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THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

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IN THE MATTER OF THE COMPLAINT FILED BY
SPRINT COMMUNICATIONS COMPANY, LP AGAINST
NATIVE AMERICAN TELECOM, LLC REGARDING TC10-026
TELECOMMUNICATIONS SERVICES

=====

Transcript of Proceedings **ORIGINAL**
April 5, 2011

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BEFORE THE PUBLIC UTILITIES COMMISSION,
STEVE KOLBECK, CHAIRMAN
GARY HANSON, VICE CHAIRMAN
CHRIS NELSON, COMMISSIONER

COMMISSION STAFF

Rolayne Ailts Wiest
Karen Cremer
Greg Rislov
Dave Jacobson
Bob Knadle
Deb Gregg
Demaris Axthelm

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**SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION**

APPEARANCES

Tom Tobin, Sprint Communications Company
Scott Knudson, Sprint Communications Company
Scott Swier, Native American Telecom (by telephone)
Darla Pollman Rogers, Interveners

Reported By Cheri McComsey Wittler, RPR, CRR

1066

1 TRANSCRIPT OF PROCEEDINGS, held in the
2 above-entitled matter, at the South Dakota State Capitol
3 Building, 500 East Capitol Avenue, Room 413, Pierre,
4 South Dakota, on the 5th day of April 2011, commencing at
5 9:30 a.m.

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 1067

1 CHAIRMAN KOLBECK: TC10-026, In the matter of
2 the Complaint filed by Sprint Communications Company, LP
3 against Native American Telecom, LLC, regarding
4 telecommunications service.

5 The question before us today is shall the
6 Commission grant Native American Telephone's Motion --
7 and I'm going to reverse the questions. Motion to Stay.
8 And shall the Commission grant Native American
9 Telephone's Motion to Dismiss, or how shall the
10 Commission proceed?

11 I'd like to handle the Stay first, and then
12 we'll discuss the Dismiss.

13 Is it the opinion of the Commissioners to have
14 two separate arguments, or do we want them to present the
15 arguments both at the same time?

16 COMMISSIONER NELSON: Separate.

17 COMMISSIONER HANSON: Mr. Chairman, I'm
18 comfortable with doing them separate. However, I don't
19 know how challenging that will be for the parties.
20 Obviously, there will be some issues that they may wish
21 to trespass upon on the two motions as they're discussing
22 it, and I wouldn't hold them to that.

23 CHAIRMAN KOLBECK: I would think arguing
24 separately would be appropriate also. I would think that
25 arguing the Stay first would make more sense. So how

1068

1 about we do it that way. All right?

2 So with that, Native American Telecom, you are
3 the moving party. If you want to start, please do.

4 MR. SWIER: Thank you, Mr. Chair, members of the
5 Commission. Thank you for allowing me to appear via
6 teleconference today.

7 With regard to the Motion to Stay, Native
8 American Telecom is requesting that this Commission stay
9 all proceedings in this case until Sprint exhausts all
10 Tribal Court remedies in the Crow Creek Sioux Tribe
11 Tribal Court.

12 Both the matter in front of the Commission and
13 the matter that's currently pending before the Crow Creek
14 Tribal Court revolve around the same issues of law and
15 fact.

16 The Tribal Exhaustion Doctrine, of course,
17 promotes tribal self-government in the authority and
18 development of Tribal Courts. And the Doctrine states
19 that the courts, and in this case regulatory agencies,
20 should stay its hand until the Tribal Court has had an
21 opportunity to determine its own jurisdiction.

22 Very briefly, the corporate structure of NAT is
23 this: It is a tribally owned, limited liability company
24 organized under the laws of the State of South Dakota.
25 And it provides internet access, basic telephone, and

1069

1 long distance service to members on and within the
2 exterior boundaries of the Crow Creek Reservation.

3 In 1997 the Crow Creek Sioux Tribe created its
4 Tribal Utility Authority. That deals with matters of
5 telecommunications on and within the exterior boundaries
6 of the reservation.

7 In September of 2008 the Utility Authority
8 issued its Telecommunications Plan. And these documents
9 are all part of the record.

10 In October of 2008 the Tribal Utility Authority
11 granted NAT the authority to provide telecommunications
12 services on the reservation subject to the laws of the
13 Crow Creek Sioux Tribe. And, indeed, one year later, in
14 September of 2009, NAT launched its tribally owned
15 telephone system.

16 NAT has physical offices, its telecommunications
17 equipment, and its telecommunication towers all on the
18 reservation. So the offices, the equipment, the towers,
19 and the people are all located on the reservation.

20 And, of course, what happened is in March of --
21 in March of 2010 Sprint improperly discontinued paying
22 its terminating access charges to NAT.

23 What we're asking the Commission to do here
24 today is to simply follow the lead of the United States
25 Supreme Court in the Iowa Mutual Insurance Company and

1070

1 National Farmers Union Insurance Company line of cases.

2 The Exhaustion Doctrine is very simple. It's
3 this: It says that Sprint cannot challenge the
4 jurisdiction of the Crow Creek Tribal Court or litigate
5 the merits of a dispute already pending before the
6 Tribal Court until Sprint exhausts its remedies in
7 Tribal Court.

8 And, Mr. Chair and members of the Commission,
9 this is a classic case for application of the Tribal
10 Exhaustion Doctrine.

11 There was a question as to although the Tribal
12 Exhaustion Doctrine is primarily a Federal Court
13 doctrine, can the Tribal Exhaustion Doctrine be applied
14 to State Courts or in this case to a State regulatory
15 agency?

16 And NAT has cited two cases. The first is the
17 Tohono O'odham Nation case, which is a Federal Court case
18 from Arizona in 1997. And also Bowen v. Doyle, which is
19 a 1995 case from the Western District Federal Court in
20 New York.

21 In those cases it's clear that the Tribal
22 Exhaustion Doctrine is not limited to Federal Courts, but
23 it can also be extended to State Courts and through
24 analogy to state regulatory agencies.

25 So what we're asking the Commission to do in

1071

1 this case is to simply recognize that this dispute
2 involves, one, a tribally owned telecommunications
3 company. Number two, the dispute involves actions that
4 are taking place within the exterior boundaries of the
5 reservation. Number three, this dispute involves the
6 scope of the Tribe and the Tribal Utility Authority's
7 regulatory authority. Number four, it also involves the
8 scope of the Tribal Court's adjudicatory authority.
9 Number five, it takes into consideration the Tribe's
10 financial stability and economic development efforts on
11 the reservation. And, finally, this dispute involves
12 employment opportunities for the Tribe's members.

13 And, again, these are all supported by the
14 voluminous documents that have already been filed in the
15 case.

16 So in sum, Mr. Chair, the fundamental issue in
17 this case is really pretty simple. It's not whether the
18 tribal -- the Tribal Court has jurisdiction. Rather, the
19 issue is whether the Tribal Court should be the first
20 entity to address the jurisdictional issue.

21 There is no doubt that this Commission will hear
22 this case at a later date, but under the Tribal
23 Exhaustion Doctrine, the Tribal Court should have the
24 first crack at determining its jurisdiction.

25 So we're asking that the Commission accept the

1 recommendation of its Staff. The Staff Brief recommends
2 granting NAT's Motion to Stay based on the Tribal
3 Exhaustion Doctrine. And we'd ask the Commission to
4 accept its Staff recommendation here.

5 Mr. Chair, regarding the tribal exhaustion
6 issue, we want to keep -- I want to keep this brief.
7 It's been briefed extensively. So unless the Commission
8 has any questions at this time, that is the conclusion of
9 my initial presentation here this morning.

10 CHAIRMAN KOLBECK: All right. Thank you,
11 Mr. Swier.

12 Next we'll move to Sprint, Complainant.

13 MR. KNUDSON: Thank you, Mr. Chairman. With me
14 today -- I'm Scott Knudson from Briggs and Morgan,
15 representing Sprint Communications. And with me at
16 counsel table is Tom Tobin, my local counsel from Winner,
17 South Dakota. I'm sorry to say Mr. Whiting also
18 representing Sprint in this case can't appear today due
19 to a death in the family.

20 Last December the Federal District Court
21 determined that the Crow Creek Tribe's court lacked
22 jurisdiction over NAT's complaint against Sprint based
23 upon interstate traffic. The Federal Court construed
24 47 U.S.C. 207 in the Federal Communications Act to
25 determine that a Federal Court or the FCC had exclusive

1073

1 jurisdiction over interstate claims. And because the
2 jurisdiction was exclusive there was no need to exhaust.

3 The Federal District Court was interpreting the
4 Exhaustion Doctrine as applied by the United States
5 Supreme Court in cases decided after the cases that
6 Mr. Swier has cited. In particular we brought these
7 cases to the attention of the Commission. Straight v.
8 A-1 Construction and Nevada v. Hicks, which established
9 in the absence of a grant of jurisdiction to a Tribal
10 Court, there's no need to exhaust because it would only
11 result in delay.

12 And I just heard Mr. Swier say that ultimately
13 the Commission will hear Sprint's Complaint. I remind
14 the Commission that Sprint filed first in May. And we're
15 now approaching 10 months, 11 months perhaps almost, and
16 we have had no progress on Sprint's Complaint on the
17 merits. What Mr. Swier is recommending to the Commission
18 will only add further delay to defer it to a tribunal
19 which has no jurisdiction over Sprint's Complaint.

