BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

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

REPLY MEMORANDUM OF NATIVE AMERICAN TELECOM, LLC[1]

Introduction

Native American Telecom, LLC ("NAT") submits this reply memorandum in further support of its application, to the extent required, for a certificate of authority to provide intrastate interexchange access service that originates or terminates off the Crow Creek Reservation. This reply responds predominantly to the post-hearing brief of Sprint Communications Corp L.P. ("Sprint"), the only remaining intervener who still opposes NAT's application.

Sprint's post-hearing submission is the product of an unlimited budget by an enterprise that stops at nothing to advance an agenda irrelevant to the goals of this Commission or the interests of the State of South Dakota. Sprint's attempts to undermine NAT's application do not withstand any real scrutiny.

Sprint contends that this Commission cannot address what NAT is requesting. NAT has been the first to acknowledge that, given its status as a tribal enterprise, the jurisdiction of this Commission, the Federal Communications Commission ("FCC"), and the Tribal Utility Authority is not completely clear under every imaginable circumstance. This Commission faces similar uncertainties from the ever-changing landscape of communications technology, but the

[1] This reply memorandum is a revised version of the original.

broad authority of this Commission to supervise and control telecommunications companies in the State of South Dakota is clear. Under both its enabling statue and its regulations, this Commission has both the authority and the flexibility to address NAT's application, just like it has the authority to deal with all of the new challenges raised in others areas of telecommunications.

Sprint also contends there is confusion about the organization or transition of NAT's business or the governance of that business, but in reality there is only obfuscation by Sprint. The original "Native American Telecom" was a South Dakota limited liability company, and it was determined for a variety of sound business reasons, mostly to benefit by being organized as a tribal entity, that it would be better to reorganize under Tribe law. The new tribal entity then merged with the original one in what was a routine corporate transaction. This Commission itself requires only notice when a LEC is engaged in a merger. *See* SDCL § 41-31-20. Notice of the merger has been provided. See Exhibits ("Exh.") 19-21.

Sprint knows, and even admits in its brief, that "the bar to certification has been historically low." Sprint Brief, p. 6. To get around the historically low standard, Sprint repeatedly takes testimony and facts out of context. It cites provisions of the FCC's Connection America Fund Order of November 2011 ("CAF Order") that discuss the FCC's concerns about "access stimulation" in a context before the Order as if the FCC had not taken comprehensive measures to address those concerns. It contends that NAT's application is not complete and that NAT has not complied with this or that law or regulation. In fact, the application is indeed complete, and Sprint's own "representative" and "expert" testified that NAT was in compliance with applicable laws. At most, there was evidence that NAT filed a 499 form on which someone

entered data on the wrong line, which resulted in an o*verpayment.* Hearing Transcript ("Trans."), p. 408.

Finally, as discussed below, Sprint continues to advance a "public policy" position that itself is inconsistent with the public policy of the United States as articulated in the CAF Order, and inconsistent with the public policy of the State of South Dakota and this Commission, as reflected by their licensing of and support for businesses lawfully accepting conferencing traffic under lawful state and federal tariffs. Sprint also ignores the public policy of the federal, state, and local governments that encourage the delivery of affordable phone service to rural America and Indian tribes, except to argue that its judgment – which Sprint admits is based solely on its own financial concerns – should be substituted for the judgment of the Tribe. The Tribe and NAT think not.

I. THIS COMMISSION HAS THE POWER AND JURISDICTION TO ACT ON AND GRANT NAT'S APPLICATION.

A. This Commission Has The Authority To Act On NAT's Application, Which Was Made Within The Applicable Rules.

This Commission has very broad powers. It "has general supervision and control over 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. Thus, if a matter applies to telecommunications companies offering common carrier services, this Commission has general supervision and control over the company, except for those things regulated by federal law or regulations.[2]

Section 49-31-3 also provides, "Each telecommunications company that plans to offer or provide interexchange telecommunications service shall file an application for a certificate of

[2] As discussed in the next section, the Crow Creek Sioux Tribe has rights regulated under the U.S. Constitution, certain federal laws, and treaties, which would not come within this Commission's authority and jurisdiction.

authority with the commission pursuant to this section." It also provides, "Telecommunications companies seeking to provide any local exchange service shall submit an application for certification by the commission pursuant to §§ 49-31-1 through 49-31-89." Nothing in the statute requires that companies who desire to provide either interexchange service, access service, or some subset of those services make comprehensive applications that contemplate that every possible service be provided. Or, to put it another way, it is routine for carriers to provide some services that interexchange carriers provide, or that local exchange carriers ("LEC") provide, or some limited combination of the two.

