UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

SPRINT COMMUNICATIONS COMPANY L.P.,

Plaintiff,

v.

THERESA MAULE IN HER OFFICIAL CAPACITY AS JUDGE OF TRIBAL COURT, CROW CREEK SIOUX TRIBAL COURT, AND NATIVE AMERICAN TELECOM, LLC.,

Defendants.

Civil No. 10-4110

SPRINT COMMUNICATIONS COMPANY L.P.'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR A PRELIMINARY INJUNCTION

INTRODUCTION

Sprint Communications Company L.P. ("Sprint") started this action to enjoin Native American Telecom, LLC ("NAT") from pursing a claim it brought against Sprint in the Crow Creek Sioux Tribal Court ("Tribal Court"). In its tribal complaint, NAT alleged Sprint has refused to pay for what NAT claims are switched access charges due it under tariffs it has on file with the Federal Communications Commission ("FCC") and the Crow Creek Sioux Tribal Utility Authority ("Tribal Utility Authority"). But Sprint does *not* interconnect with NAT on the Crow Creek Sioux Reservation ("Reservation") or anywhere else, and Sprint in fact is not directly connected to NAT for switched access services. *All* of Sprint's

long distance traffic at issue in this case is directed to and handed off in Sioux Falls, South Dakota, at a switch owned by South Dakota Network, LLC. In addition, Sprint has no physical presence on the Reservation. Thus, there is no constitutionally lawful basis to compel Sprint to defend NAT's allegations in Tribal Court. Requiring it to do so would violate its due process rights.

Sprint believes that NAT is operating a scheme to fraudulently bill Sprint for telephone calls that are made to appear as legitimate telephone calls to end users on the Reservation. The scheme NAT has concocted exploits a weakness in the federal regulatory regime. Long distance carriers like Sprint must rely on local exchange carriers to originate or terminate long distance calls. Here, what NAT purports to bill Sprint for is a charge for terminating access. An entity like NAT prepares the necessary paperwork to operate as a "competitive local exchange carrier," purportedly to provide local telephone services. It then obtains a block of telephone numbers, files a "tariff" with the FCC, and starts billing Sprint and other long-distance carriers under the ruse of providing terminating access to the new "local exchange."

But NAT is not offering the typical terminating access service. For example, in July 2010, Sprint determined that 99.98% of the calls reported as terminating on a NAT phone number were calls to conference

call bridge numbers, terminating instead on equipment Sprint believes is located in Los Angeles, California. Federal law requires that NAT's tariff enforcement action be filed before the FCC or in federal court, which is one more compelling reason why the Tribal Court lacks jurisdiction over Sprint. In naming the Tribal Court and its judge as defendants in its declaratory judgment action, Sprint has simply followed a well-established path for challenging the jurisdiction of the Tribal Court in federal court. *See, e.g., Strate v. A-1 Contractors*, 520 U.S. 438 (1997); *Christian Children's Fund, Inc. v. Crow Creek Sioux Tribal Court,* 103 F. Supp. 2d 1161 (D.S.D. 2000).

The United States Supreme Court has recognized that tribal courts possess little, if any, adjudicatory authority over non-tribal members, such as Sprint, subject only to two narrow exceptions. *See Montana v. United States*, 450 U.S. 544 (1981). Where, as in this case, the exceptions are inapplicable and jurisdiction has clearly been vested in other entities, tribal exhaustion would serve no purpose other than delay and need not be followed. *See Strate v. A-1 Contractors*, 520 U.S. 438, 459 n.14 (1997). Sprint thus moves for a preliminary injunction.

FACTUAL BACKGROUND

A. The Parties

1. NAT

According to public records available at the South Dakota Secretary of State, NAT is a limited liability company organized in 2008 under the laws of South Dakota with its principal place of business in Sioux Falls, South Dakota. Affidavit of Scott G. Knudson ("Knudson Aff.") at ¶ 2 and Ex. A. Gene DeJordy and Tom Reiman are NAT's founders and the members personally liable for NAT's debts pursuant to SDCL § 47-34A-303(c). *Id.* [1] Neither Reiman nor DeJordy are enrolled members of the Crow Creek Sioux Tribe ("Tribe") or any other tribe. Answer of NAT ¶ 13. Neither DeJordy nor Reiman live on the Reservation, DeJordy resides now in Connecticut,[2] while Reiman lives in Sioux Falls. In September 2009 NAT filed its annual report with the Secretary of State listing Reiman as NAT's president and registered agent. Knudson Aff. at ¶ 3 and Ex. B. NAT purports to operate as a competitive local exchange

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[1] NAT's public filings can be found on the Secretary of State's corporate database www.sdsos.gov.

[2] According to federal court documents in the Eastern District of Arkansas, DeJordy is a defendant in a lawsuit brought by Alltel Communications, L.L.C. An Affidavit of Service in that file discloses DeJordy lives in Fairfield, Connecticut. Knudson Aff. ¶ 6 and Ex. E.

carrier on the Reservation under tariffs filed with the FCC and the Tribal Utility Authority.[3]

In its brief in support of its motion to stay filed with this Court, NAT claims, without providing any supporting documentation, that NAT is in fact 51% owned by the Tribe, with Widevoice Communications, Inc. and Native American Telecom Enterprises LLC ("NAT Enterprise") as the other owners. [Docket No. 15] Documents on file with the Secretary of State show Reiman and DeJordy are the organizers of NAT Enterprise, and both remain personally liable under SDCL § 47-34A-303(c) for the debts of NAT Enterprise. Knudson Aff. ¶ 4 and Ex. C. Reiman is the president and registered agent of NAT Enterprise. *Id.* at ¶ 5 and Ex. D.

In an affidavit filed with the Court [Docket No. 14], DeJordy describes the technology NAT allegedly employs to provide its services. NAT is using WiMax (World Interoperability for Microwave Access) technology. Affidavit of Gene DeJordy dated September 3, 2010 ("DeJordy Aff.") at ¶ 13. The WiMax technology NAT has employs "advanced antenna and radio technology." *Id.* With this technology, NAT "delivers wireless IP (Internet Protocol) voice and data communications." *Id.* DeJordy also claims that NAT has eschewed applying for Universal Service Funds ("USF") or other federal or state funding source to install

[3] Please find these tariffs attached to Sprint's Complaint as Exs. A and B, respectively.

its equipment. *Id.* ¶ 11.[4] NAT, however, has sought and received a license from the FCC to operate its WiMax technology. Knudson Aff. ¶ 16 and Ex. O.

2. The Tribal Court

The Crow Creek Tribal Court is the tribal court for the Crow Creek Sioux Tribe and has its chambers in Fort Thompson, South Dakota. Answer of Tribal Court ¶ 14.

3. The Tribal Judge

When Sprint initiated this action the Honorable Theresa Maule was the Judge of the Crow Creek Tribal Court. *See* Answer of Tribal Court ¶ 15.

4. Sprint

Sprint is a telecommunications company that provides telecommunications services nationwide and in the context of the issues addressed in this case operates as an interexchange carrier ("IXC"). Affidavit of Amy S. Clouser dated September 28, 2010 ("Clouser Aff.") ¶ 2.

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[4] It is odd that NAT protests Sprint's refusal to pay NAT's fraudulent bills as hurting the Tribe, while refusing to take part in a generous and legal subsidy scheme. The goal of the USF is to ensure that basic telephone services are available in all areas, by providing funding to companies operating with traditionally hard to serve areas. But to receive a USF subsidy, NAT would have to submit to FCC oversight of the subsidy, which would have brought its traffic pumping under regulatory scrutiny. Hence, the only plausible reason not to seek USF or other governmental assistance was to avoid having its traffic pumping scheme subject to regulatory oversight.

