

**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	)	Docket No. TC08-110
To Provide Local Exchange	)	
Service on the Crow Creek	)	
Indian Reservation	)	

**REPLY OF NATIVE AMERICAN TELECOM, LLC  
TO INTERVENORS' RESPONSE TO MOTION TO DISMISS**

Native American Telecom, LLC (“Native Telecom”) hereby replies to the Response of Midstate Communications (“Midstate”), Venture Communications Cooperative (“Venture”) and the South Dakota Telecommunications Association (“SDTA”) (collectively, “Intervenors”) to the Motion to Dismiss, and hereby renews its Motion to Dismiss the application for a certificate of authority to provide local exchange services on the Crow Creek Indian Reservation.

**I. BACKGROUND**

The Crow Creek Sioux Tribe (the “Tribe”) resides on the Crow Creek reservation and is a federally recognized Indian tribe.<sup>1</sup> In 1997, the Tribe created the Crow Creek Utility Authority (the “CCUA”) for the purpose of planning and overseeing utility services upon the reservation and to promote the use of such services to “improve the health and welfare of the residents.”<sup>2</sup> To further this important goal, the Tribe and Native Telecom entered into an agreement in August 2008, which provided for the parties to develop and implement an advanced telecommunications system for use by the residents of the reservation.<sup>3</sup> Native Telecom subsequently filed an

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<sup>1</sup> Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs, 73 Fed. Reg. 18,553 (2008).

<sup>2</sup> Crow Creek Utility Authority Plan of Operation at § 3.A.2.

<sup>3</sup> Comments of the Crow Creek Sioux Tribe, In the Matter of the Application of Native American Telecom, LLC for a Certificate of Authority to Provide Local Exchange Service on the Crow Creek Indian

application with the South Dakota Public Utilities Commission (the “Commission”) requesting a certificate of authority to provide local exchange services on the Crow Creek reservation.<sup>4</sup> On December 1, 2008, based upon the authorization granted to it by the Crow Creek tribal council and in furtherance of the Tribe Telecommunications Plan, the CCUA issued an order authorizing Native Telecom to provide “basic telephone and advanced broadband services” within “all areas of the Crow Creek Sioux Reservation.”<sup>5</sup> In light of this approval from the CCUA, Native Telecom filed a motion to dismiss the application to this Commission. On December 10, 2008, Midstate, Venture and SDTA filed a Response opposing the Motion to Dismiss.<sup>6</sup> The Tribe filed its own comments in response asking the Commission “to recognize the Tribe’s jurisdiction and sovereignty and [to] dismiss Native Telecom’s application.”<sup>7</sup>

Native Telecom respectfully requests that the Commission promptly dismiss the Application and deny any request to continue this proceeding. It is imperative that the Tribe and Native Telecom move forward as soon as possible with their plan for the development and deployment of advanced telecommunications services to the reservations. As the Tribe informed the Commission in its Comments, the “Crow Creek reservation is one of the nation’s poorest

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Reservation, Docket No. TC08-110 (Dec. 11, 2008) (“Tribe Comments”), at 2; *see also* Crow Creek Indian Reservation Telecommunications Plan to Further Business, Economic, Social, and Educational Development, dated Aug. 19, 2008 (the “Tribe Telecommunications Plan”). A copy of the Tribe Telecommunications Plan was provided as Exhibit D to Native Telecom’s application to this Commission for a certificate of authority.

<sup>4</sup> Application of Native American Telecom, LLC for a Certificate of Authority to Provide Local Exchange Service on the Crow Creek Indian Reservation, Docket No. TC08-110 (Sept. 9, 2008) (“Application”).

<sup>5</sup> Order Granting Approval to Provide Telecommunications Service, Native American Telecom, LLC Request to Provide Telecommunications Service Within the Exterior Boundaries of the Crow Creek Reservation, at 1 (Oct. 28, 2008) (“CCUA Order”).

<sup>6</sup> Intervenor’s Response to Motion to Dismiss the Application of Native American Telecom, LLC for a Certificate of Authority to Provide Local Exchange Service on the Crow Creek Indian Reservation, Docket No. TC08-110 (Dec. 10, 2008) (“Response”). Midstate, Venture and SDTA were granted leave to intervene by the Commission on October 21, 2008.

<sup>7</sup> Tribe Comments at 1.

Indian reservations.”<sup>8</sup> Lack of sufficient telephone and other telecommunications services upon Native American reservations has been a longstanding and pervasive problem. While 94% of all Americans have at least one telephone in their home, the Federal Communications Commission (“FCC”) previously found that only 47% of Native Americans living on reservations or other tribal lands have a telephone.<sup>9</sup> The FCC determined that this lower telephone subscribership is “largely due to the lack of access to and/or affordability of telecommunications services in these areas.”<sup>10</sup> Moreover, those few services currently offered on Indian reservations are often inadequate, expensive and in disrepair.<sup>11</sup> In addition to the FCC, the National Telecommunications and Information Administration has recognized the importance of telecommunications availability on reservations and has established programs to expand these services.<sup>12</sup> The FCC has found that “by enhancing tribal communities’ access to telecommunications, including access to interexchange services, advanced telecommunications, and information services, we increase tribal communities’ access to education, commerce, government and public services.”<sup>13</sup>

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<sup>8</sup> *Id.*

<sup>9</sup> *Federal-State Joint Board on Universal Services; Promoting Deployment and Subscribership in Unserved and Underserved Areas, including Tribal and Insular Areas*, Twelfth Report and Order, 15 FCC Rcd. 12208 (2000) (“2000 FCC Report”), at ¶ 26.