This Commission's regulations include application requirements for a certificate of authority for interexchange service, codified as § 20:10:24:02 (the "Interexchange Regulation"). These regulations also provide for an application for local exchange service, codified as § 20:10:32:03 (the "LEC Regulation"). In addition, the regulations have requirements for companies seeking authority to provide local exchange service in the service area of a rural telephone company under § 20:10:32:15 (the "Rural Service LEC Regulation").

In its original application, NAT stated it was applying to "*provide local exchange and interexchange service*" pursuant to the Interexchange Regulation, the LEC Regulation, and the Rural Service LEC Regulation. NAT later restructured and became a limited liability company organized under tribal law, and this Commission and its staff asked NAT questions about jurisdiction over the Tribe, NAT, the scope of the service it was actually providing, and what it actually believed it needs from this Commission.

Understanding that there is a lack of clarity given NAT's status as a tribal entity, just as there is a lack of clarity in many areas of telecommunications today, NAT's commitment and desire has always been to obtain the authority that this Commission determines it needs and to be

in compliance with all applicable laws and regulations. Mr. Holoubek, NAT's interim President, testified at the hearing about the input NAT was getting from the Commission and staff, as follows:

> Q. So if you were, for example, the Habitat For Humanity on the second page and you had to call a lumberyard off the reservation, you couldn't use the NAT service?
>
> A. That's right. And part of that issue was and around the time that we were doing, I think, our revised application -- I don't know if Ms. Cremer called me or had a written question or what it was, but there was a question that we had about intrastate interexchange services. You know, because prior to that time those calls would have been completed.
>
> And we had a discussion about it. And there was a lot of confusion around it. But one of the things that was made clear to me at the time was that the Commission had a real concern over if -- not the people that were calling each other within the boundaries of the reservation but the people that were calling outside the boundaries of the reservation because -- and I think the way it was put to me was isn't that person, you know, under the protection and regulation of this State as opposed to Crow Creek? Because I'll tell you, up to that point we were pretty convinced in our minds that -- that we had the authority for everything that we were doing. And at that point we had a discussion about it. And I said, you know, I still am not sure what the facts are, what the truth is about that. I don't know what the resolution's going to be.
>
> I know the way Arizona and New Mexico will handle it. But I don't know the way South Dakota's going to handle it. But out of deference to the Commission we ought to stop connecting those calls because they haven't provided that CLEC authorization. And I swear to you that's the way the discussion went down. And it's the reason why we stopped providing the service like that. At a big detriment to the people living on the reservation there….

Trans., p. 304-305.

The staff's input also encouraged NAT to be more specific as to what it was doing in practice and what type of authority it was requesting from this Commission. In its Amended Application, NAT tried to be accommodating while at the same time making clear that its

application remained as broad as was necessary to get whatever authority that this Commission determined it needed. The Amended Application states this:

> Native American Telecom … hereby respectfully submits this Amended Application For Certificate Of Authority, ***to the extent required***, to provide ***intrastate interexchange access service*** for traffic that originates or terminates off of the Crow Creek reservation within the state of South Dakota, pursuant to **ADSD 20:10:32:03, 20:10:32:15, and 20:10:24:02**.

Exh. 1 (emphasis added). NAT's Amended Application thus makes clear that it is still applying under the Interexchange Regulation, the LEC Regulation, and the Rural Service LEC Regulation. The reference to "***intrastate interexchange access service"*** takes into account both interexchange service and access service.

Sprint contends there is "no rule that allows the Commission to grant a certificate to provide *access service*." Sprint Post-Hearing Brief, p . 14 (emphasis in original). Sprint ignores the fact that access service is a subset of LEC authority, and it is routine for companies to obtain LEC authority without providing every service that a LEC can conceivably provide. Also, the Amended Application also makes clear that NAT continues to apply under the LEC Regulation. The broad power that this Commission has for the supervision and control over all telecommunications under SDCL § 49-31-3 gives this Commission the power and authority to act on NAT's application.