Sprint is qualified to do business within the State of South Dakota and is certificated by the South Dakota Public Utilities Commission to provide intrastate interexchange services in South Dakota. *Id.* The FCC has also authorized Sprint to provide interstate interexchange services. *Id.*

B. Sprint's role as an IXC subjects it to traffic pumping

As an interexchange carrier ("IXC") Sprint offers long-distance services to its customers around the country. Long-distance calls are those that are made from one local calling area to another. For example, in a typical situation (unlike in this case), a long-distance call may be made from an end user customer in Massachusetts to a called party, or "end user," in South Dakota. The call is delivered to Sprint's long distance network, and Sprint carries the call to the network of the local exchange carrier ("LEC") serving the called customer. *Id.* ¶ 3. In some cases, there is a third carrier between Sprint's long distance network and the LEC network serving the called customer. *Id.* at ¶¶ 3, 16-22.

The facilities used to complete the last leg of these calls are typically provided by the called party's own LEC. Because Sprint does not generally own the facilities that physically connect to end users, it must pay local carriers for access to them. The charge that Sprint pays for access to the called party is known as a "terminating access" charge because the call "terminates" with the party that is called. *Id.* ¶ 5.

Sprint (like other long-distance carriers) purchases terminating access service under a tariff required to be published by the local carrier that contains charges for terminating access (along with other offered services). Pursuant to the terms of that tariff, Sprint and other long-distance carriers have purchased access services under the tariff whenever they hand off a call to the local carrier that has properly defined "terminating access" service. *Id.* Because LECs have an effective monopoly over local telephone service in their service areas, the long distance carriers have no choice but to purchase the service defined in the tariff when the calls are made from one of their customers to an end user in the calling area of the local exchange carrier. *Id.* ¶¶ 5-6; s*ee In re Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exch. Carriers*, FCC Docket No. 96-262, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd. 9923, T 30 (2001). For that reason, it is important that tariffed services are defined precisely. For that reason, too, tariffs are construed narrowly – only services expressly set out in the tariff are "deemed" to be purchased. *See In re Theodore Allen Commc'ns, Inc. v. MCI Telecomms. Corp.*, 12 FCC Rcd. 6623, ¶ 22 (1997).

C. Sprint seeks to enjoin NAT's practice of traffic pumping

Traffic pumping is a scheme where a LEC partners with free conference call centers or chat rooms to artificially stimulate telephone call volume. NAT purports to operate local exchange carrier operations on the Reservation but with respect to what NAT wants to bill Sprint, exists only to operate a fraudulent scheme called traffic pumping. *See* Clouser Aff. ¶¶ 9-15. Traffic pumping occurs when a LEC, such as NAT, partners with a second company (a "Call Connection Company") that has established free or nearly free conference calling, chat-line, or similar services that callers use to connect to other callers or recordings. The Call Connection Company generates large call volumes to numbers assigned to the LEC. The LEC in turn unlawfully bills those calls as if they are subject to terminating access charges, hoping that IXCs unwittingly pay those bills. If the IXC does so, the LEC and Call Connection Company share the revenues. *Id.* ¶ 9. Sprint has seen these traffic pumping schemes target areas where switched access rates are the highest, which tend to be in rural areas. *Id.*

The FCC and the Iowa Utilities Board have ruled that switched access charges do not apply to calls delivered to Call Connection Companies because 1) Call Connection Companies are not end users of local exchange service, 2) such calls are not terminated to an end user's

premises, and 3) such calls do not terminate in the LEC's certificated local exchange area.[5] Numerous other cases involving the legality of traffic pumping are pending before federal courts throughout the United States.[6]

D. NAT purports to operate under FCC and tribal tariffs that are improper

NAT has two tariffs it purports to enforce in tribal court. One is NAT's tariff that it filed with the FCC on September 14, 2009, with an effective date of September 15, 2009. A copy of NAT's initial FCC tariff

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[5] *See In the Matter of Qwest Commc'ns Corp. v. Farmers and Merchants Mut. Tel. Co.*, File No. EB-07-MD-001, Second Order on Reconsideration (Nov. 25, 2009); *In re Qwest Commc'ns Corp. v. Superior Tel. Co.,* No. FCU-07-2, Final Order, (Iowa Utilities Board, Sept. 21, 2009).

[6] *See, e.g., Sprint Commc'ns Co., L. P. v. Superior Tel. Coop.*, No. 4:07-CV-00194 (S.D. Iowa); *Qwest Commc's Corp. v. Superior Telephone Coop.,* No. 4:07-CV-0078 (S.D. Iowa), *AT&T Corp. v. Superior Tel. Coop.*, No. 4:07-CV-0043 (S.D. Iowa); *AT&T Corp. v. Reasnor Tel. Co., LLC*, No. 4:07-CV-00117 (S.D. Iowa). There are also several similar suits pending in South Dakota, including three suits involving Sprint. *See Sancom, Inc. v. Sprint Commc'ns Co., L.P.*, No. CIV 07-4107 (D.S.D.); *Northern Valley Commc'ns, LLC v. Sprint Commc'ns Co., L.P.*, No. CIV. 08-1003 (D.S.D.); *Splitrock Prop., Inc. v. Sprint Commc'ns Co., L.P.*, No. CIV 09-4075 (D.S.D.). Two other cases brought in the District of Minnesota involving a Minnesota LEC and Sprint and Qwest have been referred to the FCC and stayed pending the outcome of related proceedings at the Minnesota Public Utilities Commission. *See Tekstar Commc's, Inc. v. Sprint Commc'ns Co., L.P.*, No. 08-CV-01130-JNE-RLE (D. Minn.); *Qwest Commc'ns Co. LLC v. Tekstar Commc'ns, Inc.* No. 10-CV-00490 (MJD/SCN). Other cases include *North Country Commc'ns Corp. v. Sprint Commc'ns Co., L.P.*, 09-CV-2685 (S.D. Iowa); *Beehive Tel. Co. Inc. Nevada v. Sprint Commc'ns Co., L.P.*, 08-CV-00380 (D. Ut.); and *Bluegrass Tel. Co., Inc. v. Sprint Commc'ns Co, L.P.*, 410-CV-104 (W.D. Ky).

was attached as Exhibit A to Sprint's Complaint. NAT also claims a tariff it filed with the Tribal Utility Authority on September 1, 2009, ostensibly effective that very day. A copy of NAT's tribal tariff was attached to Sprint's Complaint as Exhibit B. Since the filing of its Complaint, Sprint has determined that NAT amended its FCC tariff on October 21, 2009. *See* Knudson Aff. ¶ 7 and Ex. F.[7] These two tariffs are for all practical purposes the same.

While NAT purports to operate under these tariffs, it actually operates in South Dakota without a state certificate of authority. On September 8, 2008, NAT applied with the South Dakota Public Utilities Commission ("SD PUC") for a state Certificate of Authority to provide competitive local exchange service on the Crow Creek Reservation pursuant to ARSD 20:10:32:03 and 20:10:32:15. In NAT's application to the SD PUC, NAT described its application as "a joint venture with the Crow Creek Sioux Tribe," to "provide service only within the exterior boundaries of the Crow Creek Indian Reservation." Knudson Aff. ¶ 8 and Ex. G at 1, 3. NAT provided "the biographies of the principal owners" of NAT – Reiman and DeJordy. *Id.* at 3, Ex. B.