20 I urge the Commission to deny the Motion to Stay
21 for several reasons: First of all, South Dakota
22 Legislature has empowered this Commission to regulate
23 intrastate telecommunications traffic.

24 Congress has set up a dichotomy of regulation of
25 interstate telecommunication services -- or telecom

1074

1 services overall. In 47 U.S.C. 152(b) Congress has
2 divided regulation between the Federal Communications
3 Commission with jurisdiction over interstate traffic and
4 allowing the state to regulate that intrastate portion of
5 telecommunications traffic. So Congress has ordained
6 that this Commission through the State Legislature can
7 regulate intrastate traffic.

8 The Legislature in 47-31-3 has said that this
9 Commission has the sole authority to regulate intrastate
10 traffic. Now that's important because what's at issue
11 here and what's involved in Sprint's Complaint is billing
12 for intrastate traffic. We're not talking about
13 intra-reservation traffic but intrastate traffic. That's
14 traffic originating somewhere in the State of South
15 Dakota that ends up on NAT's equipment, gets billed
16 terminating access charges to Sprint.

17 It asserts that it can provide intrastate
18 traffic in its tariff that it has on file with the Tribal
19 Utility Commission. In Section 1.1 of that tribal tariff
20 it talks about applying to intrastate traffic. That's
21 Exhibit F to an Affidavit that I filed with our papers.

22 And Sprint's been billed for that intrastate
23 traffic, and that's found in Exhibit 9 of the Reiman
24 Affidavit filed by NAT. Now Sprint is just one of
25 several interexchange carriers that are involved in this

1075

1 dispute. We happened to file the Complaint with the
2 Commission, but there would be other intrastate traffic
3 NAT would be attempting to bill for.

4 So first the Legislature has determined that the
5 Commission should be regulating intrastate traffic in the
6 first place. And, second, I'd like to take issue with
7 the assertion the Tribal Exhaustion Doctrine applies at
8 all to the states.

9 First of all, let's be clear where this doctrine
10 arises. It's not an act of Congress. It's a judge-made
11 rule. The Federal Judiciary has said as a matter of
12 comity -- in other words, we will extend kind of a
13 first-chance opportunity to tribal courts to rule on
14 these issues whether the Tribal Court would have
15 jurisdiction.

16 That was created by Federal Courts. And the
17 federal rule is not applicable to the states. If it
18 would be applicable, it would require an act of Congress
19 to make the federal exhaustion rule apply to State Courts
20 or State regulatory agencies.

21 The two cases that Mr. Swier cited both involve
22 Federal Courts and not a State agency determining to
23 defer to the jurisdiction of a Tribal Court. And they're
24 distinguishable on the facts from the situation.

25 NAT has cited no State Court, no State agency

1076

1 adopting the exhaustion rule. And, further, because the
2 Legislature has empowered the Commission to act first, it
3 should exercise its jurisdiction here and rule on
4 Sprint's Complaint.

5 Now the South Dakota Supreme Court has addressed
6 this question as well in the Cheyenne River case that we
7 cite in our Briefs. That's an issue where there was a
8 sale of some certain telephone exchanges that were on the
9 Cheyenne River Reservation and whether or not the PUC and
10 also the State Supreme Court then could regulate the
11 terms and conditions of the sale of those telephone
12 exchanges.

13 The issue came up in that case of whether or not
14 exercising State or PUC jurisdiction over the sale of
15 those exchanges would somehow interfere with tribal
16 self-government, and the Supreme Court concluded it would
17 not.

18 Now that's important to consider here because
19 the basis for the federal rule is to promote tribal
20 self-government. If the State Supreme Court has said
21 that where the Commission has clear authority to act,
22 they will not implicate that particular federal interest
23 and, therefore, there should be no concern over
24 exhaustion in these particular circumstances.

25 And I remind the Commission that the factual

1077

1 circumstances here are similar to those that were in
2 Cheyenne River. What Cheyenne River was talking about
3 was a concern for people who live within the reservation
4 who were not tribal members. We have a similar
5 circumstance here.

6 Crow Creek Reservation is an open reservation.
7 There's a significant non-Indian population on the
8 reservation. There are substantial amounts of fee land
9 owned by non-Indians within that reservation. And the
10 type of technology that they're proposing to use is WiMAX
11 technology. That's a radio technology which radiates in
12 all directions so it can easily go outside the boundaries
13 of the reservation.

14 And I would also point out that when NAT first
15 came to the Commission and applied for a Certificate of
16 Authority it said that it was going to serve all
17 individuals and businesses within the reservation.
18 That's Exhibit J to my Affidavit that was filed here.

19 And then in Exhibit W to my Affidavit there was
20 testimony from the Federal Court litigation in October of
21 last year where the NAT witness admitted that there was
22 no effort to screen out non-tribal members from being
23 eligible for service.

24 So the facts of our situation are similar to
25 those of Cheyenne River. And I submit then that the

1078

1 underlying concern about promoting tribal self-government
2 doesn't rise to the level of which any type of exhaustion
3 should apply. Instead this Commission should step
4 forward and enforce the mandate that the Legislature has
5 given it and act to decide on Sprint's Complaint.

6 Then, finally, to point out the Federal Court
7 decision with respect to the stay, I think the Staff's
8 Brief recommended that the Motion to Stay be granted
9 until either the Federal Court or the Tribal Court had
10 ruled. We have a ruling now from the Federal Court.

11 The Federal Court determined to enjoin NAT's
12 Tribal Court action in full. So that action has
13 basically stopped. It enjoined that action because it
14 ruled or interpreted 47 U.S.C. 207 to create an exclusive
15 federal forum for the Complaints involving the interstate
16 traffic.

17 It interpreted some cases such as the El Paso
18 case, which is the Price-Anderson Act Decision. The
19 Coeur d'Alene and Alltel cases were also referenced.
20 They involve the Federal Communications Act. The
21 significance of which is when -- here Congress has
22 determined where jurisdiction lies. That ties back into
23 the interpretation of the exhaustion pool that the
24 Supreme Court articulated in Strate and Hicks, which is
25 very straightforward. Absent a federal grant of

1 jurisdiction, there is no need to exhaust because
2 exhaustion would only delay consideration of the merits.

3 Because Congress has delineated this
4 federal/state dichotomy in 47 U.S.C. 152(b) the
5 Commission now has the authority to move forward and
6 regulate the intrastate traffic component of NAT
7 services. That's what's involved in Sprint's Complaint
8 before the PUC.

9 So we urge the Commission to deny the Motion to
10 Stay and move forward on the merits.

11 At this point I'd like to reserve the rest of my
12 argument on the issue of the Motion to Dismiss.

13 CHAIRMAN KOLBECK: All right. Thank you very
14 much. I think next we'll hear from Crow Creek Sioux
15 Tribe Utility Authority if they'd like to speak. They're
16 an Intervener.

17 How about SDTA, Midstate, and SDN? We'll hear
18 from those Interveners.

19 MS. POLLMAN ROGERS: Good morning, Mr. Chair,
20 members of the Commission. My name is Darla Pollman
21 Rogers, and I'm appearing today on behalf of Interveners
22 SDTA, SDN, and Midstate.

23 We submitted a Brief in this Docket that was
24 filed December 6, and in that Brief we articulated five
25 reasons why we believe the Commission should deny the

1080

1 Motion to Stay.

2 The previous presenter almost verbatim gave you
3 those same arguments so I will not repeat them.

4 We believe that it's clear in reviewing Federal
5 law, State law, and Administrative Rules and our own
6 Supreme Court's analysis of the Congressional legislative
7 intent of Federal law that the Commission has
8 jurisdiction over this matter. The Motion to Stay should
9 be denied, and we would urge you to submit a ruling to
10 that effect.

11 Thank you.

12 CHAIRMAN KOLBECK: Thank you. And one more
13 Intervener.

14 AT&T, would you like to comment?

15 No comment. Okay. How about we turn towards
16 Staff. Ms. Cremer.

17 MS. CREMER: Good morning. This is Karen Cremer
18 from Staff. As noted, the parties have briefed this
19 matter rather extensively and thoroughly explained how
20 they believe the case law should be applied in this
21 matter.

22 For the most part the parties agree on what
23 case law applies. Where their disagreement is is, of
24 course, how to apply that case law to the jurisdictional
25 issue.

1081

1 As Ms. Rogers stated, Staff has also filed a
2 Brief. I'm not going to read it to you or repeat that.
3 I will rely on that Brief and will just basically
4 summarize Staff's recommendations.

5 Regarding the Motion to Stay, Staff believes
6 that the Motion should be granted. Staff believes that
7 an evidentiary hearing needs to be held so that this
8 jurisdictional issue can be resolved so that the matter
9 can then be heard on its merits.

10 The question before you then is who should hold
11 this evidentiary hearing, as clearly what type of traffic
12 this is needs to be determined. If it is as NAT says,
13 confined solely within the exterior boundaries of the
14 reservation, the Commission likely does not have
15 jurisdiction.

16 If it's as Sprint says and outside the
17 boundaries of the reservation, clearly, the Commission
18 has jurisdiction in that regard.

19 I don't believe the Commission would be in error
20 if they determined to hold the evidentiary hearing
21 themselves. I don't think there's necessarily a right
22 answer here or a wrong answer. The Commission clearly
23 has an obligation to hear all matters over which they
24 have subject matter jurisdiction.

