q.** Do you and your Board members make every effort to
 11 attend those Board meetings?
 12 **A. Yes.**
 13 **Q.** Peter, Mr. Knudson asked you, "Why hasn't the Tribe
 14 received any money?" Explain to the Court why the Tribe
 15 hasn't received any money.
 16 **A. Well, it's a new business starting out, and all new**
 17 **businesses incur a lot of costs. In the beginning -- I**
 18 **just learned there was money coming in, a little over a**
 19 **million dollars. Most of that was paid back to the people**
 20 **and the organizations that put up the money.**
 21 **I would have to say when we were close to getting**
 22 **payments from that or receiving revenues from that is about**
 23 **the time when Sprint and the other providers quit paying**
 24 **their bills.**
 25 **Q.** Peter, you work. Right?

1 **A. Yes.**
 2 **Q.** You understand Verizon offers cell phone service on
 3 the Reservation?
 4 **A. Yes.**
 5 **Q.** In fact, it's an eligible telecommunications carrier,
 6 and it provides subsidized cell phone service on the
 7 Reservation?
 8 **A. Who does?**
 9 **Q.** Verizon. Do you know that?
 10 **A. No. Alltel is the one there with the best coverage,**
 11 **but we have to travel over an hour away to the Alltel**
 12 **office.**
 13 **Q.** Now, you said the money that went into NAT went to the
 14 people who put the money in. Is that right?
 15 **A. As far as I understand.**
 16 **Q.** How much money has Free Conferencing Corporation put
 17 into NAT?
 18 **A. I don't know right off the top of my head.**
 19 **Q.** Are you aware that Sprint paid its last invoice of
 20 NAT's in February of 2010?
 21 **A. Yes. I was just made aware of that.**
 22 **Q.** That happened before you became a member of the Board
 23 of NAT. Isn't that true?
 24 **A. That was February of 2010, yes.**
 25 **Q.** Have you gone back to look at the financial records of

181

1 NAT since you joined the Board of NAT?

2 **A. No.**

3 **Q. Are there any financial records on the Reservation**

4 **pertaining to NAT that you could go look at?**

5 **A. Yes.**

6 **Q. Where are they?**

7 **A. In my office.**

8 **Q. You never looked at them, though?**

9 **A. Yes, I've skimmed through them.**

10 **Q. Have you skimmed through the records before you became**

11 **a Board member?**

12 **A. No.**

13 **Q. So you don't know the financial history of NAT prior**

14 **to becoming a Board member. Do you?**

15 **A. No.**

16 **Q. Since becoming a Board member, all you've done is skim**

17 **those records. Is that correct?**

18 **A. Yes.**

19 MR. KNUDSON: No further questions.

20 THE COURT: Mr. Swier?

21 MR. SWIER: No further questions. Thank you.

22 THE COURT: You may be excused then. Thank you.

23 (Witness excused)

24 THE COURT: Mr. Swier, you may call your next

25 witness.

182

1 MR. SWIER: Thank you, Your Honor. We would have

2 no further witnesses at this time.

3 THE COURT: Mr. Knudson?

4 MR. KNUDSON: We have one. We'll call Amy

5 Clouser.

6 AMY CLOUSER,

7 called as a witness, being first duly sworn, testified as

8 follows:

9 DIRECT EXAMINATION

10 BY MR. KNUDSON:

11 **Q. Good afternoon, Miss Clouser. If you would be so kind**

12 **to tell the Court and courtroom your name and how you spell**

13 **it.**

14 **A. My name is Amy Clouser. A-M-Y C-L-O-U-S-E-R.**

15 **Q. Miss Clouser, tell me about your employment experience**

16 **at Sprint.**

17 **A. I started at Sprint in March of 1998 with Sprint**

18 **Publishing and Advertising.**

19 **Q. Is that the Yellow Pages?**

20 **A. Yes.**

21 **Q. Then what did you do?**

22 **A. I worked in the Billing and Collections Department.**

23 **Q. Then where did you go?**

24 **A. In March 2001 I applied for and was offered a position**

25 **with Access Verification as an Access Auditor II.**

183

1 **Q. What are your duties as an Access Verification**

2 **Analyst?**

3 **A. I audit and process invoices for Sprint Long Distance.**

4 **Q. Those invoices come from whom?**

5 **A. It comes from various telephone companies.**

6 **Q. Would that include the invoices that were sent by CABS**

7 **Agent on behalf of NAT?**

8 **A. Yes.**

9 **Q. You are familiar that there is a dispute here between**

10 **Sprint and NAT over the payment of certain invoices. Is**

11 **that right?**

12 **A. Yes.**

13 **Q. When did the dispute with NAT arise?**

14 **A. In February 2010.**

15 **Q. What happened?**

16 **A. At that time we received an invoice with significant**

17 **charges that we reviewed and found that it was for toll**

18 **fraud minutes of use.**

19 MR. SWIER: I'll object, Your Honor, and ask that

20 be stricken, the fraud comment. That's obviously a

21 mischaracterization.

22 THE COURT: Overruled. The answer will stand.

23 MR. KNUDSON: Thank you, Your Honor.

24 BY MR. KNUDSON:

25 **Q. Prior to that invoice, had Sprint paid invoices sent**

184

1 on behalf of NAT?

2 **A. Yes. We paid two invoices.**

3 **Q. When was that?**

4 **A. For the December 2009 and January 2010 invoices.**

5 **Q. Do you recall how much the December 2009 invoice was?**

6 **A. It was for \$18,544.26.**

7 **Q. Then the January invoice, ma'am?**

8 **A. It was \$10,911.96.**

9 **Q. How did Sprint pay those invoices?**

10 **A. They were paid by check to CABS Agent.**

11 **Q. After you did your audit for the third invoice, what**

12 **was the decision made regarding that invoice?**

13 **A. The decision was made to dispute the charges.**

14 **Q. What does that mean?**

15 **A. That we determined access pumping, and that the**

16 **charges were invalid.**

17 **Q. When you dispute them, what do you do?**

18 **A. We submitted a Dispute Detail Report to the billing**

19 **party.**

20 **Q. Who is that?**

21 **A. CABS Agent.**

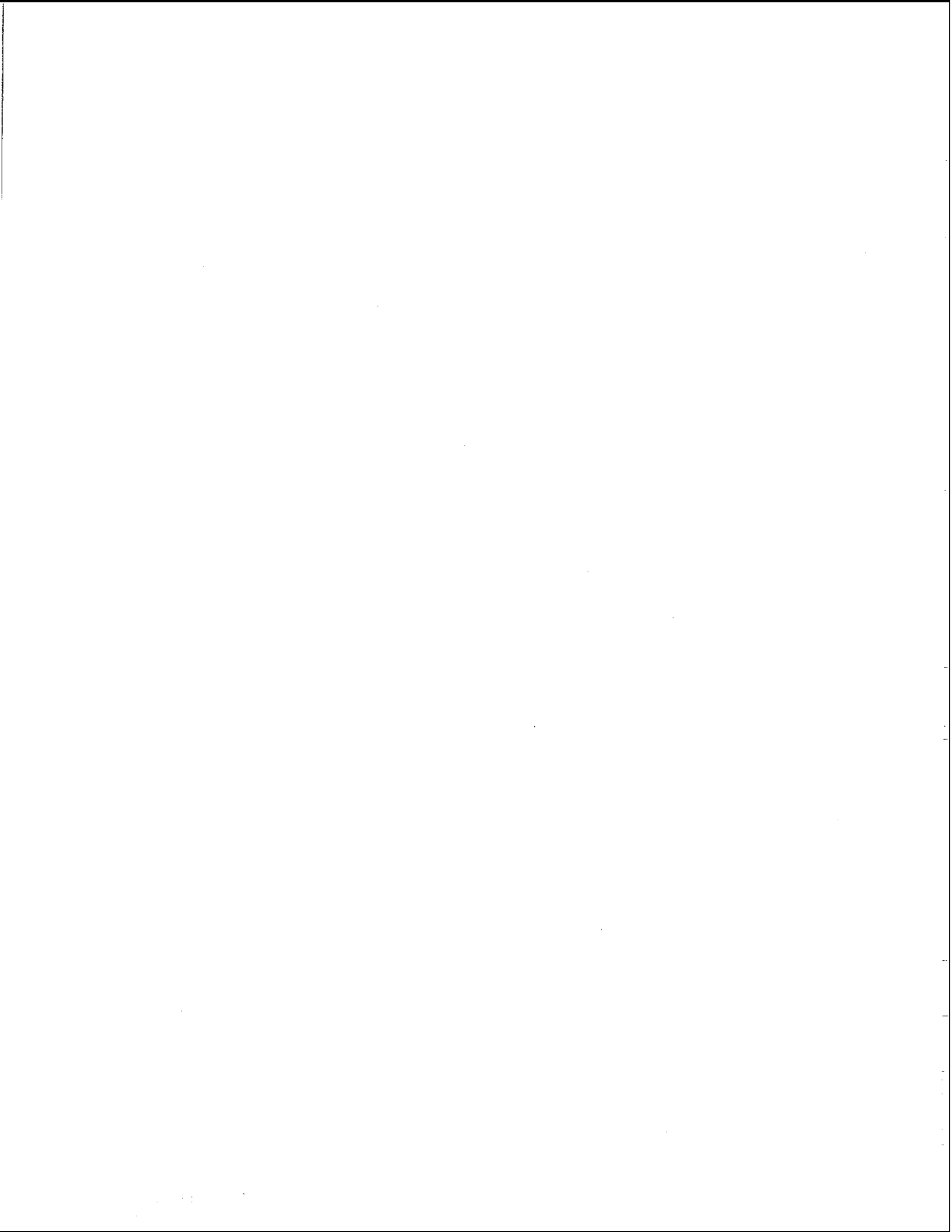
22 **Q. Did you do anything about the first two invoices that**

23 **you paid?**

24 **A. Yes. We disputed those invoices in arrears, and**

25 **submitted Dispute Detail Reports for those charges, as**

185	187
<p>1 well.</p> <p>2 Q. Did you request a refund?</p> <p>3 A. Yes.</p> <p>4 Q. Has that refund request been granted?</p> <p>5 A. No.</p> <p>6 Q. You've looked at -- have you performed what would be a</p> <p>7 minutes of usage analysis of NAT's traffic to Sprint?</p> <p>8 A. Yes.</p> <p>9 MR. KNUDSON: If I may approach, Your Honor.</p> <p>10 THE COURT: You may.</p> <p>11 BY MR. KNUDSON:</p> <p>12 Q. Miss Clouser, I'm handing you what's been marked as</p> <p>13 Plaintiff's Exhibit F. Take a moment to look at that,</p> <p>14 please. Can you identify that exhibit?</p> <p>15 A. Yes.</p> <p>16 Q. What is it?</p> <p>17 A. This is from an Excel spreadsheet that I created from</p> <p>18 Call Detail Records.</p> <p>19 Q. Is there a database you examined to prepare this</p> <p>20 report?</p> <p>21 A. Yes. We have a database called Sonar, in which we can</p> <p>22 run ad hoc reports for Call Detail Records.</p> <p>23 Q. What's inside the Sonar database?</p> <p>24 A. The Sonar database contains call detail information,</p> <p>25 as recorded by Sprint switches.</p>	<p>1 Q. Let's go to the top line. "Terminating OCN 424F."</p> <p>2 What is that?</p> <p>3 A. OCN is Operating Carrier Number. 424F is NAT's as</p> <p>4 assigned by NECA.</p> <p>5 Q. By whom?</p> <p>6 A. National Exchange Carrier Association.</p> <p>7 Q. What does the next line, "Type FGD," mean?</p> <p>8 A. FGD signifies long distance.</p> <p>9 Q. Then we have a "Start Date." What is that?</p> <p>10 A. That's the date range for the calls.</p> <p>11 Q. So these are calls from December 1 through December</p> <p>12 31, 2010?</p> <p>13 A. Correct.</p> <p>14 Q. Then there's a listing, "Conference MOU." Can you say</p> <p>15 what "MOU" stands for?</p> <p>16 A. Minutes of use.</p> <p>17 Q. What does the number represent?</p> <p>18 A. The number represents the minutes of use I attributed</p> <p>19 to conference lines.</p> <p>20 Q. Does this report show the total number minutes of use</p> <p>21 to the 477 exchange for December of 2010?</p> <p>22 A. Yes. At the very bottom there's a sum of the total</p> <p>23 minutes of use.</p> <p>24 Q. What were the total minutes of use reported?</p> <p>25 A. 922,691.</p>
186	188
<p>1 Q. Is that the database for all calls going through</p> <p>2 Sprint's equipment?</p> <p>3 A. Yes.</p> <p>4 Q. So it has the Call Detail Records for all calls made</p> <p>5 on Sprint's switches?</p> <p>6 A. Yes.</p> <p>7 Q. Is this database checked for accuracy?</p> <p>8 A. Yes, it is.</p> <p>9 Q. What steps are taken to secure the database from --</p> <p>10 the data stored in that database from loss or alteration?</p> <p>11 A. We have quality controls in place with Sprint</p> <p>12 technicians and outside vendors to ensure the accuracy of</p> <p>13 the data, and also to make sure it's secure from loss of</p> <p>14 data per Sprint retention policies.</p> <p>15 Q. So this database became the basis for preparing</p> <p>16 Exhibit F?</p> <p>17 A. Yes.</p> <p>18 MR. KNUDSON: I would offer Exhibit F.</p> <p>19 MR. SWIER: No objection.</p> <p>20 THE COURT: F is received.</p> <p>21 BY MR. KNUDSON:</p> <p>22 Q. Tell us what Exhibit F represents, Miss Clouser.</p> <p>23 A. It represents the dialed telephone numbers.</p> <p>24 Q. Should I just walk through this?</p> <p>25 A. Sure.</p>	<p>1 Q. Of that, minutes of use attributed to conference were</p> <p>2 how much?</p> <p>3 A. 922,146.</p> <p>4 Q. What percentage of the total did that represent?</p> <p>5 A. 99.94 percent.</p> <p>6 Q. How did you determine it was 99.94 percent to</p> <p>7 conference calls?</p> <p>8 A. I called the top telephone numbers to determine the</p> <p>9 conference numbers. I also did Internet searches to see if</p> <p>10 there was any marketing or advertising for the conference</p> <p>11 phone numbers.</p> <p>12 Q. Based on that investigation, you concluded what?</p> <p>13 A. That the top six phone numbers were for conference</p> <p>14 phone numbers. Those are what make up the 99.94 percent.</p> <p>15 Q. Did you determine that any were associated with</p> <p>16 FreeConference.com?</p> <p>17 A. Yes.</p> <p>18 Q. You performed other traffic analyses of NAT's exchange</p> <p>19 previously. Haven't you?</p> <p>20 A. Yes.</p> <p>21 Q. Is the results of Exhibit F consistent with what</p> <p>22 you've seen before?</p> <p>23 A. Yes.</p> <p>24 Q. Is Exhibit A up there? If you would, Amy, take a look</p> <p>25 at Plaintiff's Exhibit A, and look at the first page. Do</p>



1 access charges for over a year. Have you?
 2 **A. We have not remitted payment for any additional**
 3 **invoices after that date.**
 4 **Q.** You have not paid NAT for over a year. Have you?
 5 **A. Correct.**
 6 **Q.** You bill your customers every month, is that right,
 7 Sprint's customers?
 8 MR. KNUDSON: Outside the scope of direct.
 9 Objection.
 10 THE COURT: Overruled. You can answer.
 11 BY MR. SWIER:
 12 **Q.** Does Sprint bill its customers on a monthly basis, for
 13 the most part?
 14 **A. I don't work in the Sprint billing department. I'm**
 15 **unsure how all the policies work.**
 16 **Q.** You do know, based on your experience, I would
 17 presume, that Sprint still charges their customers access
 18 fees. Don't they?
 19 **A. Yes.**
 20 **Q.** In fact, the access fees that your customers have paid
 21 to you are the access fees generated by NAT's services.
 22 Aren't they?
 23 MR. KNUDSON: Objection. Foundation.
 24 THE COURT: Overruled. You may answer, if you
 25 know.

1 **A. I don't know for certain.**
 2 **BY MR. SWIER:**
 3 **Q.** Miss Clouser, does Sprint bill their customers for
 4 access fees, and then refuse to pay the local exchange
 5 carriers those fees?
 6 **A. I don't know how the billing works.**
 7 **Q.** In fact, what Sprint does is they bill their customers
 8 for those access fees, they refuse to pay the local
 9 exchange carriers, and Sprint puts that money in their
 10 pocket to make a profit. Don't they?
 11 MR. KNUDSON: Objection. Foundation. Outside
 12 the scope of direct.
 13 THE COURT: Overruled. You may answer.
 14 **A. We're not refusing to pay. We're disputing invalid**
 15 **charges.**
 16 **BY MR. SWIER:**
 17 **Q.** Miss Clouser, Sprint collects the access fees from
 18 their customers. Correct?
 19 **A. Correct.**
 20 **Q.** Sprint refuses to pay the access fees to the companies.
 21 that provide those services. Don't they?
 22 **A. Sprint is --**
 23 **Q.** Do they refuse to pay --
 24 MR. KNUDSON: Objection. He's arguing with the
 25 witness.

1 THE COURT: Overruled. You may go ahead and
 2 answer.
 3 BY MR. SWIER:
 4 **Q.** Sprint then does not pay those access fees to local
 5 exchange carriers, if they're disputed. Right?
 6 **A. The charges are in dispute and are not being paid.**
 7 MR. SWIER: Your Honor, I have been patient with
 8 three questions, and I haven't gotten an answer.
 9 THE COURT: I think she answered that time.
 10 BY MR. SWIER:
 11 **Q.** So let me get this straight. Sprint bills their
 12 customers. They collect the access fees. They refuse to
 13 give the access fees to the companies that provide the
 14 services. You keep the access fees and make a profit. Is
 15 that right? Is that right?
 16 **A. No.**
 17 **Q.** Where does the money go?
 18 **A. Those minutes of use are not subject to access.**
 19 **Q.** Do you charge your customers for those access fees?
 20 **A. I don't know the charges involved.**
 21 **Q.** You charge them for those fees and keep them. Don't
 22 you?
 23 **A. I do not know that.**
 24 MR. KNUDSON: Objection. Asked and answered.
 25 THE COURT: Overruled. The answer will stand.