While NAT's SD PUC application was pending, NAT obtained authorization from the Tribal Utility Authority on October 28, 2008, to

[7] The changes NAT made do not affect the Commission's jurisdiction. If anything, the changes made NAT's tariff even more one-sided.

provide LEC services within the Crow Creek Reservation. Knudson Aff. ¶ 12 and Ex. K. In response, on December 1, 2008, NAT moved to dismiss its application pending before the SD PUC. The Tribe itself filed comments with the SD PUC in support of NAT's motion to dismiss. Nowhere in its comments did the Tribe describe itself as the majority owner of NAT. Rather, it described the Tribe as having "entered into an agreement," with NAT to develop a telecommunications system on the Reservation. Knudson Aff. ¶ 9 and Ex. H. The SD PUC granted NAT's motion as a matter of right, without addressing the merits, on February 5, 2009. *See* Knudson Aff. ¶ 10 and Ex. I. As a result, NAT is operating within the State of South Dakota, purportedly as a local exchange carrier and seeks to assess switched access charges *without* a certificate of authority from the SD PUC.

E. NAT bills Sprint for switched access charges based on traffic pumping

NAT has devised a scheme to inflate call volumes artificially to phone numbers assigned to NAT's local calling area, in order to bill Sprint for what NAT wrongly characterizes as tariffed "terminating access" service. But under this scheme, Sprint is *not* connecting a call with a called party on the Reservation that is a customer of NAT. Sprint only connects the calls NAT bills Sprint to South Dakota Network, LLC. Clouser Aff. ¶ 22. Moreover, NAT's scheme with its Call Connection

Company partners involves advertising "conference call," or similar services that allow callers who do not reside on the Reservation to talk to one another. *See* Clouser Aff. ¶¶ 11-15.

In his affidavit, DeJordy proclaims "NAT's services take place exclusively within the exterior boundaries of the Reservation." DeJordy Aff. ¶ 4. This misleading statement is very carefully worded, for the word "services" is not a defined term in NAT's tariffs. NAT may have a telephone switch in Fort Thompson, within Reservation boundaries, but virtually none of the traffic South Dakota Network LLC delivers to that switch stays on the Reservation.

Sprint has determined that virtually all of the calls NAT has or wants to bill Sprint for are routed to a telephone switch located in Los Angeles, California. Clouser Aff. ¶¶ 10, 19-21. The calls at issue in this dispute are delivered to conference bridge equipment which is typically located at the switch. *Id.* at ¶ 21. Other LECs and Call Connection Companies involved in traffic pumping schemes normally locate conference bridge equipment at or near the switch used for the traffic. Whether the equipment is located in California or elsewhere, it is certainly not located at an end user's premises on the Reservation, and few, if any, of the parties so communicating reside on the Reservation. Clouser Aff. ¶¶ 15-21. In this case, 99.98% of the traffic for which NAT

is seeking compensation was to these conference bridge services. *Id.* at ¶ 15.

In December 2009, Sprint received its first bill from NAT, which used a Texas billing firm called CABS Agent (with whom Sprint is familiar) to prepare and send the bill. A preliminary review of the bill revealed that the charges seemed legitimate, and thus a check was made payable to CABS Agent and sent to its Texas address in the ordinary course of business. This occurred the next month as well. When Sprint received a third bill totaling more than $75,000, however, Sprint investigated NAT's activities and identified its use of traffic pumping. Sprint has requested return of its funds from NAT, which has refused. Clouser Aff. ¶ 8

F. Sprint does not do business with NAT on the Reservation

Sprint has investigated the factual basis by which NAT claims a right to bill Sprint for switched access services allegedly on the Reservation. NAT's DeJordy claims Sprint provides interexchange services *on* the Reservation. DeJordy Aff. ¶ 15. That is simply *not* the case. Sprint has no physical property on the Reservation so it cannot be doing business on that basis with NAT. Clouser Aff ¶ 16. In fact, Sprint does not have any facilities on the Reservation, and does not interconnect with any NAT equipment on the Reservation. *Id.* ¶¶ 16-22.

All of Sprint's long distance calls into South Dakota that are at issue here interconnect with South Dakota Network, LLC, a wholly independent entity unrelated to Sprint, which maintains a tandem telephone switch in Sioux Falls. *Id.* It is South Dakota Network, LLC and its equipment that actually interconnect with NAT. *Id.* Sprint simply does not connect any of its long distance calls directly with NAT. Likewise, if NAT actually has local phone service on the Reservation, Sprint has nothing to do with that service, and any long distance calls from those customers (if they actually exist) would travel over the facilities of South Dakota Network, LLC before reaching Sprint's facilities. *Id.* ¶ 22.

Sprint's investigation also revealed that after South Dakota Network routes a call to NAT's equipment, ostensibly located in Fort Thompson on the Reservation, those calls are then sent to a telephone switch located in Los Angeles, California. Clouser Aff. ¶ 21. This switch is operated by Widevoice Communications, a company Sprint has seen before in traffic pumping cases.[8] *Id.*

[8] If, as NAT now claims, Widevoice Communications is a part owner of NAT, that fact only makes the traffic pumping scheme more obvious and NAT's connection to legitimate reservation services even more attenuated. *See* Clouser Aff. ¶¶ 19-22.

G. NAT improperly involves the Tribal Utility Authority and the Tribal Court

On March 26, 2010, NAT contacted the Tribal Utility Authority about Sprint's position that traffic pumping is not a legitimate access service. This communication took place without Sprint's knowledge. On March 29, 2010, the Tribal Utility Authority issued an *ex parte* order stating that Sprint was required to pay the access charges, based on the tariff on file with the FCC and the Tribal Utility Authority:

> [T]his Utility Authority finds Sprint's non-payment of Native American Telecom-Crow Creek's access tariff charges to be in violation of the laws of the Crow Creek Sioux tribe. This finding applies to both the *intrastate* access services subject to the tariff in effect at this Utility Authority and the *interstate* access services subject to the tariff in effect at the FCC.

Tribal Utility Authority Order, at 4 (Mar. 29, 2010) (emphasis added). Knudson Aff. ¶ 11 and Ex. J.

The Tribal Utility Authority's Order is premised on Sprint's alleged nonpayment of what are claimed to be terminating access charges that an entity called CABS Agent billed Sprint, purportedly pursuant to NAT's FCC and tribal tariffs. But in its Order, the Tribal Utility Authority identified the complainant as "Native American Telecom-Crow Creek"; the entity, however, to whom the Tribal Utility Authority granted telecommunications authority on the Reservation is Native American Telecom, LLC. *Compare* Knudson Aff. Ex. K *with* Ex. J. Thus, even

though NAT has billed Sprint and sued it in Tribal Court, there may be as yet another entity purportedly offering on-Reservation telecommunication services.

In response, Sprint initiated an action against NAT before the SD PUC to stop NAT's scheme with respect to intra-state traffic. NAT refuses to acknowledge the SD PUC's jurisdiction over NAT, even though at one time NAT had a tariff on file with the SD PUC. The Tribal Utility Authority intervened in the PUC action. The parties in that proceeding are currently briefing the PUC's jurisdiction over NAT. Knudson Aff. ¶ 13 and Ex. L.

On July 12, 2010, NAT sued Sprint in Tribal Court. Knudson Aff. ¶ 14 and Ex. M. As the facts underlying this case did not take place on the Reservation, involve a federal tariff the Tribal Court cannot enforce and a nominal tribal tariff that exceeds the tribe's regulatory authority, Sprint moved in Tribal Court by special appearance to dismiss NAT's Complaint. Nevertheless, on August 30, 2010, NAT moved the Tribal Court to establish a scheduling order. Knudson Aff. ¶ 15 and Ex N.