It is also routine for companies to seek certificates of authority when they may not be needed or there is uncertainty as to whether the law requires them. As just one example, Time Warner Cable currently offers residential and business voice services using VoIP technology. The FCC has declined to classify VoIP services as regulated telecommunications services or Title I information services, but has afforded VoIP providers the flexibility to offer their services pursuant to either category. Time Warner has begun to submit voluntarily to state telephone regulation as a telecommunications carrier in connection with its plan to provide discounted

Lifeline telephone services to low-income customers. This will place additional burdens on Time Warner's business and could expose the company to additional regulatory risk in connection with its compliance with state and federal regulation. Time Warner's choice should be commended.

NAT began this process believing that as a tribal organization with the status of a sovereign nation – the law sometimes calls tribes "domestic dependent nations" – it may not need any certificate of authority from this Commission. As a product of comity and respect, though, it has made its application and agreed to be subject to this Commission's jurisdiction to the extent it is determined that Commission authority is required. That choice also should be commended.

B. NAT's Application and Conduct Is Consistent With This Commission's Authority As Well As The Comity Between Federal, State, and Tribal Jurisdiction.

Sprint attempts to make a tortured and circular argument about the intersection of federal, state, and tribal law even though those laws are intended to work in concert, not in conflict. This Commission's own enabling statute gives it broad powers except those "otherwise regulated by federal law or regulation." The statute is written like that to ensure that it works together with the rest of our republic, which would include the rights of Indian tribes under the U.S. Constitution, federal laws, and treaties. *See* SDCL § 49-31-3.

In *Cheyenne River Sioux Tribe Tel. Auth. v. PUC*, 595 N.W.2d 604 (S.D. 1999), the South Dakota Supreme Court addressed just how federal, tribal, and state jurisdiction can work in concert in the context of telecommunications. *Cheyenne River* is an excellent example of how this Commission can exercise its authority, fulfill its basic responsibilities to the citizens of South Dakota, and respect the sovereign status of the Crow Creek Utility Authority under which NAT is currently providing interstate service.

Cheyenne River concerned this Commission's approval of the transfer of three telephone exchanges by a state-regulated carrier to a tribal entity. Under state statutes and regulations, the Commission had the power, authority, and responsibility to approve all transfers of telephone exchanges after considering certain factors listed in SDCL § 49-31-59. *Cheyenne River*, 595 N.W.2d at 612. The tribal entity purchasing the exchanges challenged the original approval on the ground that it was conditioned on the tribe waiving its sovereign immunity. Upon initial review, a trial court remanded the matter and directed this Commission to reconsider the sales without conditioning approval on the tribe's sovereign immunity waiver. This Commission then considered the factors in the statute, made findings, and denied the transfer.

The South Dakota Supreme Court's decision recognized, and respected, the jurisdiction of both this Commission, acting for the State, and of the Tribe. Its reasoning is consistent with what NAT seeks with is application now. First, the *Cheyenne* Court described the nature of tribal power and its scope:

> [T]he [U.S.] Supreme Court stated that "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." Furthermore, "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." However, "[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 other arrangements."

Id. (citations omitted). The Supreme Court then made clear that "[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." *Id*. at 566, 101 S. Ct. at 1258, 67 L. Ed. 2d at 511. *Cheyenne River*, 595 N.W.2d 604, 609.

The carrier in *Cheyenne River* was regulated by both the FCC and this Commission as part of a plan to provide "a rapid, efficient, nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges" *Id.* at 610. Even though the FCC has regulatory power, the regulatory scheme also provided for state regulation of intrastate communications, with the "primary purposes and objectives to protect telecommunications' consumers." *Id.* "Consumers are ensured, through this regulation, of adequate facilities and reasonable rates." *Cheyenne River*, 595 N.W.2d 604, 610.

In *Cheyenne*, the Supreme Court found that this Commission had the authority to act on the application because the seller was a regulated, non-tribal entity over which it had jurisdiction and, in fact, the affirmative responsibility regarding the sale of exchanges. It just could not overstep its authority into areas of Tribal sovereignty, which in that case involved requiring a waiver of the Tribe's rights as a tribe.

