

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

IN THE MATTER OF THE COMPLAINT)	ORDER DENYING MOTIONS
FILED BY SPRINT COMMUNICATIONS)	TO DISMISS; ORDER
COMPANY, LP, AGAINST NATIVE)	DENYING MOTION TO STAY;
AMERICAN TELECOM, LLC REGARDING)	ORDER DENYING MOTION
TELECOMMUNICATIONS SERVICES)	FOR SUMMARY JUDGMENT

TC10-026

On May 4, 2010, the Public Utilities Commission (Commission) received a complaint from Sprint Communications Company, LP (Sprint) against Native American Telecom, LLC (NAT). On May 5, 2010, Sprint filed an amended complaint. In its amended complaint, Sprint requested: 1) a declaration that the Commission has the sole authority to regulate Sprint's interexchange services within South Dakota; 2) a declaration that the Crow Creek Sioux Tribe Utility Authority lacks jurisdiction over Sprint; 3) declaration that NAT must seek a certificate of authority from the Commission and file a lawful tariff with the Commission before it can assess charges for switched access service; and 4) an award of money damages in an amount to be determined at a hearing.

Petitions to intervene were filed by the South Dakota Telecommunications Association (SDTA), South Dakota Network, LLC (SDN), Midstate Communications (Midstate), AT&T Communications of the Midwest, Inc., (AT&T), and the Crow Creek Sioux Tribe Utility Authority (CCSTUA). On June 1, 2010, NAT filed a Motion to Dismiss and a Motion to Establish Briefing Schedule for Respondent's Motion to Dismiss. At its June 18, 2010, meeting, the Commission granted Petitions to Intervene to all those who filed to intervene. On July 29, 2010, NAT filed a Motion to Stay this docket.

At its August 10, 2010, meeting, the Commission required that the Motion to Dismiss and Motion to Stay be briefed during the same briefing schedule. The parties subsequently filed briefs on the Motion to Dismiss and Motion to Stay. On October 12, 2010, NAT filed a Motion to Extend Filing Date of NAT's Reply Brief. On October, 13, 2010, Sprint filed a Stipulation to NAT's Request for Additional Time to File Reply Briefs in Support of its Motions to Stay and to Dismiss. On December 13, 2010, Sprint filed a Motion for Leave to File a Supplemental Reply to NAT's Reply Brief, or to Strike. On December 13, 2010, a Supplemental Reply Brief of Sprint was filed. At its January 18, 2011, meeting, the Commission voted to deny Sprint's Motion to Strike and granted Sprint's Motion to File a Supplemental Reply to NAT's Reply Brief. On March 7, 2011, NAT filed a Motion for Protective Order.

At its April 5, 2011, meeting, the Commission voted to deny NAT's Motion to Stay. NAT then requested that its Motion to Dismiss be deferred until after discovery at which time the Commission could have more information on which to base its decision. The Commission voted to grant NAT's request to defer the Motion to Dismiss.¹

¹ On May 17, 2011, the Commission's Order Denying Motion to Stay was appealed to circuit court by NAT. By order dated August 23, 2011, the circuit court affirmed the Commission's Order Denying Stay. *In the Matter of the Complaint Filed by Sprint Communications Company, LP against Native American Telecom, LLC regarding Telecommunications Services*, Memorandum Decision and Order, CIV. 08-11 (August 23, 2011).

On May 12, 2011, Sprint filed a Motion to Compel. On December 27, 2011, Sprint filed a Motion Requesting a Protective Order Requiring the Parties and Intervenors to Comply with a Confidentiality Agreement. At its January 31, 2012, meeting, the Commission granted Sprint's Motion Requesting a Protective Order Requiring the Parties and Intervenors to Comply with a Confidentiality Agreement. On April 11, 2012, Sprint filed a Motion to Compel NAT to Honor its Agreement to Answer Discovery. On April 23, 2012, NAT filed a Motion to Dismiss Based on Mootness. On December 11, 2012, Sprint filed a Motion for Summary Judgment. On January 14, 2013, NAT Filed a Response to Sprint's Motion for Summary Judgment. On February 1, 2013, AT&T filed a Response in Support of Sprint's Motion for Summary Judgment. On February 4, 2013, SDN filed a Brief in Response to Sprint's Motion for Summary Judgment. On February 20, 2013, Sprint filed a Reply Memorandum of Law of Sprint in Support of Motion for Summary Judgment. On February 22, 2013, NAT filed a letter requesting a new motion date. By Order dated February 28, 2013, the Commission issued an Amended Order Setting Procedural Schedule setting oral argument on Sprint's Motion for Summary Judgment for April 9, 2013.