25 The problem I have is that I don't believe it's

1082

1 clear that the Commission has subject matter jurisdiction
2 here and, hence, the need for an evidentiary hearing. So
3 then it becomes a question of whether this Commission's
4 obligation to exercise its jurisdiction is subordinated
5 by the Congressional policies of promoting tribal
6 self-government and self-determination.

7 I believe the case law encourages forums such as
8 this Commission to permit the Tribe to hold an
9 evidentiary hearing on the issue of jurisdiction, as it
10 is their jurisdiction that's being challenged.

11 There was no one thing for Staff in coming to
12 this conclusion. For me it was -- it was more of a
13 totality of the circumstances, the courts repeatedly
14 stressing the principle that's deeply rooted in the
15 United States Supreme Court's Indian Jurisprudence, which
16 is Indian Courts are granted deference when determining
17 jurisdiction as that determination should be made by the
18 Tribe and not for the Tribe.

19 There are so many nuances to Indian Law and the
20 fact that the Tribal Court would have experience in this
21 area that the Commission lacks was one of those
22 circumstances that I felt was important in having them go
23 first and the Commission staying its hand and, again, the
24 recognition of tribal sovereignty and self-government.

25 If it is determined that the traffic in question

1083

1 is, in fact, occurring outside the boundaries of the
2 reservation, this Commission is not divested of
3 jurisdiction. We will proceed as we normally do.

4 Again, the granting of the Motion to Stay does
5 not determine that the Tribal Court has jurisdiction. It
6 just merely permits the Tribal Court to address that
7 issue first.

8 Thank you.

9 CHAIRMAN KOLBECK: Thank you, Ms. Cremer.

10 NAT, would you like some rebuttal?

11 MR. SWIER: Just very quickly.

12 Sprint appears to rely on the Cheyenne River
13 case from South Dakota Supreme Court. I would note in
14 that case that the Tribal Exhaustion Doctrine was never
15 confronted by the court in that case. It appears that
16 the litigants in the Cheyenne River case never brought
17 forward the tribal exhaustion issue.

18 So, unfortunately, that case, although relied
19 upon heavily by Sprint, does not appear to provide any
20 guidance when it comes to this specific tribal exhaustion
21 issue.

22 Secondly, it was mentioned that in this case
23 Sprint filed its Complaint first and then NAT soon after
24 filed its Complaint in Tribal Court. I think when it
25 comes to the tribal exhaustion issue the issue is not who

1084

1 runs to the courthouse or in this case to the regulatory
2 agency first. I don't think that has any bearing on the
3 tribal exhaustion analysis.

4 I think what you look at is exactly what NAT and
5 the Commission Staff has indicated in this case, that you
6 look to the fundamental tenets of the Tribal Exhaustion
7 Doctrine. And those fundamental tenets in this case
8 would seem to dictate that the Tribal Court should have
9 the first crack at determining its own jurisdiction.

10 And because of that, again, we feel that the
11 Staff recommendation should be accepted. As the Staff
12 Brief said, granting NAT's Motion for Stay would seem to
13 be the most practical and most pragmatic way to move
14 forward in this case, and we would ask the Commission to
15 do so.

16 CHAIRMAN KOLBECK: Thank you.

17 Commissioner questions.

18 Commissioner Nelson.

19 COMMISSIONER NELSON: I have several. And I'll
20 start with Mr. Swier.

21 Scott, the 47 U.S.C. 152(b) seems to me to be
22 pretty clear that Congress intended this utility to be
23 regulated either by Federal law or by the State. It
24 doesn't make any mention of regulation at the Tribal
25 level.

1085

1 How would you address that?

2 MR. SWIER: I would say this: I think, number
3 one, obviously we're dealing with a unique set of
4 circumstances here. We're dealing with circumstances
5 where the record as so far that's been put in the record
6 is that there are some real questions here as to whether
7 the traffic that's being generated is limited simply to
8 the reservation.

9 So I think in that case -- there's no doubt that
10 this Commission has jurisdiction over intrastate traffic.
11 I agree with that. However, when you look at the unique
12 circumstances here that this matter is being relegated to
13 activities within the sovereign borders of the
14 reservation, I think that makes a difference and makes
15 this unique.

16 I think also, you know, under the Tribal
17 Exhaustion Doctrine, a Federal Court -- let me just use
18 this analogy: When we use tribal exhaustion there's no
19 question that a Federal Court has jurisdiction in various
20 matters. But what the Tribal Exhaustion Doctrine comes
21 down to is whether or not in this case this Commission
22 wants to recognize tribal exhaustion, wants to defer to
23 the sovereignty of the Tribal Court and let the Tribal
24 Court make that initial determination.

25 And I think when you look at the facts here,

1086

1 it's a discretionary decision by this Commission to
2 invoke tribal exhaustion. But when you look at the
3 tenets of tribal exhaustion you look at how that factors
4 into the federal law, I just think that this is a case
5 that clearly, clearly screams for tribal exhaustion.

6 So that's how I think we get to that point from
7 the Federal Communications Act to having this Commission
8 defer to the Tribal Court and at least initially to make
9 this jurisdictional determination.

10 COMMISSIONER NELSON: I would certainly agree
11 with your comment about it being a discretionary decision
12 on our part whether to adopt tribal exhaustion.

13 Would you agree with me that our doing so as a
14 regulatory agency would be breaking new ground?

15 MR. SWIER: I don't think -- well, obviously in
16 South Dakota it would be breaking new ground. And,
17 again, I think that's why this case is so unique in that,
18 number one, I don't think there's any doubt that State
19 Courts and regulatory agencies have this authority.

20 Number two, you may well be breaking new ground.
21 I think that if there would have been any cases like this
22 throughout the country, either myself or Mr. Knudson or
23 Ms. Pollman Rogers would have found them based on the
24 extensive briefing here.

25 So in a way the court would be breaking new

1087

1 ground in terms of regulatory authority. But in terms of
2 invoking the Tribal Exhaustion Doctrine, you'd be
3 following what the great majority of cases throughout the
4 country have found. And that's that the Tribal Court
5 should have the first crack at this jurisdictional
6 decision.

7 COMMISSIONER NELSON: You've talked a lot
8 about -- you know, you mentioned the sovereign borders of
9 the reservation, talked about the fact of the equipment
10 and people and everything else is located within the
11 borders of the reservation, that this is entirely an
12 operation on the reservation.

13 And yet when NAT chose to form their business
14 they formed it as a LLC under the laws of the State of
15 South Dakota. Would that not in itself subject NAT to
16 jurisdiction of this Commission?

17 MR. SWIER: Thank you. I don't think it would,
18 Commissioner Nelson. I think that NAT made the decision
19 to file with the South Dakota Secretary of State's office
20 as an LLC. However, the activities that they're
21 conducting are based on activities within the exterior
22 boundaries of the reservation.

23 So I think simply that the fact that NAT is a
24 South Dakota recognized LLC does not make a difference in
25 whether tribal exhaustion should or should not be

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1 invoked.

2 COMMISSIONER NELSON: Let's move a moment to the
3 ruling of Judge Schreier on December 1. To your
4 knowledge, since that ruling has the Crow Creek Sioux
5 Tribal Court done anything on this case?

6 MR. SWIER: Well, no, it hasn't on the
7 interstate part of it because of Judge Schreier's
8 Decision. I think that the Tribal Court is simply
9 waiting to see what happens with this Commission
10 regarding this particular traffic.

11 But, as you know, the Crow Creek Tribal Court
12 has a fully functioning court system. There's been a
13 judge appointed to hear this case. And would I presume
14 that if tribal exhaustion is invoked, we would proceed
15 just like we would in front of this Commission or any
16 other court.

17 We would obtain a scheduling order. We would
18 get dates, and we'd start moving forward. And that
19 process and those procedures are already in place. It's
20 just a matter of waiting to see what this Commission
21 does.

22 I don't think it's either efficient or from a
23 money perspective it doesn't seem to make any sense to be
24 having both this Commission and the Tribal Court moving
25 along the same lines. I mean, then we're just

1089

1 double-booking ourselves.

2 That's why I think this decision is so
3 important; because if tribal exhaustion is invoked, we go
4 to the Tribal Court and start moving.

5 COMMISSIONER NELSON: Okay. And the last
6 question, I believe, and I don't know if you can answer
7 this question, but you talked about the fact that,
8 obviously, Crow Creek Sioux Tribe has established their
9 judicial branch and is prepared to handle this.

10 Do you know under the Constitution of that
11 Tribe whether there is separation of powers between the
12 judicial branch and the executive and legislative
13 branch?

14 MR. SWIER: I believe that the Constitution does
15 provide for three separate branches. And, in fact, what
16 the Crow Creek Tribe did here is they actually have
17 appointed a judge, Judge B.J. Jones, who is a law
18 professor up University of North Dakota. He has actually
19 been appointed as the judge in this case. So -- and I
20 think the reason for that is the Tribe wanted to make
21 sure that there was not a melding between the various
22 branches.

23 So a judge has been appointed in this case that
24 has no relationships whatsoever with the Crow Creek
25 Tribe. So I think in this case the Tribe has done

1 everything possible to make sure that that line of
2 demarcation between their three branches of Government
3 is, indeed, invoked.

4 COMMISSIONER NELSON: Thank you. Appreciate the
5 answers to those questions. I have one question for
6 Staff, if I might.

7 In examining Judge Schreier's ruling, do you
8 believe that that injunction was limited solely to
9 interstate, or is it a blanket decision?