Here, NAT seeks the same comity between state authority and tribal sovereignty, while bending over backward to defer to this Commission's concerns. For this Commission and the citizens it serves, this Commission's focus should be on who it is supposed to protect, and how it can accomplish the "primary purposes and objectives" of both the FCC and this Commission to "protect telecommunications' consumers." If Sprint had its way, this Commission would deny NAT's application and abandon all regulatory authority to the Tribal Utility Commission. If it did that, this Commission would lose regulatory oversight over NAT. Instead, NAT has deferred to legitimate concerns of this Commission in what it considers a legitimate area of Commission responsibility – calls made within the State of South Dakota to and from the Reservation.

The Crow Creek Tribal Utility Commission clearly has the authority to grant NAT approval to provide telecommunications service on the reservation to tribal members. Not even

Sprint seems to dispute this basic tenet. It can also, as the U.S. Supreme Court has said and as restated in *Cheyenne River,* regulate the activities of non-members "who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." Any person or entity who signs up for service wholly on the reservation enters into a "consensual relationship."[3] They have volunteered to be protected by the Tribal authority, so are of less concern to this Commission in any event.

For intrastate calls, there is an argument that such calls are between one state and a "domestic dependent nations," i.e. another state. NAT could have attempted to avoid regulation and oversight by this Commission. Instead, NAT actually invited Commission oversight with this application. It is something to be commended, not criticized, and surely is consistent with the powers and responsibilities of this Commission.

II. NAT MEETS THE STANDARDS SET FORTH IN THIS COMMISSION'S RULES CHALLENGED BY SPRINT.

Sprint claims that NAT has not met the standards set forth in this Commission's rules. However, Sprint's contentions are not supported by the record and do not withstand scrutiny. The standards to provide local service are substantially similar to those for interexchange service, and thus Sprint only discussed the local service standards in its brief. Here, NAT addresses Sprint's contentions:

> ***ARSD 20:10:32:15(2) A description of the legal and organizational structure of the applicant's company.***

[3] Sprint contends there is some question as to whether Free Conferencing Corporation ("Free Conferencing") has agreed to the jurisdiction of the Tribe. *See* Sprint Brief, p. 23. Sprint admits that Mr. DeJordy testified unequivocally that it did. *Id.; see also* Trans., pp. 161 ("Q: And NAT takes the position that Free Conferencing has consented to the Tribe's jurisdiction; right? A: It doesn't really take that position. Free Conferencing did.") Attempting to undermine this unrebutted testimony, Sprint cites two documents in which Free Conferencing says nothing about consent as if the absence of mention of a topic in a document unrelated to the topic shows something relevant to the subject. Sprint's argument on this subject is one of dozens of red herrings in its brief. Even if Free Conferencing has not consented and consent was required, it could be given at any time.

Sprint contends that NAT's corporate structure is confusing and that NAT has not provided a clear explanation of its organizational structure. The structure is only unclear to Sprint and those who have listened to Sprint's attempt to obscure the structure.

Mr. DeJordy originally established NAT as a South Dakota limited liability company with the purpose of providing telecommunications service in rural areas of South Dakota, including the Crow Creek reservation. Exh. 3, (DeJordy Direct Testimony). In 2008, NAT was reorganized as a tribally owned company with the purpose of only providing service on the Crow Creek reservation. *Id.* NAT's ownership structure is: (i) 51 % by Crow Creek Holding, LLC, a company organized under Crow Creek Sioux tribal laws and 100% owned by the Crow Creek Sioux Tribe; (ii) 25% by Native American Telecom Enterprise, LLC, a business development company; and (iii) 24% by WideVoice Communications, Inc., an engineering and consulting company. *Id.*

In his direct, earlier pre-filed testimony, Mr. Holoubek stated, "Recently, the Crow Creek Sioux Tribe took additional steps to establish the required tribal structure and laws to enable entities to be established and governed by Crow Creek Sioux tribal laws. NAT is currently in the process of being reorganized as a Crow Creek tribal entity organized under, and operating under, the Crow Creek Tribal laws." Exh. 11, p. 4. The reorganization was then effected with what was a routine corporate restructure: a new limited liability company, temporarily called "Crow Creek Telecom, LLC," was formed under tribal law; it was merged with the original "Native American Telecom" organized under South Dakota law, and the new merged entity was then named "Native American Telecom, LLC." This Commission was consulted about the change, and the transactional documents implementing the restructuring were offered and admitted into

evidence at the hearing. Trans., 248-249; Exhs. 19 (Purchase Agreement), 20 (Articles of Merger), 21 (Agreement and Plan of Merger).