On April 3, 2013, Sprint filed a Notice of Supplemental Authority. On April 4, 2013, NAT filed a Continuance of Hearing. Argument was held on April 9, 2013, as the parties had agreed that NAT could respond to Sprint's Supplemental Authority at a later time. On April 25, 2013, NAT filed a response to Sprint's supplemental authority and Sprint replied on May 1, 2013. On July 23, 2013, Sprint filed a Statement Regarding Ripeness of Pending Motions for Deliberation and Decision. On July 25, 2013, NAT filed a Motion to Re-Open Discovery and Stay Sprint's Motion for Summary Judgment Due to New Information that has Recently Come to Light. On August 8, 2013, Sprint filed a response opposing NAT's motion to reopen discovery and stay Sprint's summary judgment motion. On August 23, 2013, NAT filed a Notice of Change in Corporate Structure and Affidavit in Support of NAT's Motion to Re-Open Discovery and Stay Sprint's Motion for Summary Judgment Due to New Information that has Recently Come to Light. On August 27, 2013, NAT filed a Declaration of Scott R. Swier in Opposition to Sprint's Motion for Summary Judgment.

At its August 27, 2013, meeting, the Commission considered NAT's Motion to Dismiss; NAT's Motion to Dismiss Based on Mootness; NAT's Motion to Re-Open Discovery and Stay Sprint's Motion for Summary Judgment Due to New Information that has Recently Come to Light; and Sprint's Motion for Summary Judgment. The Commission denied all of the motions. The Commission finds that it has jurisdiction in this matter pursuant to SDCL Chapters 1-26, 49-13, and 49-31.

NAT's Motion to Dismiss

In NAT's Motion to Dismiss, NAT requested that the "Commission dismiss all proceedings in this action because proper regulatory jurisdiction and adjudicatory jurisdiction rests with the Crow Creek Tribal Court (Tribal Court)." NAT's Brief in Support of Motion to Dismiss at 1. NAT stated that it "is a full-service, tribally-owned limited liability company organized under the laws of the State of South Dakota." *Id.* NAT stated that it provides high-speed Internet access, basic telephone, and long-distance services on and within the Crow Creek Sioux Tribe Reservation (Reservation)" and that its "services take place exclusively within the exterior boundaries of the Reservation." *Id.* at 2. NAT stated that it has filed an Access Service Tariff with the Federal Communications Commission for interstate traffic and an Access Service Tariff with the CCSTUA. *Id.* at 3.

NAT stated that "South Dakota state law is *preempted* as a matter of fundamental Indian law" and that "[t]he Tribe is undoubtedly endowed with the inherent regulatory jurisdiction to establish the Tribal Utility Authority." *Id.* at 8 (emphasis in original). NAT further contended that

the “application of South Dakota state law *infringes* upon substantial Tribal interests.” *Id.* at 9 (emphasis in original). NAT cited to the Supreme Court’s decision in *Montana v. U.S.*, 450 U.S. 544 (1981). *Id.* at 10. NAT stated that *Montana* contained “two exceptions that allow for tribal adjudicatory jurisdiction – (1) the consensual relationship exception and (2) the substantial tribal interest exception when the activities of the non-Indian “threatens or has some direct effect on the political integrity, political security or the health and welfare of the tribes.” *Id.* (citing *Montana*, 450 U.S. at 565-566). NAT contended that Sprint “entered into a consensual relationship by providing telecommunications services on the Reservation through its business dealings with NAT.” *Id.* at 10. NAT stated that the disputed access charges were paid to NAT by Sprint for a period of time and that “Sprint has been in a consensual relationship with NAT, the Tribe, and the Tribe’s members within the exterior boundaries of the Reservation.” *Id.* Regarding the second exception, NAT asserted that “Sprint’s actions directly threaten and have direct effects on the political integrity, political security, health, and welfare of the Tribe.” *Id.*

Sprint alleged that NAT is engaging in a traffic pumping scheme and is fraudulently billing Sprint for terminating long distance calls to a Call Connection Company. Sprint’s Memorandum in Opposition to NAT’s Motion to Stay or to Dismiss at 1-2. Sprint stated that “NAT is operating within the State of South Dakota, purportedly as a local exchange carrier with a tariff that professes to apply to all services ‘into, out of and within the State of South Dakota.’” *Id.* at 12 (citation omitted). Sprint contended that “NAT has clearly violated South Dakota law by offering local exchange service in South Dakota without a certificate of authority issued by the Commission.” *Id.* at 21.