10 MS. CREMER: At first blush when I looked at it
11 I thought it was more encompassing than it was. As I
12 read it more thoroughly, she made a real point -- the
13 Court made a real point of always saying interstate,
14 interstate and leading me to believe -- and I don't know
15 if the parties are following up or doing anything more --
16 that there is a division between intrastate reservation
17 and intrastate as we think of it.

18 COMMISSIONER NELSON: If I could follow up on
19 that, would you agree that Sprint requested an injunction
20 and an all encompassing injunction?

21 MS. CREMER: You know, I would have to look at
22 exactly what they asked for and how their Briefs rolled
23 out. Sprint would probably, you know, know what they
24 asked for and what they ultimately -- yeah. Without
25 looking more closely, I can't say that for sure.

1 COMMISSIONER NELSON: Thank you. If I could
2 redirect that question -- and this is going to be a
3 really open-ended question, but it appears to me in
4 reading through the Sprint Briefs that you asked for an
5 open-ended, all encompassing injunction.

6 In reading the final Decision, I think there is
7 some question there as to exactly what Judge Schreier
8 meant. Could you address that?

9 MR. KNUDSON: We asked for a complete injunction
10 of all proceedings in the Tribal Court. The Tribal
11 Complaint filed by NAT, as far as sweeping, involved all
12 of the activities, and we asked for the entire
13 proceedings to be enjoined, and that's what the District
14 Court said.

15 MR. SWIER: Commissioner Nelson, if I may --

16 COMMISSIONER NELSON: Let's let Sprint finish,
17 and then I'd love to hear from you.

18 CHAIRMAN KOLBECK: Pull your microphone --
19 Mr. Swier, are you having trouble hearing Sprint?

20 MR. SWIER: I am a little bit. Yes,
21 Mr. Kolbeck.

22 MR. KNUDSON: Quote on page 18 of the Court's
23 Order, "Sprint's Motion for a Preliminary Injunction
24 Docket 20 is granted."

25 And so we received complete relief as requested

1092

1 in our Motion. And so I believe that if this Commission
2 allows or defers to the Tribal Court, it would -- the
3 Tribal Court would be in violation of this injunction.

4 I'd also like to respond to the assertion that
5 B.J. Jones is independent. He was appointed by the
6 Tribal Council. I don't think the Tribal Constitution
7 provides for the kind of separation of powers that we
8 would expect in State Court or in Federal Court.

9 This Judge serves at the pleasure of the Tribal
10 Council. And when he first came on to this case he had
11 questions about his appointment, whether it had been duly
12 authorized. There are other parties in play here over
13 who can serve as a Tribal Court, and that's simply the
14 decision by the Tribal Council.

15 COMMISSIONER NELSON: If I might, one more
16 follow-up question, and I'll ask the same question that I
17 asked of Mr. Swier.

18 Are you aware has the Tribal Court done anything
19 on this issue since December 1?

20 MR. KNUDSON: To my knowledge, it's done
21 nothing.

22 COMMISSIONER NELSON: Thank you. No further
23 questions at this point.

24 CHAIRMAN KOLBECK: Commissioner Hanson. Well,
25 Commissioner Nelson, would you like Mr. Swier -- he tried

1093

1 to jump in quick there.

2 COMMISSIONER NELSON: I'm sorry. Go ahead,
3 Mr. Swier.

4 MR. SWIER: Thank you. I think the Judge's
5 opinion is very clear. It only relates to interstate
6 traffic. In fact, the Federal Court I don't think has
7 the jurisdiction under the Communications Act to make a
8 ruling on any intrastate traffic.

9 That would be the role of this Commission. So
10 to say that that is a broad brush order from
11 Judge Schreier as Commissioner Nelson pointed out, I
12 think that entails a huge question. But, again, I think
13 that was definitely addressed to interstate traffic, and
14 that was clear throughout the Judge's opinion that she
15 was limiting her decision to interstate.

16 And I think that Judge Schreier even recognized
17 that she likely did not even have jurisdiction over intra
18 because that is a local decision, state or, in this case,
19 potentially a Tribal Court decision, as opposed to
20 traffic that traveled over multi-states making it
21 interstate.

22 So when you read that Decision in its totality,
23 I think that she limited that to interstate traffic, and
24 I think that's an extremely reasonable reading of her
25 Decision.

109

1 COMMISSIONER NELSON: That leads me to a
2 follow-up question for Sprint.

3 Did Judge Schreier have any authority over
4 intrastate traffic so far as an injunction is concerned?

5 MR. KNUDSON: I would say that what the District
6 Court had was the power to enjoin the Tribal Court
7 proceedings based on the Complaint NAT filed in Tribal
8 Court, which encompassed interstate traffic, and it also
9 asserted a breach of contract action which was based on
10 the interstate tariff and that the entire Complaint is
11 infused with the assertion that this is a -- an
12 interstate traffic, that the District Court would not be
13 enjoining that intrastate action that we're bringing here
14 before the Commission, but it would prevent the Tribal
15 Court from going forward with anything relating to the
16 Complaint that NAT had filed with the Tribal Court.

17 So I think it didn't parse out the Complaint.
18 It just took it this is so intertwined that it would join
19 the entire action.

20 COMMISSIONER NELSON: If I might, Mr. Chairman,
21 a follow-up question for Mr. Swier.

22 Is there anywhere in that 18-page Decision where
23 Judge Schreier indicates that she feels she doesn't have
24 the authority to enjoin the Court relating to the
25 intrastate traffic?

1095

1 MR. SWIER: Well, other than the fact that her
2 Opinion is replete with references only to interstate and
3 she doesn't make any reference I do not believe in her
4 Decision to her having any jurisdiction or any effect
5 over intra.

6 And she made a very obvious point. I mean, she
7 could have just said intra and interstate traffic, or she
8 just could have said traffic. But her Opinion throughout
9 makes a clear dichotomy that she is dealing with
10 interstate traffic and not intrastate traffic.

11 COMMISSIONER NELSON: Thank you. I appreciate
12 that. I think now that may be all the questions I have.

13 CHAIRMAN KOLBECK: Thank you.
14 Commissioner Hanson.

15 COMMISSIONER HANSON: Thank you, Mr. Chairman.
16 Mr. Swier, I guess it's your day because I think
17 practically all of my questions are going to be directed
18 to you.

19 Sprint argues that Federal doctrine is not
20 binding on State Courts or State agencies. Do you agree
21 or disagree with that?

22 MR. SWIER: Federal doctrine meaning the Tribal
23 Exhaustion Doctrine in this case?

24 COMMISSIONER HANSON: Correct.

25 MR. SWIER: I do not believe -- the Tribal

1096

1 Exhaustion Doctrine is never binding. It's not even
2 binding on the Federal Courts. It is always
3 discretionary with the Federal Court.

4 And through an analogy then, as I indicated
5 before, I don't think that the Tribal Exhaustion Doctrine
6 is mandatory in this case in front of the Commission.
7 Just like in Federal Court this Commission has the
8 discretion to either invoke or not invoke the Doctrine.

9 But as you can see from the Federal Court
10 Decisions, when Federal Courts have confronted this issue
11 they have given great, great deference, almost
12 unanimously in the cases, to invoking the Doctrine.

13 So, again, I think it's discretionary with the
14 Commission but the federal cases that have interpreted
15 this Doctrine, if you're going to follow those, I don't
16 think there's any doubt that the Doctrine should be
17 invoked.

18 So it's discretionary both in the Federal Court
19 and discretionary with the State Court and, in this case,
20 the State regulatory agency.

21 COMMISSIONER HANSON: You stated that when the
22 PUC will hear this Docket and throughout your discussion.
23 You agree that the South Dakota PUC has jurisdiction to
24 rule on this Docket; correct?

25 MR. SWIER: I agree that the court -- that the

1097

1 Commission obviously has jurisdiction to rule on the
2 tribal exhaustion issue, yes. And in all the Federal
3 Court cases that have interpreted the Tribal Exhaustion
4 Doctrine the Federal Court realizes it has jurisdiction.
5 In all these cases the Federal Court has said, yes, we do
6 have jurisdiction. However, we are going to recognize
7 this Exhaustion Doctrine, and it is important enough for
8 us to recognize the Tribal Court sovereignty and to let
9 the Tribal Court make the initial determination on its
10 jurisdiction.

11 If the Tribal Court finds that it doesn't have
12 jurisdiction, then this case comes back to the Public
13 Utilities Commission.

14 So without a doubt one way or another, this
15 matter, I don't think there's any doubt, is going to come
16 back to this Commission. But the Tribal Exhaustion
17 Doctrine sets out a structure that when we're dealing
18 with these type of issues the Tribal Court should have
19 the first crack at it.

20 So, again, I see it as totally analogous to how
21 the Federal Courts handle this Exhaustion Doctrine.

22 COMMISSIONER HANSON: Well, I need a
23 clarification then. Because during your last statement
24 just a few sentences ago it sounded as if you felt that
25 not only the Tribal Court should be the first court but

1 that it would possibly mean they'd be the last court.
2 Would there --

3 MR. SWIER: How the Tribal Exhaustion Doctrine
4 works is if the court would invoke the doctrine and the
5 Tribal Court would first hear this jurisdictional issue,
6 the Tribal Court would then make its jurisdictional
7 decision. If the Tribal Court finds that it has
8 jurisdiction, then the merits of the action would be
9 heard in Tribal Court.