1 BY MR. SWIER:
 2 **Q.** Have you ever looked at Sprint's filings with the
 3 National Securities and Exchange Commission?
 4 **A. No.**
 5 **Q.** You are well aware, though, in working for Sprint for
 6 the years you have, Sprint is a multi-billion dollar
 7 company. Isn't it?
 8 **A. Yes.**
 9 **Q.** In fact, Sprint is one of the largest companies,
 10 telecommunications companies in the world, isn't it, in
 11 terms of revenue?
 12 **A. I don't know that for certain.**
 13 **Q.** You guys do really well. Don't you?
 14 MR. KNUDSON: Objection. Outside the scope of
 15 direct.
 16 THE COURT: Sustained.
 17 BY MR. SWIER:
 18 **Q.** Miss Clouser, while you were a Financial Auditor and
 19 an Analyst, you obviously counted money coming in for
 20 customers who paid Sprint for services. Right?
 21 **A. No.**
 22 **Q.** Ever run a business before?
 23 **A. No.**
 24 **Q.** Do you have a business degree?
 25 **A. No.**

1 Q. What's your background in being familiar with finances
2 of a business? Do you have any background in that?

3 A. No.

4 Q. Let me ask you this: Do you have any children?

5 MR. KNUDSON: Objection. Outside the scope of
6 direct.

7 THE COURT: Sustained.

8 BY MR. SWIER:

9 Q. Did you ever run a lemonade stand when you were a kid?

10 A. Actually, no.

11 MR. KNUDSON: Objection.

12 THE COURT: The objection is overruled. The
13 answer will stand.

14 BY MR. SWIER:

15 Q. Let's say I ran a lemonade stand, and you came to me
16 and I gave you lemonade, and I charged you five cents for
17 that lemonade. Okay?

18 A. Okay.

19 Q. You took my lemonade and drank it. You drank it all
20 empty. No more lemonade left. I said, "Ms. Clouser, I'm
21 glad you enjoyed my lemonade. Now please pay me my five
22 cents for the lemonade."

23 MR. KNUDSON: Objection. Argumentative.

24 Speculation. Outside the scope of direct.

25 THE COURT: Overruled.

1 that you drank all my lemonade, and you tell me that
2 lemonade is only worth a penny? Is that fair that you get
3 to tell me how much my lemonade is worth?

4 MR. KNUDSON: Objection. Argumentative.

5 THE COURT: Sustained.

6 BY MR. SWIER:

7 Q. If I came and bought lemonade from you and drank your
8 lemonade, would you expect me to pay you?

9 A. It depends.

10 Q. Well, would you give me your lemonade, if you are in a
11 for-profit business --

12 THE COURT: Mr. Swier, you've really made your
13 point.

14 MR. SWIER: I don't think I have any questions
15 left, Your Honor. Thank you.

16 THE COURT: Mr. Knudson, anything further?

17 MR. SWIER: Oh, I'm sorry, can I ask one more
18 question?

19 THE COURT: Sure.

20 BY MR. SWIER:

21 Q. Miss Clouser, are you familiar with what an FCC tariff
22 is?

23 A. Yes.

24 Q. Are you aware that on November 30 of 2010 the FCC
25 approved Native American Telecom's new tariff?

1 BY MR. SWIER:

2 Q. If you take my product and you use it and you drink
3 it, and you don't pay me, do I get to stay in business very
4 long?

5 A. I'm not sure.

6 Q. Does Sprint provide services?

7 A. Yes.

8 Q. Does Sprint get paid for their services?

9 A. Yes.

10 Q. Is Sprint making a profit on their services?

11 A. I don't know.

12 Q. But you do work, and you get paid. Right?

13 A. Yes.

14 Q. So if I give you lemonade, and you drink it, then
15 isn't it fair that I get my five cents for what I provided
16 you?

17 A. If we were in agreement with the lemonade, yes.

18 Q. Wouldn't you pay me for the lemonade? You'd pay me
19 for the lemonade, wouldn't you?

20 MR. KNUDSON: Objection. Asked and answered.

21 THE COURT: Overruled. You may answer.

22 A. If we were in agreement that the lemonade was worth
23 five cents, I would pay you for that lemonade.

24 BY MR. SWIER:

25 Q. Well, who gets to determine that? What if you tell me

1 MR. KNUDSON: Objection. Calls for a legal
2 conclusion.

3 THE COURT: Overruled. You may answer.

4 A. Yes.

5 MR. SWIER: May I approach, Your Honor?

6 THE COURT: You may.

7 BY MR. SWIER:

8 Q. I'm showing you what's been marked as Defendant's
9 Exhibit 30. Have you ever seen that document before?

10 MR. KNUDSON: Objection. I have not seen this
11 document either.

12 (Mr. Swier handed Mr. Knudson a document)

13 MR. KNUDSON: Well, and he's throwing it at me.
14 Your Honor, this conduct is unprofessional. An admonition,
15 please.

16 THE COURT: Let's just all act like adults.

17 Mr. Swier, you may continue.

18 MR. SWIER: Thank you.

19 BY MR. SWIER:

20 Q. Are you familiar with that access tariff?

21 A. No, I have not seen this before.

22 Q. Are those the type of tariffs that Sprint looks at
23 when they decide to pay access fees?

24 A. Yes.

25 Q. So those are standard in the industry?

201

1 **A. Yes.**
 2 **Q.** Are you familiar with that, with the term "high-volume
 3 access tariff"?
 4 **A. Not really familiar, no.**
 5 **Q.** Are you familiar with the high-volume access tariff in
 6 that particular exhibit?
 7 **A. No, because I was not aware of this tariff.**
 8 **Q.** But you still had instructions not to pay NAT for
 9 their services. Correct?
 10 **A. Correct.**
 11 MR. SWIER: Your Honor, I offer Exhibit 30,
 12 please.
 13 THE COURT: Any objection?
 14 MR. KNUDSON: Seeings it's a public record, no
 15 objection.
 16 THE COURT: Exhibit 30 is received.
 17 MR. SWIER: Thank you. Your Honor, I also have a
 18 question. I don't think I offered Exhibit 29 with
 19 Mr. Lengkeek. Could I offer that exhibit at this time?
 20 That's the one that shows the jobs.
 21 THE COURT: Any objection to Exhibit 29?
 22 MR. KNUDSON: No objection.
 23 THE COURT: 29 is received.
 24 MR. SWIER: Thank you. I have no further
 25 questions.

202

1 THE COURT: Mr. Knudson? Anything further?
 2 MR. KNUDSON: Nothing further.
 3 THE COURT: You can be excused then. Thank you.
 4 (Witness excused)
 5 THE COURT: You may call your next witness.
 6 MR. KNUDSON: We have no further witnesses. I
 7 would only advise the Court of the Affidavit of Randy D.
 8 Farrar which we filed in October, responding to some
 9 allegations that Mr. Swier was insinuating when he had
 10 Mr. Reiman on the stand, as well, and addressed directly
 11 what he was attempting to elicit in his cross-examination.
 12 THE COURT: Do you know the docket number on that
 13 Affidavit?
 14 MR. KNUDSON: Yes, I do. Your Honor, it's Docket
 15 61-3.
 16 THE COURT: Any objection to the Court
 17 considering that, Mr. Swier?
 18 MR. SWIER: No, Your Honor. In addition to that,
 19 I believe the Court could also take judicial notice of all
 20 the exhibits provided by both parties on both preliminary
 21 injunction motions. I believe those are already in the
 22 record, and I would just ask the Court to take notice of
 23 those.
 24 THE COURT: I will. It helps if you can point
 25 out specifically which ones you want me to give closer

203

1 attention to, if there are any.
 2 MR. SWIER: Your Honor, I think just as a whole,
 3 we would ask the Court to take notice of those. In
 4 particular, the high-volume access tariff that I believe
 5 was marked as Exhibit 30. That's also been made a part of
 6 our docket filings here.
 7 I also believe the FCC's new Notice of Proposed
 8 Rulemaking has also been filed with the Court.
 9 THE COURT: It has. All right. Let's take a
 10 15-minute break, and come back and do argument.
 11 MR. SWIER: That's fine.
 12 MR. KNUDSON: I'm all for taking a break, Your
 13 Honor. I am also mindful of the time. I believe
 14 Mr. Lengkeek went much longer than was represented on
 15 direct. I'd like to be able to leave today. Can we at
 16 least break by 5:00?
 17 THE COURT: Yes. We'll take a 15-minute break.
 18 But then, Mr. Swier, how much time are you going to use for
 19 your first part of your argument?
 20 MR. SWIER: Twenty minutes tops.
 21 THE COURT: Okay. Then 20 minutes for you? That
 22 should get us out by 4:00 then. We'll give Mr. Swier a 5-
 23 or 10-minute rebuttal. We'll be in recess.
 24 (Recess at 2:48 until 3:05)
 25 THE COURT: Mr. Swier?

204

1 MR. SWIER: Thank you, Your Honor. Your Honor,
 2 may it please the Court and counsel.
 3 We've heard a lot of facts today about this matter.
 4 This really comes down to a very technical and very
 5 important legal issue.
 6 Native American Telecom has requested two items in
 7 Their Preliminary Injunction Motion. First, that all back
 8 payments, via the switched access service fees, be paid to
 9 Native American Telecom for the services that NAT provided
 10 under their tariff.
 11 The second item we're asking under our Preliminary
 12 Injunction is that Sprint be enjoined from withholding any
 13 current or future switched access payments under NAT's new
 14 high-volume access tariff that went into play November 30
 15 of 2010.
 16 So, Your Honor, this case, of course we have to
 17 examine the Dataphase factors. The first prong of the
 18 Dataphase factor --
 19 THE COURT: Actually before that, don't we need
 20 to determine if the Court can even give injunctive relief?
 21 MR. SWIER: Yes, Your Honor. If you would like
 22 me to address that first.
 23 THE COURT: I would.
 24 MR. SWIER: I know in its Brief, Sprint has cited
 25 two primary cases saying the Court can't grant injunctive

205

1 relief, because this is a damages or money request. The
 2 first case that's relied on by Sprint is the United States
 3 Supreme Court case, in Grupo Mexicano, I think is how it's
 4 pronounced. Here is why this case is easily
 5 distinguishable from Grupo Mexicano.
 6 Number one. The Grupo case was a creditor preference
 7 case. We're not dealing with a creditor preference here.
 8 Number two, the movant in that case, the movant for
 9 the injunctive relief, was looking for a Restraining Order
 10 that precluded an asset transfer because of the creditor
 11 preference they thought was going on. So that case sought
 12 a freezing of assets. There were no arguments in that case
 13 regarding anything similar to the Dataphase factors.
 14 THE COURT: A freezing of assets in that case
 15 would have left the parties at the status quo, so that by
 16 the time a judgment was entered, money would be available,
 17 if, in fact, the Plaintiff won.
 18 The relief you are requesting here is even more than
 19 freezing the status quo. You are asking for an affirmative
 20 change in the position of the parties to affirmatively
 21 order Sprint to pay before a judgment is entered on the
 22 merits of the case.
 23 So isn't the relief you are requesting even greater
 24 than what was requested in Grupo?
 25 MR. SWIER: I think in this case, as in Grupo,

206

1 the issue was the status quo, and in this case the status
 2 quo cannot be maintained without payment being made to NAT.
 3 Because if payment is not made to NAT, then NAT, as the
 4 testimony indicated, is likely to either file bankruptcy or
 5 likely to go out of business.
 6 THE COURT: But in Grupo, the issue of whether
 7 the money was owed or not was not even really contested,
 8 unlike here there is a question that Sprint has raised as
 9 to whether they even owe the money. They're not admitting
 10 they owe the money. In Grupo that wasn't even a question.
 11 The Supreme Court found that entering a preliminary
 12 injunction was beyond the Court's power.
 13 MR. SWIER: Your Honor, of course we have cited,
 14 in our favor, the NewLife vs. Express Scripts case. That's
 15 a 2007 --
 16 THE COURT: From a District Court.
 17 MR. SWIER: -- from a District Court in
 18 Pennsylvania.
 19 THE COURT: That's not binding on this Court.
 20 MR. SWIER: Correct. It's simply used as a
 21 factually analogous case. In the NewLife case --
 22 THE COURT: They didn't even discuss Grupo.
 23 MR. SWIER: They didn't discuss Grupo. That
 24 wasn't brought up. But the fact is that Grupo --
 25 THE COURT: So you think that's binding on me

207

1 when they don't even discuss Grupo?
 2 MR. SWIER: I think possibly, with the facts in
 3 that case, in order to maintain the status quo, which in
 4 that case it's the same here. NewLife was just going to go
 5 out of business if they did not receive their payment.
 6 THE COURT: I understand the facts of that case.
 7 Let's go back to Grupo for a minute.
 8 One of the things that Grupo made clear was that the
 9 Court has to look at whether the relief you're requesting
 10 is something that traditionally the Court could grant.
 11 I look at your Counterclaim. First, you have a claim
 12 for breach of contract, which is basically a damages claim.
 13 Wouldn't you agree on a breach of contract claim, the
 14 Court historically has not used equitable powers?
 15 MR. SWIER: I think to a certain point that's
 16 right, Your Honor. However, when you look at the
 17 circumstances in this case, plus in our Answer we did
 18 allege various equitable defenses. We alleged unclean
 19 hands. We alleged other equitable affirmative defenses.
 20 THE COURT: But do you think that if you have a
 21 claim at law, like breach of contract, that an equitable
 22 defense then is a defense to a legal claim?
 23 MR. SWIER: I think in this case, Your Honor,
 24 equity is meant to maintain the status quo. I understand
 25 where the Court is going. So this means that if you are

208

1 going to read Grupo in that way, that any company can
 2 simply cut off the oxygen of any other company, and that's
 3 entirely permissible. I don't think Grupo is intended to
 4 be read that broadly. I think it was very fact specific.
 5 So I think with the claims that are brought, when you
 6 look at maintaining the status quo, the only way we can
 7 maintain the status quo here is for NAT to receive payment.
 8 There's no other way.
 9 As the other cases have indicated, if we receive
 10 payment four, five, six months down the line, that doesn't
 11 do NAT any good. They are either going to close their
 12 doors, or they're going to file bankruptcy. We have
 13 provided the concrete evidence for the Court to make that
 14 determination. So I think that --
 15 THE COURT: How is the remedy you are seeking
 16 anything different than like prejudgment attachment?
 17 MR. SWIER: Your Honor, in most circumstances, of
 18 course, prejudgment attachment is not proper. But, again,
 19 when you look at the facts here, equity is intended to not
 20 let this type of thing happen. It's within the Court's
 21 discretion, I believe, even with Grupo, because I think
 22 that's a limited decision. I think even with Grupo, this
 23 Court still has the ability under the affirmative defenses
 24 and under the damages claim to maintain the status quo.
 25 If these payments are not made for one or two or three

209

1 months until this case comes to a final resolution, the
 2 status quo is gone, because you have a company that's
 3 surviving and still has their doors open, which no longer
 4 will. I think that's very clear.
 5 So I think that Grupo can be distinguished, because
 6 we're dealing with an entirely different factual situation.
 7 The Court's equitable powers would allow this to be done.
 8 The Court, of course, can also impose under Rule 65 a bond.
 9 The fact is if these payments are not made --
 10 THE COURT: If I impose a bond under Rule 65,
 11 generally it has to be in an amount so that the party can
 12 be made whole that I've ruled against. So if I rule
 13 against Sprint here and order them to pay, and let's say
 14 the amount I order them to pay is the \$500,000 mentioned
 15 earlier today, you would have to post a bond in that
 16 amount, plus the interest that would accrue during the time
 17 period this case was pending on appeal.
 18 How does your client have the wherewithal to pay that
 19 bond?
 20 MR. SWIER: What we would do, Your Honor, what's
 21 done in most of these cases. We would have to find a
 22 bonding company who would be willing to have us put up
 23 whatever percentage of the bond they would require to do
 24 that. I think the financial wherewithal is probably such
 25 that we could post potentially a 10 percent bond with a

210

1 bonding company.
 2 THE COURT: One of the representations made is
 3 that your client is on the verge of bankruptcy. I know
 4 from getting bonds for clients of mine in the past, that
 5 you have to have the wherewithal to pay back the amount in
 6 the event the bonding company pays the bond. So I don't
 7 know how your client would be able to, since you
 8 represented they are on the verge of bankruptcy, would be
 9 able to come up with the collateral that would be necessary
 10 for the bonding company.
 11 MR. SWIER: Your Honor, I think that's a decision
 12 they would have to make. The fact of the matter is that
 13 with the bond, I still think that would be a commercial
 14 decision. If we could get a bonding company who could
 15 require whatever amount they could require, and NAT could
 16 at least come up with a 10 percent bond, that would at
 17 least allow them for the next couple months to keep their
 18 doors open and to keep providing the services that need to
 19 be provided.
 20 The Court also has the discretion to say, simply based
 21 on the party's financial status, after a factual finding,
 22 you can find that they can't afford a bond. Therefore,
 23 based on your factual findings, you don't think a bond is
 24 appropriate in this case. You could do that. That's
 25 within your power to do that.

211

1 Again, this company is in such dire circumstances.
 2 We're dealing with a company that has \$6,000 in the bank
 3 against a company that is a multi-billion dollar company.
 4 THE COURT: Mr. Swier, going back to the merits
 5 of whether the Court even has the power to do this. I
 6 looked at the claims you have.
 7 First, you have the breach of contract. Then you have
 8 breach of an implied contract. Both of those are just
 9 seeking standard damages or a standard collection action.
 10 The third claim you have seeks relief based on a
 11 theory of quantum meruit, which would be an equitable
 12 claim.
 13 The question I have is in a similar case to yours,
 14 back in June of 2009, Sancom vs. Qwest, this Court
 15 dismissed the quantum meruit claim, finding that it was
 16 barred by the filed rate doctrine.
 17 So is there any reason why I would do anything
 18 different here with regard to that equitable claim you do
 19 have?
 20 MR. SWIER: I think there would be, Your Honor.
 21 There was a new case that came down just a few weeks ago.
 22 It was the All American case from the FCC. In that case
 23 the FCC found in that case that you could not bring claims
 24 under the Federal Communications Act, I believe it was
 25 Section 201 and 203, if found that, indeed, these type of

212

1 switched access service litigations, you could not bring
 2 those type of claims under the Federal Communications Act.
 3 What the case said is you have to bring a normal
 4 common law action, which could be breach of contract, which
 5 could be implied contract. Which in this case, after that
 6 new decision, means I can now bring an unjust enrichment or
 7 quantum meruit equitable claim. I think that All American
 8 case changed the entire landscape of the cause of action
 9 that need to be brought validly in these switched access
 10 cases.
 11 THE COURT: So let's say you have a valid quantum
 12 meruit claim. How would I determine the dollar amount that
 13 would be paid? Quantum meruit assumes there's no contract
 14 between the parties. There's no contract. There's no
 15 implied contract. The Court just has to determine what the
 16 value of the services was.
 17 So how could I fashion a remedy ordering Sprint to pay
 18 a reasonable amount at this point in the litigation?
 19 MR. SWIER: I think you can do it in one of two
 20 ways. Number one, it's in the record that Sprint owes from
 21 the very first tariff up to today almost \$600,000.
 22 THE COURT: But that's based on the tariff rate.
 23 MR. SWIER: It is, but --
 24 THE COURT: The quantum meruit assumes the tariff
 25 rate is not valid.