Because the Tribal Court and the Tribal Utility Authority clearly lack jurisdiction over Sprint, Sprint concurrently filed a complaint with this Court to enjoin further proceedings in the Tribal Court. Because NAT is using its Tribal Court action to argue to this Court and the SD

PUC that both forums must defer to the Tribal Court, Sprint now seeks a preliminary injunction from this Court to ensure that no further action is taken by NAT or the Tribal Court.

SUMMARY OF ARGUMENT

As a threshold issue, tribal court exhaustion does not apply to this case. The Eighth Circuit Court of Appeals made clear in *Hornell Brewing Co. v. Rosebud Sioux Tribal Court*, 133 F.3d 1087 (8th Cir. 1998), that the power of Indian tribes with respect to civil jurisdiction over non-Indians is limited to activities "on their reservations." *Id.* at 1091.

The United States Supreme Court has held that where exhaustion would serve no purpose other than delay, exhaustion of tribal court remedies is not a prerequisite to federal court action, especially when, as here, the Tribal Court clearly lacks jurisdiction in this case. There is no congressional grant of jurisdiction to the Tribal Court. In fact, Congress stated the opposite in the Federal Communications Act, clearly requiring that NAT's claims against Sprint be heard only in federal court or before the FCC. Put very simply, Sprint has no physical presence on the Reservation and has not consented to Tribal Court jurisdiction. The Tribal Court is thus without authority to act in this case.

Sprint has demonstrated its entitlement to a preliminary injunction. First, and perhaps most importantly, Sprint has

demonstrated that it will succeed on the underlying merits of this case. The Tribal Court indisputably lacks jurisdiction over Sprint and the complaint filed there. As this jurisdiction is so clearly lacking, Sprint will be harmed it if is forced to continue to defend itself in an improper forum. This Court must step in to protect Sprint's due process rights. Additionally, given the large number of traffic pumping cases pending across the county, including those cases before this Court, the public interest will be served by restraining the tribal court action and ensuring uniform application of the Federal Communications Act.

ARGUMENT

I. EXHAUSTION OF TRIBAL REMEDIES IS NOT REQUIRED IN THIS CASE

The question of exhaustion of tribal remedies is a threshold matter that can be promptly resolved in this case. Sprint is not exchanging traffic directly with NAT on the Reservation or anywhere else. This lack of presence on the Reservation is critical. The Eighth Circuit Court of Appeals stated in *Hornell Brewing*:

> Neither *Montana* nor its progeny purports to allow Indian tribes to exercise civil jurisdiction over activities or conduct of non-Indians occurring *outside their reservations* …. 133 F.3d at 1091(emphasis in original).
>
> …because the conduct and activities at issue here did not occur on the Rosebud Sioux Reservation, we do not believe *Montana's* discussion of activities of non-Indians on fee land within a reservation is relevant to the facts of this case. More importantly, the parties fail to cite a case in which the

> adjudicatory power of the tribal court vested over activity occurring outside the confines of a reservation .... *Id.*
>
> ...we think it plain that the Breweries' conduct outside the Rosebud Sioux Reservation does not fall within the Tribe's inherent sovereign authority .... *Id.* at 1093.
>
> ...the Rosebud Sioux Tribal Court lacks adjudicatory authority over the dispute arising from the Breweries' use of the Crazy Horse name in the manufacturing, sale and distribution of Crazy Horse Malt Liquor outside the Rosebud Sioux Reservation.

Id. at 1093-1094; *see also Christian Children's Fund,* 103 F. Supp. 2d at 1166 (D.S.D. 2000) (no tribal court jurisdiction because activity was off-reservation.)

Hornell establishes that the Tribal Court lacks jurisdiction over NAT's claims because the Sprint calls at issue interconnect to South Dakota Network, *not* to NAT. Clouser Aff. ¶ 22. Moreover, analysis of the actual traffic pumping scheme NAT has devised shows that – contrary to what NAT's principal DeJordy professes – virtually all calls to NAT's exchange do not terminate to an end user premises on the Reservation. Instead, the telephone switch where the calls were routed is physically located in Los Angeles, where calls were directed to conference bridge equipment rather than terminating to an end user located on the Reservation. *Id.* ¶ 21.

Simply a prudential rule, the Supreme Court has carved out some very significant limitations to the tribal exhaustion of remedies doctrine.

> When, as in this case, it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by *Montana's* main rule, it will be equally evident that tribal courts lack adjudicatory authority over disputes arising from such conduct. As in criminal proceedings, state or federal courts will be the only forums competent to adjudicate those disputes. Therefore, when tribal-court jurisdiction over an action such as this one is challenged in federal court, the otherwise applicable exhaustion requirement, see *supra*, at 1410-1411, must give way, for it would serve no purpose other than delay.

Strate, 520 U.S. at 459 n.14 (citations omitted). "In some cases not falling within the Tribe's inherent sovereign authority, there is no exhaustion requirement because the tribal court simply lacks authority to adjudicate disputes arising from such conduct." *Christian Children's Fund*, 103 F. Supp. 2d at 1163 (citing *Hornell*). This is one of those cases.

In *Nevada v. Hicks*, 533 U.S. 353 (2001), the Supreme Court discussed the role of federal statutes in this process:

> It is true that some statutes proclaim tribal-court jurisdiction over certain questions of federal law. … But no provision in federal law provides for tribal-court jurisdiction over § 1983 actions.

Id. at 367. The same is true in this case, as the Federal Communications Act does not provide for tribal court jurisdiction. Without any statutory authority for tribal court adjudication of NAT's claims, exhaustion of tribal court remedies would serve no purpose other than delay and, thus, not required in this case. *See Strate*, 520 U.S. at 459 n.14; *see also*

Hicks, 533 U.S. at 369 (recognizing this same exception). The timing of NAT's Tribal Court complaint – coming after Sprint started the SD PUC action – shows how NAT brought the Tribal Court action in an effort to keep this controversy out of state or federal hands. *See* Knudson Aff. Ex. M.

NAT's tribal law suit clearly does not fall within the Tribal Court's jurisdiction because NAT's claims are pre-empted by federal law. NAT seeks damages in Tribal Court under sections 201, 203, and 206 of the Federal Communications Act, 47 U.S.C. §§ 201, 203, 206. *See* Tribal Court Complaint ¶¶ 34-54 (Knudson Aff. ¶ 14 and Ex. M). Yet section 207 of the Act, which gives NAT a cause of action to pursue such remedies, expressly requires that those claims only be pursued in federal court or before the FCC:

> Any person claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to [the FCC]…or may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies.

47 U.S.C. § 207 (emphasis added). "By its express language, [the FCA] established concurrent jurisdiction in the FCC and federal district courts only, leaving no room for adjudication in any other forum – be it state, tribal or otherwise." *Alltel Commc'ns v. Oglala Sioux Tribe*, No. CIV.10-

5011, 2010 WL 1999315, at *12 (D.S.D. May 18, 2010) (quoting *AT&T Corp. v. Coeur D'Alene Tribe*, 295 F.3d 899, 905 (9th Cir. 2002)); *Cf. Phillip Morris USA, Inc. v. King Mountain Tobacco Co.*, 569 F.3d 932 (9th Cir. 2009) (no exhaustion required where defendants sued in tribal court after federal action initiated; tribal court had no colorable jurisdiction).