<sup>10</sup> *Id.* at ¶ 20.

<sup>11</sup> See Tracey A. LeBeau, *Reclaiming Reservation Infrastructure: Regulatory and Economic Opportunities for Tribal Development*, 12 Stan. L. & Pol’y Rev. 237, 238 (2001) (“Reservation infrastructure, including basic services such as water, electricity, gas and telecommunications, are currently incapable of supporting tribal populations.”); see also *2000 FCC Report*, at ¶ 20 (finding that the cost of basic service on Indian reservations can be as high as \$38 per month).

<sup>12</sup> See Statement of Kelly Klegar Levy, Associate Administrator, Office of Policy and Development, National Telecommunications and Information Administration, U.S. Department of Commerce, Before the Senate Committee on Indian Affairs, May 22, 2003 (discussing various NTIA programs for the development of advanced telecommunications services on Indian reservations).

<sup>13</sup> *2000 FCC Report*, at ¶ 23.

To promote such improvements in welfare and economic well-being, the Tribe “developed a Telecommunications Plan for the establishment of a telecommunications infrastructure on the reservation that will enable business, economic, social and educational development.”<sup>14</sup> Under this plan, and by working directly with Native Telecom, the Tribe will be able to spur the development of telecommunications services in the reservation that will be designed to meet the unique needs of its residents. This will allow for the provision of “broadband internet access to critical tribal government locations, schools, and other educational and medical locations” with services to be expanded to businesses and residents.<sup>15</sup> Any delay in the roll-out of these services will impair the economic growth of the Tribe and could preclude altogether the development of vital communications links within the reservation. Indeed, the Tribe can afford no such delay with respect to this crucial economic development initiative -- more than 97% of the reservation’s 3,000 residents are unemployed, and the impact of the recession affecting the rest of the country only makes it all the more difficult to attract business interests and improve circumstances on the reservation.<sup>16</sup> Prompt action on the motion to dismiss -- by the end of this month -- is therefore essential if the Tribe is to realize the benefits of the Tribe Telecommunications Plan.

## **II. THE INTERVENORS’ RESPONSE IS IMPROPER AS A MATTER OF LAW AND PRACTICE.**

As an initial matter, the Intervenor’s Response is procedurally improper and should be denied as a matter of course. The Commission’s rules provide that a party may dismiss or withdraw its pleading prior to the entry of a final order and that, upon such request to dismiss, it

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<sup>14</sup> Tribe Comments at 1.

<sup>15</sup> *Id.*

<sup>16</sup> Tribe Telecommunications Plan at 1.

is then the responsibility of the Commission to consider and evaluate the request.<sup>17</sup> Although other types of proceedings and filings expressly provide for comments and oppositions to be filed by other parties,<sup>18</sup> the rules do not provide for any type of response or opposition from any other parties or intervenors to a filing of a motion to dismiss.

Furthermore, the Intervenor's Response provides no lawful basis for the denial of Native Telecom's motion to dismiss or any significant public interest that would require the Commission to keep the proceeding open. For example, the Intervenor professes confusion about "what type of services Native Telecom proposes to provide"<sup>19</sup> and "what type of entity Native Telecom is."<sup>20</sup> These contrived cries of confusion are without merit (and are also beside the point as discussed in Section III hereof). In its application, Native Telecom provided all of the information required by A.R.S.D. § 20:10:32:03. For example, Native Telecom clearly explained that it sought to "provide facilities-based telephone and advanced broadband services" and that it is "currently working with carriers to establish connectivity for the exchange of telecommunications traffic and with equipment vendors for the technology, including advanced wireless broadband technology."<sup>21</sup> Native Telecom further indicated that it would provide local exchange services, that it intended to meet the service requirements of A.R.S.D. § 20:10:32:15, and that it planned to seek designation as an Eligible Telecommunications Carrier pursuant to 47

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<sup>17</sup> A.R.S.D. § 20:10:01:02.4.

<sup>18</sup> *See, e.g.*, A.R.S.D. §§ 20:10:01:16.01 and 20:10:01:30.02.

<sup>19</sup> Response at 2.

<sup>20</sup> *Id.* at 3.

<sup>21</sup> Application at 1, 3.

U.S.C. § 214(e)(6).<sup>22</sup> The references to these statutes and administrative code provisions leave little room for confusion regarding the type of services that Native Telecom would provide.

Likewise, the CUA Order could not be more clear -- it restates Native Telecom's proposal to "make basic telephone and advanced broadband service readily available and affordable to the residents of the reservation."<sup>23</sup> The CUA Order further confirms that the basic telephone service to be offered by Native Telecom will be "consistent with the federal universal service requirements of 47 U.S.C. § 214(e) and the rules of the Federal Communications Commission ('FCC')."<sup>24</sup> This explanation is as robust as the description of services typically contained in orders from this Commission making similar grants of authority.<sup>25</sup> As sophisticated participants in the industry who have presumably participated in hundreds of regulatory proceedings and reviewed scores of applications for possible objection, it is implausible that the Intervenor could be confused by or uncertain about the type of services that Native Telecom proposes to provide.