1 MR. SWIER: But I think, Your Honor, what you can
 2 do is you can use that tariff rate as a benchmark, and say
 3 for a short period of time for this preliminary injunction,
 4 that is the amount that I will use as a benchmark, because
 5 the FCC hasn't struck down -- in fact, the FCC said the
 6 tariffs are fine.

7 THE COURT: But wouldn't it be fair for the Court
 8 to assume that even you don't think that tariff rate is
 9 correct since you have now filed a new tariff?

10 MR. SWIER: No, I don't think at all. I think in
 11 that case what NAT has done is exactly what the FCC has
 12 said in their new NPRM. That NPRM, as you know, was an
 13 incredibly historic document, and it just happened to come
 14 out about less than a month ago.

15 What that document says specifically is that access
 16 stimulation, which is what they called it, access
 17 stimulation is both legal and compensable, which we've
 18 argued from the beginning. So I think that will be clear
 19 that this type of traffic is legal and compensable. That
 20 issue I think is off the table now.

21 Then what they said is, okay, if you were involved in
 22 access stimulation or conferencing service, like my clients
 23 are. We don't hide that. That's what we're involved in.
 24 We're with a free conferencing company. What you do is you
 25 don't just say they don't get paid.

1 What the FCC has said is that that is compensable
 2 traffic. How we're going to compensate for that traffic is
 3 to have a high-volume access tariff, which is exactly, just
 4 a couple months before the FCC's NPRM came out, is what we
 5 did. So we were actually a couple months ahead of the
 6 FCC's NPRM, which says as of right now, we think the
 7 high-volume access tariff is the way to go, which is
 8 exactly what we did. We were two steps ahead of the FCC.

9 So I think what the Court could do, if you look at the
 10 past tariffs before the high-volume was filed in November,
 11 you could say, "You know what? I think that amount is in
 12 dispute, and we need a little bit more clarification from
 13 the FCC."

14 But now, with the high-volume access tariff, we have
 15 done exactly what the FCC has said you need to do.

16 THE COURT: How does that affect -- if I applied
 17 that rate, what impact does it have on your damages?

18 MR. SWIER: It has an impact on the damages that
 19 I think, if the number Mr. Cestero said, was that if you
 20 take the money that Sprint owes from the time the
 21 high-volume access tariff was filed until as of right now,
 22 they owe NAT approximately \$120,000 under that high-volume
 23 access tariff. Let's just leave the other money to the
 24 side a minute. We can fight about that later.

25 But that high-volume access tariff, number one, Sprint

1 and all the large carriers fought like heck, as the record
 2 reflects, to try to get that high-volume access tariff
 3 deemed illegal. The issues were briefed voluminously by
 4 the parties.

5 The FCC said that is a lawful tariff, and we reject
 6 Sprint and Verizon and the other big companies' arguments
 7 that it's not. That tariff has been deemed lawful.

8 Then a month and a half later --

9 THE COURT: It wasn't really deemed lawful,
 10 though, was it? They decided that at that point it should
 11 not automatically be rejected.

12 MR. SWIER: But when you go through the 15-day
 13 notice process, like that tariff did, Your Honor, once that
 14 15-day notice period goes by, and the FCC does not reject
 15 the tariff, that is deemed lawful. That's in our Brief.
 16 Because in the NPRM, the FCC clarified what "deemed lawful"
 17 is. If you look at that "deemed lawful" language in the
 18 Brief, that is a deemed lawful tariff.

19 Now, the large companies can still sue us through the
 20 FCC process, and we'd go through the entire litigation
 21 there. But as of right now, that high-volume access tariff
 22 is deemed lawful.

23 The FCC now has says, "Yeah, that's how you should do
 24 it. If you're going to crank up the minutes, then the rate
 25 should come down." That's exactly what NAT did here.

1 So we think if you would take what is owed under the
 2 high-volume access tariff for the next couple months, and
 3 you would say, "Okay, Sprint, you owe \$120,000 to NAT." I
 4 mean it's clear under that tariff that that's a valid
 5 tariff. Then what you can do is you can say, "Okay, from
 6 this time until we have the ultimate trial on the merits,
 7 Sprint, you have to pay that money under the high-volume
 8 access tariff until we have a final resolution."

9 That allows the Court to provide the equitable relief
 10 to keep NAT open. It's easy to determine, because you are
 11 under a tariff that the FCC has deemed lawful. It sets out
 12 specifically what the rate of compensation would be based
 13 on the minutes. The higher the minutes go, the more the
 14 compensation comes down. It's to Sprint's advantage. If
 15 there's a bunch of access stimulation, the more minutes
 16 their customers use, the lower their rate they have to pay
 17 NAT goes.

18 So from a financial standpoint, it's an advantage for
 19 them, because they don't have to pay that higher rural
 20 tariff fee. Once you hit a certain number of minutes, it
 21 takes a big drop.

22 That's exactly what the FCC has said is the way to do
 23 this. That's why the timing of that document is so ironic.
 24 Not only did we file the tariff November 30, but then on
 25 February 9 the FCC says, "That's exactly what we think

1 we're going to do here to figure out this access
 2 stimulation problem."
 3 So I think, Your Honor, it's very easy. You take that
 4 high-volume access tariff rate. That's what you apply
 5 until the FCC comes out with their final rules here
 6 probably in the next three or four months, and it keeps
 7 NAT's doors open. It's the only way those doors will be
 8 kept open.

9 THE COURT: So the remedy you are seeking is one
 10 that's equitable in nature.

11 MR. SWIER: Yes.

12 THE COURT: One of the issues a Court would
 13 generally have to look at, before granting an equitable
 14 issue, is whether the party seeking relief has unclean,
 15 hands.

16 MR. SWIER: Yes.

17 THE COURT: One of the things I look at here is
 18 the fact that, as I indicated before, in June of 2009 I
 19 issued an opinion in Sancom vs. Qwest, and in that case the
 20 small telephone exchanges were suing the large telephone
 21 companies, because the large telephone companies were
 22 denying payment on the access charges. Same issue we have
 23 here. So there was already notice in June of 2009 that the
 24 big telephone companies were disputing and not paying those
 25 access charges.

1 NAT was set up after June of 2009, basically using the
 2 same model for billing. Now they are arguing they are in
 3 financial trouble, because the big telephone companies are
 4 refusing to pay those access charges.

5 I guess my question is, doesn't that put them on
 6 alert, the fact I already issued an opinion in June of 2009
 7 that was a published opinion, and I know there were 15 to
 8 20 of these cases going on in South Dakota at that same
 9 time period. So NAT was already on notice, before they
 10 even set up this business model, that the large telephone
 11 companies would dispute and may not pay these access
 12 charges.

13 So is it fair that NAT proceeds forward, knowing it
 14 may be disputed and they'll need deep financial pockets to
 15 survive this and fight this battle with the phone
 16 companies, and their argument for injunctive relief now is
 17 we may go bankrupt if we don't get injunctive relief. Do
 18 they really have clean hands?

19 MR. SWIER: I think they do, and here is why I
 20 think it's different. If you look, and I put a chart up
 21 that showed the switched access revenues' history.

22 If when NAT was formed in August of 2009, those
 23 switched access payments would have been zero across the
 24 board, then it's a different story. Then I think NAT is on
 25 notice that, "We don't agree with what you guys are doing,

1 and we won't pay you a dime."

2 But the fact is, when you look at these revenues, as
 3 soon as the access stimulation and conference calling
 4 started, NAT was getting paid by the carriers hundreds of
 5 thousands of dollars.

6 THE COURT: But that's the exact same evidence
 7 that was in those other cases. It was only when the
 8 revenues got above a certain point, that the large
 9 telephone companies identified that it was from this type
 10 of revenue generator. That was already in the opinion I
 11 issued earlier.

12 MR. SWIER: But in that case, Your Honor, the
 13 parties were not asking for immediate preliminary
 14 injunction. Sancom and those parties were not going to
 15 file bankruptcy. They weren't going to close their doors,
 16 because they had the financial wherewithal to withstand
 17 this.

18 THE COURT: But my point is, that information was
 19 already out in the public before NAT was even formed. So
 20 can NAT use that as a basis to get injunctive relief, the
 21 fact they didn't put together a business model that gave
 22 them the wherewithal as a start-up company to weather the
 23 large telephone companies disputing these charges?

24 MR. SWIER: I think in that case, though, when
 25 you look at the facts and the fact they were paid -- if we

1 looked at business models and said, "You cannot go into any
 2 type of business if there's any type of regulatory or
 3 litigation questions." Then we wouldn't have any
 4 businesses.

5 They have a business model that the FCC has now said,
 6 "That is compensable. It should have been compensable from
 7 the beginning."

8 If the FCC comes out and says, "You know what? This
 9 stuff, access stimulation, is not compensable." Then I
 10 have an extremely difficult, if not impossible, argument to
 11 make. But the fact is, as Sprint unilaterally just said,
 12 "We're not going to pay."

13 Now the FCC has come out and said, "No, it is
 14 compensable. We're going to have a high-volume access
 15 tariff. That's how it looks like we're going to do this."

16 That has been part of NAT's business model. The FCC I
 17 just think has shown, "Yeah, that is a valid model. If you
 18 are going to have a high-volume access tariff, if you're
 19 going to have access stimulation, this is how it should be
 20 compensated."

21 So I think when you look at unclean hands, the FCC has
 22 said, "You haven't done anything wrong. You've actually
 23 done exactly what we're saying. If you are going to have
 24 access stimulation, then the rate has to come down."

25 How can it be unclean hands if we've done what the FCC

1 is now saying is how you should do it? At least from the
2 time --

3 THE COURT: The part I'm concerned about is that
4 NAT should have been on notice that they needed to have a
5 substantial amount of money to invest into this business to
6 weather this time period where there was issues and doubt.

7 MR. SWIER: Your Honor, of course as the Court
8 knows, there are some companies who simply, for whatever
9 reason, can't raise that type of capital. They tried.
10 They got loans. They did what they could. The fact of the
11 matter is, it's been months and months and months. Even
12 after the FCC says, "Yeah, NAT, you're doing things right,"
13 we still don't get paid.

14 If we would get paid under the high-volume access
15 tariff until this case is concluded, we could survive and
16 we'd be fine, and the chips would fall where they may in
17 front of a jury. That's why all the traffic previously,
18 like I said, put that in a separate pot.

19 But all we're asking for is to recognize that what we
20 did with the high-volume access tariff was correct, and we
21 should be paid for that, because our hands are totally
22 clean, because we did everything right. NAT did what the
23 FCC said we were supposed to do. If we get those payments
24 from here until the end of the case, we're fine. We
25 definitely have clean hands at that point. We've done

1 Amendment case.
2 So the interest there, protecting the party who wants
3 the expressive conduct to keep on going, is perhaps
4 analyzed differently than if you've got a private dispute,
5 such as we have here. In any case, I think that language
6 in that opinion is not dispositive to the Court's decision
7 in Doran. It was looking to whether or not the First
8 Amendment would protect the bar owner who wanted to provide
9 this topless dancing or nude dancing. I don't think it's
10 controlling in any way in this case.

11 Certainly Grupo Mexicano, another Supreme Court case,
12 decided substantially later, and I think that sets the rule
13 that governs this particular dispute. I think the Court
14 was right on the mark with what the relief is being
15 requested by NAT with its Motion for a Preliminary
16 Injunction. It is seeking to obtain, through a preliminary
17 injunction, that which it might secure, if it prevails, at
18 the end of the day.

19 The Tekstar decision, which we cite in our Brief,
20 that's from Judge Erickson in the District of Minnesota,
21 was analogous in this respect. Again, it involved a
22 dispute between a traffic pumper and a long-distance
23 carrier. The case is being referred to the FCC.

24 Tekstar is moving for a bond to require the
25 long-distance carrier, I believe it was Qwest, to pay in to

1 exactly what we're supposed to do.

2 THE COURT: All right. I think we've used up
3 your time.

4 MR. SWIER: I didn't get to what I was going to,
5 but that's fine. Thank you.

6 THE COURT: Mr. Knudson?

7 MR. KNUDSON: Yes, Your Honor.

8 THE COURT: Mr. Knudson, why don't I start out
9 with my concern on your case. In the Supreme Court Opinion
10 of Doran vs. Salem Inn, Inc., the Supreme Court recognized
11 that if a party would suffer a substantial loss of
12 business, and perhaps even bankruptcy, that that may be
13 sufficient to show the harm they would experience, and that
14 preliminary injunction would be proper.

15 MR. KNUDSON: I don't think that was the issue in
16 front of the Court. What you are referring to, I would
17 regard as sort of a preparatory background on injunctive
18 relief, but not necessarily to the decision of the Court.
19 I submit what you saw in Doran, which was a case about nude
20 dancing and whether a city could ban it or under conditions
21 could restrict it, did not involve the precise issue as to
22 whether or not injunctive relief could issue to
23 circumstances like this, help parties resolve a private
24 dispute where no constitutional issues are at stake, which
25 is really what is going on in Doran. It's a First

1 the Court \$17 million, which is what Tekstar said would be
2 its damages during the pendency of the FCC referral.

3 Judge Erickson looked at Grupo Mexicano, and said
4 that's the same rule that pertains in Tekstar. It's
5 injunctive relief, prior to judgment, that's not supported
6 by Grupo Mexicano. In fact, it's precluded by the Court's
7 decision in that case.

8 THE COURT: But in Grupo the Court recognized the
9 difference between equitable relief and relief at law.

10 In this case NAT does have the request for relief
11 under quantum meruit, which would be an equitable claim.
12 Why, if they have an equitable claim, wouldn't the Court be
13 able to grant the preliminary injunction?

14 MR. KNUDSON: Well, I think it's because the
15 nature of the relief requested under quantum meruit is a
16 proxy for remedy at law. It's a situation where the Court
17 stepped in to try to help out the party who failed to
18 perfect the creation of a legal contract, and it provided
19 something of value. The measure of damages again is in
20 money. Therefore, the quantum meruit claim, even if it
21 sounds in equity, is not the basis for granting preliminary
22 injunctive relief, awarding money damages before judgment.

23 Quantum meruit also presupposes that there was value
24 provided, and of course Sprint is contesting there was any
25 value provided here. That it's being billed for

1 terminating access charges that are not permitted under the
2 Federal Communications Act, and, therefore, there is no
3 value by which you measure.

4 I hear that you use the benchmark of a tariff. The
5 tariff they are purporting to charge is, per se,
6 unreasonable. The rates, if enforced, would allow them to
7 recover enormous rates of return, far beyond anything
8 that's allowed under a tariff regime. So even under their
9 high-volume access tariff, they are seeking rates that are
10 far and above what the FCC would permit following the end
11 of its Notice of Proposed Rulemaking.

12 THE COURT: But the FCC did refuse to strike down
13 their tariff at this point. Correct?

14 MR. KNUDSON: Are we talking about NAT's tariff?

15 THE COURT: NAT's Tariff No. 2.

16 MR. KNUDSON: Well, the Commission has recognized
17 that the deemed lawful regime, which is the accelerated
18 review, so that a tariff that's going to raise rates has to
19 be reviewed. It goes into force or can be enforced after
20 15 days, if the Commission has not suspended the tariff.

21 The Commission did not have the benefit of the
22 discovery we have presented to this Court, which is that
23 Free Conferencing Corporation is siphoning 75 percent of
24 the revenue off the top. I think that may have changed the
25 Commission's analysis of whether this tariff should have

1 been suspended pending a ruling on its lawfulness.

2 I think the Commission itself recognizes the flaw in
3 the deemed lawful regime and addresses that in its own
4 proposed rulemaking, which is why it's trying to address
5 this problem created by traffic stimulation, which the
6 Commission says contravenes public policy because it
7 *distorts investment in telecommunications resources,*
8 *imposes the cost of traffic stimulation on other customers*
9 *of this public telephone network.*

10 THE COURT: It's pretty clear to me in the cases
11 I've read that the FCC has handed down that they're going
12 to find that Sprint owes NAT something.

13 MR. KNUDSON: I don't think so, Your Honor. Take
14 a look at Farmers. Farmers is a situation where they
15 looked at a traffic stimulation scheme like we see here --

16 THE COURT: I think the footnote in Farmers makes
17 it clear that NAT is going to end up with something.

18 MR. KNUDSON: If it ends up with something, it
19 will be so de minimis, compared to what they are seeking,
20 that the end result would be the same. This business plan
21 doesn't work unless they can make unreasonable rates of
22 return.

23 Farmers says that you cannot posture a situation or
24 create a situation where the subscriber, that's FCC, Free
25 Conferencing Corporation, under their definition, is paid

1 by the local carrier. The whole idea of allowing higher
2 tariffed switched access charges in rural areas assumes
3 that you have the regular customer relationship, and that
4 you can get higher costs out of the long-distance carriers
5 to cover the higher cost of operating that rural system.

6 Now you have some scheme that comes in here, plants a
7 piece of equipment that connects callers from all over the
8 country or all over the world with an idea that they can
9 take advantage of what they call switched access charges
10 for terminating traffic, and take advantage of the higher
11 rate allowed by the Commission because of the high cost of
12 operation, when, in fact, it's not a high cost of operation
13 to generate 12 million minutes of use, and seek to recoup
14 hundred of thousands of dollars of revenue for an
15 investment on NAT's books of just over \$200,000. That's an
16 obscene rate of return, and certainly would never pass
17 regulatory mustard if the FCC had an opportunity to examine
18 it.

19 So the deemed lawful regime the FCC has recognized
20 allows companies like Free Conferencing Corporation to
21 arbitrage rates to try to take advantage of a system where
22 they can file a tariff and hopefully slip through the radar
23 screen and be able to charge and get paid these tariffs.