NAT notes that, under SDCL § 49-31-20, companies holding a certificate of authority only have to "notify" the Commission of any consolidation or merger or transfer of stock or other ownership interest that results in "a different person then owning more than fifty percent of the company stock or ownership interest." Only "notice" is required, not approval, which means that mergers which do not change the ownership do not require Commission approval. With NAT's restructuring that merely changed its incorporation from under South Dakota law to under tribal law, there was no underlying change in any of the ownership. NAT has given notice of the merger, as the merger and reorganization documents are exhibits introduced during the hearing.

The section requiring only "notice" to this Commission for a merger should be contrasted with SDCL §§ 49-31-75 and 49-31-59, which require Commission *approval* if there is a sale, assignment, lease, or transfer of either a certificate of authority or a telecommunications exchange. [4]

ARSD 20:10:32:15(4) The location of the applicant's principal office, if any, in this state and the name and address of its current registered agent, if applicable;

[4] Following its pattern, Sprint's makes a veiled allegation that NAT has not complied with FCC regulations by stating, "There is no evidence in the record that other regulatory bodies …were ever advised" of the change of NAT from a South Dakota LLC to an LLC formed under tribal law, as if such advice was re1uired. However, the FCC does not require anything of a carrier involved in a "pro form transaction." Its regulations provide:

> Pro forma transactions. (1) Any party that would be a domestic common carrier under section 214 of the Communications Act of 1934, as amended, is authorized to undertake any corporate restructuring, reorganization or liquidation of internal business operations that does not result in a change in ultimate ownership or control of the carrier's lines or authorization to operate, including transfers in bankruptcy proceedings to a trustee or to the carrier itself as a debtor-in-possession.

47 CFR 63.03(d). The FCC has also made clear that (corporate reorganization that involves no substantial change in the beneficial ownership of the corporation (**including re-incorporation in a different jurisdiction or change in form of the business entity**)" are "pro forma transactions." 47 CFR 63.03(d), Note 2(emphasis added).

The location of NAT's principal office is identified in the Amended Application. The new NAT, organized under tribal law, is registered with the state. Its current registered agent is Scott Swier, Esq., 202 N. Main Street, P.O. Box 256, Avon, SD 57315.

ARSD 20:10:32:15(5) A copy of its certificate of authority to transact business in South Dakota from the secretary of state;

A copy of the certificate of authority to transact business in South Dakota for the new NAT, organized under the tribal law, will be provided to the Commission as soon as it is processed by the Secretary of State.

ARSD 20:10:32:15(8) A list and specific description of the types of services the applicant seeks to offer and how the services will be provided including:

(a) Information indicating the classes of customers the applicant intends to serve;

(b) Information indicating the extent to and time-frame by which applicant will provide service through the use of its own facilities, the purchase of unbundled network elements, or resale;

(c) A description of all facilities that the applicant will utilize to furnish the proposed local exchange services, including any facilities of underlying carriers; and

(d) Information identifying the types of services it seeks authority to provide by reference to the general nature of the service;

All of this information is in the Amended Application. Sprint contends that "NAT seeks no authorization to provide local service, and has identified no local voice services that it would provide in accordance with a certificate of authority. Therefore, it does not meet this requirement." Sprint's argument seems to be that NAT has provided *too much* information, because it has fully informed this Commission about the services it is now providing on the reservation.

Sprint has raised questions about whether NAT needs a certificate authority for

various scenarios of calls made by people on and off the reservation, in and outside South Dakota. Commissioner Nelson used some diagrams from Sprint to inquire about this subject. Trans., pp. 414 *et seq.* A question raised at the hearing was whether NAT needs CLEC authority to connect calls from a tribal member on the reservation to a non-tribal member on the reservation. To the extent this Commission believes there is uncertainty about that, NAT seeks its authority and, in that context, has provided information in its application about its "local voice services." That Sprint criticizes NAT for informing this Commission about its network is difficult to fathom.

Sprint also suggests that NAT's description of its facilities – the WiMAX technology – and its decision not to build out the entire reservation at one time amounts to something misleading about NAT's application. Rarely is an entire network built out immediately. Changes in technology happen every day in this industry. The description of the network and services is accurate.