The claims that it is unclear "what type of entity Native Telecom is" are also unfounded. Native Telecom has explained that it is a "telecommunications company organized as a limited

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<sup>22</sup> *Id.* at 5.

<sup>23</sup> CUA Order at 1. It should also be noted that advanced broadband services are not regulated. Thus, Native Telecom need not secure authorization from the Commission to offer such services on the reservation (or elsewhere for that matter), and the only question properly under consideration here is whether the Commission has authority to override or exercise concurrent jurisdiction with the CUA with respect to *basic telephone services* offered *solely* on the Crow Creek reservation.

<sup>24</sup> *Id.*

<sup>25</sup> See, e.g., *In the Matter of the Application of BEK Communications Cooperative for a Certificate of Authority to Provide Interexchange Telecommunications Services and Local Exchange Services in South Dakota*, TC08-034, Order Granting Certificate of Authority (Oct. 3, 2008); *In the Matter of the Application of Norlight Telecommunications, Inc. for a Certificate of Authority to Provide Local Exchange Services in South Dakota*, TC08-95, Order Granting Certificate of Authority (Aug. 12, 2008); *In the Matter of the Application of Sage Telecom, Inc. for a Certificate of Authority to Provide Interexchange Telecommunications Services and Local Exchange Services in South Dakota*, TC07-101, Order Granting Certificate of Authority (Feb. 27, 2008). Indeed, to clarify matters further, the CUA expressly stated that the intended scope of its authority was "akin to competitive local exchange carrier (CLEC) approval provided to carriers outside of reservations." CUA Order at n. 1.

liability company under the laws of South Dakota.”<sup>26</sup> Biographies of the two principal owners of the company were provided with the application as well, demonstrating both the substantial qualifications of the management team and the nature of the ownership of the company. There is no mystery surrounding Native Telecom’s organizational structure or the types of services it intends to provide, and there is no reasonable basis to deny the motion to dismiss and to hold this proceeding open merely to consider these issues.<sup>27</sup>

Finally, even if the descriptions of Native Telecom or the services it proposes to offer in the Application or the CCUA Order were found lacking for some reason, the solution is not to require Native Telecom to continue to participate in a proceeding that it has requested be terminated. The Commission should not waste its finite time and resources attempting to clarify the corporate or service descriptions with respect to an entity that has made clear that for the time being it does not desire to provide any service regulated by the Commission. Indeed, as discussed in the section that follows, even if the Commission were to accept the Intervenors’ baseless claims that they do not know enough about Native Telecom’s qualifications or the services to be provided, that issue is secondary to whether the CCUA has the authority to make its own determinations with respect to those qualifications and services.

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<sup>26</sup> Application at 1.

<sup>27</sup> The Intervenors appear to imply that Native Telecom must be subject to the jurisdiction of this Commission in offering local exchange services solely on the Crow Creek reservation because Native Telecom is not a “tribal organization or entity.” As explained in Section III.A. below, however, this is irrelevant in considering whether the CCUA has sovereign authority to regulate affairs on its reservation because, consistent with long-standing precedent, Native Telecom has consented to the jurisdiction of the CCUA with respect to Native Telecom’s operations on the reservation.

**III. THE ORDER OF THE CROW CREEK UTILITY AUTHORITY IS VALID, ENFORCEABLE, AND SUFFICIENT TO AUTHORIZE THE PROVISION OF SERVICES BY NATIVE TELECOM ON THE CROW CREEK RESERVATION.**

**A. Long-Standing Judicial and Regulatory Precedent Confirms that the CCUA Has Sovereign Authority to Regulate Matters on the Crow Creek Reservation.**

Even if the Commission were to accept the Intervenors' unfounded and implausible claims that they do not know enough about Native Telecom or its services, such questions are beside the point in the context of the pending motion to dismiss. If the CCUA is empowered to issue an order pursuant to its sovereign authority, the question of whether the CCUA did so properly in the view of the Intervenors is irrelevant. The fundamental question presented for the Commission in the motion to dismiss is not what one may think of the CCUA's processes or its substantive decision, but whether the Commission or the CCUA has jurisdiction with respect to the services that Native Telecom proposes to provide.

The CCUA clearly has such authority. Although it is true that S.D.C.L. § 49-31-3 provides the Commission with "exclusive" authority to approve the provision of local exchange services in South Dakota, this statutory grant of authority by the South Dakota legislature cannot override the authority of a Native American tribe to regulate matters within the boundaries of its reservation. The jurisdiction of the Crow Creek Sioux Tribe extends "to the territory within . . . [its] reservation boundaries" pursuant to its Constitution.<sup>28</sup> Consistent with this authority, the Tribe established the CCUA to oversee matters relating to utility systems and services. The CCUA, in turn, reached agreement with Native Telecom in August 2008 to promote the

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<sup>28</sup> Constitution and By Laws of the Crow Creek Sioux Tribe of Fort Thompson South Dakota at Article I.