Sprint stated that NAT’s assertion that the Commission’s regulatory jurisdiction is inapplicable in the absence of congressional authorization, if correct, “only establishes that the Tribe may regulate NAT’s services to Tribal members *solely* within the exterior boundaries of the Reservation. But NAT’s activities are not so limited, and the Commission is endowed under both federal and state law to regulate NAT’s provisions of telecommunications services outside Reservation boundaries and to non-members within those boundaries.” *Id.* at 31-32. Regarding the *Montana* exceptions, Sprint stated that with respect to the first exception, Sprint is not a tribal member. Sprint further claimed that NAT is not a tribal member and that, even if it were, the Supreme Court’s decision in *Plains Commerce Bank* “precludes the Tribal Court of any adjudicatory power over Sprint.” *Id.* at 33-34 (citing *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316, 128 S. Ct. 2709 (2008)). Sprint stated that in addition to NAT’s tribal lawsuit not involving a tribal member, Sprint has not consented to Tribal Court jurisdiction, and that providing telecommunications services on a reservation does not create a consensual relationship. *Id.* at 34 (citing *Reservation Tel. Coop. v. Henry*, 278 F. Supp. 2d 1015, 1023 (D.N.D. 2003)). Sprint further asserted that under *Plains Commerce Bank* the proposed regulation must also bear a nexus to the relationship. *Id.* at 35. Sprint asserted that its “alleged activities, *i.e.*, nonpayment of access charges, do not bear a sufficient nexus to justify regulation because no consensual relationship exists to be regulated for doing business with a South Dakota limited liability company, owned or operated by non-members of the Crow Creek Sioux Tribe.” *Id.* at 35.

Regarding the second *Montana* exception, Sprint asserted that “[t]he 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.” *Id.* at 36. Regarding the issue of whether conduct occurred on the reservation, Sprint claims that its decision not to pay the invoices took place in Sprint’s headquarters in Kansas and that the payment went to an unrelated billing agent in Texas, not to the Reservation. *Id.* Sprint further asserted that its conduct does not threaten or directly affect the political integrity, political security, or the health or welfare of the Tribe because “calls delivered to a Call Connection Company have no direct

affect on the tribe.” *Id.* at 37.

At its August 27, 2013, meeting, the Commission considered these motions. With respect to NAT’s Motion to Dismiss, the Commission unanimously voted to deny the motion. As the Commission stated in its Motion Denying Stay, the South Dakota Supreme Court has found that the Commission’s authority under SDCL chapter 49-31 is “extensive and crucial to the overall regulatory scheme.” *Cheyenne River Sioux Tribe Telephone Authority v. Public Utilities Commission of South Dakota*, 1999 SD 60, ¶ 21, 595 N.W.2d 604, 609. The Commission first notes that during oral argument NAT stated that its Motion to Dismiss was based on the jurisdictional issue of tribal exhaustion. Tr. at 7 (Transcript of August 27, 2013). NAT stated that since the circuit court affirmed the Commission’s ruling denying NAT’s Motion to Stay, which was based on the doctrine of tribal exhaustion, NAT did not believe that anything was remaining regarding its Motion to Dismiss as the decision on tribal exhaustion had already been made.² The Commission further notes that although NAT focused its argument in its Motion to Dismiss on the provisioning of telephone service on the Reservation, this fails to address the issues presented in the complaint regarding interexchange services and the scope of NAT’s tariff. In its decision affirming the Commission’s Order Denying Stay, the circuit court stated that “[i]t is quite clear that the tribe does not have jurisdiction over calls that would originate off the reservation and terminate on the reservation or otherwise originate on the reservation and terminate off the reservation.” *In the Matter of the Complaint Filed by Sprint Communications Company, LP Against Native American Telecom, LLC Regarding Telecommunications Services*, Memorandum Decision and Order, at 4, CIV. 08-11 (August 23, 2011). The court further noted that the tariff filed by NAT was not limited to providing services on the reservation.³ In addition, Sprint has alleged that NAT is not a tribal member. Therefore, NAT’s Motion to Dismiss is denied.