24 But the Commission has now ruled in All American, that
25 simply because the long-distance carriers have woken up and

1 are not paying, is not a violation of the Act. So it's not
2 a violation of the Federal Communications Act. The
3 Commission is very explicit about the remedies that NAT
4 has.

5 NAT can cut off Sprint. The testimony of Ms. Clouser
6 shows in doing so, it would reduce the minutes of use
7 attributable to Sprint, and could reduce the charges from
8 South Dakota Network, because that's based out of portal
9 use, and that's commensurate with the amount of minutes of
10 use.

11 The other option the Commission said in All American
12 was that NAT could sue for breach of contract. A breach of
13 contract is at law. I don't think All American, I don't
14 think the Notice of Proposed Rulemaking changes your ruling
15 on quantum meruit from a few years ago.

16 The Commission is saying sue under breach of contract,
17 and if you've got a breach of contract case, Grupo Mexicano
18 says you don't get pre-judgment injunctive relief. That's
19 what Judge Erickson found in the Tekstar case. Therefore,
20 their Motion at the threshold fails, because they don't
21 have a legal right, or I should say a right in equity to
22 injunctive relief. They failed to establish irreparable
23 harm.

24 I think you are on the mark with your analysis of they
25 went into this business, knowing full well that the

1 long-distance carriers would wake up and oppose and refuse
 2 to pay these charges. Nonetheless, they go ahead and begin
 3 investing resources, as Defendant's Exhibit 27. This is
 4 invest money from WideVoice that's pouring in to build out.

5 But who is WideVoice? WideVoice is David Erickson.
 6 David Erickson is an experienced telecom entrepreneur. He
 7 is exploiting his regulatory arbitrage all over the
 8 country. He knows full well the risk of going in and
 9 creating another one of these schemes.

10 Who is Gene DeJordy? Gene DeJordy was active with
 11 Alltel. He knew very well where the long-distance carriers
 12 stood on this kind of business.

13 So they walked in there with their eyes wide open.
 14 They hoped so they could take advantage of the Native
 15 American aspect of this case, that they could work through
 16 the Tribal Utility Authority, the Tribal Court, and seek to
 17 maintain their business operation, without an examination
 18 and protection from a Federal Court, which fortunately we
 19 got.

20 THE COURT: So Tariff No. 2 that was filed, don't
 21 you think that tariff meets the FCC's interests, as they've
 22 set out in the Notice of Proposed Rulemaking?

23 MR. SWIER: No, I don't. Here is why. First of
 24 all, it will allow for unreasonable charges,
 25 notwithstanding the rates they purport to set in their

1 tariff. Even if you look at their tariff, and we can't
 2 quite figure out how they are doing it, because if you look
 3 at their tariff and their so-called high-volume access
 4 tariff, if you get over five million minutes of use, your
 5 rate drops down to 0.14 cents per minute. Your other rates
 6 are higher than that.

7 But we're being billed or invoiced at about five cents
 8 per minute right now, even after this tariff has been
 9 filed. We're finding that, even on the evidence that's
 10 coming to us, that this tariff isn't being followed.

11 So the question again --

12 THE COURT: Sorry. How many minutes are they at
 13 now?

14 MR. KNUDSON: Which? My argument or the minutes
 15 of use?

16 THE COURT: The minutes of use. I don't have
 17 that exhibit right now.

18 MR. SWIER: Plaintiff's Exhibit A, Page 1,
 19 they're up to 12 million. Again, that's all the carriers
 20 that they are invoicing.

21 THE COURT: Not just Sprint.

22 MR. KNUDSON: Sprint's, as you heard, was 922,000
 23 and change. Sprint is less than 10 percent of the business
 24 here.

25 We talk about irreparable harm. He who seeks equity

1 must do equity. Frankly, I think you've seen the situation
 2 here where the people who are in charge of NAT today have
 3 not been fair to their business partners. They are seeking
 4 injunctive relief. They're seeking the equitable powers of
 5 this Court to protect them for their business practice.

6 But you heard Mr. Lengkeek testify. Until I told him
 7 how much money NAT had earned in 2010, he didn't know that
 8 fact. They have not produced any evidence that they are
 9 keeping the Tribal Board members informed of the financial
 10 status of NAT.

11 Where is Mr. Reiman? I wanted his deposition, and
 12 they benched him and put him out of town.

13 MR. SWIER: Objection, Your Honor. That is not
 14 in the record, and that is not what happened, as the Court
 15 can see from the Protective Order filed.

16 MR. KNUDSON: Where is Mr. Reiman? He was here
 17 in October. He didn't disclose to the Court then he was no
 18 longer the President of NAT. You may recall we went into a
 19 sealed session to hear how much money he invested in the
 20 business. I refer the Court to the sealed portion of the
 21 transcript at Page 3, Lines 5 through 14. You can see what
 22 his answer was, how much money he said he put into the
 23 business.

24 If you look at the Balance Sheet that's part of
 25 Exhibit A and also put into evidence by the Defendant, NAT

1 has claimed that Mr. Reiman, far from putting money into
 2 the business, is taking money out. I would submit that's
 3 why Mr. Reiman is no longer the President of NAT.

4 Again, what has happened to NAT? All the money is now
 5 under the control of the people in Long Beach, Free
 6 Conference Corporation, David Erickson. It's his money,
 7 and yet we don't hear a thing about how much money
 8 WideVoice has, how much money Free Conference Corporation
 9 has. They are the stakeholders here. They are the ones
 10 who knew what they were getting into.

11 Now they say we want to pull the plug, but we'll give
 12 it one last shot and see if we can get the Court to order
 13 Sprint to pay and see what happens. They're more
 14 interested in getting their money out of this business than
 15 putting any money back into the Reservation. You heard
 16 Mr. Lengkeek testify that the Tribe had not received a
 17 dollar, any money at all from NAT.

18 But when there was money in February of 2011, where
 19 did the money go? AT&T paid \$150,000. Did they keep the
 20 money in NAT so it could keep operating? No. The money
 21 went to WideVoice, in preference to any of the other owners
 22 of NAT. To repay what, a loan? We don't see any evidence
 23 of a loan. We don't have a loan agreement. We don't have
 24 a promissory note. There's no interest on its books of
 25 NAT, interest being charged by WideVoice.

1 So, again, WideVoice, Free Conference Corporation,
 2 David Erickson, is asking this Court to use its equitable
 3 powers to further its scheme that they concealed from the
 4 Tribe that transgresses the open, transparent policy that
 5 the FCC wants in its Notice of Proposed Rulemaking. That's
 6 the policy side of this case, Your Honor. It's not often a
 7 dispute between private parties implicates important issues
 8 of public policies, but this is one of those cases.

9 In the Notice of Proposed Rulemaking, they talk about
 10 converting the Universal Service Fund, of which
 11 Mr. Lengkeek was ignorant until I brought it up to him, so
 12 that it's Connect America Broadband. It's a much more
 13 comprehensive program to bring higher quality
 14 telecommunication services to remote areas, including
 15 Tribal lands like the Crow Creek Reservation.

16 But the FCC in its Notice of Proposed Rulemaking wants
 17 it done in an open and transparent way. We've submitted
 18 with our Memorandum addressing the Notice of Proposed
 19 Rulemaking comments of the Chairman of the Commission
 20 directly responding to the question, "Why don't we let this
 21 traffic pumping go on in rural or remote areas?" Well, he
 22 says he wants it to be open and transparent. I think he
 23 knows why.

24 We have a situation here where it's not open and
 25 transparent. It's a system designed to enrich people who

1 have no stake in what goes on at the Reservation.

2 You heard Mr. Reiman say in October how he was
 3 concerned about how poor things were at the Crow Creek
 4 Reservation. I don't deny they are. Statistics show it is
 5 a very poor place. But he is not here anymore. The money
 6 is all controlled by Free Conference Corporation. They're
 7 in Long Beach or Nevada, that's WideVoice, Nevada, a Sub S
 8 corporation.

9 So they can't cloak themselves in any public policy
 10 benefit. They are promoting a scheme that is inconsistent
 11 with what the Commission would permit under its Notice of
 12 Proposed Rulemaking. They are attempting to keep going a
 13 scheme that contravenes the policy initiatives the
 14 Commission has undertaken in its Notice of Proposed
 15 Rulemaking. If this Court were to grant that Motion, it
 16 would be directly contravening the policy initiatives the
 17 Commission has undertaken.

18 So this is an unusual case for a private dispute,
 19 where the issues are of national significance, and that the
 20 Court should be mindful in considering NAT's Motion. They
 21 have the burden on that issue, as well. I don't think they
 22 can meet their burden on that. Far from it.

23 NAT claims some legal authority that this Court can
 24 intervene at this point in time and order Sprint to pay
 25 unpaid invoices and invoices going forward. The authority

1 it cites in its Brief, we have the Semmes vs. Ford Motor
 2 Company case, which is one of those hard cases to make bad
 3 law types of cases. When the Eighth Circuit considered
 4 Semmes in the Watkins Distributor case, it held Semmes
 5 strictly limited to the facts of that case, i.e., those of
 6 no real precedential value in this Circuit.

7 Much is placed on the NewLife case. I think the Court
 8 correctly noted it's an unpublished decision, without
 9 addressing Grupo Mexicano.

10 As you recall in our briefing last fall, when there
 11 were cases that were advanced in support of Tribal
 12 exhaustion, I think failed to address Nevada v. Hicks, or
 13 other more recent Supreme Court jurisprudence on
 14 exhaustion. They were hardly persuasive. I would think
 15 NewLife falls in that category.

16 Further, one issue that seems to be motivating the
 17 District Court in NewLife. It's a factual situation where
 18 Express Scripts is asserting a right of setoff against
 19 NewLife based on a contract NewLife had with Blue Cross, to
 20 which Express Scripts was not a party or apparently a
 21 third-party beneficiary, so hardly could have standing to
 22 assert a right of setoff.

23 And that NewLife alleged it was providing life-saving
 24 medicines. I would submit that life-saving medicines are
 25 not the same as high-speed Internet access, and that you've

1 heard there are alternative sources for Internet service on
 2 the Reservation, as well.

3 Again, the Court also noted in NewLife the concrete
 4 evidence of imminent collapse of the business. We don't
 5 have that kind of concrete evidence. We have very
 6 nebulous, very vague testimony from a person who purports
 7 to be NAT's controller, although he doesn't claim that
 8 title. We don't have a cash flow forecast.

9 We have no real explanation for why they pulled
 10 \$140,000 out of NAT, except to pay WideVoice. They weren't
 11 looking ahead to see what their future costs would be and
 12 how much they had to keep in the bank to keep going.

13 I would like to point out another thing that is sort
 14 of how this thing falls apart. We talk about the founders
 15 and now the current operators of Free Conferencing
 16 Corporation. Set up something that I think is inherently
 17 doomed to fail, no matter what's going on here, if you have
 18 but one or two carriers who might say we're not going along
 19 with this scheme.

20 We've heard about the revenue generated. Then take a
 21 look at how much goes out the door for marketing expenses.
 22 Those really aren't marketing expenses. That's Free
 23 Conferencing Corporation's take off the top. That's
 24 precisely what bothered the Commission in Farmers, that the
 25 subscriber, Free Conferencing Corporation, is getting paid.

1 That distorts and makes a mockery of what the NECA tariff
2 is supposed to allow.

3 Then the billing agent. I think the Court did the
4 math that the controller was unwilling to do. It's about
5 eight percent of revenues. We don't hear how much that
6 cost went down after they fired the CABS Agent and picked
7 up another player.

8 Circuit expenses. Circuit expenses, you heard from
9 Amy Clouser, relate to usage. Those are being charged, if
10 you recall, by we've got invoices from South Dakota Network
11 and on and on. Those are the circuit expenses. That's
12 done by tariff. They knew what those charges would be. If
13 they wanted to negotiate a better rate, they could have
14 done so. They haven't offered any evidence that they've
15 ever tried to really lower those costs.

16 But let's go back to these. If we add this up, we
17 have 75 percent. We did hear the controller say 12
18 percent, and then 8 percent. So right off the top, 95
19 percent of the revenues are going to places other than
20 covering other operating expenses.

21 We have some consulting fees. I'm not sure what they
22 are. Paid Mr. Reiman \$3,000 a month, but we don't know
23 what that's for, other than to make sure the Internet Cafe
24 is open.

25 THE COURT: As I understood the agreement, out of

1 all the gross revenues, 75 percent of the gross goes to
2 Free Conferencing, and 25 percent goes to NAT. Then NAT
3 has to pay all of the expenses. Then the gross is then
4 divided according to the shares? I mean the net?

5 MR. KNUDSON: Net profit, according to the Joint
6 Venture Agreement, would be divided up according to
7 respective interests.

8 Think about this for a minute, Your Honor. If you
9 take 75 percent off the top, and then the 25 percent has to
10 cover these two line items, it doesn't leave enough behind
11 to pay those expenses. So we don't know what the agreement
12 is really between Free Conference Corporation and NAT,
13 other than it apparently calls for 75 percent off the top.
14 We heard testimony there was a written agreement signed --

15 THE COURT: But my question is out of the 25
16 percent that's going to NAT, all the expenses are paid
17 first, which would include the billing agent, circuit
18 expenses, consulting fees, the wages, any of those other
19 expenses. Then if there's anything left over, 51 percent
20 would go to the Tribe, and 25 and 24 percent to the other
21 two entities?

22 MR. KNUDSON: It could under the Joint Venture
23 Agreement if there's some profit left over. If there's
24 profit, we would also reinvest it. But that would be
25 available for distribution.

1 THE COURT: The 75 percent that goes to Free
2 Conferencing is 75 percent of the gross. They don't pay
3 any expenses out of the 75 percent?

4 MR. KNUDSON: That's correct. Now, I would like
5 to point out that Free Conferencing Corporation and
6 WideVoice are interrelated. They have a common CEO, David
7 Erickson. So David Erickson has put in various amounts of
8 money. At one point it's around \$500,000. But he's taken
9 out almost \$800,000. So even though WideVoice is the
10 nominal creditor, there is only one creditor of NAT. Free
11 Conferencing Corporation, a/k/a David Erickson, has done
12 well by this 2010.

13 THE COURT: You have about two more minutes.

14 MR. KNUDSON: I've addressed the policy
15 arguments. I think the irreparable harm, both in the front
16 end, the threshold inability, and the fact that this is a
17 flawed business model they knew wouldn't work from the
18 get-go.

19 The other Dataphase factor of significance, and I
20 really don't have time to go into it at length, is they are
21 -- the likelihood of success on the merits. In particular,
22 I pointed out the Farmers decision, which is referenced in
23 our Brief in this section. I would like basically to quote
24 from that. I'll finish with just a reference to the tariff
25 and its complexity and its violation of the Act by virtue

1 of the way it's written and designed.

2 I'll refer the Court to Page 27 of our Brief. In
3 there basically they're saying this scheme that was at
4 issue in Farmers involved a situation where the subscriber
5 was getting paid for the services, not the other way
6 around, which is what the tariff regime is supposed to
7 protect.

8 We, of course, believe they are trying to tariff for
9 void services, which is not allowed. The tariff itself,
10 No. 2, is void. They have an issue for vagueness, for
11 excessive rates, and this is really impossible to follow.
12 It would be found unreasonable under the Federal
13 Communications Act by the Commission if it were to have a
14 chance to take a look at this tariff. I would suggest this
15 case be referred there, Your Honor. That's all I have.

16 THE COURT: Thank you. Mr. Swier? I'll give you
17 ten more minutes.

18 MR. SWIER: Your Honor, there's a lot of areas I
19 want to discuss with the Court.

20 The first is the 75 percent that FreeConferenceCall
21 gets of the contract. FreeConferenceCall is the largest,
22 privately held conference calling company in the world. If
23 FreeConferenceCall doesn't do all the marketing, doesn't
24 drive all the traffic to NAT, NAT gets nothing. Zero
25 percent of zero is nothing. The only way NAT and the Tribe

241

1 make money is because of FCC's worldwide marketing efforts.
 2 So without FCC and their presence, the Tribe is back
 3 to where they've been forever. Nothing. Because those
 4 calls then to NAT don't get generated without FCC. You've
 5 heard that is a standard percentage in this industry.
 6 Also, I want to clarify. NAT gets 25 percent of the
 7 gross revenues. That is the way the contract is set up.
 8 They get 25 percent of the gross.
 9 THE COURT: Who pays the expenses? Out of whose
 10 portion do the expenses come?
 11 MR. SWIER: The expenses come out of the shares
 12 according to what the shareholders have. The Tribe had no
 13 liquid assets to pay for any of the start-up costs.
 14 THE COURT: My question is like the employee
 15 salaries, are they paid out of the 75 percent that goes to
 16 FreeConferenceCall, or are they paid out of the 25 percent
 17 that goes to NAT?
 18 MR. SWIER: I don't know for sure. I'll guess,
 19 Your Honor, because they are an employee of NAT, they are
 20 paid by NAT.
 21 THE COURT: And the carrier expenses would come
 22 out of NAT, because that's an expense that NAT has
 23 contracted for?
 24 MR. SWIER: Correct. If NAT doesn't provide
 25 those services and that infrastructure, there is no NAT.

242

1 WideVoice has the expertise, one of the partners, WideVoice
 2 has the expertise to provide that high technological
 3 equipment that's needed to do worldwide conference calling.
 4 THE COURT: So does FreeConferenceCall provide or
 5 pay for any of the expenses associated with this?
 6 MR. SWIER: FreeConferenceCall -- that's a good
 7 question, Your Honor. FreeConferenceCall gets their 75
 8 percent gross, and because -- FreeConferenceCall is not a
 9 member of NAT. They are a contractual partner of NAT, but
 10 they are not a part of NAT.
 11 THE COURT: I understand that. So of all the
 12 revenue generated, FreeConferenceCall gets 75 percent.
 13 MR. SWIER: Yes.
 14 THE COURT: And NAT gets 25 percent and pays all
 15 the expenses.
 16 MR. SWIER: I believe that's correct. Again,
 17 that's a standard agreement.
 18 THE COURT: It may be a standard agreement, but
 19 when you look at all the expenses involved, it pretty much
 20 eats up that 25 percent.
 21 MR. SWIER: Your Honor, it doesn't. What
 22 FreeConferenceCall -- what FreeConferencing has to pay to
 23 market worldwide to get up to 12 million minutes to
 24 Crow Creek is immense. It's not like they are taking that
 25 \$700,000 and putting it in their pocket free and clear.