development of a voice and data communications system on the reservation that would be owned in part by the Tribe, with an option for the Tribe to purchase the entire system thereafter.<sup>29</sup>

Long-standing precedent confirms that the State cannot infringe upon the Tribe's authority to regulate matters within its reservation boundaries. In *White Mountain Apache Tribe v. Bracker*, the United States Supreme Court identified two "independent but related barriers to the assertion of State regulatory authority over tribal reservations and members:" (1) "the exercise of such authority may be pre-empted by federal law;" and (2) such an exercise of state regulatory authority "may unlawfully infringe 'on the right of reservation Indians to make their own laws and be ruled by them.'"<sup>30</sup> The Supreme Court has further explained that any State interest in regulating conduct must be weighed against "traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development."<sup>31</sup> Finally, the Supreme Court has clarified that "[w]hen on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest."<sup>32</sup>

In fact, even though Native American tribes may have more limited jurisdiction to regulate *nonmembers* on their reservations, the Supreme Court has announced at least two exceptions to this general rule. First, even as to nonmembers, "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members through commercial dealing, contracts, leases, or

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<sup>29</sup> See Tribe Comments at 2 and Tribe Telecommunications Plan.

<sup>30</sup> 448 U.S. 136, 142 (1980) (citations omitted).

<sup>31</sup> *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987) (citations omitted).

<sup>32</sup> *Bracker*, 448 U.S. at 145.

other arrangements.” Second, a tribe may “exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, economic security, or the health or welfare of the tribe.”<sup>33</sup>

This caselaw confirms that the CCUA has authority to regulate the provision of local exchange services on the Crow Creek reservation without the prospect of a potentially conflicting exercise of jurisdiction by the State. Consistent with *Bracker*, the CCUA has made its own laws pursuant to its Constitution with respect to the delivery of telephone services to residents of its reservation. Consistent with *Cabazon*, the CCUA has approved an economic development project for the delivery of such services through the construction of an advanced telecommunications system which the Tribe will own in part initially and will have the option to own in its entirety over time. Moreover, under the balancing required by *Cabazon*, it is clear that the state interest in regulating the operations of Native Telecom is limited, given that there are state-regulated providers who offer the same or similar services in the same area.<sup>34</sup> Finally, the *Montana* case confirms that the regulation of Native Telecom’s operations on the reservation is well within the CCUA’s “licensing” authority over nonmembers -- particularly since Native Telecom consented to such regulation by agreeing to the Tribe Telecommunications Plan and by requesting approval from the CCUA to offer the promised services.

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<sup>33</sup> *Montana v. United States*, 450 U.S. 544, 565-66 (1981) (citations omitted).

<sup>34</sup> See also *Western Wireless Corporation Petition for Designation as an Eligible Telecommunications Carrier for the Pine Ridge Reservation in South Dakota, Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Memorandum Opinion and Order, 16 FCC Rcd 18133 (2001) (“*Western Wireless*”), at ¶ 20 (“Indeed, the need for the state to protect its consumers through regulation of a second carrier providing service on the Reservation is reduced because tribal customers have the option, as a fallback, to subscribe to a state-regulated carrier.”)

By contrast, the Intervenors cite to a single case, *Cheyenne River*, supporting “the authority of the Commission to regulate telecommunications services.”<sup>35</sup> But this case provides no basis for the Commission to overstep the boundaries drawn by the United States Supreme Court. In fact, this case supports Native Telecom’s position in several respects.

In *Cheyenne River*, the plaintiffs asserted that this Commission had infringed upon a Native American tribe’s authority by denying U S WEST’s sale of on-reservation exchanges. The South Dakota Supreme Court rejected this assertion, finding that the Commission’s exercise of jurisdiction over the sale did not contravene the United States Supreme Court’s *Montana* standards. The South Dakota court’s decision turned, however, on a unique factor not present here -- specifically, the court found that the “extensive congressional and legislative authority authorizes [the Commission] to regulate the activities of *U S WEST and its sale of telephone exchanges*.”<sup>36</sup> Thus, the *Cheyenne River* decision did not rest on any finding that the Commission had authority to regulate the provision of services on a reservation, but was premised upon the Commission’s *general authority to regulate the operations of U S WEST* throughout the State.

Native Telecom proposes here to operate *only* within the boundaries of the Crow Creek reservation, and thus the general authority that the Commission had over U S WEST (and now has over Midstate and Venture) is inapplicable to Native Telecom’s circumstances. Moreover, the reason that the Commission gave for denying the exchange sale in its proceedings below is telling -- the Commission determined that U S WEST’s sale would not be in the public interest in large part because of “[t]he *lack of regulatory control by the Commission*” that would result from

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<sup>35</sup> Response at 5 (citing *Cheyenne River Sioux Tribe Tele. Auth. V. Public Utils. Comm’n of South Dakota*, 1999 SD 60, 595 NW 2d 604).

