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September 27, 2010

Ms. Patricia Van Gerpen
SD Public Utilities Commission
500 E. Capitol Ave.
Pierre, SD 57501

Re: In The Matter Of The Complaint Filed By Sprint Communications Company,
LP Against Native American Telecom, LLC Regarding Telecommunications
Services – (Docket No. TC10-026)

Dear Ms. Van Gerpen:

Attached for electronic filing, please find the Intervening Parties' Brief In Opposition To
Motion For Stay And Motion To Dismiss.

If you have any questions, please contact me.

Very truly yours,

RITER, ROGERS, WATTIER &
NORTHROP, LLP

By:

A handwritten signature in cursive script that reads 'Darla Pollman Rogers'.

Darla Pollman Rogers

DPR/dk

Enclosure

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

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

Docket No. TC10-026

**INTERVENING PARTIES' BRIEF IN OPPOSITION TO MOTION FOR STAY
AND MOTION TO DISMISS**

South Dakota Network, LLC (“SDN”), Midstate Communications, Inc. (“Midstate”) and South Dakota Telecommunications Association (“SDTA”) (collectively referred to as “Intervening Parties”) hereby file this Brief in Opposition to Motion for Stay and Motion to Dismiss filed by Native American Telecom, LLC (“NAT”) in the above captioned proceeding.

I. Procedural History

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

SDTA sought to intervene in the docket on May 20, 2010, on the grounds that the specific jurisdictional and Commission authority issues raised by Sprint’s Complaint are issues that are of interest to and that stand to affect numerous SDTA members. SDN filed a Petition to Intervene on May 21, 2010, not only because the jurisdictional and

Commission authority issues raised in Sprint's Complaint will affect SDN and its member companies, but also because of the potential impact of any Commission decisions in this docket on Docket TC09-098 (SDN's complaint against Sprint).¹ Midstate also filed a Petition to Intervene on the same grounds as SDTA, and from the perspective of an incumbent LEC on the Crow Creek Reservation. On June 18, 2010, the Commission granted intervention to SDTA, SDN, Midstate, AT&T, and the Crow Creek Sioux Tribe Utility Authority (CCSTUA).

On June 1, 2010, NAT filed a Motion to Dismiss pursuant to SDCL 15-6-12(b) asserting: 1) Sprint's Amended Complaint failed to state a claim upon which relief can be granted, 2) the Commission lacks jurisdiction over the subject matter alleged in Sprint's Complaint, 3) the Commission lacks personal jurisdiction over NAT, 4) the Complaint was filed in an improper venue, 5) CCSTUA has exclusive jurisdiction over the subject matter, and 6) the Complaint should be dismissed because the Tribe and CCSTUA have sovereign immunity. CCSTUA filed a Motion to Dismiss or in the alternative, a Petition to Intervene. CCSTUA asserted in this filing that it has jurisdiction over the matters raised by Sprint in its Complaint and requested the Commission to dismiss the Petition. On July 29, 2010, NAT filed a Motion to Stay based on the doctrine of "tribal court exhaustion" following its filing of a suit against Sprint in the Crow Creek Tribal Court. The Intervening Parties file this Brief in Opposition to the Motions to Dismiss and the Motion to Stay and request that the Commission assert jurisdiction over this matter and that it proceed to an adjudication of disputes existing between the parties involved.

¹ Sprint identifies this docket in ¶ 13 of its Amended Complaint.

II. ARGUMENT

A. Standard of Review

The standard of review for a motion to dismiss is the same as the review of a motion for summary judgment – is the pleader entitled to judgment as a matter of law? Risse v. Meeks, 1998 SD 112, ¶ 10, 585 NW2d 875, 876 (citing Estate of Billings v. Deadwood Congregation of Jehovah Witnesses, 506 NW2d 138, 140 (SD 1993) “A motion to dismiss under SDCL 15-6-12(b) tests the legal sufficiency of the pleading, not the facts which support it. For purposes of the pleading, the court must treat as true all facts properly pled in the complaint and resolve all doubt in favor of the pleader”. Daktronics, Inc. v. LBW Teck Co., Inc., 2007 SD 80, ¶ 2, 737 NW2d 413, 416. All reasonable inferences of fact must be drawn in favor of the non-moving party. Id. A motion to dismiss can be converted to a motion for summary judgment when the parties submit and the court accepts matters outside the pleadings, and the parties do not object to the court’s consideration of those matters. Cable v. Union County Bd. Of County Com’rs, 2009 SD , ¶ 19, 769 NW2d 817, 825 (citing Flandreau Public School Dist. No. 50-3 v. G.A. Johnson Constr., Inc., 2005 SD 87, ¶ 6, 701 NW2d 430, 433-434) When a motion to dismiss is converted to a summary judgment motion, the well-settled standard of review applies. The Court must determine whether there is any genuine issue of material fact. Id. In the instant case, it is the position of Intervening Parties that the facts as pleaded by Sprint in the Amended Complaint be resolved in favor of Sprint, which supports denying the Motions to Dismiss.