243

1 They market worldwide. If they don't pay those upfront
 2 costs, there is no NAT.
 3 THE COURT: That's what I asked. What expenses
 4 does FreeConferenceCall have?
 5 MR. SWIER: Sure. Marketing throughout the
 6 world. They have employees, 40 or 50 employees whose job
 7 it is to further the interests of FreeConferenceCall. If
 8 that isn't there, if that leadership, if that know-how, if
 9 that corporation, which has become the largest privately
 10 held conference calling company in the world, doesn't
 11 exist, NAT gets nothing.
 12 THE COURT: But all the expenses listed on the
 13 exhibits that came in today are all paid by NAT.
 14 MR. SWIER: They are paid by NAT, because
 15 FreeConferenceCall covers all the expenses worldwide to
 16 drive the traffic. So it's a partnership. Each entity has
 17 its role. But if you don't have FreeConferenceCall
 18 generating the traffic, there's no traffic to get payment
 19 on.
 20 THE COURT: Mr. Knudson?
 21 MR. KNUDSON: I would like to object to the
 22 assertion that FreeConferenceCall pays all these other
 23 expenses. There's no competent evidence of that in the
 24 record for the Court today.
 25 THE COURT: I can assume that there are some

244

1 marketing expense, though. I mean I can use my common
 2 knowledge to assume that. People don't just pick up the
 3 phone and dial a number that gets to NAT unless there's
 4 some marketing. I think that I can draw that conclusion.
 5 MR. KNUDSON: Maintain a web browser, I suppose
 6 there might be some expense. But, again --
 7 THE COURT: I don't know what the expense is. I
 8 just think I can use my common sense to assume there is
 9 some expense.
 10 MR. KNUDSON: More than de minimis? I can't say
 11 that's the case.
 12 THE COURT: In any event, continue on.
 13 MR. SWIER: Your Honor, could I have my time,
 14 please?
 15 THE COURT: Yes.
 16 MR. SWIER: You asked before how you can fashion
 17 a fair remedy for the interim period. Here is how you can
 18 do it.
 19 Number one, Sprint has pounded on the table that this
 20 new high-volume access tariff is somehow improper. That is
 21 flat wrong. They've fought tooth and nail, and the FCC has
 22 told them, "No, you're wrong." This tariff, this
 23 high-volume access tariff is not only deemed lawful, but
 24 it's exactly what the FCC's NPRM has said how this should
 25 be handled.

1 What could we possibly do more? We did everything
 2 right. They still refuse to pay us a nickel. You know
 3 why? Because they are a huge, multi-billion dollar
 4 organization that can beat on anybody who believes they
 5 could be a competitor or who they just don't agree with how
 6 they do business.

7 It's *insulting* that Mr. Lengkeek has to sit up here
 8 and get bombarded with questions about, "Why don't you just
 9 take government subsidies? Why don't you put your hand
 10 out, like all the Reservations do, and take money?" That's
 11 arrogant and that's insulting. I actually felt sorry for
 12 Mr. Lengkeek that this has happened twice now. "Just stick
 13 your hand out. Take the government money. Don't try to
 14 compete."

15 And the scheme and the traffic pumping, look at the
 16 NPRM. They use access stimulation. They say it's
 17 compensable. The Court is exactly right. That traffic is
 18 going to be compensable. *But the more and more Sprint*
 19 *fighters, the more and more companies, like NAT, can go out*
 20 *of business.*

21 So here is the remedy that I ask the Court to fashion.
 22 You've asked for one.

23 The NPRM says this: The lowest tariff the FCC has
 24 suggested for high-volume services is that it should be
 25 compensated at the RBOC rate. That's the Regional Bell

1 Operating Company rate. That rate is .0055 cents a minute.
 2 In other words, it's five and a half tenths of a cent per
 3 minute. That's the RBOC rate, which the NPRM says that's
 4 probably what we'll use for the default.

5 Okay. If you want to go off NAT's high-volume access
 6 tariff and say, "You know what? I'm not sure of those
 7 numbers. I don't know if that's the per minute charge that
 8 will eventually come out." Then fall back to the RBOC,
 9 which is what the FCC says that's kind of what we're
 10 *looking at proposing now.*

11 If you award NAT that RBOC rate, from the traffic from
 12 when the high-volume access tariff was filed until this
 13 case is completed, that is an equitable remedy that would
 14 allow the status quo to be maintained, and NAT could keep
 15 its doors open until the end of this case. So if you want
 16 to default to the RBOC rate, we can survive for a few
 17 months. That would be a perfect equitable remedy to
 18 maintain the status quo.

19 To say this is not compensable, they keep saying that,
 20 the Court is exactly right. The NPRM says this is
 21 compensable, and it's going to be based on a high-volume
 22 access tariff to what we've done.

23 Now, if you want to question the rate, personally we
 24 don't because the FCC has said, "Your tariff is fine.
 25 We're going to deem it lawful." But if you are looking for

1 a default and an equitable remedy, that is the perfect
 2 equitable remedy. It's based on what the FCC said that
 3 lowest rate should be. If the Court would do that, we
 4 could survive until this case comes to trial.

5 Also, the Farmers case, and I know we talked about
 6 this ad nauseam in the Briefs. The Farmers case was
 7 specific to Farmers' particular tariff. That is a clear
 8 reading of that case. Our tariff takes into consideration
 9 conferencing traffic, the new high-volume tariff. That
 10 tariff, as the Court knows, has been given the okay by the
 11 FCC.

12 Your Honor, may I have a couple more minutes?

13 THE COURT: You may.

14 MR. SWIER: I want to talk about probably the
 15 most important factor here, because I think the first
 16 factor, which is the probability of success, that NAT is
 17 going to get compensated for this traffic, I think that's
 18 an easy one. We're going to get compensated for this
 19 traffic. The question is are we going to be around to get
 20 our money when it does happen? So I think probability of
 21 success, that's clearly in our favor.

22 Irreparable harm. NAT has to show the threat of
 23 irreparable harm, and we need to present concrete evidence.
 24 We have given the Court the banking statements, the
 25 financials, the monthly costs to keep NAT up and running.

1 If that's not concrete evidence of the current financial
 2 status, I don't know what is.

3 The *NewLife* case. *Sprint attempted to pooh-poo* the
 4 *NewLife* case. The *NewLife* case is on all fours. You can
 5 say, well, it's another District Court opinion. Well, it's
 6 not binding on this Court, but it provides this Court,
 7 along with *Doran*, with the most factually analogous case
 8 that's out there. It's almost on all fours factually.

9 Here is what the Court said. It said in *NewLife*, "A
 10 substantial loss of business and the threat of bankruptcy
 11 can be sufficient for finding of irreparable harm."

12 The *Doran* case, where the economic loss would be so
 13 great as to threaten destruction of the moving party's
 14 business, a preliminary injunction should be issued to
 15 maintain the status quo.

16 We've shown irreparable harm. We've shown what the
 17 current financial situation is. Here is what *Wright &*
 18 *Miller* said in their classic treatise on Civil Procedure.
 19 Where the potential economic loss is so great as to
 20 threaten the existence of a moving party's business, then a
 21 *preliminary injunction may be granted, even though the*
 22 *amount of direct financial harm is readily ascertainable.*

23 So the argument we're asking for a specific amount of
 24 money, *Wright & Miller* have said that under certain
 25 circumstances is acceptable.

1 Finally, Your Honor, Dataphase Factor No. 3, the
 2 balance of the harms. Here is the balance of the harms.
 3 NAT's harm, their business shuts down or they file
 4 bankruptcy. Sprint's harm, they are a multi-billion dollar
 5 company that has to pay maybe a couple hundred thousand in
 6 lawful fees for a few months. Balance of the harm weighs
 7 heavily in our favor.
 8 Finally, Your Honor, the Dataphase 4 factor, the
 9 public interest. Here is the public benefit interest for
 10 NAT. Again, these were pooh-pooed as being insignificant.
 11 Maybe if Sprint would have spent some time at the
 12 Reservation, they would have found these aren't
 13 insignificant. The education and the learning
 14 opportunities. The employment and the business
 15 opportunities. The public safety service. The access to
 16 governmental services. High-speed Internet and basic
 17 telephone service for Tribal members. Over a hundred
 18 high-speed broadband and telephone installations. The
 19 Internet Library. I can go on and on.
 20 Sprint, Verizon, no other company has ever attempted
 21 to do this. NAT is providing an incredible public service
 22 to the Crow Creek Reservation. No doubt about that.
 23 Sprint said, "Well, public policy dictates that we win."
 24 That was written before the NPRM came out. The NPRM
 25 said, "No, Sprint, public policy is not going to be just

1 that you win. Public policy is going to be this traffic is
 2 compensable, and you are eventually going to have to pay."
 3 But hopefully Sprint can have things drawn out enough
 4 that all these companies go out of business, including NAT.
 5 I mean, that's their business plan. If they have a problem
 6 with our business plan, take a look at theirs. It's to cut
 7 the oxygen tank off for these small companies. That's
 8 their business plan, and they are doing a good job.
 9 Luckily, NAT has had the wherewithal, with WideVoice's
 10 help, to come this far in the litigation, to pay their
 11 attorneys, to try to lobby the Congressional delegation and
 12 the FCC. NAT is one of the few companies that has had the
 13 wherewithal to stick this out. But at a certain point,
 14 it's like the lemonade stand, when you provide a service
 15 for months and months, and you don't get a penny, how are
 16 you supposed to survive? Especially on that new
 17 high-volume access tariff traffic, which is clearly
 18 compensable.
 19 So let's do this, if the Court wants to fashion a
 20 remedy. Let's allow NAT to be paid the RBOC rate from the
 21 time the high-volume access tariff was filed until this
 22 case is completed. Sprint should be ordered to pay the
 23 back money of approximately \$127,000 under the HVAT, and it
 24 should be ordered to pay each month the fees under that
 25 high-volume access tariff. That's a perfect equitable

1 remedy which limits the amount that Sprint has to pay, but
 2 lets us survive.
 3 Your Honor, because of that, we would ask you to grant
 4 NAT's Preliminary Injunction Motion. Thank you.
 5 THE COURT: Thank you, Mr. Swier. I'm going to
 6 take it under advisement, and I'll issue a written opinion.
 7 Anything further from either counsel before we adjourn for
 8 the day?
 9 MR. SWIER: No. Thank you, Your Honor.
 10 MR. KNUDSON: Do you want anything further on the
 11 discovery motion, or should we just wait?
 12 THE COURT: Did you want to do oral argument on
 13 it? I guess my concern was there was a Motion made, and no
 14 Response, no written Response that had been filed.
 15 MR. SWIER: We'd like to file a written Response,
 16 but our time to do that is not up yet. We will definitely
 17 be filing a written Response.
 18 MR. KNUDSON: Let's clarify. We wrote a Response
 19 to their Motion for a Protective Order to keep Tom Reiman
 20 from being deposed. One of the questions I wanted to ask
 21 Reiman in his deposition was the answer to Interrogatory
 22 No. 7.
 23 I sought that information from Carlos Cestero.
 24 Although he could produce Defendant's Exhibit 27 promptly,
 25 he was instructed by Mr. Swier not to produce the backup

1 that would show which carriers paid which invoices and for
 2 how much, which is the underlying detail to the revenue
 3 posted for 2010. That information we wanted in preparation
 4 for this hearing, but we still think that information is
 5 germane and should be produced.
 6 THE COURT: Are you saying if you got the answer
 7 to Interrogatory No. 27, you would not need to depose Tom
 8 Reiman?
 9 MR. KNUDSON: No. But we should get that
 10 information, by all means.
 11 THE COURT: Are you saying I should wait to rule
 12 today until you get this information, or until you find out
 13 if I'm going to order that you get the information?
 14 MR. KNUDSON: Well, depending on how you rule.
 15 Ultimately at some point in time if this case continues in
 16 this Court, we want that information.
 17 THE COURT: You have to tell me if I need to wait
 18 on my ruling on the preliminary injunction, because you
 19 need this information to present to the Court for me to
 20 consider regarding the preliminary injunction.
 21 MR. KNUDSON: I would like Reiman's deposition
 22 and that information and Interrogatory No. 7, Your Honor.
 23 MR. SWIER: If I may, Your Honor?
 24 THE COURT: Mr. Swier?
 25 MR. SWIER: Your Honor, first of all, we have

1 provided Sprint with all our financial documents except
 2 Interrogatory No. 7. Interrogatory No. 7, we can't give up
 3 the specific carrier minutes and receivables. This gives
 4 the other carriers -- this is, again, Sprint with their
 5 heavy hand. That carries a distinct -- that information
 6 carries a distinct competitive advantage, and is incredibly
 7 helpful to Sprint and the other carriers with their
 8 competing services. Now, we have provided all the totals.

9 THE COURT: Let me ask a question. Your
 10 objection to it was attorney-client privilege. It sounds
 11 to me like what you are arguing is more along the lines of
 12 a trade secret.

13 MR. SWIER: Your Honor, I think it is proprietary
 14 and a trade secret. I think, also, as we put in there, it
 15 was beyond reasonableness for discovery. Now, we can
 16 certainly amend our objection. But that information, first
 17 of all, it's not relevant. Everyone knows what the
 18 financial numbers are. It doesn't make a difference what
 19 Verizon owes or Sprint owes or Alltel owes.

20 Sprint sued us. They were the ones who started this.
 21 That's why they found themselves in Court. What the game
 22 plan was, they were hoping NAT would sue all the big
 23 companies, because then they can put NAT in discovery for
 24 years. That would guarantee NAT would go out of business.
 25 I mean, that's a pretty clear litigation strategy. That's

1 why the suit was brought with Sprint. They sued us.
 2 That information is incredibly proprietary. It will
 3 put us in a terrible position with the other carriers that
 4 we work with, and it will provide Sprint with a huge
 5 competitive advantage. Again, what difference does it make
 6 how the breakdown is? The fact is, we know what Sprint
 7 owes. We know what the total is. Why do we have to keep
 8 delaying this for information that's already out there what
 9 Sprint owes? Why do we need to know what Verizon owes or
 10 any of the other carriers?

11 So I think the Court can go ahead and rule based on
 12 the voluminous financial material that we've provided.
 13 Again, delay serves only one purpose.

14 THE COURT: Mr. Knudson?

15 MR. KNUDSON: It's simple information to produce.
 16 It could have been produced in short order,

17 In terms of any proprietary concerns, I had sent
 18 Mr. Swier a proposed confidentiality stipulation that would
 19 protect the sensitivity of the information.

20 It was germane to their case, because, first of all,
 21 if you read Mr. Cestero's Affidavit and listen to the
 22 testimony of Mr. Cestero and Mr. Lengkeek, NAT is going out
 23 of business because of Sprint. Sprint is a minor player in
 24 the overall business, and we'd like to be able to show
 25 that.

1 They are seeking an injunction against Sprint. They
 2 haven't sued any of these other people, and they can't
 3 explain why. That goes directly to why they're not
 4 entitled to injunctive relief.

5 THE COURT: Mr. Swier, you need to get in your
 6 response in to the Protective Order and the interrogatory
 7 issue. I'll review both of those motions and decide
 8 whether I think it's germane to the issue of whether or not
 9 I need to wait on the Preliminary Injunction Motion. If I
 10 believe I don't need to wait, I'll go ahead and issue my
 11 Order. If I think I do need to wait, then I'll rule on the
 12 discovery issue first, and do the preliminary injunction
 13 after that.

14 MR. SWIER: Your Honor, we'll get a response to
 15 the Court early next week.

16 THE COURT: Thank you. With that, we'll be
 17 adjourned for the day.

18 (End of proceedings at 4:30 p.m.)
 19
 20
 21
 22
 23
 24
 25

1 UNITED STATES DISTRICT COURT
 2 DISTRICT OF SOUTH DAKOTA :SS CERTIFICATE OF REPORTER
 3 SOUTHERN DIVISION

4 I, Jill M. Connelly, Official United States
 5 District Court Reporter, Registered Merit Reporter,
 6 Certified Realtime Reporter, and Notary Public, hereby
 7 certify that the above and foregoing transcript is the
 8 true, full, and complete transcript of the above-entitled
 9 case, consisting of Pages 1 - 255.

10 I further certify that I am not a relative or
 11 employee or attorney or counsel of any of the parties
 12 hereto, nor a relative or employee of such attorney or
 13 counsel, nor do I have any interest in the outcome or
 14 events of the action.