ARSD 20:10:32:15(24) Federal tax identification number and South Dakota sales tax number;

Because the restructuring was a merger and there was no change in the ownership, there is no need to change the federal tax identification number identified in the Amended Application. The South Dakota sales tax number for the new NAT, organized under tribal law, will be issued when its registration is processed by the Secretary of State.

III. NAT'S APPLICATION IS IN THE PUBLIC INTEREST, CONSISTENT WITH OTHER COMPANIES OPERATING WITH AUTHORITY IN THE STATE, AND ADDRESSES UNIQUE AND UNMET LOCAL NEEDS.

Sprint continues to make arguments about public policy that live in the past, as if the FCC did not, over two and a half years ago, address unduly high switched access rates in the

CAF Order. Instead, Sprint cites parts of the CAF Order that describe the situation before the reforms implemented by the CAF Order.

The telecommunications world has changed. Since well before the CAF Order, NAT made the decision to charge the lowest terminating access rates in the State of South Dakota. It did that even when it had the legal ability to set higher rates. Trans., pp. 379-381. NAT's rates are now competitive with rates throughout the United States. Trans., p. 384. While, yes, NAT accepts traffic from Free Conferencing, but so do other companies like Sancom Inc. and Northern Valley Communications, who are operating lawfully with certificates of authority from this Commission.

Sprint's brief also cites *Farmers* and similar cases in which it was found that, for activities involving transactions of *2009 and earlier*, local exchange carriers could not have "netting" relationships with conferencing companies and still bill under their tariffs. Yet those cases also involve LECs currently operating in South Dakota under valid certificates of authority from this Commission. Those companies long ago modified their practices to meet current requirements.

That Sprint cites litigation outside the record is ironic given that its own "expert" and representative repeatedly admitted that, while it protests about "public policy," NAT complies with all applicable laws and regulations. Trans., pp. 539-540. Sprint's "expert," Randy Farrar, also testified that NAT was lawfully operating the business in compliance with the public policy of the United States, as well as the public policy of the Commission and the State of South Dakota. Trans., pp. 540-542.

Farrar also admitted that for Sprint this matter is not about 'public policy," but money and Sprint's litigation strategy. Trans., p. 495. Sprint uses a litigation strategy of refusing to pay

– i.e. the "self help" that the FCC has declared unlawful – and then leveraging litigation for its own benefit. *See N. Valley Communs., LLC v. Sprint Communs. Co.,* 2010 U.S. Dist. LEXIS 23923 (D.S.D. Mar. 15, 2010). Sprint is doing the same thing here with NAT.

Sprint's willingness to do anything to avoid paying its obligations as part of a corporate "cost control plan" is well known in courts, agencies, and the industry. In one 2011 decision, a United States District Court in Virginia found that Sprint had wrongfully refused to pay over 20 other carriers under valid interconnection agreements.[5] *Cent. Tel. Co. of Va. v. Sprint Communs. Co. of Va., Inc*, 759 F. Supp. 2d 789, 796 (E.D. Va. 2011); *affirmed Cent. Tel. Co. of Va. v. Sprint Communs. Co. of Va., Inc.,* 715 F.3d 501 (4th Cir. 2013), *writ of certiorari denied* 134 S. Ct. 423 (2013). The Court found that "Sprint's justifications for refusing to pay access on VoiP-originated traffic, and its underlying interpretation of the ICAs, *defy credulity*." *Id.* (emphasis added). The Court also wrote that Sprint's "defense is founded on post hoc rationalizations developed by its in-house counsel and billing division as part of Sprint's cost-cutting efforts."[6] *Id.*

IV. SPRINT'S OTHER SPURIOUS CONTENTIONS ABOUT PUBLIC POLICY, NAT'S CAPABILITIES, AND NAT'S WITNESSES.

In its brief, Sprint attempts to use "public policy," unsupported allegations, and facts taken out of context as a pretense to make unfounded claims about matters beyond the two basic issues under review in this proceeding: whether NAT has sufficient technical, financial and

[5] This Commission should note that Sprint had the same counsel and law firm in the Virginia case that it has in this proceeding.