B. Positions of the Parties

Sprint's position as stated in its Amended Complaint is that this Commission has sole authority to regulate Sprint's intrastate interexchange services and that the CCSTUA lacks jurisdiction over Sprint. Sprint has requested a declaratory ruling from this Commission that NAT cannot assess intrastate switched access charges unless it has a certificate of authority from the Commission and has a valid tariff on file with the Commission. (See Amended Complaint, page 2) Sprint is also requesting reimbursement of switched access charges it believes it has inadvertently paid for NAT traffic generated from Call Connection Companies.²

NAT's position is that absent Congressional authorization, state jurisdiction over action of American Indians and of Tribal Governments, especially for actions arising on and within the exterior boundaries of the reservation are prohibited as it would interfere with tribal sovereignty and self government and is preempted as a matter of federal law. (See Respondent NAT's Brief in Support of Motion to Dismiss, ¶ IA, p.7) NAT further argues that tribal exhaustion should apply and its action filed in Federal Tribal Court should be concluded prior to this Commission taking any action (See Respondent NAT's Brief in Support of Motion to Stay, p. 8 and Crow Creek's Brief in Support of Motion to Stay, p. 2).

The Intervening Parties position in this matter is that this Commission has exclusive jurisdiction of not only Sprint but NAT, with respect to the access services being provided, and that it should adjudicate this claim. Intervening Parties agree with the position of Sprint that NAT is required to have a certificate of authority which

² Intervening Parties take no position on this issue.

extends to the services it is providing and a valid tariff applicable to those services pursuant to federal law and state law.

C. The South Dakota Public Utilities Commission has Jurisdiction to Decide this Controversy

1. The Federal Act provides clear congressional intent to provide Commission with Jurisdiction.

At the federal level, the Federal Communications Commission (FCC) is the agency that provides regulatory oversight over telecommunications services. Within that regulatory scheme, state commissions are granted authority and jurisdiction over intrastate services and facilities. 47 USC 152 (b) states “[n]othing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service.” Further, the Act defines a State Commission as “the commission, board, or official (by whatever name designated) which under the laws of any State has regulatory jurisdiction with respect to intrastate operations of carriers” 47 USC 153 (41).

Our South Dakota Supreme Court has provided analysis of the congressional and legislative authority the federal government grants to this State Commission. As it has opined previously:

The regulatory scheme of telecommunications services specifically grants the PUC authority and jurisdiction over intrastate facilities. See 47 USC 152(b). The authority of the PUC is extensive and crucial to the overall regulatory scheme. See SDCL ch. 49-31. Among other things, it has ‘general supervision and control of all telecommunications companies offering common carrier services within the state to the extent such business is not otherwise regulated by federal law or regulation.’” SDCL 49-31-3; ; Cheyenne River Sioux Tribe Telephone Authority v. Public Utilities Commission of South Dakota, 1999 SD 60, ¶20, 609, 595 NW 2d 604.

Although NAT argues federal preemption, NAT has not identified any federal law or regulation that would preempt 47 USC 152 (b) and SDCL 49-31-3. The Supreme Court also has analyzed a preemption argument similar to the one asserted by NAT in its Motion to Dismiss and concluded the Commission's authority to regulate intrastate communications is not preempted by federal law, but rather is a significant, as well as authorized, part of the overall regulatory scheme. Cheyenne River at ¶ 28 and ¶ 30. In regard to preemption the Supreme Court said

[When] determining whether a state may exercise jurisdiction, the question to be addressed is whether assumption of jurisdiction would stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. American Phone Inc. v. Northwestern Bell Tel. Co., 437 NW2d 175, 177 (SD 1989) (citing North Carolina Util. Comm'n v. FCC, 537 F2d 787 (4th Cir. 1976) (quoting Louisiana Public Serv. Comm'n v. FCC, 476 US 355 (1986)). . . [W]e find that PUC's authority to regulate in this area (intrastate communications) is not preempted by federal law, but rather, is a significant, as well as authorized, part of the overall regulatory scheme. See Rice v. Rehner, 463 U.S. 713, 726 (1983).

NAT has further argued that jurisdiction by this Commission would infringe upon its tribal interests. However, again our State Supreme Court has analyzed this issue and identified the primary purpose and objectives of Congress in regulating telecommunications:

The primary purposes and objectives of Congress in regulating telecommunications are to protect telecommunications' consumers. Consumers are ensured, through this regulation, of adequate facilities and reasonable rates. This protection applies to all consumers, whether they reside on or off an Indian reservation. Such regulation is an important government function, and PUC's regulatory authority furthers its objectives and purposes; it does not interfere with them. Cheyenne River at ¶ 28.