10 After that would happen, then Sprint would have
11 the opportunity to appeal that jurisdictional
12 determination back to this Commission. And the
13 Commission then could find one of two things: Number
14 one, that the Tribal Court was correct and that it does
15 have jurisdiction. Or, number two, the Commission could
16 find that the Tribal Court was wrong in assuming
17 jurisdiction and that the merits of the case should be
18 heard in front of the PUC.

19 So procedurally it's a little bit cumbersome,
20 but it's the way that this has been done since the
21 Federal Courts first invoked the Doctrine.

22 COMMISSIONER HANSON: I appreciate your answer.
23 Unfortunately, it seems like every time you answer a
24 question it causes me to think that I need to pursue
25 another question in regards to that. And if you would

1 please wait until I finish asking the question before you
2 answer it, I would appreciate that as well.

3 The Interveners disagreed with Staff on the
4 issue of tribal exhaustion. The Interveners argue that
5 the federal rule of tribal exhaustion is a federal rule
6 that's not binding on State Courts or State agencies. It
7 sounds as if you agree with that position from what
8 you've stated.

9 During the process here no party has cited a
10 single case in reference to the State of South Dakota
11 adopting the Doctrine of Tribal Exhaustion.

12 Are you aware of any?

13 MR. SWIER: No. May I answer, Mr. Commissioner?

14 COMMISSIONER HANSON: Yes, you may.

15 MR. SWIER: No. I am not aware of the
16 South Dakota Supreme Court adopting Tribal Exhaustion,
17 based on the fact that it's obviously never been brought
18 before the Supreme Court before. So, unfortunately, we
19 don't have any authority or any precedent regarding
20 whether or not the Supreme Court would or would not adopt
21 the Doctrine.

22 COMMISSIONER HANSON: You said that in your
23 earlier answer that if this once went to the Tribal Court
24 and then came back, that we could make one of two
25 rulings, and one of those would be that we would -- we

1 could rule that the Tribe does not have jurisdiction.

2 Why would we go through the process at this time
3 of -- well, this entire process and then ask the Tribe
4 basically if we were to stay this -- are we not in that
5 respect implying that we believe the Tribal Court does
6 have jurisdiction?

7 MR. SWIER: Mr. Commissioner, no, I don't
8 believe that at all. I guess when, again, you look at
9 the Exhaustion Doctrine and the principles behind it,
10 even though this process may seem cumbersome because
11 we're going to deal in two separate forums, that is the
12 way the Exhaustion Doctrine is set forth.

13 So just because this court would invoke the
14 Exhaustion Doctrine does not mean that -- excuse me, that
15 this Commission would never hear the case again. It's
16 just recognizing the policy reasons behind the Doctrine
17 and recognizing the importance and the sovereignty of the
18 Tribal Court.

19 COMMISSIONER HANSON: Thank you. When was this
20 originally filed with the Tribal Court?

21 MR. SWIER: This was filed -- it was filed on
22 July 7 of 2010, which would have been approximately two
23 months after Sprint's Complaint was filed with this
24 Commission.

25 COMMISSIONER HANSON: Thank you. And has any

1101

1 activity taken place since July 7 with the Tribal Court?

2 MR. SWIER: Yes. We have had a conference with
3 Judge Jones, and Judge Jones' thought was that, number
4 one, he was going to allow the Federal Court to first --
5 to first determine the interstate issues. And, I think,
6 again, that his thought was he was going to let this
7 Commission see if it was going to invoke the Tribal
8 Exhaustion Doctrine.

9 And because this matter has been going on for
10 several months, you know, we obviously do not have a
11 decision from this Commission yet. But, again, it's my
12 understanding that if exhaustion is invoked, that we do
13 have a judge on the case, and we'd be ready to move
14 forward just as we would before the Commission.

15 COMMISSIONER HANSON: And I appreciate you using
16 the word "cumbersome." I wrote that down in my notes as
17 I was going through this. I was going to ask a question
18 on that.

19 Would the South Dakota PUC actions prohibit the
20 Tribe from pursuing their own Docket -- from you pursuing
21 your own Docket in Tribal Court?

22 And I recognize the nuances and the challenges
23 of that, but just curious.

24 MR. SWIER: One of the tenets behind the
25 Exhaustion Doctrine, of course, is so we don't have

1102

1 multiple proceedings going on. For both parties I think
2 when you look at it from a money perspective and from an
3 efficiency perspective, it just wouldn't seem to make any
4 sense to have both the Tribal Court and this Commission's
5 case going on simultaneously.

6 And when you look at the Exhaustion Doctrine
7 cases, that's what the Federal Courts have said. This is
8 done to make the process actually less cumbersome so we
9 don't have multiple cases going on in different venues.

10 COMMISSIONER HANSON: Does it seem odd to you
11 that a Tribal Court would go through a process on a
12 Docket regarding a telecommunications process that
13 involves switching and calls that are off the
14 reservation?

15 MR. SWIER: I think that when you're dealing
16 with interstate, Judge Schreier, of course, has already
17 held that they don't have jurisdiction over that. But
18 when you look at the unique facts in this case where
19 everything is taking place on the reservation, that I
20 don't find it unique at all that this argument is before
21 you that these intrastate matters should first be decided
22 by the Tribe. I don't find that strange or out of the
23 ordinary.

24 COMMISSIONER HANSON: Do you disagree with
25 Sprint's claim that analysis of the actual traffic

1103

1 process shows that virtually all calls to NAT's exchange
2 do not terminate to an end user on the reservation?

3 MR. SWIER: I think that's a factual question
4 that is more toward the merits of the case. I think
5 there is a dispute there. And that's why we're not
6 arguing the merits of the case. We're simply arguing the
7 jurisdiction should be determined by the Tribal Court
8 first.

9 So there are factual issues there that are going
10 to have to be fleshed out. We just feel the proper venue
11 to flesh them out is Tribal Court, at least at this
12 point.

13 COMMISSIONER HANSON: One moment, please. I
14 believe I -- I believe you've answered all of my
15 questions for me.

16 Thank you, Mr. Chairman.

17 Thank you, Mr. Swier.

18 MR. SWIER: Thank you.

19 CHAIRMAN KOLBECK: Excuse me. This is
20 Commissioner Kolbeck. Most of my questions go towards
21 the technical nature of it. And I agree with Mr. Swier,
22 though, however, that those are towards the facts of the
23 case. They're not necessarily whether the Tribal
24 Doctrine applies here.

25 However, Mr. Swier, could you shed some light on

1 where those calls are terminating? If all of this
2 traffic is, in fact, tribal traffic, and you say that all
3 the people -- all of the equipment and everything is on
4 tribal land, can you give me some specifics as to what
5 is -- do you have a DMS-100 there? Do you have a router?
6 What do you have on tribal land?

7 MR. SWIER: There is -- there are obviously
8 hundreds of broadband internet setups. There is a
9 conferencing bridge that allows those calls to terminate
10 on the reservation. There is an internet library on the
11 reservation. I don't have my list here. But there is
12 substantial infrastructure and equipment that is on the
13 reservation. And I don't think there's any factual
14 dispute as to that.

15 There's also been employment created through NAT
16 on the reservation. NAT -- or, excuse me, tribal members
17 are using the equipment on the reservation for economic
18 development matters. Things like that.

19 So when you look at -- and, again, I don't think
20 it's disputed that the equipment is on the reservation,
21 within the exterior boundaries. I can't tell you all the
22 details of the equipment because I'm not an engineer, but
23 I think that fact is not disputed.

24 CHAIRMAN KOLBECK: Okay. Now the other -- just
25 one other thing. And, like I said, my questions --

[1105

1 Commissioner Nelson and Commissioner Hanson have done a
2 great job of, and mine go towards the technicality of it
3 so I think I will wrestle with that in my own mind.

4 Commissioner Nelson, more questions?

5 COMMISSIONER NELSON: I do have one more
6 question for Mr. Swier. You've argued and in answering
7 one of Commissioner Hanson's questions you talked about
8 the importance and the sovereignty of the Tribal Court.
9 And yet in this proceeding we've got the Crow Creek Sioux
10 Tribal Utility Authority as an Intervener, and they're
11 not even here today to argue the importance of that
12 themselves.

13 Can you shed any light on that?

14 MR. SWIER: No. I know that their attorney, the
15 Notice of Appearance was Ms. Roberts, and I think she has
16 now taken a position with the new Congressman from
17 North Dakota. So as far as the Tribal Utility Authority,
18 I would rely on their previous submissions.

19 But, obviously, I don't represent the Utility
20 Authority. I don't know their thoughts here. So it
21 would be speculation on my part, other than what's
22 already in the record as to either why or why they might
23 not be there. I'm sorry I can't give you a better answer
24 than that.

25 COMMISSIONER NELSON: Thank you.

1 MR. KNUDSON: Excuse me. I feel there have been
2 some factual statements that need to be responded to.

3 CHAIRMAN KOLBECK: Sure. Can we get you a
4 little closer to the microphone?

5 MR. KNUDSON: Yes. Sorry. First of all, I
6 think it needs to be clearly understood that Strate v.
7 A-1 Construction enunciates an exception to the
8 Exhaustion rule that falls directly into this case. And
9 that is in the Footnote 14 that we reference. And it
10 says, Where there is no grant of jurisdiction, exhaustion
11 falls away because it only causes delay.