<sup>36</sup> *Id.* at 609 (emphasis added).

transfer to the tribe.<sup>37</sup> *In other words, the Commission acknowledged the sovereign nature of the tribe and cited the loss of its regulatory oversight as a significant reason for denying the sale to the tribe.* Thus, consistent application of the Commission’s own precedent leads to the conclusion that the Crow Creek Sioux Tribe has “regulatory control” with respect to services offered solely on its reservation.<sup>38</sup>

FCC precedent reinforces this analysis. In a 2000 Policy Statement, the FCC reaffirmed “its commitment to promote a government-to-government relationship between the FCC and federally-recognized Indian Tribes.”<sup>39</sup> In doing so, the FCC expressly acknowledged “the unique legal relationship that exists between the federal government and Indian Tribal governments,” and emphasized that “Indian Tribes exercise inherent sovereign power over their members and their territory.”<sup>40</sup> Finally, the FCC stated that federal policy requires “promoting tribal self-sufficiency and economic development . . . .”<sup>41</sup> This, of course, is precisely what the CCUA has done here -- it has authorized Native Telecom consistent with the Tribe Telecommunications Plan that includes the deployment and co-ownership of an advanced communications system for voice and high-speed data services. It would therefore be

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<sup>37</sup> *Re U S WEST Communications, Inc.*, TC94-122, Amended Decision and Order Regarding Sale of the Timber Lake Exchange; Notice of Entry of Order (1997) (“*Timber Lake Transfer Order*”) at ¶ 25(2).

<sup>38</sup> Of course, where a Native American tribe has *not* assumed regulatory authority pursuant to its inherent sovereignty over the offering of basic local exchange services on a reservation, there would appear to be no concerns under *Montana* or the other cases with the State regulating such services.

<sup>39</sup> *Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes*, FCC 00-207, Policy Statement (rel. June 23, 2000), at 2.

<sup>40</sup> *Id.* at 3.

<sup>41</sup> *Id.* at 4.

inconsistent with federal policy for the Commission to deny the Crow Creek Sioux Tribe self-determination with respect to such an important economic development initiative.<sup>42</sup>

The FCC's *Western Wireless* decision further supports the conclusion that the Commission's authority to regulate matters within tribal reservations is limited. In *Western Wireless*, the FCC considered which agency had jurisdiction to designate an eligible telecommunications carrier ("ETC") providing service on the Ogala Sioux reservation. The FCC proceeded from the premise that it must act "when a state lacks jurisdiction."<sup>43</sup> In fact, the FCC noted that a prior order with respect to ETC designation expressly contemplated that carriers serving reservations might need to petition for a "jurisdictional analysis" because state authority with respect to such lands might be uncertain.<sup>44</sup> By contrast, this Commission argued that it had "general regulatory authority" over the carrier pursuant to state law, and the South Dakota Independent Telephone Coalition contended that the State was better positioned than the FCC to make public interest determinations with respect to services in tribal areas.<sup>45</sup>

After considering the *Bracker*, *Cabazon*, and *Montana* decisions, the FCC concluded that the tribe had jurisdiction over services provided by Western Wireless to tribal members. In particular, the FCC found that the State's interest largely involved "issues of service quality and

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<sup>42</sup> *Accord Bracker*, 448 U.S. at 143-44 ("The tradition of Indian sovereignty over the reservation and tribal members must inform the determination whether the exercise of state authority has been pre-empted by operation of federal law. As we have repeatedly recognized, this tradition is reflected and encouraged in a number of congressional enactments demonstrating a firm federal policy of promoting tribal self-sufficiency and economic development.") (emphasis added).

<sup>43</sup> *Western Wireless*, at ¶ 4.

<sup>44</sup> *Id.* at ¶¶ 4-5. Although the *Western Wireless* case focused on whether the FCC or this Commission should make the ETC designation, the issue arose not because of anything special with respect to ETC designation, but rather because of a more fundamental question about a state's authority to regulate activities on reservations. *See 2000 FCC Report*, at ¶ 117 ("Evaluating the extent to which a state commission has jurisdiction over activities conducted on tribal lands, whether by members or non-members of a tribe, will involve questions of whether state regulation is preempted by federal regulation, whether state regulation is consistent with tribal sovereignty and self-determination, and whether a tribe has consented to state jurisdiction in treaties or otherwise.")

<sup>45</sup> *Western Wireless*, at ¶ 9.

complaint adjudication,” both of which would be better addressed by the tribe given its compelling interest in the “regulation of transactions between the carrier and tribal members and substantial authority over the provision of communications services to the Tribe that affect the welfare of the Tribe.”<sup>46</sup> The FCC also noted that Western Wireless had “consented to tribal jurisdiction”<sup>47</sup> -- just as Native Telecom has done here through its request for approval from the CCUA and agreement to the Tribe Telecommunications Plan. Indeed, much like the service commitments made by Western Wireless, Native Telecom must work under the Tribe Telecommunications Plan to deploy a “state-of-the-art fixed wireless technology” and “provide broadband internet access to critical tribal government locations, schools, and other educational or medical locations,” with services expanded thereafter “to other businesses and residents on the reservation.”<sup>48</sup> Thus, the FCC’s *Western Wireless* case provides yet further (and more specific) confirmation that Native Telecom’s proposed provision of services on the Crow Creek reservation is within the jurisdiction of the CCUA, and not this Commission.<sup>49</sup>

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<sup>46</sup> *Id.* at ¶¶ 16, 18.

<sup>47</sup> *Id.* at ¶ 21.