NAT’s Motion to Dismiss Based on Mootness

NAT filed a Motion to Dismiss Based on Mootness. In its motion, NAT contended that Sprint had “received everything it asked for in this case” and that “[t]here is nothing left to litigate and the case is moot.” NAT’s Motion to Dismiss Based on Mootness at 1. NAT asserted that the Commission had decided the jurisdictional issues, as set forth in the first two issues contained in Sprint’s amended complaint, in the Commission’s Order Denying Motion to Stay. *Id.* at 3-4. Regarding Sprint’s third issue, that NAT must seek a Certificate of Authority from the Commission and file a lawful tariff with the Commission before it can assess charges for switched access service, NAT asserted that this request for relief is moot because NAT has applied for a Certificate of Authority with the Commission. *Id.* at 5-6. For the fourth issue, Sprint’s request for damages, NAT stated that it would pay Sprint the intrastate access charges that Sprint had previously paid to NAT and that NAT would not “charge Sprint for intrastate terminating access charges in South Dakota until NAT receives its Certificate of Authority from the Commission.” *Id.* at 6-7. Based on these statements, NAT asserted that the “damages issue is now moot.” *Id.* at 7.

² *Id.* In its Motion to Stay, NAT had requested that the Commission stay this docket until Sprint exhausted all tribal court remedies in an action filed by NAT in the Crow Creek Tribal Court, which, NAT stated, involved the same questions of law and fact that Sprint brought forth in this docket. NAT’s Brief in Support of Motion to Stay at 1.

³ *Id.* at 7-8. Under the heading “Application of Tariff,” section 1.1, the tariff states: “This tariff sets forth the regulations, rates and charges for the provision of Intrastate Access services and facilities (hereinafter “Services”) by NATIVE AMERICAN TELECOM, LLC into, out of and within the State of South Dakota.” Tariff C.C.S.T. No. 1, Original page No. 14, Application of Tariff, section 1.1 (attached as Exh. F to Sprint’s Memorandum in Opposition to NAT’s Motions to Stay or to Dismiss).

Sprint contended that the “theoretical underpinnings to the mootness doctrine - that courts should decide concrete cases or avoid advisory opinions - apply with less force to an administrative agency, if at all.” Sprint’s Response in Opposition to NAT’s Motion to Dismiss at 6. Regarding the first two jurisdictional issues, Sprint stated that the Commission has not expressly adopted Sprint’s position that the Commission has sole authority over Sprint’s intrastate activities or that the CCSTUA lacks jurisdiction over Sprint’s intrastate interexchange services. *Id.* at 7-8. Regarding the third declaratory request, Sprint stated that if the Commission rejects NAT’s current application, then a declaration from the Commission that NAT cannot offer intrastate service without a certificate of authority “will be germane to any Commission enforcement proceeding against NAT.” *Id.* at 8. With respect to the issue of damages, Sprint asserted that NAT’s offer to not bill Sprint lacked clarity. *Id.* at 5-6.

At its August 27, 2013, meeting, the Commission voted unanimously to deny NAT’s Motion to Dismiss Based on Mootness. The Commission finds that NAT failed to show that the issues presented by Sprint’s complaint have been rendered moot. Regarding the first two issues, the Commission has not definitively addressed Sprint’s position on jurisdiction regarding its provisioning of intrastate interexchange services. With regard to Sprint’s third issue, NAT claimed that its filing for a certificate of authority in another docket renders moot Sprint’s issue that NAT must seek a certificate of authority from the Commission and file a tariff with the Commission before it can assess access charges. The Commission disagrees. As noted by Sprint, NAT has previously withdrawn an application for a certificate of authority. *In the Matter of the Application of Native American Telecom, LLC for a Certificate of Authority to Provide Local Exchange Service on the Crow Creek Indian Reservation*, Docket TC08-110 (filed September 9, 2008). Moreover, with respect to its current pending application for a certificate of authority, NAT has twice amended that application. The most recent amended application changed from an “application for a certificate of authority to provide local exchange and interexchange service within the Crow Creek Sioux Tribe Reservation” to an application for a certificate of authority “to provide intrastate interexchange access service for traffic that originates or terminates off of the Crow Creek reservation within the state of South Dakota. . . .” See *In The Matter of the Application of Native American Telecom, LLC for a Certificate of Authority to Provide Interexchange Telecommunications Services and Local Exchange Services in South Dakota*, Docket TC11-087, Revised Application (filed January 27, 2012); Amended Application for Certificate of Authority (filed June 3, 2013.) The Commission finds that the filing of an application by NAT does not serve as an answer to Sprint’s third issue which seeks a determination as to whether NAT needs a certificate of authority and a tariff filed with the Commission before it can assess access charges. The Commission points out that an application for a certificate of authority would apply prospectively and Sprint’s issue is not limited to a prospective determination but includes whether NAT needed a certificate prior to offering services in South Dakota. Finally, on the damages issue, it appears that there are questions as to the scope and effect of NAT’s offer. In addition, it is unclear as to how NAT’s offer to not bill Sprint until NAT receives a certificate of authority would apply under NAT’s most recent amended application for a certificate. Therefore, the Commission finds that this issue has not been rendered moot.