15 IN TESTIMONY WHEREOF, I have hereto set my hand
 16 this 13th day of March, 2011.

17 /s/ Jill M. Connelly

18 Jill M. Connelly, RMR, CRR
 19 Court Reporter
 20 United States Courthouse
 21 405 S. Phillips Avenue
 22 Sioux Falls, SD 57104
 23 Phone: (605) 330-5669
 24 E-mail: Jill_Connelly@sdd.uscourts.gov
 25

FCC Form 499-Q Telecommunications Reporting Worksheet

Quarterly Filing for Universal Service Contributors

>>> Please read instructions before completing <<<

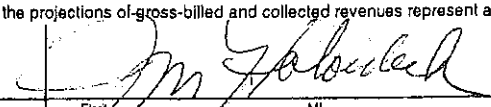
Approval by OMB
3060-0855

Block 1: Contributor Identification Information		101	Filer 499 ID	828230
102	Legal name of reporting entity	Native American Telecom, LLC		
103	IRS employer identification number	26-3283812		
104	Name telecommunications provider is doing business as	Native American Telecom, LLC		
105	Holding company (All affiliated companies should show same name here.)			
106	FCC Registration Number (FRN)	18249854		
107	Complete mailing address of reporting entity's corporate headquarters	P.O. Box 2316, Sioux Falls, SD 57101		

Block 2: Contact Information						
108	Person who completed this worksheet	First	Tara	MI	Last	Odenthal
109	Telephone number of this person	(562) 624-5444				
110	Fax number of this person	(562) 437-1422				
111	Email of this person	Tara@widevoice.com				
112	Billing address and billing contact person: [Bills for Universal Service contributions will be sent to this address.]	P.O. Box 2316, Sioux Falls, SD 57101				

Block 3: Contributor Historical and Projected Revenue Information				
113	Year of historical revenue information	2011		
114	Indicate which quarterly filing this represents	<input type="checkbox"/> February 1	Historical revenues for	Projected revenues for
		<input type="checkbox"/> May 1	October 1 - December 31 (prior year)	April 1 - June 30
		<input checked="" type="checkbox"/> August 1	January 1 - March 31	July 1 - September 30
		<input type="checkbox"/> November 1	April 1 - June 30	October 1 - December 31
			July 1 - September 30	January 1 - March 31 (following calendar year)

Historical billed revenues with no allowance or deductions for uncollectibles. See instructions.	Total Revenues	Interstate Revenues	International Revenues
	(a)	(b)	(c)
115 Telecommunications provided to other universal service contributors for resale as telecommunications or as interconnected VoIP	\$ 1,234,574	\$ 1,234,574	\$ -
116 End-user telecommunications revenues including any pass-through charges for universal service contributions, but excluding international-to-international revenues	\$ 26,703	\$ 26,703	\$ -
117 All other goods and services	\$ -	Column (b) and (c) not requested	
118 Gross-billed revenues from all sources (sum of above)	\$ 1,261,277	for Lines 117 and 118	
119 Projected gross-billed end-user interstate and international telecommunications revenues including any pass-through charges for universal service contributions, but excluding international-to-international revenues		\$ 26,703	\$ -
120 Projected collected end-user interstate and international telecommunications revenues including any pass-through charges for universal service contributions, but excluding international-to-international revenues		\$ 26,703	\$ -

Block 4: CERTIFICATION: to be signed by an officer of the reporting entity						
121	I certify that the revenue data contained herein are privileged and confidential and that public disclosure of such information would likely cause substantial harm to the competitive position of the company. I request nondisclosure of the revenue information contained herein pursuant to sections 0.459, 52.17, 54.711 and 64.604 of the Commission's Rules. <input checked="" type="checkbox"/>					
	I certify that I am an officer of the above-named reporting entity, that I have examined the foregoing report and to the best of my knowledge, information and belief, all statements of fact contained in this Worksheet are true, that said Worksheet is an accurate statement of the affairs of the above-named company for the quarter and that the projections of gross-billed and collected revenues represent a good-faith estimate based on company procedures and policies.					
122	Signature					
123	Printed name of officer	First	Jeff	MI	Last	Holcubek
124	Position with reporting entity	President				
125	Email of officer Required if available	jeff@nativeamericantelecom.com				
126	Date	8-Sep-11				
127	This filing is:	<input checked="" type="checkbox"/> Original filing	<input type="checkbox"/> Revised filing (revisions due within 45 days of original filing deadline)			

Do not mail checks with this form. Send this form to: Form 499 Data Collection Agent c/o USAC 2000 L Street, N.W. Suite 200 Washington DC, 20036
For additional information regarding this worksheet contact: Telecommunications Reporting Worksheet Info: (888) 641-8722 or via e-mail: Form499@universalservice.org

PERSONS WILLFULLY MAKING FALSE STATEMENTS IN THE WORKSHEET CAN BE PUNISHED BY FINE OR IMPRISONMENT UNDER TITLE 18 OF THE UNITED STATES CODE, 18 U.S.C. §1001

Save time, avoid problems - file electronically at

<http://forms.universalservice.org>

FCC Form 499-Q
February 2010

FCC Form 499-Q Telecommunications Reporting Worksheet

Quarterly Filing for Universal Service Contributors

>>> Please read instructions before completing <<<

Approval by OMB
3060-0855

Block 1: Contributor Identification Information

101 Filer 499 ID **828230**

102 Legal name of reporting entity **Native American Telecom, LLC**
 103 IRS employer identification number **26-3283812**
 104 Name telecommunications provider is doing business as **Native American Telecom, LLC**
 105 Holding company (All affiliated companies should show same name here.) **Native American Telecom, LLC**
 106 FCC Registration Number (FRN) **0018-2498-54**
 107 Complete mailing address of reporting entity's corporate headquarters **P.O. Box 2316
Sioux Falls, SD 57101**

Block 2: Contact Information

108 Person who completed this worksheet **First Tara MI Last Odenthal**
 109 Telephone number of this person **(562)-624-5444**
 110 Fax number of this person **(562)-437-1411**
 111 Email of this person **tara@widevoice.com**
 112 Billing address and billing contact person **P.O. Box 2316
Sioux Falls, SD 57101**
 (Bills for Universal Service contributions will be sent to this address.)

Block 3: Contributor Historical and Projected Revenue Information

113 Year of historical revenue information **2011**

114 Indicate which quarterly filing this represents

<input type="checkbox"/> February 1	Historical revenues for October 1 - December 31 (prior year)	Projected revenues for April 1 - June 30
<input type="checkbox"/> May 1	January 1 - March 31	July 1 - September 30
<input type="checkbox"/> August 1	April 1 - June 30	October 1 - December 31
<input checked="" type="checkbox"/> November 1	July 1 - September 30	January 1 - March 31 (following calendar year)

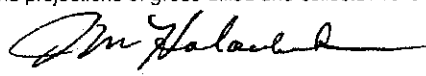
Historical billed revenues with no allowance or deductions for uncollectibles. See instructions

	Total Revenues (a)	Interstate Revenues (b)	International Revenues (c)
115 Telecommunications provided to other universal service contributors for resale as telecommunications or as interconnected VoIP	1,334,113	1,334,113	0
116 End-user telecommunications revenues including any pass-through charges for universal service contributions, but excluding international-to-international revenues	31,831	31,831	0
117 All other goods and services	0	Column (b) and (c) not requested	
118 Gross-billed revenues from all sources (sum of above)	1,357,624	for Lines 117 and 118	
119 Projected gross-billed end-user interstate and international telecommunications revenues including any pass-through charges for universal service contributions, but excluding international-to-international revenues		31,831	0
120 Projected collected end-user interstate and international telecommunications revenues including any pass-through charges for universal service contributions, but excluding international-to-international revenues		31,831	0

Block 4: CERTIFICATION: to be signed by an officer of the reporting entity

121 I certify that the revenue data contained herein are privileged and confidential and that public disclosure of such information would likely cause substantial harm to the competitive position of the company. I request nondisclosure of the revenue information contained herein pursuant to sections 0.459, 52.17, 54.711 and 64.604 of the Commission's Rules.

I certify that I am an officer of the above-named reporting entity, that I have examined the foregoing report and to the best of my knowledge, information and belief, all statements of fact contained in this Worksheet are true, that said Worksheet is an accurate statement of the affairs of the above-named company for the quarter and that the projections of gross-billed and collected revenues represent a good-faith estimate based on company procedures and policies.

122 Signature 
 123 Printed name of officer **First Jeff MI Last Holoubek**
 124 Position with reporting entity **President**
 125 Email of officer || Required if available || **jeff@nativeamericantelecom.com**
 126 Date **October 26, 2011**
 127 This filing is Original filing Revised filing (revisions due within 45 days of original filing deadline)

Do not mail checks with this form. Send this form to: Form 499 Data Collection Agent c/o USAC 2000 L Street, N.W. Suite 200 Washington DC, 20036
 For additional information regarding this worksheet contact: Telecommunications Reporting Worksheet Info: (888) 641-8722 or via e-mail: Form499@universalservice.org

PERSONS WILLFULLY MAKING FALSE STATEMENTS IN THE WORKSHEET CAN BE PUNISHED BY FINE OR IMPRISONMENT UNDER TITLE 18 OF THE UNITED STATES CODE, 18 U.S.C. §1001

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FCC Form 499-Q
February 2010

2nd filed

NATIVE AMERICAN TELECOM, LLC

WELLS FARGO BANK, NA
16-024/1220

10230

9/8/2011

Pay to the
Order of

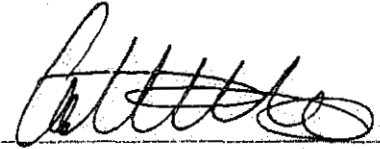
Universal Service Administrative Company

\$ **10,655.00

Ten Thousand Six Hundred Fifty-Five and 00/100*****

Dollars

Universal Service Administrative Company
PO Box 105056
Atlanta, GA 30348-5056



Form 499A - Native American Telecom LLC

⑈010230⑈ ⑆122000247⑆3190995526⑈

NATIVE AMERICAN TELECOM, LLC

10230

Universal Service Administrative Company

Date	Type	Reference	Original Amt.	Balance Due	9/8/2011 Discount	Payment
9/8/2011	Bill	Form 499A 2011	10,655.00	10,655.00		10,655.00
					Check Amount	10,655.00

WFB Checking #5526 Form 499A - Native American Telecom LLC

10,655.00

2011 FCC Form 499-A Telecommunications Reporting Worksheet (Reporting Calendar 2010 Revenues)

Approval by OMB
3060-0855

>>> Please read instructions before completing <<<
Annual Filing -- due April 1, 2011

Block 1 Contributor Identification Information

During the year, filers must refile Blocks 1, 2 and 6 if there are any changes in Lines 104 or 112. See Instructions.

101 Filer 499 ID [If you don't know your number, contact the administrator at (888) 641-8722. 828290
If you are a new filer, write "NEW" in this block and a Filer 499 ID will be assigned to you.]

102 Legal name of reporting entity Native American Telecom, LLC

103 IRS employer identification number 26-3283812

104 Name telecommunications provider is doing business as Native American Telecom, LLC

105 Telecommunications activities of filer [Select up to 5 boxes that best describe the reporting entity. Enter numbers starting with "1" to show the order of importance -- see directions.]

Audio Bridging (teleconferencing) Provider CAP/CLEC Cellular/PCS/SMR (wireless telephony incl. by resale) Coaxial Cable

Incumbent IEC Interconnected VoIP 2 Interchange Carrier (XC) Local Reseller Operator Service Provider (OSP)

Paging & Messaging Payphone Service Provider Prepaid Card Private Service Provider Satellite Service Provider

Shared-Tenant Service Provider / Building IEC SMR (dispatch) Toll Reseller Wireless Data

If Other Local, Other Mobile or Other Toll is checked, describe carrier type / services provided: Other Local Other Mobile Other Toll

106.1 Holding company name (All affiliated companies must show the same name on this line.) None

106.2 Holding company IRS employer identification number N/A

107 FCC Registration Number (FRN) [https://frn.fcc.gov/corsWeb/publicHome.do] 0018249864
[For assistance, contact the CORES help desk at 877-480-3201 or CORES@fcc.gov]

108 Management company [If filer is managed by another entity] N/A

109 Complete mailing address of reporting entity corporate headquarters
Street 1 P.O. Box 2316
Street 2
Street 3
City Sioux Falls
State SD
Zip (postal code) 57101
Country (if not USA)

110 Complete business address for customer inquiries and complaints
check if same address as Line 109
Street 1
Street 2
Street 3
City
State
Zip (postal code)
Country (if not USA)

111 Telephone number for customer complaints and inquiries [Toll-free number if available] 605-477-2222
State
Zip (postal code)
Country (if not USA)

112 List all trade names used in the past 3 years in providing telecommunications. Include all names by which you are known by customers.
a Native American Telecom, LLC
b
c
d
e
f

g
h
i
j
k
l

Use an additional sheet if necessary. Each reporting entity must provide all names used for telecommunications activities.

PERSONS MAKING WILLFUL FALSE STATEMENTS IN THE WORKSHEET CAN BE PUNISHED BY FINE OR IMPRISONMENT UNDER TITLE 18 OF THE UNITED STATES CODE, 18 U.S.C. §1001
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2011 FCC Form 499-A Telecommunications Reporting Worksheet (Reporting Calendar 2010 Revenues)

Block 2-A Regulatory Contact Information

201	Filer 499 ID [from Line 101]	828230							
202	Legal name of reporting entity [from Line 102]	Native American Telecom, LLC							
203	Person who completed this Worksheet	First Tara	MI	Last	Obanlian				
204	Telephone number of this person	(982) 824-5444							
205	Fax number of this person	(982) 437-1422							
206	Email of this person <input type="checkbox"/> not for public release <input type="checkbox"/>	Tara@widevoice.com							
207	Corporate office, atm, name, and mailing address to which future Telecommunications Reporting Worksheets should be sent	Office	Email <input type="checkbox"/> not for public release <input type="checkbox"/>		Atm First name	MI	Last	Phone	Fax
		Street 1	Street 1		Street 2			Street 3	
		City	State	Zip (postal code)	Country if not USA				

208 Billing address and billing contact person
 [Plan administrators will send bills for contributions to this address. Please attach a written request for alternative billing arrangements.]
 check if name and address same as Line 203
 check if same address as Line 109

208.1 Email address where ITSP regulatory fee bill should be sent
 [not for public release] Tara@widevoice.com
 State MI Zip (postal code) 20036 Country if not USA

All carriers and providers of interconnected VoIP must complete Lines 209 through 213. During the year, carriers and providers of interconnected VoIP must refile Blocks 1, 2 and 6 if there are any changes in this section. See Instructions.

209	D.C. Agent for Service of Process per 47 U.S.C. §413	Company	Atm First name	MI	Last	Swier	ext -
210	Telephone number of D.C. agent	(905) 286-3218					
211	Fax number of D.C. agent	(905) 286-3219					
212	Email of D.C. agent	scott@swierlaw.com					
213	Complete business address of D.C. agent for hand service of documents	Street 1	Street 1		Street 2		Street 3
		City	Washington	State	D.C.	Zip	20036
214	Local/alternate Agent for Service of Process (optional)	Company	Atm First name	MI	Last		ext -
215	Telephone number of local/alternate agent						
216	Fax number of local/alternate agent						
217	Email of local/alternate agent						
218	Complete business address of local/alternate agent for hand service of documents	Street 1	Street 1		Street 2		Street 3
		City		State		Zip (postal code)	Country if not USA

PERSONS MAKING WILLFUL FALSE STATEMENTS IN THE WORKSHEET CAN BE PUNISHED BY FINE OR IMPRISONMENT UNDER TITLE 18 OF THE UNITED STATES CODE, 18 U.S.C. §1001
 Save time, avoid problems -- file electronically at <http://forms.universal-service.org> FCC Form 499-A / March 2011

Block 2 of FCC Registration and Contact Information

Filers must refile Blocks 1, 2 and 6 if there are any changes in this section. See Instructions.

219	Filer 499 ID [from Line 101]	B28290	Native American Telecom, LLC	MI	Last Holoubek	
220	Legal name of reporting entity [from Line 102]	First Jeff				
221	Chief Executive Officer (or, highest ranking company officer if the filing entity does not have a chief executive officer)	Street 1 Street 2 Street 3 City	MI			
222	Business address of individual named on Line 221 check if same as Line 109 <input checked="" type="checkbox"/>	Street 1 Street 2 Street 3 City	MI			
223	Second ranking company officer, such as Chairman (Must be someone other than the individual listed on Line 221)	Street 1 Street 2 Street 3 City	MI			
224	Business address of individual named on Line 223 check if same as Line 109 <input checked="" type="checkbox"/>	Street 1 Street 2 Street 3 City	MI			
225	Third ranking company officer, such as President or Secretary (Must be someone other than individuals listed on Lines 221 or 223)	Street 1 Street 2 Street 3 City	MI			
226	Business address of individual named on Line 225 check if same as Line 109 <input checked="" type="checkbox"/>	Street 1 Street 2 Street 3 City	MI			
227	Indicate jurisdictions in which the filing entity provides service. Include jurisdictions in which service was provided in the past 15 months and jurisdictions in which service is likely to be provided in the next 12 months	State	Zip (postal code)	Country if not USA		
	<input type="checkbox"/> Alabama	<input type="checkbox"/> New York	<input type="checkbox"/> Tennessee			
	<input type="checkbox"/> Alaska	<input type="checkbox"/> Michigan	<input type="checkbox"/> Texas			
	<input type="checkbox"/> American Samoa	<input type="checkbox"/> Midway Atoll	<input type="checkbox"/> Utah			
	<input type="checkbox"/> Arizona	<input type="checkbox"/> Minnesota	<input type="checkbox"/> U.S. Virgin Islands			
	<input type="checkbox"/> Arkansas	<input type="checkbox"/> Mississippi	<input type="checkbox"/> Vermont			
	<input type="checkbox"/> California	<input type="checkbox"/> Iowa	<input type="checkbox"/> Virginia			
	<input type="checkbox"/> Colorado	<input type="checkbox"/> Johnston Atoll	<input type="checkbox"/> Wake Island			
	<input type="checkbox"/> Connecticut	<input type="checkbox"/> Kansas	<input type="checkbox"/> Washington			
	<input type="checkbox"/> Delaware	<input type="checkbox"/> Kentucky	<input type="checkbox"/> West Virginia			
	<input type="checkbox"/> District of Columbia	<input type="checkbox"/> Louisiana	<input type="checkbox"/> Wisconsin			
	<input type="checkbox"/> Florida	<input type="checkbox"/> Maine	<input type="checkbox"/> Wyoming			
	<input type="checkbox"/> Georgia	<input type="checkbox"/> Maryland	<input checked="" type="checkbox"/> South Dakota			

228 Year and month filer first provided (or expects to provide) telecommunications in the U.S. Check if prior to 1/1/1999, otherwise

Year 2009 Month November

PERSONS MAKING WILLFUL FALSE STATEMENTS IN THE WORKSHEET CAN BE PUNISHED BY FINE OR IMPRISONMENT UNDER TITLE 18 OF THE UNITED STATES CODE, 18 U.S.C. §1001

Save time, avoid problems -- file electronically at <http://forms.universalserver.org> FCC Form 499-A / March 2011

2011 FCC Form 499-A Telecommunications Reporting Worksheet (Reporting Calendar 2010 Revenues)

301 Filer 499 ID [from Line 101] 828230

302 Legal name of reporting entity [from Line 102] Native American Telecom, LLC

Report billed revenues for January 1 through December 31, 2010.
Do not report any negative numbers. Dollar amounts may be rounded to the nearest thousand dollars. However, report all amounts as whole dollars.