It is clear by reviewing the federal law and our own Supreme Court's analysis of the congressional and legislative intent of federal law that the Commission has

jurisdiction over intrastate communications. The Supreme Court has analyzed and rejected the very arguments NAT is making herein.

2. State law and administrative rules confer exclusive jurisdiction to Commission.

Our state laws recognize this federal congressional and legislative authority and have codified them in our state statutes. SDCL 49-31-3 states:

The commission has general supervision and control of all telecommunications companies offering common carrier services within the state to the extent such business is not otherwise regulated by federal law or regulation.” The commission may exercise powers necessary to properly supervise and control such companies (emphasis added).

SDCL 49-31-3 further identifies specifically that the “commission shall inquire into any complaints, unjust discrimination, neglect or violation of the laws of the state governing such companies.” One such violation of the law as alleged by Sprint in its Complaint is that NAT is operating within the state of South Dakota without a certificate of authority in violation of SDCL 49-31-3 and that it is operating without a valid tariff on file with the Commission in violation of SDCL 49-31-12.2. SDTA and Midstate have consistently maintained that NAT needs to have a certificate of authority from the Commission. These same concerns were identified by SDTA and Midstate previously in TC08-110 and TC08-109 and the Intervening Parties argue the state law directly supports the Commission’s jurisdiction.

SDCL 49-31-3 requires each telecommunications company that plans to offer local exchange services or interexchange services to submit an application for certification to the Commission, and that the Commission “shall have the exclusive authority to grant a certificate of authority.” (emphasis added). SDLC 49-31-69 clearly states that “No telecommunications company may... offer or otherwise provide local

exchange service in this state prior to receiving a certificate of authority to provide the services from the Commission.” Additionally, the Commission can require each telecommunications Company to have a schedule of reasonable fares and rates or prices and can even seek a writ of mandamus in the event a telecommunication company neglects or refuses to file or publish its tariffs of rates or prices. SDCL §§ 49-31-12 and 49-31-12.5. These statutes make it very clear that NAT is subject to the laws of the State just like every other telecommunications carrier. The protections offered to consumers through the telecommunications regulatory scheme apply whether a consumer resides on the reservation or not.

The Intervening Parties continue to believe that NAT needs a certificate of authority and a valid filed tariff with the Commission to provide its services. SDTA and other South Dakota LECs that provide similar services on the Indian Reservations in South Dakota have been concerned about the lack of any state regulation of NAT’s local and interexchange services for some time. On September 9, 2008, NAT filed an Application for authority to provide local exchange service on the Crow Creek Indian Reservation (TC08-110) and the Pine Ridge Indian Reservation (TC08-109)³. NAT ultimately moved to dismiss that Application in the TC08-110 proceedings based on 1) it receiving authority from the requisite Tribal Authority and 2) the claim that “NAT’s provision of service [was] being limited to consumers residing within the exterior boundaries of the Crow Creek reservation” (See Motion to Dismiss, TC08-110). NAT asserted in that prior proceeding before this Commission that it would only be offering services to consumers that are tribal members within the boundaries of the reservation.

³ SDTA, Midstate, and Venture intervened in TC08-110 and SDTA, Golden West, Great Plains, and Fort Randall intervened in TC08-109.

SDTA and Midstate expressed concerns regarding the NAT assertions and strongly opposed NAT's Motion to Dismiss filed in the TC08-110 Docket. In that Response, SDTA and Midstate pointed out that further investigation was needed by the Commission to flush out the specific type of services that would be offered and to determine how NAT would, physically, offer the services and at the same time keep its operations confined to the Crow Creek Reservation. Ultimately, the Commission indicated it did have jurisdiction⁴ of the matters at issue in TC08-110 pursuant to SDCL Chapters 1-26 and 49-31, but, in any event, allowed NAT to voluntarily dismiss its filed Application for a Certificate of Authority (See Order Granting Motion to Dismiss, TC08-110). Subsequently, NAT also filed a Motion to Dismiss in Docket TC08-109 based on claims that it was uncertain of its service plans on the Pine Ridge Reservation. (See Motion to Dismiss, TC08-109). The Commission also granted this Motion and closed that prior docket at NAT's request. (See Order Granting Motion to Dismiss, TC08-109).