NAT’s Motion to Re-Open Discovery and Stay Sprint’s Motion for Summary Judgment Due to New Information that has Recently Come to Light

NAT filed a Motion to Re-Open Discovery and Stay Sprint’s Motion for Summary Judgment Due to New Information that has Recently Come to Light. In the motion, NAT requested the Commission stay any action on Sprint’s Motion for Summary Judgment in order to allow NAT to conduct further discovery. NAT’s Motion to Re-Open Discovery and Stay Sprint’s Motion for Summary Judgment at 4. NAT stated that it had learned that Sprint intended

to withdraw the testimony of its expert witness, Randy Farrar, in Docket TC11-087.⁴ NAT contended that Farrar's testimony is critical to Sprint's claims in both Docket TC11-087 and this docket. *Id.* at 2. NAT contended that it "should be allowed to conduct further discovery regarding Sprint's last-minute withdrawal of Farrar's testimony." *Id.* at 4.

Sprint opposed NAT's stay motion. Sprint first noted that discovery does not need to be reopened because there is no scheduling order cutting off discovery in this docket. Response of Sprint Opposing NAT's Motion to Reopen Discovery at 4-5. Sprint stated that NAT failed to comply with SDCL 15-6-56(f) by not filing an affidavit with its request for further discovery to defeat Sprint's Motion for Summary Judgment. *Id.* at 5. Sprint also stated that it was not withdrawing Farrar's testimony in Docket TC11-087. Rather Sprint was not going to offer Farrar's prefiled testimony, filed in Docket TC11-087 on March 26, 2013, because Sprint was submitting new prefiled testimony based on NAT's most recent amended application for a certificate of authority. Tr. at 23-24 (August 27, 2013 Transcript). Sprint further contended that NAT has failed to comply with the statute by failing to make a showing as to how discovery will lead to facts that would defeat Sprint's motion. *Id.* In addition, Sprint argued that "[t]he mere fact Sprint used an admission of a party opponent from another docket as part of its summary judgment record in TC10-026 does not, without more, make the issues in TC10-026 dependent on resolution of issues in TC11-087." Response of Sprint Opposing NAT's Motion to Reopen Discovery at 6.

Following Sprint's response, NAT filed an affidavit in support of its motion that essentially restated what NAT had filed in its motion. Affidavit in Support of NAT's Motion to Re-Open Discovery and Stay Sprint's Motion for Summary Judgment Due to New Information that has Recently Come to Light.

At its August 27, 2013, meeting, the Commission voted unanimously to deny NAT's Motion to Re-Open Discovery and Stay Sprint's Motion for Summary Judgment. The Commission finds there has been no order closing discovery. In addition, the Commission finds that NAT failed to show how taking further discovery regarding prefiled testimony filed in a separate docket, TC11-087, would lead to additional facts that NAT could use to oppose Sprint's Motion for Summary Judgment in this docket.

Sprint's Motion For Summary Judgment

In its Motion for Summary Judgment, Sprint sought a declaration that:

- (1) NAT cannot provide telecommunications anywhere within the State of South Dakota without a certificate of authority from the Commission;
- (2) NAT cannot invoice for intrastate telecommunications services until it has a lawful tariff on file with the Commission;
- (3) NAT's invoices to Sprint for intrastate services that NAT has issued without a certificate of authority and lawful tariff on file with the Commission are void; and
- (4) The Commission has sole authority to regulate Sprint's interexchange services within the State of South Dakota, and conversely, the Crow Creek Sioux Tribal Utility Authority cannot regulate Sprint's activities in this State.