As revealed by the DeJordy affidavit, the technology NAT proposes to use presents a serious question of federal law whether there is exclusive federal authority over the technology and whether how NAT can employ a tariff to bill for access. The WiMax technology NAT is using is a form of wireless technology. NAT describes it as licensed, and indeed, NAT has obtained a radio-spectrum license from the FCC. Knudson Aff. Ex. O. Radio-based service can readily extend off the Reservation, something NAT represented to the SD PUC that it would not do when it applied for authority to operate within South Dakota. Knudson Aff. Ex. G at 1, 3.

Congress has determined that the regulatory regime depends on whether the service is telecommunications or information services. The former is:

> the transmission, between or among points specified by the user, of information of the user's choosing, *without change in the form of content of the information as sent and received.*

47 U.S.C. § 153(43) (emphasis added).

Alternatively, the provision of information service means:

> the offering of a capacity for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any capability of the management, control, or operation of a telecommunications system or the management of a telecommunications service.

47 U.S.C. § 153(20). Services that involve a change in protocol are information services. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 977 (2005).

NAT claims it is providing "wireless IP (Internet Protocol) voice and data services." DeJordy Aff. ¶ 13. In the event this service were deemed CMRS (Commercial Mobile Radio Service), NAT could not lawfully use a tariff to bill Sprint – it would have to negotiate with Sprint for a contractual right to do so. *See In re Petitions of Sprint PCS and AT&T Corp. for Declaratory Ruling Regarding CMRS Access Charges*, 17 FCC Rcd. 13192 (2002); *In re Implementation of Sections 3(N) and 332 of the Communications Act Regulatory Treatment of Mobile Services*, 9 FCC Rcd 1411, ¶ 178 (1994) ("To avoid the introduction of these anticompetitive practices, to protect consumers and the public interest, and because continued voluntary filing of tariffs is an unreasonable practice for commercial mobile radio services under Section 201(b) of the Act, we will not accept the tariff filings of CMRS providers."). If NAT's service were

deemed a version of VoIP service (Voice over Internet Protocol), which DeJordy's affidavit suggests is the case, as a matter of federal law, NAT could not assess access charges to such traffic. *PAETEC Commc'ns, Inc. v. CommPartners LLC*, Civ. No. 08-0397, 2010 WL 1767193, at *2 (D.D.C. Feb. 18, 2010) ("Information services are not subject to the access charges regime."); *Southwestern Bell Telephone, L.P. v. Missouri Public Service Commission*, 461 F. Supp. 2d 1055, 1081-82 (E.D. Mo. 2006) ("federal access charges are inapplicable to an "information service" like IP-originated traffic); *Vonage Holdings Corp. v. Minn. Pub. Utils. Comm'n*, 290 F. Supp. 2d 993, 1001 (D. Minn. 2003) (VoIP traffic subject to regulation as an information service not as a telecommunications service). And, if NAT's service is deemed information service of any type, Congress has ruled that it would not be subject to access tariff pricing. *See PAETEC*, 2010 WL 1767193, at *2. In short, what NAT appears to be providing may be something that under section 207, only federal courts or the FCC can address.

The same section 207 analysis holds for any of NAT's claims premised on Sprint's alleged violation of NAT's tribal tariff. On its face, the tribal tariff purports to regulate long distance calls in a manner very

similar to NAT's FCC tariff.[9] But the Tribal Utility Authority can only regulate, if at all, a tribal tariff by which NAT provides only local exchange services on the Reservation to tribal members.[10]

It is obvious that NAT has tried to manufacture Tribal Court jurisdiction and filed its complaint in Tribal Court in order to use the tribal exhaustion doctrine to delay proceedings in this Court and before

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[9] For example, section 1.1 of the tribal tariff proclaims it applies to "Intrastate Access Services . . . into, out of and within the State of South Dakota." Complaint [Docket 1] Ex. B, at 14. In the definitional provisions of each of NAT's tariffs, the terms "End User" and "Terminating Access" are identical. (The FCC tariff is Ex. A to the Complaint.) Moreover, there is nothing in the tribal tariff's definition of End User that restricts the location of an end user (who ultimately receives the call) to the Reservation. This drafting is artful legerdemain to create a tariff that addresses decisions like *In re Qwest Comm'cns. Corp. v. Superior Tel. Corp.*, Dk. No. FCU-07-02 (IUB Sept. 21, 2009), where the Iowa Utilities Board held a LEC's intrastate access charges for calls to conference bridges, chat rooms and the like were not within a tariff's provisions defining access service. Here both of NAT's tariffs include conference bridges in chat rooms located anywhere.

[10] Available federal census data and state tax information demonstrates that a significant portion of those living on the Reservation are non-tribal members and that a significant portion of the land encompassing the Reservation is owned by non-tribal members. Census data show a significant percentage of residents on the Reservation – about 13% – are not of American Indian descent. *See* Knudson Aff. Ex. P. The most recent census data available demonstrates that of the 2,225 residents of the Reservation, only 1,936 are classified as being of American Indian descent. *Id.* This figure demonstrates that a significant portion of the population within the Reservation boundaries are not tribal members.

Additionally, a substantial part of the Reservation has consequently become fee land, and much of that fee land is owned by non-Indians. *See* Knudson Aff. ¶¶ 18-19 and Ex. Q (60 percent of Reservation land in Buffalo County is fee land) and Ex R (over 40 percent of Reservation land in Hughes County is taxable, i.e. , fee land).

the SD PUC. NAT was formed in 2008 by two non-Indians who remain personally liable for NAT's debts. Knudson Aff. Ex. A One of those, Thomas Reiman, is NAT's president and registered agent with an office in Sioux Falls, not on the Reservation. Knudson Aff. Exs. A and B. NAT offers no record support that now, in 2010, the Tribe owns 51% of NAT or how the Tribe actually funded that investment. Indeed, NAT Enterprise, one of the purported owners of NAT, discloses that in 2010 it, too, was owned by the founders of NAT. Knudson Aff. Exs. C and D. NAT and NAT Enterprise have the same president and registered agent. *Compare* Knudson Aff. Exs. A and B with Exs. C and D. Where the creators of NAT are non-Indian entrepreneurs, they cannot claim tribal identity for NAT by allegedly offering the Tribe a 51% share of NAT. Because only non-Indians remain liable for NAT's debts, it cannot be deemed a tribal entity.

Finally, federal law completely preempts the Tribal Court's jurisdiction. As there is no room for tribal court adjudication of NAT's claims, exhaustion of tribal court remedies would serve no purpose other than delay and thus is not required in this case. *See Strate, supra,* 520 U.S. at 459 n.14. Because the lack of tribal authority is clear, there is no need for Sprint to exhaust the jurisdictional issue in Tribal Court. *See Hicks*, 533 U.S. at 374.

II. STANDARDS FOR A PRELIMINARY INJUNCTION

Pursuant to Rule 65, the Court may issue a preliminary injunction when it clearly appears from specific facts that immediate and irreparable injury will result to the moving party. Fed. R. Civ. P. 65(b).

In this circuit, federal district courts consider the well-known *Dataphase* factors when determining whether to issue a preliminarily injunction:

> (1) the probability that the movant will succeed on the merits of its claim;
>
> (2) the threat of irreparable harm to the movant;
>
> (3) the balance between the harm to the movant if injunctive relief is denied and the injury that will result if such relief is granted; and
>
> (4) the public interest.