Since the closing of these prior dockets, the Intervening Parties have remained concerned over the fact that NAT is operating without the requisite authorization and outside the regulatory requirements of this Commission. Intervening Parties do not take a position on whether NAT's traffic is access traffic that Sprint should be obligated to pay, but do take a position on whether NAT needs a valid certificate of authority and must file a switched access tariff. It is the position of Intervening Parties that this Commission has exclusive jurisdiction over intrastate access services. The Intervening Parties are interested in maintaining the jurisdictional integrity of the Commission over intrastate switched access. The Intervening Parties are concerned about the type of services NAT

⁴ The Commission also asserted jurisdiction over NAT in TC09-019, In the Matter of the Filing for Approval of an Interconnection Agreement between Midstate Communications, Inc. and Native American Telecom, LLC.

provides and how it physically provides those services. These concerns are at the forefront of the jurisdictional issues now raised by NAT. Accordingly, a dismissal at this stage is premature. NAT cannot limit its service to the boundaries of the reservation and even if it could, the Commission still has jurisdiction. The Intervening Parties urge this Commission to deny both the Motion to Dismiss and the Motion for Stay. By doing so, the Commission will avoid undue delay and confusion over the regulation of telecommunications companies and services in South Dakota.

D. NAT is not Limiting its Provision of Telecommunications Services to Areas or Customers on the Crow Creek Reservation.

During the 2008 filings made by NAT requesting a certificate of authority, NAT was requesting only authority to provide local exchange service. Local exchange service is defined as “the access to and transmission of two-way switched telecommunications service within a local exchange area” (emphasis added: SDCL 49-31-1(13)). Since that time, it is clear that one of NAT’s primary services is the provision of switched access service which allows for the origination or termination of interexchange telecommunications services and Intervening parties also have knowledge that NAT in providing access services is providing transmission services in other parts of South Dakota, outside the borders of the Crow Creek Reservation. NAT suggests that its operations are limited to the provisioning of services within the boundaries of the Crow Creek Reservation and that it only provides services to tribal members, but these claims are simply not true.

NAT uses facilities outside of the reservation to provide its access services. Specifically, SDN provides centralized equal access services (CEAS) for traffic that passes through SDN’s tandem in Sioux Falls, South Dakota. In fact, SDN filed a suit

against Sprint alleging nonpayment for centralized equal access charges for which a portion was related to NAT traffic. (TC09-098) A portion of NAT's traffic also utilizes a switch in Midstate's service area to facilitate these calls. (TC09-019) Even in the rare instance when a call originates and terminates on the reservation, the call is traveling off of the reservation to do so. NAT appears to be arguing that because all calls it receives through its access services utilize, in part, facilities on the reservation, this strips the Commission of jurisdiction. The access services are provided through various switching and transmission facilities and not all of these facilities are located on Reservation lands.

Furthermore, NAT is not even capable of limiting its provisioning of services to the Reservation boundaries, as a practical matter. For example, if a customer travels outside of the reservation boundaries with a telephone or a laptop computer, how can services be limited solely to areas within the reservation? To the extent that NAT uses wireless technology to provide service, radio waves do not respect geopolitical boundaries, but instead propagate across such borders. Another issue that surfaces is service to non-tribal members who live within the exterior boundaries of the reservation. NAT has provided no indication that it distinguishes between the two.

Finally, even NAT's tariff refutes the assertion that NAT only provides service on the Indian reservation. The tariff states that it applies to NAT's services "into, out of and within the State of South Dakota." Nothing in the tribal tariff restricts it to End Users who are members of the Tribe on the Reservation. Under the tribal tariff definition, an End User can be anyone anywhere within the national public switched telephone network. "Customers" under the tariff definition are not limited to tribal members within the boundaries of the reservation, either. The term "Customer" refers to "any person,

firm, partnership, corporation, or other entity including, but not limited to conference call service provider, chat line provider, calling card provider, call center, help desk provider, internet service provider, international provider operating within the United States, and residential and/or business service subscribers, which uses service under the terms and conditions of this tariff and is responsible for payment of charges". This clearly implies that customers of NAT can be located all over the United States.

E. Tribal Exhaustion does not apply

The Intervening Parties do not take a position on the Tribal Exhaustion doctrine based upon the clear statutory support that indicates this Commission has jurisdiction of this controversy. The Intervening Parties support the position of Sprint that Tribal Exhaustion does not apply to actions filed before a state administrative body.

III. Conclusion

The Intervening Parties assert that this Commission has exclusive jurisdiction over intrastate access services services, pursuant to both federal and state law. Accordingly, NAT should be required to adhere to the South Dakota statutes and be required to receive both a local exchange and interexchange certificate of authority from this Commission and to file the appropriate switched access tariffs. Intervening parties urge that the Commission deny the Motion to Stay and the Motion to Dismiss.

Dated this 27 day of September, 2010.

By: *Darla Pollman Rogers*

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CERTIFICATE OF SERVICE

I, Darla Pollman Rogers, certify that a copy of the original SDN Petition to Intervene, dated September 27, 2010, filed in Commission Docket TC10-026, was served upon the PUC electronically, directed to the attention of:

Ms. Patty Van Gerpen
Executive Director
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Pierre, SD 57501

A copy was also sent by e-mail and/or US Postal Service First Class mail to each of the following individuals:

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