⁴ *Id.* at 2. As previously explained, Docket TC11-087 is the docket in which NAT has filed an application for a certificate of authority with the Commission. See *In The Matter of the Application of Native American Telecom, LLC for a Certificate of Authority to Provide Interexchange Telecommunications Services and Local Exchange Services in South Dakota, Docket TC11-087.*

In support of its Motion for Summary Judgment, Sprint submitted a Statement of Undisputed Material Facts along with supporting affidavits. Sprint stated that NAT began invoicing Sprint in December of 2009 for "what NAT calls terminating access charges." Memorandum of Law of Sprint in Support of Motion for Summary Judgment at 17. Sprint sought a declaration from the Commission that NAT cannot provide telecommunications services anywhere in South Dakota without a certificate of authority from the Commission and that NAT must have a valid tariff on file with the Commission before it can charge for intrastate telecommunications services pursuant to SDCL 49-31-3. *Id.* at 16. Sprint also requested a declaration from the Commission that NAT's invoices for intrastate telecommunications services to Sprint are void as a matter of law because NAT does not have a certificate of authority from the Commission or a tariff on file with the Commission. *Id.* at 18. Sprint asserted that "NAT's tribal tariff is of no force and effect, in Sprint's view, anywhere in South Dakota, and indisputably, nowhere outside the Crow Creek Reservation." *Id.* at 19-20.

Sprint also requested a declaration that only the Commission can regulate Sprint's interexchange services within South Dakota and that the CCSTUA has no jurisdiction over Sprint for any purpose. *Id.* at 20-21. Sprint contended that federal judicial precedent "does not support any inherent tribal regulatory authority over telecommunications services within reservation boundaries" and that the federal courts "have articulated a general rule that a tribe cannot regulate non-members." *Id.* at 23 (citations omitted). Sprint then discussed the two exceptions to this general rule as set forth in *Montana* and argued that neither was applicable in this case. *Id.* at 24-28.

NAT opposed Sprint's motion and submitted a statement of material facts and a response to Sprint's statement of material facts. NAT stated that Sprint's motion "encompasses the same intrastate jurisdictional issues" that were decided by the Commission in its Order Denying NAT's Motion to Stay and by the circuit court when it affirmed the Commission's decision. NAT's Memorandum in Response to Sprint's Motion for Summary Judgment at 14. NAT further contended that it appeared that Sprint was expanding its request for relief and was now seeking a ruling that would affect NAT's interstate activities. *Id.* at 15-16. NAT asserted that Sprint's Motion for Summary Judgment was not properly before the Commission because Sprint is asking for relief that was never requested in its amended complaint. Tr. at 62-63 (April 9, 2013 Transcript). NAT also stated that it had ceased invoicing Sprint for intrastate services, had retracted previous invoices issued to Sprint, and had issued a refund. NAT's Memorandum in Response to Sprint's Motion for Summary Judgment at 18-19. NAT contended that issues related to its invoices to Sprint were moot.

With respect to Sprint's fourth issue as set forth in its Motion for Summary Judgment, NAT asserted that the Commission and circuit court have already found that the Commission has the authority to regulate intrastate services but that the Commission does not have the "authority to determine what (if any) jurisdiction the Crow Creek Sioux Tribal Utility Authority may have over Sprint regarding interstate activities or Sprint's activities on the Crow Creek Sioux Reservation." *Id.* at 19-20. NAT stated that it "has never provided services to customers outside the borders of the Reservation, and all subscribers are enrolled members of the Crow Creek Sioux Tribe, except for Free Conferencing Corporation, a Nevada corporation that locates conferencing equipment in leased facilities located on the Reservation and was, and still is, required to submit to the authority of the Tribal Utility Commission." NAT's Memorandum in Response to Sprint's Supplemental Authority at 6. NAT stated that when calls come from somewhere in the state to the reservation or someone on the reservation calls out to someone in the state, then that is "when the Commission's intrastate jurisdiction applies." Tr. at 34 (August 27, 2013 Transcript). NAT stated that it needed a certificate of authority for intrastate activity and that it cannot bill for intrastate services without a certificate of authority. *Id.* at 53. NAT stated it is not providing intrastate telecommunications services but is providing interstate

services and services that occur within the boundaries of the reservation. *Id.* at 46-47. NAT stated that Free Conferencing Corporation only operates within the boundaries of the reservation and does not need state authority to operate. *Id.* at 35.