12 What you are hearing today is that it will not
13 be more efficient to send this to Tribal Court and then
14 back to the Commission because there is no grant of
15 jurisdiction. Congress in 152(b) did not grant the
16 Tribal Court jurisdiction. No act of this State
17 Legislature has done so either.

18 I would also like to point out that there is
19 intrastate traffic here. Sprint was billed -- and I
20 bring you back to Reiman Exhibit 9. Usage charges,
21 intrastate, \$181.02. Now there are other IXC's that are
22 also being billed for intrastate traffic. What is this
23 traffic?

24 It is not one reservation member calling another
25 reservation member. It has not been disputed by NAT at

1107

1 any other proceeding that 99.98 percent of the traffic
2 originates from outside their reservation. And why is
3 that the case? Because what is on the reservation is a
4 piece of equipment which is conference bridge equipment.
5 It is operated by a company -- the fee conferencing
6 service is operated by a company called Free Conferencing
7 Corporation out of Long Beach, California.

8 Now in 2010 we have learned in the federal
9 litigation that NAT received revenues of over
10 \$1.1 million from this conference bridge terminating
11 access charges that IXCs actually paid. 75 percent of
12 that revenue went back to Free Conferencing Corporation.
13 This is the Iowa Utilities Board Decision in Farmers.

14 You have what they say is a customer on the
15 reservation, but NAT is paying that customer for the
16 business. That's not a typical customer relationship.

17 These calls are coming in from all over the
18 switched telephone network outside the reservation. Now
19 they have the equipment on the reservation, but they were
20 created as a South Dakota LLC. Tom Reiman was the
21 president. He lives in Sioux Falls. He's no longer the
22 president. Somebody associated with WiMAX -- WideVoice,
23 excuse me, in Long Beach is now running NAT.

24 NAT's books and records were first kept in a
25 bank in Sioux Falls. Now they've migrated all the

1108

1 bookkeeping functions, all the financial controls, to
2 Long Beach where NAT essentially offices within the
3 offices of Free Conferencing Corporation.

4 So to talk about all the tribal connections here
5 is to ignore that the nerve center. The principal place
6 of business of NAT is now in Long Beach, California.

7 So I think it's not -- you have to have a full
8 record before the Commission to make an informed
9 decision.

10 Thirdly, if the Federal Court has enjoined the
11 tribal proceeding and the Complaint that NAT has filed
12 there, there really isn't pending before the Tribal Court
13 a pure, simple Complaint over the violation of failure to
14 pay for intrastate charges.

15 And so we've got the only real action going here
16 and, we've had this pending for over 10 months. And
17 we're entitled -- we expect the Commission to exercise
18 the authority of the State of South Dakota to regulate
19 intrastate traffic. It has been given that power by
20 Congress. The Legislature has chartered this Commission
21 to do so.

22 And, finally, I'd like to point out, and I
23 wasn't at the scheduling conference with B.J. Jones but
24 Mr. Tobin was, and I don't believe that Mr. Jones was
25 going to go any further forward and Mr. Tobin can give

1109

1 his recollection of what Mr. Jones was willing to do on
2 that day, just to set the record straight.

3 MR. TOBIN: Yes. In response to Mr. Swier's
4 position, our notes indicate -- and by "ours" I mean
5 Mr. Whiting took the notes, and I was present in the
6 room. It was a telephone conference, which is our only
7 connection with the Tribal Court process to date in this
8 case.

9 Judge Jones indicated he had a question
10 regarding whether or not this whole matter had been
11 preempted. I don't recall any reference with respect to
12 exhaustion or anything else that Mr. Swier mentioned
13 earlier.

14 But as a result of the Judge's question
15 regarding preemption, that Judge set up a tentative
16 briefing schedule, which is as follows: On October 20 he
17 suggested the Tribe would intervene. We never did hear
18 from the Tribe. On November 12 the NAT and the Tribe
19 should file their final brief on preemption. On
20 November 26 Sprint was going to be allowed to file a
21 reply brief. And on December 14 if certain facts
22 couldn't be stipulated, then we could then have a hearing
23 sometime in December.

24 None of that ever took place. No one met a
25 single deadline, and at some point in time it was agreed

1 that since the Federal Court had went forward, that we
2 shouldn't do anything more until after we had heard from
3 the Federal Court, which we did subsequently. And we
4 still haven't heard anything from Judge Jones or from the
5 Tribal Court.

6 CHAIRMAN KOLBECK: Thank you. Okay. Any
7 other -- does that stem any questions?

8 All right. So no other questions from
9 Commissioners?

10 Is there any action or discussion?

11 I can break that egg there. This is a lot of
12 information, and it's a very, very big decision. We
13 don't do this very often, but I would like to take it
14 under advisement. I'm not too keen on making a decision
15 today, but I'd like my fellow Commissioners' opinions on
16 that.

17 COMMISSIONER HANSON: Thank you for starting to
18 make the omelet. I appreciate that.

19 From my standpoint, I'm prepared to make a
20 Motion today, and I'll just state what I -- I won't make
21 the Motion but just for conversation at this point.

22 I am prepared to make a Motion that the
23 Commission not grant the Motion to Stay. I, frankly,
24 through all of the -- and you're correct. We've had a
25 lot of information here. And it may make good sense for

1111

1 each of us to retire and have an opportunity to digest
2 that information.

3 Although I think we've had a lot of information
4 prior to this as well. I feel I would definitely defer
5 to the Doctrine of Tribal Court Exhaustion if I believed
6 that this was very much a -- in the jurisdiction of the
7 Tribal Court and not in the jurisdiction of the PUC.

8 I don't think there's any doubt that
9 South Dakota Public Utilities Commission has jurisdiction
10 over this. Certainly allowing -- showing deference and
11 allowing the Tribal Court to go through the process may
12 be the gentlemanly thing to do.

13 At the same time I agree with Mr. Swier's
14 statement that it's cumbersome and that it's unnecessary.
15 And from the standpoint of due process, I think that we
16 should not delay the due process here.

17 This is an ongoing situation that needs to be
18 clarified, that we need to rule on, and it appears
19 that -- well, it's extremely obvious that in a situation
20 where all of the traffic were taking place on the
21 reservation, that definitely the Tribal Court should go
22 through that process.

23 At the same time, this is a NAT trafficking
24 system that involves citizens across the State of South
25 Dakota, citizens across the nation. Sprint has basically

1 proven because there's been no challenge from the other
2 parties that there is a tremendous amount of financial
3 and processing that is off the reservation. This is more
4 of a customer relationship than a tribal authority
5 operating a telecommunications system. And for those
6 reasons I'm quite willing to make that Motion that I said
7 to you earlier.

8 Mr. Chairman, are you -- I will defer to the
9 Chair on the direction that you wish to take.

10 COMMISSIONER NELSON: Well, in that case I do
11 have something to say. I would move that we deny NAT's
12 Motion to Stay.

13 CHAIRMAN KOLBECK: All right. The Motion has
14 been made. I know what I'm feeling and if the numbers
15 that we had here today are true, which I believe they
16 are, but if a substantial amount of traffic is flowing
17 through there, we know that it's not all
18 intra-reservation.

19 However, I understand that it is cumbersome. I
20 understand that the Tribe has given thought to this. I
21 just don't -- I'm going to have to make the call here.

22 COMMISSIONER NELSON: You know, I certainly
23 agree this is an important decision. This is -- you
24 know, jurisdictional issues are not something that I
25 suspect this Commission deals with very frequently.

[1113

1 But by the same token, this has been -- this
2 Docket's been open for 10 months, and the progress has
3 been slow. And I do not want to see it slowed up any
4 further by us delaying on this. I'm certainly prepared
5 to make that decision today.

6 And as I look at it, looking at the federal law,
7 47 152(b), it's clear to me that Congress gave certain
8 authority to the Federal Government and certain authority
9 to State Government. No mention whatsoever of Tribal
10 jurisdiction.

11 And I appreciate Mr. Swier's emphasis on the
12 fact that our granting of Tribal Exhaustion is a
13 discretionary option that we have. And I appreciate
14 that. But, you know, Sprint's comments about it's
15 discretionary but you've got to have the jurisdiction to
16 do it, that makes sense to me. And at this point I'm not
17 convinced under the federal law that we have the
18 jurisdiction to do it. And for that reason I'm prepared
19 to move ahead with this Motion at this time.

20 CHAIRMAN KOLBECK: All right. And those are
21 very good arguments. And I've been leaning that way to
22 vote yes on your Motion. I just wanted to make sure that
23 I was giving full deference to the Tribe. And,
24 obviously, what's going on is a big -- it's a national
25 problem. It's something we have to deal with.

1114

1 If there wasn't the volume of traffic, as
2 Commissioner Hanson had alluded to, obviously we'd be
3 looking that this could go back to the Tribe and think
4 maybe it's just intra-tribe traffic.

5 But since it's a larger volume it has to be
6 coming from somewhere else, which is outside of the
7 Tribe, which is our jurisdiction. So we'll call the
8 vote.