Dataphase Sys., Inc. v. C L Sys., Inc., 640 F.2d 109, 114 (8th Cir. 1981); *Yankton Sioux Tribe v. Kempthorne,* 442 F. Supp. 2d 774 (D.S.D. 2006). No single factor in itself is dispositive – rather, all of the factors must be considered to determine whether, on balance, they weigh in favor of granting the injunction. *Calvin Klein Cosmetics Corp. v. Lenox Labs., Inc.*, 815 F.2d 500, 503 (8th Cir. 1987). However, the Eighth Circuit has held that: "[t]he two most critical factors for a district court to consider in determining whether to grant a preliminary injunction are (1) the probability that plaintiff will succeed on the merits and (2) whether the

plaintiff will suffer irreparable harm if an injunction is not granted." *Chicago Stadium*, 530 F.2d at 206. Each of these factors weighs strongly in Sprint's favor.

III. SPRINT IS LIKELY TO SUCCEED ON THE MERITS OF ITS CLAIMS

The "probability of success" on the merits factor does not require the party seeking relief to prove a greater than fifty percent likelihood that he will prevail, saying "the court ordinarily is not required at an early stage to draw the fine line between a mathematical probability and a substantial possibility of success." *Dataphase*, 640 F.2d at 113. "The focus in determining probable success should not be to apply the probability language with mathematical precision." *Lenox Labs., Inc.*, 815 F.2d at 503. The case law is clear that plaintiffs do not have to show a greater than fifty percent chance of success on the merits. Sprint can readily demonstrate that level of probability here.

A. The Tribal Court lacks jurisdiction to hear Federal Communications Act claims

By its express terms, the statute under which NAT proceeds precludes NAT's claims from being heard in Tribal Court. NAT seeks relief under Section 201, 203, and 206 of the Federal Communications Act, 47 U.S.C. §§ 201, 203, 206, as well as a declaratory judgment based upon the Federal Communications Act. *See* Tribal Court Complaint ¶¶

34-54 (Knudson Aff. Ex. M). The Federal Communications Act, however, only allows such claims for relief as provided for under Section 207.[11]

As noted above, *supra* at 20-21, the plain language of Section 207 is beyond dispute – only the FCC or a federal district court may award relief under the Federal Communications Act. A tribal court is not authorized to do so. *See AT&T Corp.*, 295 F.3d at 905 ("§ 207 establishes concurrent jurisdiction in the FCC and federal district courts only, leaving no room for adjudication in any other forum – be it state, tribal or otherwise."); *see also Alltel Commc'ns*, 2010 WL 1999315, at *12 (quoting *AT&T Corp.*).

The WiMax technology NAT is employing raises a serious question whether it is lawful to charge anyone even for legitimate access services. This question is one the FCC has ruled is governed by federal law. Charging for tariffed services proscribed by federal law is a question that under section 207 is to be decided in a federal forum.

NAT's so-called tribal tariff is hardly that. Both NAT and the Tribe represented to the SD PUC that NAT would provide services only *within* the Reservation. But the tribal tariff defines its scope as providing "Intrastate Access Services . . . by Native American Telecom, LLC into, out of and within the State of South Dakota." (Complaint Ex. B at 11).

[11] Among its other deficiencies, NAT's tribal complaint fails to cite to this specific provision.

On its face the tribal tariff applies outside the Reservation within South Dakota and even outside the State of South Dakota. And critical provisions of the so-called tribal tariff – Access Charges, Customer, End User, Switched Access Services, Terminating Access – are essentially the same as the FCC tariff.[12] The traffic pumping that CABS Agent invoiced Sprint for could have been billed under either tariff, as both include conference bridge users as permitted Customers and End Users, while and the tribal tariff does not even require the Customer and End User to be on the Reservation. And by using the radio technology of WiMax, NAT's services will not stop at the Reservation boundary.[13]

Because the tribal tariff purports to regulate interstate long distance calls as well, which is plainly outside the tribe's regulatory authority, the tribal tariff must likewise be enforced in federal court or by the FCC. Therefore, any relief that NAT seeks under the Federal Communications Act cannot be provided by the Tribal Court. *See Strate*, 520 U.S. at 459 n.14 ("When, as in this case, it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land

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[12] These terms are found in the definitions part of the tariffs, at pages 9-12 of both tariffs.

[13] Also, if NAT's services truly only impact the Reservation, NAT is still serving a significant number of non-tribal members residing on the Reservation. *See* Knudson Aff. Exs. P-R and Footnote 9, *supra* at 24-25.

covered by *Montana's* main rule, it will be equally evident that tribal courts lack adjudicatory authority.").

B. *Montana* does not confer jurisdiction over NAT's complaint

Even if there are some reservation contacts, tribal courts exercise very limited jurisdiction over the activities of non-members. In *Montana*, the Supreme Court established that a tribe's powers do *not* extend to the activities of nonmembers of the tribe, except in two limited circumstances. 450 U.S. 544 (1981). The test under which tribal court jurisdiction over non-members is measured is as follows:

> (1) A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter into consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements; and
>
> (2) A tribe may also retain inherent power to 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, the economic security, or the health or welfare of the tribe.

450 U.S. at 565-66.

Justice Souter said it well in *Hicks*:

> We said that the passage "scarcely supports the view that the *Montana* rule does not bear on tribal-court adjudicatory authority in cases involving nonmember defendants," 520 U.S., at 451-452, and stressed the "three informative citations" accompanying the statement, which mark the true contours of inherent tribal authority over nonmembers … Accordingly, in explaining and distinguishing *Iowa Mutual*, we confirmed in *Strate* what we had indicated in *Montana*: that

> as a general matter, a tribe's civil jurisdiction does not extend to the "activities of non-Indians on reservation lands,"...

Hicks, 533 U.S. at 381 (Souter, J., concurring.)

Other subsequent Supreme Court cases have likewise demonstrated that the *Montana* exceptions are to be *narrowly* construed, and NAT bears the burden of demonstrating jurisdiction. *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 659 (2001) (tax on non-member on fee land presumptively invalid); *see Progressive Specialty Ins. Co. v. Burnette*, 489 F. Supp. 2d 955, 958 (D.S.D. 2007) ("tribal jurisdiction over non-members is 'presumptively invalid'") (quoting *Atkinson*, 532 U.S. at 659).

1. Neither NAT nor Sprint is a tribal member

Under the first *Montana* exception, tribal court jurisdiction may only be exercised where a non-tribal member enters into a consensual relationship with a tribe or a tribal member. 450 U.S. at 565. In this case, however, NAT is a limited-liability company, organized under the laws of the State of South Dakota. Knudson Aff. Exs. A-B. This South Dakota company was founded by two individuals who do not reside on the Reservation, each of whom, and only they, remain personally liable for NAT's debts. *Id.* In documents filed with the South Dakota Secretary of State, NAT's principal executive office is located in Sioux Falls. Based on these facts NAT cannot claim to be a tribal entity. *Id.* Defendant

Sprint is obviously not a tribal member, being a limited partnership with its principal place of business in Overland Park, Kansas. Clouser Aff. ¶ 2.

The recent, as yet unsubstantiated, claim that NAT is now 51 percent owned by the Tribe does not confer tribal court jurisdiction over Sprint. In *Plains Commerce Bank*, the Court held the tribal court lacked the power to hear a claim of discrimination asserted by two tribal members against a non-tribal bank which had foreclosed on their land within the reservation and sold that land over their protest to a non-Indian. *Plains Commerce Bank v. Long Family Land and Cattle Co.*, __ U.S. __, 128 S. Ct. 2709, 2720 (2008). Likewise, here, it matters not whether NAT's non-tribal organizers have engaged in some type of shell game to create the appearance of NAT being a tribal entity. *Plains Commerce Bank* strips the Tribal Court here of *any* adjudicatory power over Sprint.