See instructions regarding Percent Interstate & International

Revenues from Services Provided for Resale as Telecommunications by Other Contributors to Federal Universal Service Support Mechanisms

Fixed local service

Monthly service, local calling, connection charges, vertical features, and other local exchange service including subscriber line and PICC charges to IXCs

Code	Description	Total Revenues (a)	Breakouts	
			Interstate Revenue (d)	International Revenue (e)
303.1	Provided as unbundled network elements (UNEs)	0	0	0
303.2	Provided under other arrangements	0	0	0
304.1	Per-minute charges for originating or terminating calls	0	0	0
304.2	Provided as unbundled network elements or other contract arrangement	\$4,938,297.00	\$4,938,297.00	0
305.1	Local private line & special access service	0	0	0
305.2	Provided to other contributors for resale as telecommunications	0	0	0
306	Payphone compensation from toll carriers	0	0	0
307	Other local telecommunications service revenues	0	0	0
308	Universal service support revenues received from Federal or state sources	0	0	0
309	Mobile services (i.e., wireless telephony, paging & messaging, and other mobile services)	0	0	0
310	Monthly, activation, and message charges except toll	0	0	0
Toll services				
310	Operator and toll calls with alternative billing arrangements (credit card, collect, international call-back, etc.)	0	0	0
311	Ordinary long distance (direct-dialed MTS, customer toll free (800/888 etc.) service, "10-10" calls, associated monthly account maintenance, PICC pass-through, and other switched services not reported above)	0	0	0
312	Long distance private line services	0	0	0
313	Satellite services	0	0	0
314	All other long distance services	0	0	0
315	Total revenues provided for resale [Lines 303 through 314]	\$4,938,297.00	\$4,938,297.00	0

Note: As stated in the instructions, for all revenues reported on this page, you must retain the Filer 499 ID and contact information for the associated customers. You must verify that each of these customers was a direct contributor to the federal universal service support mechanism for calendar year 2010 and that the customer is purchasing service for resale as telecommunications. These records must be made available to the administrator or the FCC upon request. The FCC website contains information on federal universal service contributors. (See instructions.)

PERSONS MAKING WILLFUL FALSE STATEMENTS IN THE WORKSHEET CAN BE PUNISHED BY FINE OR IMPRISONMENT UNDER TITLE 18 OF THE UNITED STATES CODE, 18 U.S.C. §1001

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2011 FCC Form 499-A Telecommunications Reporting Worksheet (Reporting Calendar 2010 Revenues)

Block 4-A End-User and Non-Telecommunications Revenue Information					
401 Filer 499 ID [from Line 101]	828230				
402 Legal name of reporting entity [from Line 102]	Native American Telecom, LLC				
Report billed revenues for January 1 through December 31, 2010. Do not report any negative numbers. Dollar amounts may be rounded to the nearest thousand dollars. However, report all amounts as whole dollars.	Total Revenues (a)	If breakouts are not book amounts, enter whole percentage estimates		Breakouts	
		Interstate (b)	International (c)	Interstate Revenues (d)	International Revenues (e)
See instructions regarding percent interstate & international.					
Revenues from All Other Sources (end-user telecom. & non-telecom.)					
403 Surcharges or other amounts on bills identified as recovering State or Federal universal service contributions	0			0	0
<i>Fixed local services</i>					
Monthly service, local calling, connection charges, vertical features, and other local exchange service charges except for federally tariffed subscriber line charges and PICC charges					
<i>Traditional Circuit Switched</i>					
404.1 Provided at a flat rate including interstate toll service -- local portion	0			0	0
404.2 Provided at a flat rate including interstate toll service -- toll portion	0			0	0
404.3 Provided without interstate toll included (see instructions)	\$77,123			\$77,123	0
<i>Interconnected VoIP</i>					
404.4 Offered in conjunction with a broadband connection	0			0	0
404.5 Offered independent of a broadband connection	0			0	0
405 Tariffed subscriber line charges and PICC charges levied by a local exchange carrier on a no-PIC customer	0			0	0
406 Local private line & special access service [includes the transmission portion of wireline broadband internet access provided on a common carrier basis]	0			0	0
407 Payphone coin revenues (local and long distance)	0			0	0
408 Other local telecommunications service revenues	0			0	0
<i>Mobile services (i.e. wireless telephony, paging & messaging, and other mobile services)</i>					
409 Monthly and activation charges	0			0	0
410 Message charges including roaming and air-time charges for toll calls, but excluding separately stated toll charges	0			0	0

PERSONS MAKING WILLFUL FALSE STATEMENTS IN THE WORKSHEET CAN BE PUNISHED BY FINE OR IMPRISONMENT UNDER TITLE 18 OF THE UNITED STATES CODE, 18 U.S.C. §1001

Total Revenues	If breakouts are not book amounts, enter whole percentage estimates		Breakouts
	(a)	(b)	
(a)	(b)	(c)	(d)
International Revenues			(e)

Toll services			
411	Prepaid calling card (including card sales to customers and non-carrier distributors) reported at face value of cards	0	0
412	International calls that both originate and terminate in foreign points	0	0
413	Operator and toll calls with alternative billing arrangements (credit card, collect, international call-back, etc.) other than revenues reported on Line 412	0	0
414	Ordinary long distance (direct-dialed MTS, customer toll free 800/888 etc.) service, "10-10" calls, associated monthly account maintenance, PICG pass-through, and other switched services not reported above)	0	0
414.1	All other than interconnected VoIP, including, but not limited to, itemized toll on wireline and wireless bills	0	0
414.2	All interconnected VoIP long distance, including, but not limited to, itemized toll	0	0
415	Long distance private line services	0	0
416	Satellite services	0	0
417	All other long distance services	0	0
Revenues other than U.S. telecommunications revenues, including information services, inside wiring maintenance, billing and collection customer premises equipment, published directory, dark fiber, Internet access, cable TV program transmission, foreign carrier operations, and non-telecommunications revenues (See instructions.)			
418.1	bundled with circuit switched local exchange service	0	0
418.2	bundled with interconnected VoIP local exchange service	0	0
418.3	Other	0	0
Block 4-B Total Revenue and Uncollectible Revenue Information			
419	Gross billed revenues from all sources (incl. reseller & non-telecom.) [Lines 303 through 314 plus Lines 403 through 418]	\$5,015,420	\$5,015,420
420	Gross universal service contribution base amounts [Lines 403 through 411 plus Lines 413 through 417] [See Table 3 in instructions.]	\$77,123	\$77,123
421	Uncollectible revenue/bad debt expense associated with gross billed revenues amounts shown on Line 419 [See Instructions.]	\$3,930,046	\$3,930,046
422	Uncollectible revenue/bad debt expense associated with universal service contribution base amounts shown on Line 420	0	0
423	Net universal service contribution base revenues [Line 420 minus line 422]	\$77,123	\$77,123

PERSONS MAKING WILLFUL FALSE STATEMENTS IN THE WORKSHEET CAN BE PUNISHED BY FINE OR IMPRISONMENT UNDER TITLE 18 OF THE UNITED STATES CODE, 18 U.S.C. §1001

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<http://forms.universalservice.org>

2011 FCC Form 499-A Telecommunications Reporting Worksheet (Reporting Calendar 2010 Revenues)

Block 3 and Block 4 Revenues Breakout

501	Filer 499 ID [from Line 101]	828230	Native American Telecom, LLC
502	Legal name of reporting entity [from Line 102]		

Filers that report revenues in Block 3 and Block 4 must provide the percentages requested in Lines 503 through 510. See instructions for limited exceptions.

		Block 3 Carrier's Carrier (a)	Block 4 End-User Telecom. (b)
503	Southeast: Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, Puerto Rico, South Carolina, Tennessee, and U.S. Virgin Islands	0%	0%
504	Western: Alaska, Arizona, Colorado, Idaho, Iowa, Minnesota, Montana, Nebraska, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington, and Wyoming	100%	0%
505	West Coast: California, Hawaii, Nevada, American Samoa, Guam, Johnston Atoll, Midway Atoll, Northern Mariana Islands, and Wake Island	0%	0%
506	Mid-Atlantic: Delaware, District of Columbia, Maryland, New Jersey, Pennsylvania, Virginia, and West Virginia	0%	0%
507	Mid-West: Illinois, Indiana, Michigan, Ohio, and Wisconsin	0%	0%
508	Northeast: Connecticut, Maine, Massachusetts, New Hampshire, New York, Rhode Island, and Vermont	0%	0%
509	Southwest: Arkansas, Kansas, Missouri, Oklahoma, and Texas	0%	0%
510	Total [Percentages must add to 0 or 100.]	100%	0%

511 Revenues from resellers that do not contribute to Universal Service support mechanisms are included in Block 4-B, Line 420 but may be excluded from a filer's TRS, NANPA, LNP, and FCC interstate telephone service provider regulatory fee contribution bases. To have these amounts excluded, the filer has the option of identifying such revenues below. As stated in the instructions, you must have in your records the FCC Filer 499 ID for each customer whose revenues are included on Line 511. (See instructions.)

Revenues from resellers that do not contribute to Universal Service		
	Total Revenues	Interstate and International
\$	0.00	\$ 0.00

PERSONS MAKING WILLFUL FALSE STATEMENTS IN THE WORKSHEET CAN BE PUNISHED BY FINE OR IMPRISONMENT UNDER TITLE 18 OF THE UNITED STATES CODE, 18 U.S.C. §1001
 Save time, avoid problems -- file electronically at <http://forms.universalservice.org> FCC Form 499-A / March 2011

2011 FCC Form 499-A Telecommunications Reporting Worksheet (Reporting Calendar 2010 Revenues)

Block 4 - Nondisclosure of Revenue Information

601 Filer 499 ID [from Line 101] 828230

602 Legal name of reporting entity [from Line 102] Native American Telecom, LLC

Section IV of the instructions provides information on which types of reporting entities are required to file for which purposes. Any entity claiming to be exempt from one or more contribution requirements should so certify below and attach an explanation. [The Universal Service Administrator will determine which entities meet the de minimis threshold based on information provided in Block 4, even if you fail to so certify, below.

603 I certify that the reporting entity is exempt from contributing to Universal Service [] TRS [] NANPA [] LNP Administration []

Provide explanation below:

604 Please indicate whether the reporting entity is State or Local Government Entity [] I.R.C § 501or State Tax Exempt (see instructions) []

605 I certify that the revenue data contained herein are privileged and confidential and that public disclosure of such information would likely cause substantial harm to the competitive position of the company. I request nondisclosure of the revenue information contained herein pursuant to Sections 0.459, 52.17, 54.711 and 64.604 of the Commission's rules. [X]

I certify that I am an officer of the above-named reporting entity as defined in the instructions, that I have examined the foregoing report and, to the best of my knowledge, information and belief, all statements of fact contained in this Worksheet are true and that said Worksheet is an accurate statement of the affairs of the above-named company for the previous calendar year. In addition, I swear, under penalty of perjury, that all requested identification registration information has been provided and is accurate. If the above-named reporting entity is filing on a consolidated basis, I certify that this filing incorporates all of the revenues for the consolidated entities for the entire year and that the filer adhered to and continues to meet the conditions set forth in section II-C of the instructions.

606 Signature [Handwritten Signature]

607 Printed name of officer First Jeff MI Last Holoubek

608 Position with reporting entity President

609 Business telephone number of officer (605) 477-2222 ext -

610 Email of officer [not for public release] jeff@nativeamericantelecom.com

611 Date March 30, 2011

612 Check those that apply: [] Original April 1 filing for year [] New filer, registration only [] Revised filing with updated registration [X] Revised filing with updated revenue data

Do not mail checks with this form. Send this form to: Form 499 Data Collection Agent c/o USAC 2000 L Street, N.W. Suite 200 Washington DC, 20036
For additional information regarding this worksheet contact: Telecommunications Reporting Worksheet information: (888) 641-8722 or via email: Form499@universalservice.org

PERSONS MAKING WILLFUL FALSE STATEMENTS IN THE WORKSHEET CAN BE PUNISHED BY FINE OR IMPRISONMENT UNDER TITLE 18 OF THE UNITED STATES CODE, 18 U.S.C. §1001

Confidential

In Separate Sealed Envelope

Pages 653-658

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

SPRINT COMMUNICATIONS)	CIV. 10-4110-KES
COMPANY, L.P.,)	
)	
Plaintiff,)	
)	ORDER DENYING DEFENDANT
vs.)	NATIVE AMERICAN TELECOM'S
)	MOTION FOR A PRELIMINARY
NATIVE AMERICAN TELECOM, LLC,)	INJUNCTION
and CROW CREEK SIOUX TRIBAL)	
COURT,)	
)	
Defendants.)	

Defendant, Native American Telecom (NAT), moves for a preliminary injunction to enjoin plaintiff, Sprint Communications Company, from withholding interstate switched access charges that NAT has already billed or will bill to Sprint in the future. Sprint resists the motion. The motion is denied.

BACKGROUND

Viewed in the light most favorable to Sprint, the nonmoving party, the pertinent facts to this order are as follows:

Sprint provides nationwide long-distance telephone services and is known under the telecommunications regulatory framework as an interexchange carrier (IXC). Sprint delivers long-distance calls to local exchange carriers (LECs) for termination to end-users. Under the current regulatory framework established by the Federal Communication Commission (FCC), Sprint pays the LEC a terminating access charge based on the LEC's filed tariff.

In 1997, the Crow Creek Sioux Tribe established the Crow Creek Sioux Tribal Utility Authority (Tribal Utility Authority). In October of 2008, the Tribal Utility Authority authorized NAT, a tribally owned limited liability company organized under the laws of South Dakota, to provide telecommunications service on the Crow Creek Reservation subject to the tribe's laws. Pursuant to the 2008 approval order, NAT filed two access tariffs for telephone traffic on the reservation, one with the FCC for interstate traffic and one with the Tribal Utility Authority for intrastate traffic within the reservation. In September of 2009, NAT launched its system on the Crow Creek Reservation.

NAT is an LEC that also operates a free conference calling system with a conference call bridge located on the reservation. The party using NAT's services does not pay NAT for the conference call but rather is assessed normal charges by the party's telecommunications provider. NAT then bills the telecommunications provider an access fee as defined in its tariffs. NAT's conference calling system is at issue here.

After paying two of NAT's bills for charges connected to conference calls, Sprint ceased paying NAT's terminating access tariffs because Sprint believed that NAT was involved in a traffic-pumping scheme, otherwise known as access stimulation or regulatory arbitrage, to generate traffic from conference calls.

In March of 2010, NAT filed a complaint against Sprint with the Tribal Utility Authority seeking enforcement of its access tariffs. On March 29, 2010,

the Tribal Utility Authority entered an ex parte order finding that Sprint's refusal to pay NAT's tariffs violated the "filed rate doctrine." In response, Sprint filed a complaint with the South Dakota Public Utilities Commission (SDPUC) to enjoin NAT's collection efforts with respect to interstate traffic. On July 12, 2010, NAT filed a complaint in the CCSTC to collect the unpaid access service tariffs. Sprint sought relief in this court to enjoin the CCSTC from deciding the collection action. The court granted Sprint's motion for a preliminary injunction enjoining the CCSTC.

NAT then filed a second interstate tariff with the FCC. Several IXCs, including Sprint, petitioned the FCC to reject or, in the alternative, suspend NAT's tariff pending an administrative investigation. The FCC declined to rule that the second tariff was so patently unlawful that it should be rejected, and the tariff became effective on November 30, 2010. Docket 67-6 at 1.

NAT moved for a preliminary injunction on its November 2010 tariff to require Sprint to pay NAT's bills during the pendency of this action. Sprint responded that NAT has not alleged a cause of action against Sprint and, thus, cannot seek a preliminary injunction. NAT moved to amend its counterclaim to assert *claims of a breach of contract and collection action pursuant to its federal tariff, a breach of implied contract resulting from a violation of its federal tariff, and quantum meruit and unjust enrichment.* NAT also seeks declaratory relief.

Docket 86-1. The court granted NAT's motion to amend its counterclaim during the March 3, 2011, hearing.

Sprint has stated that it will seek leave from the FCC to amend its complaint to add provisions challenging the unlawfulness of NAT's November 2010 tariff. After resolving various discovery disputes and reviewing two additional exhibits consisting of Thomas Reiman's deposition¹ and NAT's CABs Summary,² the preliminary injunction motion is ripe for review.

DISCUSSION

Federal Rule of Civil Procedure 65(a) authorizes a court to issue a preliminary injunction. "A preliminary injunction is an extraordinary remedy,

¹ Before the court held a hearing on NAT's preliminary injunction motion, NAT and Sprint engaged in limited discovery pertaining to the preliminary injunction motion and hearing. Sprint sought to depose Thomas Reiman, one of NAT's co-founders. NAT objected to the deposition and moved for a protective order. The parties finished briefing the matter after the March 3, 2011, hearing. The court then ordered the parties to depose Reiman and submit the transcript to the court. Docket 106 at 11.

² NAT refused to answer Sprint's interrogatory number 7, which asked NAT to "[i]dentify all interexchange carriers whom NAT has invoiced under any of its tariffs, including the name of the interexchange carrier, the amounts invoiced, and the payments received, if any." Docket 92 at 2. Sprint moved to compel NAT's response to interrogatory number 7. NAT, citing Rule 26(c)(1)(G)'s protections for confidential financial information, refused to answer and the court reviewed the documents in camera. NAT produced one document entitled "NAT-Crow Creek Inception thru Current CABs A/R and Payment Summary" (CABs Summary). Docket 106 at 11. After reviewing the document, the court ordered NAT to produce the document to Sprint but issued a protective order. Docket 117. Specifics of the CABs Summary are generically discussed in this order to ensure that NAT's confidential financial information remains as confidential as possible.

and the burden of establishing the propriety of an injunction is on the movant.”
Watkins Inc. v. Lewis, 346 F.3d 841, 845 (8th Cir. 2003) (citing *Calvin Klein
Cosmetics Corp. v. Lenox Labs., Inc.*, 815 F.2d 500, 503 (8th Cir. 1987); *Goff v.
Harper*, 60 F.3d 518, 520 (8th Cir. 1995)).

The moving party must make a familiar four-part showing before the court issues a preliminary injunction: (1) the threat of irreparable harm by the movant; (2) the balance between this harm and the injury that granting the injunction will inflict on the other parties; (3) the probability that the movant will succeed on the merits; and (4) the public interest. *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981). A district court has wide latitude to issue a preliminary injunction, and the appellate court only reviews a preliminary injunction order for abuse of discretion. *Chicago Stadium Corp. v. Scallen*, 530 F.2d 204, 206 (8th Cir. 1976).

I. Probability of Success on the Merits

The two most critical *Dataphase* factors are the probability that the movant will succeed on the merits and whether the movant will suffer irreparable harm if the preliminary injunction is not granted. *Scallen*, 530 F.2d at 206. Probability of the success on the merits is a critical factor in determining whether a court should issue a preliminary injunction. *Lankford v. Sherman*, 451 F.3d 496, 507 (8th Cir. 2006).