NAT asserted that there were a number of material facts in dispute that precluded the Commission from granting summary judgment. *Id.* at 34. NAT denied that Sprint has never consented to being regulated by the CCSTUA, stating that this was a legal conclusion. NAT's Combined Statement of Material Facts and Response to Sprint's Statement of Material Facts at 14, ¶ 3. NAT denied Sprint's statement that Sprint does not have a physical presence on the Reservation, stating this is Sprint's legal conclusion as to how Sprint operates in this case. *Id.* at ¶ 5. NAT denied Sprint's explanation of how the traffic to NAT is routed and stated that the explanation was wrong.⁵ NAT denied that it stated that it intends to serve all customers within the Crow Creek Reservation. NAT's Combined Statement of Material Facts and Response to Sprint's Statement of Material Facts at 15, ¶ 8. NAT stated that Sprint's material fact no. 8 is an incorrect reading of Mr. Holoubek's affidavit. Tr. at 36 (September 26, 2013 Transcript).⁶ NAT denied that it provided service exclusively to Free Conferencing Corporation through the Service Agreement. *Id.* at 16, ¶15. NAT denied that the Crow Creek Sioux Tribe has received nothing from NAT while Free Conferencing has received hundreds of thousands of dollars. *Id.* at ¶ 31. NAT stated that Sprint had failed to show that NAT "has provided intrastate services to anyone outside the reservation." Tr. at 34 (August 27, 2013 Transcript). NAT contended "there are genuine issues of material fact, including the fact that Sprint, of course, has alleged that NAT is a sham entity." Tr. at 83 (April 9, 2013 Transcript).

In response to NAT's assertion that there were a number of material facts in dispute, Sprint contended that these were not material facts that related to what Sprint is seeking in its requests for declaratory relief. Tr. at 43 (August 27, 2013 Transcript).

The Commission unanimously voted to deny Sprint's Motion for Summary Judgment.⁷ Summary judgment is proper only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to a judgment as a matter of law." SDCL 15-6-56(c). The burden is on the moving party to clearly demonstrate "an absence of any genuine issue of material fact and an entitlement to judgment as a matter of law." *Luther v. City of Winner*, 2004 SD 1, ¶ 6, 674 N.W.2d 339, 343 (internal citations omitted). The evidence and the favorable inferences from that evidence are viewed in a light most favorable to the nonmoving party. *Id.* (internal citations omitted). The Commission finds that Sprint has failed to demonstrate the absence of any genuine issue of material fact. As set forth above, NAT has disputed a number of Sprint's stated undisputed material facts. The Commission finds Sprint has failed to show that it is entitled to judgment as a matter of law.

⁵ *Id.*; Tr. at 35 (August 27, 2013 Transcript). Sprint's material fact no. 5 provided, in part, as follows: "From there, all calls to NAT go to a switch operated by Wide Voice Communications in Long Beach, California, which routes the traffic back to the SDN switch in Sioux Falls. Once there, NAT-bound traffic goes over SDN fiber to a Midstate Communications switch in Ft. Thompson, where it is exchanged with NAT." Sprint's Statement of Undisputed Material Facts, No. 5.

⁶ Sprint's material fact no. 8 stated: "In its responses to discovery Sprint has served on NAT in Commission Docket TC11-07, NAT stated it intends to serve all customers within the Crow Creek Reservation, without discriminating between whether the individuals and businesses it serves are members or owned by members of the Crow Creek Sioux Tribe or not." Sprint's Statement of Undisputed Material Facts, No. 8.

⁷ The Commission further instructed Commission Staff to work with the parties to set a date for an evidentiary hearing as soon as possible.

It is therefore

ORDERED, that NAT's Motion to Dismiss is denied; and it is further

ORDERED, that NAT's Motion to Dismiss Based on Mootness is denied; and it is further

ORDERED, that NAT's Motion to Re-Open Discovery and Stay Sprint's Motion for Summary Judgment Due to New Information that has Recently Come to Light is denied; and it is further

ORDERED, that Sprint's Motion for Summary Judgment is denied.

Dated at Pierre, South Dakota, this 17th day of September, 2013.

CERTIFICATE OF SERVICE
The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, electronically.
By: <u>Joy Lashley</u>
Date: <u>9-17-13</u>
(OFFICIAL SEAL)

BY ORDER OF THE COMMISSION:

Gary Hanson
GARY HANSON, Chairman

Chris Nelson
CHRIS NELSON, Commissioner

Kristie Fiegen
KRISTIE FIEGEN, Commissioner