2. No consensual relationship exists that would support jurisdiction

In addition to NAT's tribal lawsuit not involving a tribal member, no consensual relationship has been established that would support tribal jurisdiction or regulation under *Montana* and its progeny. Sprint is a telecommunications provider. Providing telecommunications services on a reservation "as a matter of law does *not* create a 'consensual

relationship' with the tribe or its members." *Reservation Tel. Coop. v. Henry*, 278 F. Supp. 2d 1015, 1023 (D.N.D. 2003) (tribe had no authority to tax utility's property within reservation). Because "[a]n individual has no organic, economic or political right to service by a particular utility merely because he deems it advantageous to himself, . . . it is inaccurate to view a request for service by a potential electric customer from an electric supplier as forming a consensual relationship similar to that which occurs in other commercial contexts." *In re Application of Otter Tail Power Co.*, 451 N.W.2d 95, 105 (N.D. 1990) (internal quotations omitted). Instead, the provision of telecommunications services is regulated by the FCC or the SD PUC. *See* 47 U.S.C. § 151 *et seq.*; *Cheyenne River Sioux Tribe Tel. Auth. v. Public Utils. Comm'n of S. D.,* 1999 SD 60 ¶ 30, 595 N.W.2d 604, 611 (holding that the SD PUC had authority over the sale of a telephone exchange located on a reservation).

In addition to requiring a consensual relationship, the Supreme Court has also held that the proposed regulation must bear a nexus to any such relationship. "*Montana* limits tribal jurisdiction under the first exception to the regulation of the activities of nonmembers." *Plains Commerce,* 128 S. Ct. at 2721 (internal quotations omitted); *see also Atkinson*, 532 U.S. at 656 (holding that the tribal regulation must bear some nexus to the consensual relationship). "Even then, the regulation

must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations." *Plains Commerce Bank*, 128 S. Ct. at 2724. In this case, Sprint's alleged activities, *i.e.*, nonpayment of access charges, likewise lack a sufficient regulatory nexus, because Sprint has no consensual relationship with a South Dakota limited liability company, owned or operated by non-members of the Crow Creek Sioux Tribe. Similarly, if Sprint has no physical presence or interconnection with NAT on the Reservation, there is no basis to hold the Tribal Court has adjudicatory jurisdiction over NAT.

Nor would it matter even if the Tribe in fact owns part of NAT. As noted above, *supra* at 32, in *Plains Commerce Bank*, the borrower was a South Dakota LLC owned by members of the Cheyenne River Sioux Tribe. The fact the bank in *Plains Commerce* chose to do business with tribal members involving fee land on a reservation did not confer adjudicatory jurisdiction over the bank. 128 S. Ct. at 2720.

3. No conduct supports an exercise of inherent jurisdiction

The second *Montana* exception recognizes that tribes also may retain inherent jurisdiction over "the conduct of non-Indians on fee lands within its reservation when the conduct threatens or has some direct effect on the political integrity, the economic security, or the health or

welfare of the tribe." *Montana*, 450 U.S. at 566. This second *Montana* exception is also narrowly applied. As the Supreme Court observed in *Atkinson*:

> *Montana's* second exception "can be misperceived." The exception is only triggered by *non-member conduct* that threatens the Indian tribe; it does not broadly permit the exercise of civil authority wherever it might be considered "necessary" to self-government. Thus, unless the drain of the non-member's conduct upon tribal services and resources is so severe that it actually 'imperils' the political integrity of the Indian tribe, there can be no assertion of civil authority beyond tribal lands.

532 U.S. at 657 n.12 (emphasis in original). The tribe's inherent jurisdiction is not triggered in this case because Sprint's allegedly wrongful conduct has not occurred on non-fee lands within the Reservation, nor has it directly affected the political integrity, economic security, health, or welfare of the tribe. Sprint has no property on the Reservation and does not in fact interconnect with NAT.

NAT alleges in tribal court that Sprint improperly failed to pay NAT's invoices. *See* Knudson Aff. Ex. M. Sprint's decision not to pay the invoices, however, did not take place on the Reservation; instead it took place in the state of Kansas, the location of Sprint's headquarters. *See* Clouser Aff. ¶ 2. Nor did NAT receive payment on the Reservation; payment went instead to an unrelated billing agent in Texas. *Id.* at ¶ 8. Similarly, the calls were sent to a telephone switch in California and

delivered to conference bridge equipment rather than end user premises on the Reservation. Clouser Aff. ¶ 12. Thus, if NAT's tribal tariff were truly confined to boundaries of the Reservation, that tariff would not even be implicated in this case.

Not only has it not committed any wrongful conduct on the Reservation, but Sprint's conduct does not directly imperil the political integrity, economic security, health or welfare of the tribe. The business NAT attributed to Sprint does not affect tribal members because calls delivered to a Call Connection Company have no direct affect on the tribe. The second *Montana* exception is designed to allow a tribe to do only "what is necessary to protect tribal self-government or to control internal relations." *Strate*, 520 U.S. at 458-59. "The conduct must do more than injure the tribe, it 'must imperil the subsistence' of the tribal community.'" *Plains Commerce Bank*, 128 S. Ct. at 2726 (quoting *Montana*, 450 U.S. at 566); *see* Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW § 4.02[3][C], at 231 n.220 (2005) (the "elevated threshold for application of the second *Montana* exception suggests that tribal power must be necessary to avert catastrophic consequences."). Therefore, as neither NAT nor Sprint is a tribal member, and no allegedly wrongful conduct has occurred within the Reservation, the Tribal Court cannot assert jurisdiction under *Montana*.

Courts and the FCC have rejected NAT's argument that the second *Montana* exception applies. In *Reservation Telecom Coop. v. Henry*, the court held:

> The Defendants have wholly failed to establish that *Montana's* second exception applies and justifies the imposition of a possessory interest tax. The Cooperative's actions of providing telecommunication services, and the related sales and service of telephone equipment, do not endanger the tribe's political integrity, the economic security, or the health or welfare of the tribe.

278 F. Supp. 2d at 1024; *see also Cheyenne River*, 1999 SD 60, ¶¶ 18-23, 595 N.W.2d at 608-09 (PUC's exercise of authority over tribe's agreement to purchase on-reservation portion of telephone exchange did not infringe on exercise of tribal self-government). The FCC likewise rejected Western Wireless' assertion that the second *Montana* exception applied to its services on the Pine Ridge Reservation:

> We are not persuaded that, in the circumstances of this case, tribal regulation of the relationship between non-members and Western Wireless is so crucial to Indian sovereignty interests that it meets the Supreme Court's exacting standard. Insofar as the State asserts authority to regulate Western Wireless' provision of service to non-tribal members, therefore, we believe it may do so.

Western Wireless, at ¶ 23.

As NAT and, certainly, Sprint are not tribal members, and no allegedly wrongful conduct has occurred within the Reservation, the Tribal Court cannot assert jurisdiction under *Montana*. *See Hornell*

Brewing, 133 F. 3d at 1093 (where complained-of activities are off the reservation, tribal court lacked any adjudicatory authority over non-member). Sprint has thus demonstrated a likelihood of success of the merits.

IV. SPRINT WILL BE IRREPARABLY HARMED

Although this Court must consider all the *Dataphase* factors, the most crucial one – the one described as the "threshold inquiry," is whether the plaintiff has shown a possibility of irreparable harm in the absence of injunctive relief. *See Glenwood Bridge, Inc. v. City of Minneapolis*, 940 F.2d 367, 371 (8th Cir. 1991) (stating that, "in any case" involving a motion for preliminary injunction, "the threshold inquiry is whether the movant has shown the threat of irreparable injury" … and that a "movant's failure to sustain its burden of proving irreparable harm ends the inquiry" (quotation omitted)); s*ee also* 11A Charles Wright, Alan Miller & Mary Kane, FEDERAL PRACTICE AND PROCEDURE § 2948.1, p. 139 ("Perhaps the single most important prerequisite for the issuance of a preliminary injunction is a demonstration that if it is not granted the applicant is likely to suffer irreparable harm before a decision on the merits can be rendered.").