9 Commissioner Nelson.

10 COMMISSIONER NELSON: Aye.

11 CHAIRMAN KOLBECK: Commissioner Hanson.

12 COMMISSIONER HANSON: Aye.

13 CHAIRMAN KOLBECK: And Commissioner Kolbeck
14 votes aye also.

15 Thank you.

16 We'll continue on to the Motion to Dismiss.
17 Shall the Commission grant Native American's Motion to
18 Dismiss?

19 Native American Telephone, why don't you
20 continue on.

21 MR. SWIER: Thank you. Mr. Chair, members of
22 the Commission, I think we're just going to rely on our
23 Brief here. I think that the Staff Brief is correct in
24 that it would be premature at this point based on the
25 factual record to go any further with this Motion to

1115

1 Dismiss.

2 I think that when you look at the record, this
3 Motion should be deferred and a decision should not be
4 made. Now that we are going to be apparently in front of
5 this Commission, that I think the Motion to Dismiss as
6 the Staff Brief said is premature and that we should move
7 forward with discovery, and when discovery is completed
8 NAT can move forward with its Motion to Dismiss and this
9 Commission can have more information on which to base its
10 decision.

11 COMMISSIONER HANSON: Mr. Chairman, may I make a
12 Motion?

13 CHAIRMAN KOLBECK: Yes.

14 COMMISSIONER HANSON: Mr. Chairman, in lieu of
15 the fact that NAT has stated that they would like to
16 defer the Motion to Dismiss, I would simply ask -- I'm
17 assuming that they have the right to do that and take it
18 off the table.

19 Would it be appropriate to simply ask the other
20 parties if they're opposed to that, if they want to argue
21 that and just have the Motion?

22 MR. KNUDSON: For Sprint I have one question,
23 which is really directed at Mr. Swier, which is is the
24 issue whether the Commission has jurisdiction of the
25 question of whether there is any intrastate traffic?

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1 Because, otherwise, I think his challenge to the
2 Commission's jurisdiction, and if you go to his Brief, is
3 it says, "The Motion to Dismiss must be granted because
4 the Commission does not have jurisdiction" -- missing
5 word here "over NAT's activities on the reservation."
6 That's on page 42 of its Brief.

7 But actually if, in fact, there is intrastate
8 traffic, which would be calls from one South Dakota
9 resident outside the reservation to another person,
10 either nonmember of the reservation or someone else
11 that's not on the reservation but because of the
12 conferencing bridge equipment somehow those calls get
13 connected to each other on the reservation, that's
14 activity that I think is squarely within the Commission's
15 jurisdiction to regulate. And I don't think there's any
16 question that --

17 COMMISSIONER HANSON: Thank you, Mr. Knudson.
18 The reason I ask is because generally we give deference
19 to someone who's made a Motion if they wish to withdraw
20 it or if they wish to defer it.

21 So I was just asking the Chair if that's what
22 he wishes to do, rather than going through a hour or two
23 replete of arguments just to give deference to the
24 party.

25 MR. KNUDSON: Wouldn't intend to draw on the

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1 action that long, Your Honor -- or Mr. Commissioner.

2 CHAIRMAN KOLBECK: How about Crow Creek Sioux
3 Tribe Utility Authority? They're an Intervener. Would
4 they like to comment?

5 Hearing nothing, SDTA, Midstate, would you like
6 to comment? AT&T?

7 No. Okay.

8 Rolayne would that be a nonaction or a Motion to
9 Defer?

10 MS. AILTS WIEST: I think it might be better to
11 actually have a Motion to Defer it.

12 CHAIRMAN KOLBECK: All right. Anyone else
13 wishing to comment?

14 Mr. Swier, any further comments on it?

15 MR. SWIER: No further comments. That is what
16 we would ask. We've also in our Brief made an argument
17 under SDCL 49-13-1.1, which our argument is that it
18 prohibits Sprint from simultaneously pursuing its claim
19 against NAT before this Commission and the Federal
20 Court.

21 Does the Commission want to take that particular
22 matter up, or will that not be considered today?

23 CHAIRMAN KOLBECK: I would answer no. But after
24 we've heard all of our comments, I'm going to defer to
25 Staff and then maybe Ms. Wiest.

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1 MR. SWIER: You bet. Otherwise, we have no
2 objection to the Commission making a Motion to simply
3 defer NAT's Motion to Dismiss.

4 CHAIRMAN KOLBECK: Okay. Thank you. Staff.
5 Would you like to comment on the Motion to Defer?

6 MS. CREMER: No. Staff does not have any
7 comment. Thank you.

8 CHAIRMAN KOLBECK: All right. Well, we have a
9 Motion to Defer. I think we're all in agreement. That's
10 probably the best course of action at this point. So
11 I'll put it up for vote.

12 Commissioner Nelson.

13 COMMISSIONER HANSON: I don't know that a Motion
14 was actually made. I didn't actually make a Motion.

15 CHAIRMAN KOLBECK: I thought you did. I'm
16 sorry.

17 COMMISSIONER HANSON: I was asking if you needed
18 one. I don't think I made a Motion.

19 CHAIRMAN KOLBECK: We'll make it clear.

20 COMMISSIONER HANSON: I move that the Commission
21 defer NAT's Motion to Dismiss.

22 CHAIRMAN KOLBECK: All right. Now we do for
23 sure have a Motion.

24 Any Commissioner discussion?

25 Hearing none, Commissioner Nelson.

1119

1 COMMISSIONER NELSON: Aye.
2 CHAIRMAN KOLBECK: Commissioner Hanson.
3 COMMISSIONER HANSON: Aye.
4 CHAIRMAN KOLBECK: And Commissioner Kolbeck
5 votes aye also.

6 (The proceeding concluded at 10:54 a.m.)
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STATE OF SOUTH DAKOTA)

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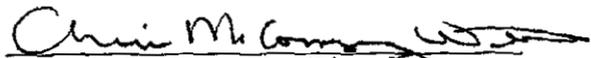
CERTIFICATE

COUNTY OF SULLY)

I, CHERI MCCOMSEY WITTLER, a Registered Professional Reporter, Certified Realtime Reporter and Notary Public in and for the State of South Dakota:

DO HEREBY CERTIFY that as the duly-appointed shorthand reporter, I took in shorthand the proceedings had in the above-entitled matter on the 5th day of April, 2011, and that the attached is a true and correct transcription of the proceedings so taken.

Dated at Onida, South Dakota this 14th day of April, 2011.



Cheri McComsey Wittler
Notary Public and
Registered Professional Reporter
Certified Realtime Reporter