<sup>48</sup> Tribe Telecommunications Plan. The plan makes clear that the Tribe intends to rely heavily on this infrastructure (in which it will have an ownership interest) “to generate economic development, opportunities, and revenue” and to “take advantage of its tribal sovereignty in engaging in business,” including the applications for “status as a foreign trade zone.” Thus, the Tribe is pinning high hopes on this infrastructure and clearly anticipates a high level of involvement in the ownership, management, and utilization of it. *Accord Western Wireless*, at ¶ 15 (identifying the Tribe’s “rights to participate extensively in and administer the service plan” as significant). It should also be noted again that the provision of advanced broadband services is not subject to this Commission’s regulation, and thus the only regulatory question presented is whether the Commission has jurisdiction over basic telephone services offered on a reservation where the Tribe has already assumed jurisdiction over such services.

<sup>49</sup> From what Native Telecom can discern, neither the Commission nor any of the intervenors appealed the FCC’s finding in the *Western Wireless* decision that the Tribe (and not the State) had jurisdiction over services provided to tribal members.

**B. The CCUA’s Jurisdiction in the Present Case Extends to Both Tribal Members and to Nonmembers on the Crow Creek Reservation.**

In its *Western Wireless* decision, the FCC distinguished between regulation of services provided to tribal members and those provided to nonmembers, finding that a Native American tribe had jurisdiction with respect to the former, while this Commission retained jurisdiction with respect to the latter.<sup>50</sup> The Intervenors here pick up on this distinction, claiming that at the very least the Tribe “does not have authority over non-tribal members.”<sup>51</sup> This argument, however, fails to appreciate the nuances of the precedent. In short, not only do the judicial and regulatory decisions unmistakably confirm that the CCUA has authority over services provided to *tribal members*, but as discussed below, there is good cause to find that the CCUA’s jurisdiction extends in this case to services delivered to *nonmembers on the Crow Creek reservation*.

The distinction between a tribe’s sovereignty over members and nonmembers arises primarily from the *Montana* case. While the *Montana* Court reaffirmed the authority of tribes over the activities of tribal members, it further articulated limits on a tribe’s inherent power to regulate the activities of *nonmembers* on a reservation -- but the Court did not go so far as to say that a tribe has no authority to regulate nonmember conduct. To the contrary, the *Montana* decision confirms that a tribe has sovereign authority to regulate the conduct of nonmembers on a reservation “through taxation, licensing, or other means” if: (1) those nonmembers enter into consensual relationships with the tribe or its members, or (2) the exercise of such regulatory authority is necessary to protect “the political integrity, the economic security, or the health or welfare of the tribe.”<sup>52</sup>

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<sup>50</sup> *Western Wireless*, at ¶¶ 17-23.

<sup>51</sup> Response at 6.

<sup>52</sup> *Montana*, 450 U.S. at 565-66.

As discussed in the preceding section, the first *Montana* exception clearly validates the CCUA’s regulation of services that Native Telecom would provide *to Tribe members*. But the *Montana* exceptions also justify the CCUA’s exercise of jurisdiction over Native Telecom’s delivery of services *to nonmembers* residing on the reservation for at least two reasons. First, those nonmembers who choose to purchase services from Native Telecom are not compelled to do so; they have an alternative for service in the form of state-regulated local exchange carriers. Thus, those nonmembers who choose to contract with Native Telecom would be consenting, based upon a decision in a market with competing providers, to procure services regulated by the Tribe as opposed to those regulated by this Commission. Second, the fact pattern in *Western Wireless* -- in which the FCC found that this Commission could regulate services provided to nonmembers on a reservation -- is distinguishable from the present case. Specifically, the FCC’s decision hinged upon the *Montana*-based conclusion that “a non-tribal carrier serving non-tribal customers does not appear to have any relationship to the internal affairs of the tribe.”<sup>53</sup> By contrast, here the Crow Creek Sioux Tribe will have a partial ownership stake in the system used to deliver services, and ultimately could own the entire system. Thus, the Tribe’s regulation of the network it owns and upon which it is pinning significant hopes with respect to economic development, even as that network may be used to deliver services also to nonmembers on the reservation, is “crucial to Indian sovereignty interests”<sup>54</sup> and directly related to managing “the internal affairs” of the Tribe.<sup>55</sup>

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<sup>53</sup> *Western Wireless*, at ¶ 22.

<sup>54</sup> *Id.* at ¶ 23.

<sup>55</sup> This is consistent with the Commission’s own statement in its *Timber Lake Transfer Order* that it would lack “regulatory control” over a telecommunications system if that system were owned by a Tribe. See *Timber Lake Transfer Order*, at ¶ 25(2).