[6] Just last month, CenturyLink of Missouri LLC was forced to bring a complaint against Sprint before the Missouri Public Service Commission citing the same cost cutting plan. It alleges that Sprint is withholding payment on undisputed charges in order to claw-back payments it made without dispute for two years. According to the complaint, "the retroactive dispute conjured up by Sprint merely reflected a corporate decision to reduce costs by unilaterally changing its position with respect to the amount it was willing to compensate other carriers for terminating VoIP originated traffic."

managerial capabilities to offer the telecommunications services described in its application; and whether allowance is consistent with public policy. Instead of addressing those standards, Sprint tries to orchestrate a side show. Sprint's spurious claims are discussed below.

NAT Has A Customer That Makes Money. NAT's purpose, Sprint claims, is to "send money to California." That NAT currently has as its first large customer a California company that receives 75% of the gross revenues that that customer generates is neither remarkable nor something that bears on its technical, financial and managerial capability. NAT offered witnesses from each of the three ownership groups, including the 51% Tribal owner, that the business' performance and governance was acceptable to all. Sprint offered one witness, long-time Sprint employee Randy Farrar, who acknowledged that NAT's business complied with all applicable laws and regulations, was consistent with the public policy of the United States and South Dakota, but that it "*just don't sound right*." Trans., pp 540-542, 545-546. That is not a basis to deny a certificate of authority to a company that is supplying phone and broadband service to an unserved population and has been do so successfully now for four years.

Sprint Is Looking After The Tribe. Sprint also claims that "NAT's purpose does not benefit the Tribe," and that the Tribe's 51% voting control over all matters affecting the Tribe is "meaningless." This Commission should contrast Sprint's newfound concern for the Tribe with its failure to ever to provide affordable service there or even to have its "expert" visit the reservation before opining on NAT's prospects. Who is Sprint to opine on the benefits to the Tribe when the Tribal Chairman testified that both he and the Tribe are satisfied with the business arrangement, the governance of NAT, and the money earned by NAT's largest customer? Trans., p. 100-105.

Sprint's Claim that NAT Has Operated Without A Certificate. Sprint asserts that NAT provides services to Free Conferencing, that Free Conferencing is not a tribal member, and thus "after the Circuit Court affirmed the Commission's jurisdiction over intrastate service, NAT knowingly violated the law by continuing to operate." This statement is highly misleading. In the Memorandum and Order of the Circuit Court, Circuit Court Judge Anderson described the issue as follows:

> The issue presented in this case is whether or not the PUC or the Tribal Utility Authority has jurisdiction over this matter with respect to intrastate telecommunications.

Memorandum and Order, August 23, 2011. On this issue, the Court ruled that this Commission did not act in excess of its discretion or abuse its discretion when it denied a stay requested by NAT in favor of tribal jurisdiction. While the Circuit Court expressed the view that the tribe did not have jurisdiction over calls that would originate off the reservation and terminate on the reservation and vice versa, nothing in the decision suggests that Free Conferencing was doing that, or that its activities were even at issue.

The facts, however, are that all of the Free Conferencing traffic goes to NAT's switch on the reservation, Free Conferencing traffic did not involve any significant intrastate traffic and, even if it had, NAT stopped accepting intrastate traffic in deference to the application before this Commission. Trans., pp. 304-305, 354-356, 370.

NAT's Managers. Sprint has much to say about NAT's managers, but it comes to nothing of substance. Sprint's Brief does not even address the fact that NAT has operated successfully for four years despite the hostile environment created by Sprint itself or the challenges of delivering service to an impoverished rural area.

Sprint claims Mr. Holoubek is "mired in conflict" and then cites a "potential" conflict of interest that only Sprint imagines. Each of NAT's three owners have three members on the

company's board, and each had witnesses testify about their satisfaction with management, the progress of the business, and soundness of its plans for moving forward. The only complaint of NAT and it owners were about the unfair and deceptive business practices of Sprint and its battery of lawyers.

Sprint also claims that Mr. Holoubek is "responsible for NAT's erroneous filing" with USAC. Revenue was indeed recorded on the wrong line on a government form, resulting in no payment issues. The filing and compliance process has now been assigned to one of the preeminent telecommunications consulting and compliance firms in the nation. In contrast, a federal judge has found that sworn testimony given by Sprint's Director of Policy "defies credulity" and that the testimony of a Sprint attorney was "similarly misleading." *Cent. Tel. Co. of Va. v. Sprint Communs. Co. of Va., Inc*, 759 F. Supp. 2d 789, 807 (E.D. Va. 2011).