Sprint has represented that it will amend its complaint with the FCC to continue challenging the validity of NAT's November 2010 tariff. Docket 72 at 2 ("Sprint will seek leave to amend its [FCC] complaint to add provisions to its complaint challenging the unlawfulness of Tariff No. 2"). The FCC has expertise in the federal communications realm and when a tariff's terms are disputed, the FCC should first interpret that tariff. *See, e.g., Access Telecomm. v. Sw. Bell Tel. Co.*, 137 F.3d 605, 609 (8th Cir. 1998) (" '[W]here words in a tariff are used in a peculiar or technical sense, and where extrinsic evidence is necessary to determine their meaning or proper application,' as is the case here, the issue should first go to the appropriate administrative agency." (alteration in original) (quoting *United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 66 (1956))). NAT and Sprint dispute the terms of NAT's November 2010 tariff and, given the highly technical nature of telecommunications tariffs, the FCC should first determine the validity of NAT's tariff in a final ruling.

Moreover, on February 9, 2011, the FCC released a Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking (NPRM). Docket 82-2, Fed. Commc'n Comm'n, *Notice of Proposed Rulemaking & Further Notice of Proposed Rulemaking*, Feb. 9, 2011, available at http://www.fcc.gov/Daily_Releases/Daily_Business/2011/db0209/FCC-11-13A1.pdf. In the NPRM, the FCC stated that it recognizes the need to address traffic pumping, change the current intercarrier compensation system to reduce current incentives to engage

in regulatory arbitrage for profit, and reevaluate how companies should file tariffs on voice over internet protocol (VoIP) technology. NPRM, Docket 82-2 at 7, 38, 448-49, 494-508, 524-542. VoIP technology is one of the types of technology that NAT currently employs.

If the court ruled on the merits now, any ruling could conflict with the FCC action between Sprint and NAT and/or be contrary to the FCC's ultimate rules on tariffs for VoIP technology and free conferencing calling services. This court has stayed other telecommunications cases concerning tariffs for conference calling systems upon referral to the FCC and not decided the cases' merits. *See, e.g., Splitrock Props., Inc. v. Quest Commc'ns Corp.*, No. 08-4172-KES, 2010 WL 2867126, at *13 (D.S.D. July 20, 2010) (staying a telecommunications case involving a conferencing call system and referring several issues to the FCC); *Sancom Inc. v. Sprint Commc'ns Co.*, No. 07-4107-KES, 2010 WL 936718 (D.S.D. Mar. 15, 2010) (same); *Sancom, Inc. v. Quest Commc'ns Corp.*, No. 08-4172-KES, 2010 WL 960005 (D.S.D. Mar. 12, 2010) (same); *Northern Valley Commc'ns, LLC v. Sprint Commc'ns Co.*, No. 08-1003-KES, 2010 WL 936723 (D.S.D. Mar. 15, 2010) (same); *Sancom, Inc. v. AT&T Corp.*, 696 F. Supp. 2d 1030 (D.S.D. Mar. 11, 2010) (same). There is no reason for the court to deviate from this past practice and determine the merits in this action while the above actions are awaiting determination from the FCC. Moreover, as stated below, because NAT is unable to show irreparable harm, any discussion on the merits is unnecessary.

II. Irreparable Harm

Of the two most critical *Dataphase* factors, courts more heavily weigh the threat of irreparable harm factor: “[T]he movant’s failure to sustain its burden of proving irreparable harm ends the inquiry ‘and the denial of the injunctive request is warranted.’” *Glenwood Bridge, Inc. v. City of Minneapolis*, 940 F.2d 367, 371 (8th Cir. 1991) (quoting *Gelco Corp. v. Coniston Partners*, 811 F.2d 414, 420 (8th Cir. 1987)). The key word in the irreparable harm factor is irreparable: “The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.” *Sampson v. Murray*, 415 U.S. 61, 88 (1974) (internal quotation omitted). “Failure to show irreparable harm is an independently sufficient ground upon which to deny a preliminary injunction.” *Watkins*, 346 F.3d at 844 (citing *Adam-Mellang v. Apartment Search, Inc.*, 96 F.3d 297, 299 (8th Cir. 1996); *Gelco*, 811 F.2d at 420); see also *Sampson*, 415 U.S. at 88 (“This court has stated that ‘[t]he basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies.’” (alteration in original) (quoting *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506-07 (1959))).

NAT need only show the possibility of harm and not actual harm. See, e.g., *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953) (“The purpose of an injunction is to prevent future violations . . . and, of course, it can be utilized

even without a showing of past wrongs.” (citing *Swift & Co. v. United States*, 276 U.S. 311, 326 (1928))). But NAT must “demonstrate that irreparable injury is **likely** in the absence of an injunction.” *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 129 S. Ct. 365, 375 (2008) (emphasis in original) (citing *Los Angeles v. Lyons*, 461 U.S. 95, 103 (1983); *Granny Goose Foods, Inc. v. Teamsters*, 415 U.S. 423, 441 (1974); *O’Shea v. Littleton*, 414 U.S. 488, 502 (1974)).

Courts typically grant preliminary injunctions when the movant proves irreparable harm and the remedy is to maintain the status quo until the case’s merits are resolved. See, e.g., *Owens v. Severin*, 293 Fed. Appx. 425, 425 (8th Cir. 2008) (reasoning that the “purpose of [a] preliminary injunction is to preserve the status quo until the court rules on [the] merits.” (citing *Devose v. Herrington*, 42 F.3d 470, 471 (8th Cir. 1994))); *Nat’l Basketball Ass’n v. Minn. Prof’l Basketball, Ltd.*, 56 F.3d 866, 871-72 (8th Cir. 1995) (“A preliminary injunction confers important rights and finally adjudicates the issue of preserving the status quo until the district court reaches the case’s merits.”).

Sprint argues that even if NAT could show damages, the court cannot grant a preliminary injunction because the injunction would be outside the court’s equitable remedies. An injunction is an equitable remedy, *General Motors Corp. v. Harry Brown’s LLC*, 563 F.3d 312, 316 (8th Cir. 2009), but NAT seeks a legal remedy of monetary damages.

The Supreme Court has held that a court cannot use its equitable powers to grant a preliminary injunction when the injunction only seeks a legal remedy. *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 333 (1999). In interpreting *Grupo*, the Eighth Circuit has reasoned that a district court cannot use its equitable power of an injunction when the underlying case is legal in nature. *Kennedy Bldg. Assocs. v. CBS Corp.*, 476 F.3d 530, 535 (8th Cir. 2007) (reasoning further that a state statute could create an equitable remedy for a legal cause of action). “The law is clear . . . that ‘a dollar loss invokes the Court’s legal powers, as opposed to its equitable powers.’” *Gen. Motors Corp. v. Harry Brown’s, LLC*, 590 F. Supp. 2d 1134, 1138 (D. Minn. 2008), *aff’d Harry Brown’s, LLC*, 563 F.3d 312 (8th Cir. 2009) (quoting *Halikas v. Univ. of Minn.*, 856 F. Supp. 1331, 1334 (D. Minn. 1994)); *see also Franklin v. Gwinnett Cnty. Public Sch.*, 503 U.S. 60, 75-76 (1992) (“[I]t is axiomatic that a court should determine the adequacy of a remedy in law before resorting to equitable relief.”).

Here, the status quo is that Sprint has disputed NAT’s charges since February of 2010. Docket 72 at 36. In its preliminary injunction motion, NAT seeks a monetary damage award from Sprint, which is a legal remedy. Thus, it appears that NAT’s request falls outside the court’s equitable powers and the court is unable to order NAT’s requested remedy.

NAT heavily relies on *NewLife Homecare Inc. v. Express Scripts, Inc.*, No. 3:07CV761, 2007 WL 1314861 (M.D. Pa. May 4, 2007), in arguing that the court can grant a preliminary injunction for monetary damages. Notwithstanding that *NewLife* is only persuasive authority and does not address *Grupo*, the facts are also distinguishable. NewLife had a contract with an insurance company to provide prescriptions. *Id.* at *1. Express Scripts Inc. (ESI) had a contract with the insurance company to pay NewLife's bills. *Id.* NewLife submitted claims on behalf of various members of the insurance company to ESI; ESI approved the claims, but never paid NewLife. *Id.* ESI owed NewLife approximately \$1.6 million. *Id.* Because ESI withheld payment, NewLife was in arrears to its pharmaceutical suppliers, could not obtain credit, and was unable to secure products to meet its clients' urgent health needs. *Id.* at *2.

The *NewLife* court reasoned "that the law requires convincing proof that a business will in fact cease to exist or be forced into bankruptcy for such an eventuality to be considered irreparable harm." *Id.* at *7. The court found that NewLife met this strict evidentiary burden because it submitted not only an affidavit from the company's treasurer and accounts manager stating that NewLife's suppliers refused to process new orders and some suppliers would begin collection attempts, but also a cash flow projection stating the specific date of when NewLife would be cash flow negative. *Id.* at *5. Finding that NewLife had "presented concrete evidence that it will in fact be forced out of business and/or

into bankruptcy due to the defendant's failure to release the payments," and that some threat existed that patients would be unable to obtain life-saving medications, the court granted the preliminary injunction. *Id.* at *6.

The facts of this case are distinguishable from those in *NewLife*. While ESI never disputed the terms of its contract with NewLife and the insurance company, Sprint argues that NAT's tariff is invalid, vague, and unenforceable. The *NewLife* court used its equitable power to enforce an undisputed, existing contract. This court, if it grants the preliminary injunction, would enforce NAT's tariff, the validity of which is directly disputed by Sprint. Because there is no factual similarity to *NewLife* and the case does not address *Grupo*, NAT's reliance on *NewLife* is unpersuasive.

The other cases relied on by NAT are also factually distinguishable. In *Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197 (2d Cir. 1970), the appellate court affirmed, in part, a preliminary injunction to enjoin a manufacturer from contacting a dealer's customers and to prevent termination of the dealership by the manufacturer. *Id.* at 1207-08. Sprint and NAT do not have a relationship similar to a dealership relationship that the court could enforce. In *Dorean v. Salem Inn, Inc.*, 422 U.S. 922 (1975), the Supreme Court affirmed a preliminary injunction when a city ordinance prohibited topless dancing because the ordinance violated business owners' First and Fourteenth Amendment rights and, absent the injunction, the business owners would have suffered "a

substantial loss of business and perhaps even bankruptcy.” *Id.* at 932. NAT does not allege a deprivation of a constitutional right and, instead, only seeks a legal remedy of monetary damages.

In *Northwestern Controls v. Outboard Marine Corp.*, 317 F. Supp. 698 (D. Del. 1970), the district court denied a preliminary injunction and reasoned that “where the loss, as in the case, may be ascertained in money damages, no irreparable injury is shown and refusal to grant a preliminary injunction is proper.” *Id.* at 703 (citing *Graham v. Triangle Publ’ns, Inc.*, 344 F.2d 775 (3d Cir. 1965)). *Northwestern Controls* supports the conclusion in this case because NAT’s injury is only monetary. Lastly, in *Columbia Broadcasting System, Inc. v. ASCAP*, 320 F. Supp. 389 (S.D.N.Y. 1970), the court issued a preliminary injunction to put the parties back to the status quo ante under the parties’ previous contract. *Id.* at 393-94. While Sprint paid two of NAT’s bills in December of 2009 and January of 2010, Sprint has stated that it made the payments in error and denies that it has a contract with NAT. NAT’s arguments and citations to case law are unpersuasive and the court’s equitable powers do not include the grant of a preliminary injunction to remedy a legal wrong.

Even if the court could issue the remedy that NAT seeks using its equitable powers, NAT has not sustained its burden to prove that it will suffer irreparable harm if the court does not issue the preliminary injunction. NAT’s CABs Summary shows that as of April 10, 2011, the date NAT compiled the

CABs Summary, NAT has billed ten telecommunications companies approximately \$6.8 million and assessed approximately \$283,000 in finance charges. NAT has received about \$1.3 million in payments and, as of April 10, 2011, is owed approximately \$5.8 million. NAT has billed Sprint about \$782,000 and assessed about \$23,000 in finance charges. Sprint has paid about \$29,000 in two separate payments and currently owes NAT approximately \$775,000. Of the \$5.8 million that NAT is owed by ten telecommunications companies, Sprint is responsible for \$775,000, or approximately 13 percent, of all payments owed to NAT.

One IXC is currently indebted to NAT for approximately \$2 million and except for one payment in December of 2010, has not paid NAT's invoices since July of 2010. A second IXC is indebted to NAT for approximately \$1 million and has not paid NAT since August of 2010. A third IXC is indebted to NAT for approximately \$1.7 million and has not paid NAT since February of 2010.

NAT offers no reason as to why Sprint's failure to pay will cause NAT to file for bankruptcy when three other IXCs have not paid NAT in at least six months and, combined, owe NAT approximately \$4.7 million. NAT has neither identified a specific amount that will keep it afloat during the pendency of this action nor offered concrete proof that an injunction against Sprint would save NAT from the alleged bankruptcy.

Moreover, Sprint ceased paying NAT's bills in February of 2010, but NAT did not bring its preliminary injunction motion until January of 2011. A significant delay in time between the filing of a preliminary injunction motion and the alleged harm weighs against a finding that irreparable harm is imminent. *See, e.g., Crow Creek Sioux Tribal Farms, Inc. v. U.S. I.R.S.*, 684 F. Supp. 2d 1152, 1158 (D.S.D. 2010) ("Also relevant, though not dispositive, to determining whether there would be irreparable harm is a party's delay in seeking injunctive relief from the Court."); *Utah Gospel Mission v. Salt Lake City Corp.*, 316 F. Supp. 2d 1202, 1221 (D. Utah 2004) ("Plaintiffs' delay in seeking an injunction undermines their argument that they will suffer irreparable harm if an injunction does not issue."); 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure*, § 2948.1 (1995) ("A long delay by plaintiff after learning of the threatened harm may be taken as an indication that the harm would not be serious enough to justify a preliminary injunction."). NAT waited more than six months after Sprint filed this action against NAT in August of 2010 before moving for a preliminary injunction against Sprint. NAT's delay further undermines its claim that it faces imminent bankruptcy.

NAT has not offered sufficient concrete evidence that it faces imminent bankruptcy if the court does not grant its preliminary injunction motion. Because there is no threat of irreparable harm, the court need not analyze the

possibility of success on the merits³ or any of the other *Dataphase* factors. See *Beacon Theatres*, 359 U.S. at 506-07; *Watkins*, 346 F.3d at 844; *Adam-Mellang*, 96 F.3d at 299; *Gelco*, 811 F.2d at 420. NAT has not met its burden to show that a preliminary injunction is appropriate. Accordingly, it is

ORDERED that defendant Native American Telecom, LLC's motion for a preliminary injunction (Docket 67) is denied.

IT IS FURTHER ORDERED that Sprint's motion to strike (Docket 110) is denied as moot.

Dated May 31, 2011.

BY THE COURT:

/s/ Karen E. Schreier

KAREN E. SCHREIER
CHIEF JUDGE

³ NAT has filed two notices of supplementary authority in support of its preliminary injunction motion, see Dockets 104, 105, and Sprint responded to the notices and moved to strike the supplemental authority and replace NAT's authority with Sprint's authority. See Docket 109, 110, 111, 112. NAT has responded to Sprint's motion to strike. Docket 114. Because the supplemental authority primarily concerns the success on the merits factor, the court will not address the supplemental authority at this time and Sprint's motion to strike is denied as moot.

U.S. Census Bureau
American FactFinder



South Dakota -- American Indian Area
GCT-PL, Race and Hispanic or Latino: 2000
Data Set: Census 2000 Redistricting Data (Public Law 94-171) Summary File

NOTE: For information on confidentiality protection, nonsampling error, definitions, and count corrections see <http://factfinder.census.gov/home/en/datanotes/expplu.html>.

Geographic area	Total population	Race									
		One race								Two or more races	Hispanic or Latino (of any race)
		Total	White	Black or African American	American Indian and Alaska Native	Asian	Native Hawaiian and Other Pacific Islander	Some other race			
AMERICAN INDIAN RESERVATION AND OFF-RESERVATION TRUST LAND -- FEDERAL											
Cheyenne River Reservation and Off-Reservation Trust Land, SD	6,470	6,357	2,067	2	6,249	8	3	7	113	76	
Cheyenne River Reservation	6,466	6,353	2,063	2	6,249	9	3	7	113	76	
Cheyenne River Off-Reservation Trust Land	4	4	4	0	0	0	0	0	0	0	
Crow Creek Reservation, SD	2,225	2,187	299	4	1,895	0	0	8	36	25	
Flandreau Reservation, SD	408	380	53	0	328	0	0	1	28	12	
Lake Traverse Reservation, SD--ND (part)	10,217	10,058	6,568	13	3,453	13	0	11	159	71	
Lower Brule Reservation and Off-Reservation Trust Land, SD	1,353	1,344	105	1	1,237	0	0	1	9	7	
Lower Brule Reservation	1,353	1,344	105	1	1,237	0	0	1	9	7	
Lower Brule Off-Reservation Trust Land	0	0	0	0	0	0	0	0	0	0	
Northern Cheyenne Reservation and Off-Reservation Trust Land, MT--SD (part)	0	0	0	0	0	0	0	0	0	0	
Northern Cheyenne Off-Reservation Trust Land (part)	0	0	0	0	0	0	0	0	0	0	
Pine Ridge Reservation and Off-Reservation Trust Land, SD--NE (part)	15,507	15,313	989	12	14,295	9	6	29	194	208	
Pine Ridge Reservation	14,988	13,924	892	10	12,985	9	6	28	144	182	
Pine Ridge Off-Reservation Trust Land (part)	1,499	1,389	77	2	1,310	0	0	0	50	26	
Rosebud Reservation and Off-Reservation Trust Land, SD	10,469	10,333	1,251	8	9,040	13	0	21	136	189	
Rosebud Reservation	9,050	8,925	1,138	8	7,747	13	0	19	125	138	
Rosebud Off-Reservation Trust Land	1,419	1,408	113	0	1,293	0	0	2	11	51	
Standing Rock Reservation, SD--ND (part)	4,208	4,137	1,579	4	2,543	2	0	0	69	89	
Turtle Mountain Reservation and Off-Reservation Trust Land, MT--ND--SD (part)	0	0	0	0	0	0	0	0	0	0	
Turtle Mountain Off-Reservation Trust Land (part)	0	0	0	0	0	0	0	0	0	0	
Yankton Reservation, SD	6,500	6,393	3,691	12	2,633	5	1	41	117	154	

Source: U.S. Census Bureau, Census 2000 Redistricting Data (Public Law 94-171) Summary File, Matrices PL1 and PL2.

EXHIBIT P