Finally, even if the Commission were to conclude that it retains authority under the *Montana* framework to regulate services provided to *nonmembers* on the reservation, that is no reason to keep this proceeding open. Native Telecom has requested that its application be withdrawn. It believes that the CUA Order provides it with all the authority necessary to provide the proposed services on the Crow Creek reservation. If the Commission believes to the contrary with respect to nonmembers, it can simply say so and close this proceeding. If Native Telecom were to choose thereafter to offer services to nonmembers on the reservation without filing another application with this Commission, the Commission could take whatever steps it deems necessary to address what it perceives to be the unauthorized provision of a service subject to its regulation.<sup>56</sup>

#### **IV. THE INTERVENORS' OTHER ARGUMENTS PROVIDE NO BASIS TO KEEP THIS CERTIFICATION PROCEEDING OPEN.**

##### **A. A Certification Proceeding Before this Commission is Hardly the Right Place for Resolution of Boundary Disputes with a Native American Tribe.**

In a transparent attempt to delay the provision of competitive services on the reservation, the Intervenor makes the illogical throwaway argument that the Commission should continue this proceeding in order to adjudicate the alleged disputed boundaries of the Crow Creek reservation.<sup>57</sup> First, the Intervenor fails to provide any specific information or facts regarding any current existing disputes that might affect the provision of telecommunications services upon

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<sup>56</sup> As for the Intervenor's claim (*see* Response at 6) that Native Telecom "has not indicated how it will determine if a potential customer is a tribal or non-tribal customer," this likewise provides no basis whatsoever to keep the certification proceeding open. Native Telecom intends to provide only those services for which it has received proper authorization. If Native Telecom determines after a review of applicable law that it needs to identify members of the Tribe to comply with the limits of its authorization, it can and would work with the Tribe to do so. If Native Telecom failed to do so and subsequently offered what the Commission believes to be regulated services subject to its jurisdiction, the Commission has mechanisms at its disposal to enforce applicable law. But it would make no sense to keep this certification proceeding open just to figure out the mechanics by which Native Telecom might determine the tribal membership status of any given customer (assuming that were even necessary).

<sup>57</sup> Response at 6.

the reservation.<sup>58</sup> Furthermore, even if such a dispute exists, the Commission has no authority to evaluate and determine the exterior boundaries of the reservations, especially in a certification proceeding that is limited in scope by statute. Instead, such review is clearly the purview of other state agencies. For example, South Dakota's Office of Tribal Government Relations ("OTGR") is charged by statute with facilitating communication between federal, state and tribal governments to resolve problems.<sup>59</sup> The OTGR is better positioned and equipped to address any reservation boundary disputes than an agency whose expertise is utility services and regulation. The Commission can make better use of its time and resources than wading into issues far afield from its expertise and its regulatory mandate, and the Intervenors' suggestion that the Commission should keep this proceeding open in order to delve into reservation boundary law must be rejected as absurd.

**B. The Intervenors' Common Carrier Arguments are Both Misplaced and Wrong.**

In a last-ditch attempt to keep this docket open, the Intervenors claim that the Commission should retain jurisdiction because Native Telecom would not satisfy common carrier requirements if it were to provide services only to tribal members. As an initial matter, these arguments are misplaced, since the question of whether such an offering would comport with common carrier requirements is not properly considered in a certification proceeding. Moreover, the Intervenors' arguments are incorrect as a matter of law -- if it were determined

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<sup>58</sup> The Intervenors' tag-along claim that jurisdictional issues would be confused if a customer were to travel outside of the reservation boundaries with a telephone or laptop is laughable. *See id.* As an initial matter, advanced broadband services are not regulated, so if the customer travels with a laptop, that is a non-issue from the Commission's perspective. Moreover, with respect to telephone service, the same analogy could be posed as to customers of Venture or Midstate themselves -- what if one of their customers travels into Qwest territory? Or across the state line into North Dakota? Does the fact that customers might occasionally travel mean that Venture and Midstate need authority to operate in Qwest region, in North Dakota, or even nationwide? Certainly not, and the same is true of Native Telecom's proposal to provide services within the reservation boundaries.

<sup>59</sup> S.D.C.L. § 1-4-1.

that the CCUA's grant of authority is effective only as to services provided to tribal members,<sup>60</sup> Native Telecom would not violate any common carrier requirements by providing services only to such tribal members.

The purpose of a certification proceeding is to determine the technical, financial, and managerial qualifications of an applicant who intends to offer a regulated service.<sup>61</sup> But Native Telecom does not intend at this time to offer any service regulated by the Commission. Instead, it proposes at this time to offer services that are subject only to the regulatory authority of the CCUA. A certification proceeding is not the appropriate place to consider whether an entity's *refusal* to provide a Commission-regulated service for which that entity does *not* have adequate authority (at least according to the Intervenors) violates general common carrier principles. Indeed, as the Intervenors themselves seem to acknowledge, any question of whether a carrier's service comports with common carrier requirements is perhaps best resolved in the context of a request for ETC designation.<sup>62</sup> Thus, there is neither any need nor any legal basis to keep this certification proceeding open -- to the extent there is any question at all about compliance with common carrier obligations, that could and should be resolved in the context of an ETC designation or some other proceeding.

Moreover, the Intervenors are simply wrong as a substantive matter in claiming that Native Telecom's provision of services would give rise to any common carrier regulatory concerns. The Intervenors correctly point out that common carrier regulation proceeds from the

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<sup>60</sup> Of course, Native Telecom believes that the CCUA Order provides adequate authority to provide services to *all* residents of the Crow Creek reservation, regardless of tribal status, for the reasons set forth in Section III.B. above.

<sup>61</sup> See A.R.S.D. § 20:10:32:06.