The Eighth Circuit has held that a district court may presume irreparable harm from a finding of probable success on the merits.

Lenox Labs., Inc., 815 F.2d at 505; *see also Bio-Tech. Gen. Corp. v. Genentech Inc.*, 80 F.3d 1553, 1558 (Fed. Cir. 1996). As evidenced above, Sprint is likely to succeed on the merits. To prevail on a motion for a preliminary injunction, Sprint must only establish a threat of irreparable harm, not actual irreparable harm. *Diamontiney v. Borg*, 918 F.2d 793, 795 (9th Cir. 1990) ("Requiring a showing of actual injury would defeat the purpose of the preliminary injunction, which is to prevent an injury from occurring."); *see 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."); *Baker Elec. Coop., Inc. v. Chaske*, 28 F.3d 1466, 1472-73 (8th Cir. 1994) (preliminary injunction was justified based on a showing of a threat of irreparable harm); 11A Charles Wright, Alan Miller & Mary Kane, FEDERAL PRACTICE AND PROCEDURE § 2948.1, at 155 ("the injury need not have been inflicted when application is made or be certain to occur").

In this case, if the Tribal Court action continues, Sprint faces the irreparable harm of a violation of its due process rights. This invasion of Sprint's rights is sufficient to warrant a preliminary junction. "A plaintiff is required to make only a prima facie showing that there has been an invasion of its rights and that a preliminary injunction is essential to the

assertion and preservation of those rights." *Livestock Mktg. Ass'n v. U.S. Dep't of Agric.*, 132 F. Supp. 2d 817, 824 (D.S.D. 2001).

The exercise of jurisdiction is rooted in due process. The Supreme Court has long recognized that a court improperly exercising jurisdiction over a party violates the Due Process Clause of the Fourteenth Amendment. *Pennoyer v. Neff*, 95 U.S. 714, 732 (1877). NAT's seeking to hale Sprint into this tribal court is a violation of Sprint's due process rights.

> The ability of nonmembers to know where tribal jurisdiction begins and ends, it should be stressed, is a matter of real, practical consequence given '[t]he special nature of [Indian] tribunals,' *Duro v. Reina*, 495 U.S. 676, 693 (1990), which differ from traditional American courts in a number of significant respects.

Hicks, 533 U.S. at 383 (Souter, J., concurring).

Additionally, in this case, NAT seeks to have the Tribal Court, a court without jurisdiction in this case, issue an order holding Sprint liable for hundreds of thousands of dollars, and more going forward, funds that are Sprint's property. Sprint's property cannot "be taken away without that procedural due process required by the Fourteenth Amendment." *Bell v. Burson*, 402 U.S. 535, 539 (1971). This threat is real, as NAT surreptitiously obtained an *ex parte* order from the Tribal Utility Authority that held Sprint's refusal to pay these unlawful charges

under *both* the tribal and FCC tariffs was a violation of tribal law. (Order at 4, Knudson Aff. Ex. J.)[14]

Loss of constitutional rights or freedom constitutes irreparable harm. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Walker v. Wegner*, 477 F. Supp. 648 (D.S.D. 1979), *aff'd*, 624 F.2d 60 (8th Cir. 1980). The irreparable harm Sprint faces, the loss of its constitutional rights, cannot be adequately redressed by other legal remedies. *See Gelco Corp. v. Coniston Partners*, 811 F.2d 414, 418 (8th Cir. 1987). The irreparable harm to Sprint's due process rights thus warrants a preliminary injunction in this case.

V. A BALANCE OF THE HARM WEIGHS IN FAVOR OF RESTRAINING THE TRIBAL COURT

The third *Dataphase* factor also supports the issuance of a temporary restraining order. As explained above, the harm to Sprint will be severe should the injunction not issue, but the harm to NAT, the Tribal Court, and Judge Maule will be minimal should the injunction issue. Judge Maule and the Tribal Court will be able to focus their time

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[14] A fundamental precept to due process is the right to an impartial tribunal. Whether the Crow Creek Sioux Tribal Court would be impartial in Sprint's case is a fair question. The Tribal Court has hired the *same* lawyer to represent it in this case as the Tribal Utility Authority hired to represent it in Sprint's SD PUC proceeding. As NAT's tribal complaint is based in part on the Tribal Utility Authority March 29 order (issued *ex parte*), there is an intolerable risk of systemic bias in the Tribal Court. The Tribal Judge is also not independent, serving at the pleasure of the Tribal Council.

on cases over which the Tribal Court actually has jurisdiction, better serving the needs of the Tribe and its members. Additionally, now that Sprint has instituted this action in federal court, NAT will be able to present its claims in the proper forum. While Sprint denies that NAT is entitled to any remedy, federal law requires that NAT pursue its remedies in federal court. *See* 47 U.S.C. § 207 ("any person claiming to be damaged by any common carrier subject to the provision of this chapter may make complaint to [*the FCC*] … or may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any *district court of the United States* of competent jurisdiction") (emphasis added).

VI. RESTRAINING FURTHER ACTION IN THE TRIBAL COURT IS IN THE PUBLIC INTEREST

The multitude of traffic pumping cases pending in federal district courts across the country (*see* notes 3 and 4, *supra*) illustrates that these issues are of national import that must be uniformly resolved. By filing its case in Tribal Court, NAT is seeking to circumvent the national debate over traffic pumping and instead obtain monies to which it is not entitled. By issuing a preliminary injunction, this Court can align this case with those currently venued in South Dakota and across the country. Such an injunction is in the public interest.

Additionally, enjoining further action in the Tribal Court also favors the interests of justice. NAT is using its Tribal Court action to delay a decision in this matter. In the process, NAT is seeking to obtain a remedy from a tribunal that does not have jurisdiction. In doing so, NAT is attempting to leverage its close relationship with the Tribe (it obtained an order *ex parte* from the Tribal Utility Authority) and force the Tribal Court to spend its time resolving this case, to the detriment of those cases properly before the Tribal Court. Federal law requires that NAT seek its remedies before the FCC or in federal court. Enjoining NAT from circumventing federal law favors the public interest.

South Dakota law will also be served by issuing the injunction. In its current form, NAT operates in South Dakota without a Certificate of Authority from the SD PUC. NAT is attempting to ignore its obligations under state and federal law to obtain such a certificate by purporting to operate solely within the bounds of the Reservation. NAT's technology does not necessarily stop at Reservation boundaries, and NAT's tariffs demonstrate that NAT is seeking compensation for calls that do not terminate to end users located on the Reservation. If even eligible for such compensation, NAT must comply with state and federal law. Therefore, issuing an injunction favors the public interest.

CONCLUSION

This Court should issue a preliminary injunction that enjoins NAT, the Tribal Court, and Judge Maule from advancing in Tribal Court the case that NAT has improperly brought against Sprint in that forum. That injunction meets the *Dataphase* factors. An injunction will also favor the larger regulatory telecommunications framework implicating both state and federal law.

Dated: September 28, 2010

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on September 28, 2010, the foregoing *Sprint Communications Company L.P.'s Memorandum in Support of Its Motion for A Preliminary Injunction* was filed and served on all counsel of record via the Court's CM/ECF system.

/s/ Stanley E. Whiting

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