Sprint then actually states in its brief that Mr. Holoubek "changed his answer" and cites this testimony out of context:

> Q. And so, for example, when the NAT and Free Conferencing signed their original agreement NAT was promising to provide services to Free Conferencing without charge; right?
>
> A. Yes. In the original agreement --
>
> Q. You've answered my question. Is the answer yes?
>
> A. I'd change my answer to no then if you don't like the explanation.

Sprint Brief, 43, Trans., 258. In fact, the actual testimony continued immediately with the explanation, like this:

> Q. So no? The answer is no that in the original agreement it did not provide that NAT would offer services without charge for Free Conferencing?
>
> A. It kind of goes back to the explanation that I just made, that it went from a netting relationship to one where it was more specific later in that relationship.

> But I'd just say this as well, that it's not necessary for a LEC to even charge end user fees. What's necessary is that those end user fees are paid to USAC. Or that the tax on the end user fees are paid to USAC. So it's not necessary that they collect, for example, in this case from Free Conferencing.
>
> And in that agreement it was never anticipated that Native American Telecom would be receiving free services, for example, from SDN or Midstate or that they -- we know that there's costs involved. So if you're laying out the elements of a contract and saying -- and trying to identify how the payments are going to go back and forth, you might say, okay, so this is how the payments are going to get paid in one instance and we're not going to charge for these payments over here because it's all being netted out in the relationship. Okay.
>
> But later when it became clear from Farmers, as you brought up, we decided that you know what? It's probably a good idea to change that policy and go a different route. Which is what took place. So --

Trans., p. 259.

Mr. Erickson as "Management." Sprint describes Mr. Erickson as "management." He is not. He is one of nine directors, and the job of directors is to set policy, not to manage a company.

Carey Roesel. Sprint claims, "It is nothing short of astonishing that Mr. Roesel … would claim he did not know and never inquired about the technology used to deliver calls.… His firm made FCC/USAC filings identifying NAT as a VoIP provider, and so must have asked that question." Sprint Brief, p. 16, Note 9. As Sprint well knows, though, Mr. Roesel's firm identified NAT as both a CLEC and a VoIP provider. Form 499A asks: "Enter numbers starting with "1" to show the order of importance," and it identified the company as a CLEC/CAP with a "1", and VoIP as a "2". Modern technology does not force a company into one regulatory mold and completing Form 499's in that way is routine.

NAT as an alleged VoIP Provider. Sprint also alleges that the "Commission should find, based on the record, that NAT provides IP voice services to Free Conferencing." Sprint

Brief, p. 17. Sprint is attempting to imply that a VoIP link by one large customer takes an entire LEC outside the jurisdiction of regulators, which just is not the case. The FCC's test for identifying traffic as "VoIP" is not whether a ***link*** used to provide the service is IP, but rather whether the service "requires Internet Protocol-compatible customer premises equipment (CPE)." *See* CAF Order, Footnote 1892. Even if it is VoIP, South Dakota is not prohibited by statute from regulating VoIP (as is the case in many states) or granting CLEC authority to a VoIP provider.). There are almost certainly CLEC cable entities in South Dakota that use IP connections and are VoIP providers.

With NAT, access service functions are not being provided via VoIP, although some of the connections in the call path may be IP. Sprint does not dispute that the traffic comes from callers on the PSTN. Additionally, there is a qualitative difference between "over-the-top" VoIP (like Vonage) and facilities-based VoIP that Sprint fails to acknowledge and which must be part of any discussion of the regulatory treatment of VoIP. Whether or not the last link to Free Conferencing is VoIP is a red herring.

Thus, while someday the Commission might have to address the scope of its authority over service that are solely VoIP, that issue has nothing to do with NAT, its application, or this proceeding.

NAT's Technical Capabilities. On page 33 of its brief, Sprint refers to ARSD 20:10:24:02(7) and states, "Sprint also notes that there is no testimony explaining how NAT would, from a technical standpoint, deliver outbound intrastate, interexchange calls to locations off of the Reservation." Sprint neglects to mention that its own "representative" and "expert" confirmed under oath in response to Commissioner Hanson's question that NAT had the technical capability to operate. Trans., p. 581.

CONCLUSION

For the foregoing reasons, NAT respectfully requests that the Commission allow NAT's application.

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