<sup>62</sup> The Intervenors note that "only common carriers are eligible to be designated as [sic] an ETC." Response at 10.

fundamental proposition that a common carrier can not “make any unjust or unreasonable discrimination in charges, practices . . . or services for or in connection with like communication service . . . or [] make or give any undue or unreasonable preference to any particular person, class of persons, or locality, or [] subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.”<sup>63</sup> But after accurately quoting the federal statute embodying these common carrier requirements, the Intervenor breeze past the most critical aspects of the statutory language. Specifically, the Intervenor miss (or omit) that the law does not prohibit “discrimination.” Rather, the law prohibits *unjust or unreasonable* discrimination and *undue or unreasonable* preferences, prejudice, or disadvantages.<sup>64</sup>

Native Telecom believes, as stated above, that the CCUA’s approval is sufficient to allow delivery of services to *all* residents of the Crow Creek reservation. But the Intervenor have argued that, at most, the CCUA Order authorizes Native Telecom to provide service only to tribal members.<sup>65</sup> They then try to whipsaw Native Telecom by claiming that, if Native Telecom served only tribal members and refused to serve nonmembers, this would violate common carrier obligations. Thus, the Intervenor argue, the Commission should retain “jurisdiction and regulatory oversight” with respect to such potential violations of law.<sup>66</sup> But even if a certification proceeding were the proper venue for exercising jurisdiction and regulatory oversight over potential future violations of law (which it is not), it does not constitute *unjust and*

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<sup>63</sup> See *id.* (quoting 47 U.S.C. § 202(a)).

<sup>64</sup> See, e.g., *Union Telephone Co. v. Quest Corp.*, 495 F.3d 1187, 1196 (10th Cir. 2007) (granting summary judgment to the defendant because discrimination in the form of different billing practices was “not unreasonable”); *MCI Telecomms. Corp. v. FCC*, 917 F.2d 30 (D.C. Cir. 1990) (defining a three-step test for unlawful discrimination under Section 202 of the Communications Act, the last of which is whether the discrimination was unreasonable).

<sup>65</sup> Response at 6.

<sup>66</sup> *Id.* at 10.

*unreasonable* discrimination for a carrier to serve only those customers for which it has legal authority to serve.<sup>67</sup> To the contrary, if it were found that Native Telecom could serve only tribal members as a matter of law, *it would be just and reasonable* for Native Telecom to decline to serve a nonmember in order to avoid such a violation of law. Thus, the Intervenors' claims that Native Telecom would violate common carrier obligations are mistaken and baseless.

## V. CONCLUSION

The Intervenors have thrown out a variety of arguments in an attempt to keep this certification proceeding open, with the transparent objective of holding up Native Telecom's efforts to initiate service under the authority granted by the CCA. None of these arguments justifies keeping this proceeding open, nor are there any "complex factual and legal issues"<sup>68</sup> that warrant an evidentiary hearing as requested by the Intervenors.

The facts required to rule on the motion to dismiss are quite simple. Native Telecom does not intend at this time to offer any services regulated by this Commission, and Native Telecom has obtained approval from the CCA to offer services on the Crow Creek reservation. Other attempts at misdirection by the Intervenors -- such as professing confusion as to what type of entity Native Telecom is -- are irrelevant in the present context. Likewise, the legal issues are hardly as complex as the Intervenors would like to make them, and the briefing submitted by the parties in connection with the motion to dismiss gives the Commission an ample record upon which to decide the matter in short order and without evidentiary hearing. In particular, numerous rulings of the United States Supreme Court with respect to State-tribal relations, together with several decisions by the FCC interpreting that precedent, confirm that the CCA

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<sup>67</sup> See, e.g., *Levine v. BellSouth Corp.*, 302 F.Supp.2d 1358, 1372 (S.D. Fla. 2004) (finding it was "not unreasonable" for a carrier to treat customers differently based upon differences in legal requirements applicable to serving them).

<sup>68</sup> Response at 11.

has the sole authority to regulate the services that Native Telecom proposes to offer on the Crow Creek reservation. By contrast, collateral legal issues such as whether Native Telecom would operate as a common carrier and what the proper boundaries of the Crow Creek reservation are would take this Commission far beyond the proper scope of a certification proceeding.

For the reasons set forth herein, Native Telecom respectfully renews its motion to dismiss the Application and requests that the Commission grant its motion without delay. Indeed, prompt action is critical in order for the Tribe to realize the economic development benefits expected from deployment of the system; delay may preclude delivery of these benefits altogether. Even if it is determined that the Commission has jurisdiction over basic telephone services provided to nonmembers on the Crow Creek reservation -- a determination that Native Telecom argues is incorrect for the reasons set forth herein -- the Commission should simply state as much in a finding and promptly close this proceeding, as Native Telecom has stated that it does not at this time intend to offer any services regulated by this Commission.

Dated this 18th day of December 2008.

Respectfully submitted,

**Native American Telecom, LLC**

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## CERTIFICATE OF SERVICE

I, Gene DeJordy, hereby certify that, on the 18<sup>h</sup> day of December 2008, I sent by email a true and correct copy of the **REPLY OF NATIVE AMERICAN TELECOM, LLC TO INTERVENORS' RESPONSE TO MOTION TO DISMISS** to the following:

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