Q

Q

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\$	7	agencies [6] - 4:19, 6:24, 11:20, 22:19, 31:20, 35:6	applies [3] - 11:7, 16:23, 39:24	Avenue [1] - 2:3
\$181.02 [1] - 42:21	7 [2] - 36:22, 37:1 75 [1] - 43:11	agency [6] - 6:15, 11:22, 11:25, 20:2, 22:14, 32:20	apply [3] - 11:19, 14:3, 16:24	aware [3] - 26:18, 35:12, 35:15
1	9	ago [1] - 33:24	applying [1] - 10:20	Axthelm [1] - 1:16
1 [2] - 24:3, 28:19	9 [2] - 10:23, 42:20	agree [12] - 16:22, 21:11, 22:10, 22:13, 26:19, 31:20, 32:23, 32:25, 35:7, 39:21, 47:13, 48:23	appointed [6] - 24:13, 25:17, 25:19, 25:23, 28:5, 56:8	aye [6] - 50:10, 50:12, 50:14, 55:1, 55:3, 55:5
1.1 [2] - 10:19, 43:10	99.98 [1] - 43:1	agreed [1] - 45:25	appointment [1] - 28:11	B
10 [3] - 9:15, 44:16, 49:2	9:30 [1] - 2:5	agreement [1] - 54:9	appreciate [8] - 26:4, 31:11, 34:22, 35:2, 37:15, 46:18, 49:11, 49:13	B.J. [3] - 25:17, 28:5, 44:23
10:54 [1] - 55:6	A	ahead [2] - 29:2, 49:19	approach [1] - 9:15	bank [1] - 43:25
11 [1] - 9:15	A-1 [2] - 9:8, 42:7	Ailts [1] - 1:13	appropriate [2] - 3:24, 5:19	base [1] - 51:9
12 [1] - 45:18	a.m. [2] - 2:5, 55:6	AILTS [1] - 53:10	April [4] - 1:8, 2:4, 56:10, 56:14	based [8] - 8:2, 8:22, 22:23, 23:21, 30:7, 30:9, 35:17, 50:24
14 [2] - 42:9, 45:21	above-entitled [2] - 2:2, 56:10	allow [1] - 37:4	area [1] - 18:21	basic [1] - 4:25
14th [1] - 56:13	absence [1] - 9:9	allowed [1] - 45:20	argue [3] - 35:4, 41:11, 51:20	basis [1] - 12:19
152 [b] [5] - 10:1, 15:4, 20:21, 42:15, 49:7	absent [1] - 14:25	allowing [4] - 4:5, 10:4, 47:10, 47:11	argued [1] - 41:6	Beach [4] - 43:7, 43:23, 44:2, 44:6
18 [1] - 27:22	accept [2] - 7:25, 8:4	allows [2] - 28:2, 40:9	argues [1] - 31:19	bearing [1] - 20:2
18-page [1] - 30:22	accepted [1] - 20:11	Alltel [1] - 14:19	arguing [4] - 3:23, 3:25, 39:6	becomes [1] - 18:3
1995 [1] - 6:19	access [4] - 4:25, 5:22, 10:16, 43:11	alluded [1] - 50:2	argument [4] - 15:12, 38:20, 53:16, 53:17	BEFORE [1] - 1:10
1997 [2] - 5:3, 6:18	act [6] - 11:10, 11:16, 12:2, 12:21, 14:5, 42:16	almost [3] - 9:15, 16:2, 32:11	arguments [5] - 3:14, 3:15, 18:3, 49:21, 52:23	behalf [1] - 15:21
2	Act [5] - 8:24, 14:18, 14:20, 22:7, 29:7	American [7] - 1:19, 3:3, 3:6, 3:8, 4:2, 4:8, 50:19	arises [1] - 11:10	behind [3] - 36:9, 36:16, 37:24
20 [2] - 27:24, 45:16	action [11] - 14:12, 14:13, 30:9, 30:13, 30:19, 34:8, 44:15, 46:10, 53:1, 54:10	AMERICAN [1] - 1:5	Arizona [1] - 6:18	believes [2] - 17:5, 17:6
2008 [2] - 5:7, 5:10	actions [2] - 7:3, 37:19	American's [1] - 50:17	articulated [2] - 14:24, 15:24	best [1] - 54:10
2009 [1] - 5:14	activities [5] - 21:13, 23:20, 23:21, 27:12, 52:5	amount [2] - 48:2, 48:16	asserted [1] - 30:9	bet [1] - 54:1
2010 [3] - 5:21, 36:22, 43:8	activity [2] - 37:1, 52:14	amounts [1] - 13:8	asserts [1] - 10:17	better [2] - 41:23, 53:10
2011 [4] - 1:8, 2:4, 56:11, 56:14	actual [1] - 38:25	analogous [1] - 33:20	associated [1] - 43:22	between [5] - 10:2, 25:11, 25:21, 26:2, 26:16
207 [2] - 8:24, 14:14	add [1] - 9:18	analogy [3] - 6:24, 21:18, 32:4	assuming [2] - 34:16, 51:17	big [2] - 46:12, 49:24
26 [1] - 45:20	address [4] - 7:20, 19:6, 21:1, 27:8	analysis [3] - 16:6, 20:3, 38:25	AT&T [2] - 16:14, 53:6	bill [1] - 11:3
4	addressed [2] - 12:5, 29:13	Anderson [1] - 14:18	attached [1] - 56:11	billed [4] - 10:15, 10:22, 42:19, 42:22
413 [1] - 2:3	adjudicatory [1] - 7:8	answer [10] - 17:22, 25:6, 34:22, 34:23, 35:2, 35:13, 35:23, 41:23, 53:23	attempting [1] - 11:3	billing [1] - 10:11
42 [1] - 52:6	Administrative [1] - 16:5	answered [1] - 39:14	attention [1] - 9:7	binding [4] - 31:20, 32:1, 32:2, 35:6
47 [6] - 8:24, 10:1, 14:14, 15:4, 20:21, 49:7	admitted [1] - 13:21	answering [1] - 41:6	attorney [1] - 41:14	bit [2] - 27:20, 34:19
47-31-3 [1] - 10:8	adopt [2] - 22:12, 35:20	answers [1] - 26:5	authority [16] - 4:17, 5:11, 7:7, 7:8, 10:9, 12:21, 15:5, 22:19, 23:1, 30:3, 30:24, 35:19, 44:18, 48:4, 49:8	blanket [1] - 26:9
49-13-1.1 [1] - 53:17	adopting [3] - 12:1, 35:11, 35:16	appeal [1] - 34:11	Authority [9] - 5:4, 5:7, 5:10, 13:16, 15:15, 41:10, 41:17, 41:20, 53:3	blush [1] - 26:10
5	advisement [1] - 46:14	appear [3] - 4:5, 8:18, 19:19	Authority's [1] - 7:6	board [1] - 43:13
5 [1] - 1:8	AGAINST [1] - 1:4	appearance [1] - 41:15	authorized [1] - 28:12	Bob [1] - 1:15
500 [1] - 2:3		APPEARANCES [1] - 1:17		booking [1] - 25:1
5th [2] - 2:4, 56:10		appearing [1] - 15:21		bookkeeping [1] - 44:1
6		applicable [2] - 11:17, 11:18		books [1] - 43:24
6 [1] - 15:24		application [1] - 6:9		borders [3] - 21:13, 23:8, 23:11
		applied [4] - 6:13, 9:4, 13:15, 16:20		boundaries [9] - 5:2, 5:5, 7:4, 13:12, 17:13, 17:17, 19:1, 23:22, 40:21
				Bowen [1] - 6:18

branch [3] - 25:9, 25:12, 25:13
 branches [3] - 25:15, 25:22, 26:2
 breach [1] - 30:9
 break [1] - 46:11
 breaking [4] - 22:14, 22:16, 22:20, 22:25
 bridge [4] - 40:9, 43:4, 43:10, 52:12
 brief [16] - 8:1, 8:6, 14:8, 15:23, 15:24, 17:2, 17:3, 20:12, 45:19, 45:21, 50:23, 51:6, 52:2, 52:6, 53:16
 briefed [2] - 8:7, 16:18
 briefing [2] - 22:24, 45:16
 briefly [1] - 4:22
 briefs [3] - 12:7, 26:22, 27:4
 Briggs [1] - 8:14
 bring [1] - 42:20
 bringing [1] - 30:13
 broad [1] - 29:10
 broadband [1] - 40:8
 brought [3] - 9:6, 19:16, 35:17
 brush [1] - 29:10
 Building [1] - 2:3
 business [3] - 23:13, 43:16, 44:6
 businesses [1] - 13:17
 BY [1] - 1:4

C

California [2] - 43:7, 44:6
 cannot [1] - 6:3
 Capitol [2] - 2:2, 2:3
 carriers [1] - 10:25
 case [57] - 4:9, 4:19, 6:9, 6:14, 6:17, 6:19, 7:1, 7:15, 7:17, 7:22, 8:18, 12:6, 12:13, 14:18, 16:20, 18:23, 16:24, 18:7, 19:13, 19:14, 19:15, 19:16, 19:18, 19:22, 20:1, 20:5, 20:7, 20:14, 21:9, 21:21, 22:4, 22:17, 24:5, 24:13, 25:19, 25:23, 26:25, 28:10, 29:18, 31:23, 32:6, 32:19, 33:12, 34:17, 35:10, 36:15,

37:13, 38:5, 38:18, 39:4, 39:6, 39:23, 42:8, 43:3, 45:8, 48:10
 cases [17] - 6:1, 6:16, 6:21, 9:5, 9:7, 11:21, 14:17, 14:19, 22:21, 23:3, 32:12, 32:14, 33:3, 33:5, 38:7, 38:9
 causes [2] - 34:24, 42:11
 center [1] - 44:5
 certain [4] - 12:8, 45:21, 49:7, 49:8
 certainly [4] - 22:10, 47:10, 48:22, 49:4
 CERTIFICATE [1] - 56:2
 certificate [1] - 13:15
 Certified [2] - 56:6, 56:19
 CERTIFY [1] - 56:8
 chair [8] - 4:4, 6:8, 7:16, 8:5, 15:19, 48:9, 50:21, 52:21
 CHAIRMAN [31] - 1:10, 1:11, 3:1, 3:23, 8:10, 15:13, 16:12, 19:9, 20:16, 27:18, 28:24, 31:13, 39:19, 40:24, 42:3, 46:6, 48:13, 49:20, 50:11, 50:13, 51:13, 53:2, 53:12, 53:23, 54:4, 54:8, 54:15, 54:19, 54:22, 55:2, 55:4
 chairman [8] - 3:17, 8:13, 30:20, 31:15, 39:16, 48:8, 51:11, 51:14
 challenge [3] - 6:3, 48:1, 52:1
 challenged [1] - 18:10
 challenges [1] - 37:22
 challenging [1] - 3:19
 chance [1] - 11:13
 charges [5] - 5:22, 10:16, 42:20, 43:11, 44:14
 chartered [1] - 44:20
 CHERI [1] - 56:5
 Cheri [2] - 1:22, 56:18
 Cheyenne [7] - 12:6, 12:9, 13:2, 13:25, 19:12, 19:16
 chose [1] - 23:13
 CHRIS [1] - 1:11
 circumstance [1] - 13:5

circumstances [7] - 12:24, 13:1, 18:13, 18:22, 21:4, 21:12
 cite [1] - 12:7
 cited [5] - 6:16, 9:6, 11:21, 11:25, 35:9
 citizens [2] - 47:24, 47:25
 claim [2] - 38:25, 53:18
 claims [1] - 9:1
 clarification [1] - 33:23
 clarified [1] - 47:18
 classic [1] - 6:9
 clear [11] - 6:21, 11:9, 12:21, 16:4, 18:1, 20:22, 29:5, 29:14, 31:9, 49:7, 54:19
 clearly [6] - 17:11, 17:17, 17:22, 22:5, 42:6
 closely [1] - 26:25
 closer [1] - 42:4
 Coeur [1] - 14:19
 comfortable [1] - 3:18
 coming [3] - 18:11, 43:17, 50:6
 comify [1] - 11:12
 commencing [1] - 2:4
 comment [8] - 16:14, 16:15, 22:11, 53:4, 53:6, 53:13, 54:5, 54:7
 comments [4] - 49:14, 53:14, 53:15, 53:24
 COMMISSION [3] - 1:1, 1:10, 1:12
 Commission [8] - 3:6, 3:8, 3:10, 4:5, 4:8, 4:12, 5:23, 6:8, 6:25, 7:21, 7:25, 8:3, 8:7, 9:7, 9:13, 9:14, 9:17, 9:20, 9:22, 10:3, 10:6, 10:9, 10:19, 11:2, 11:5, 12:2, 12:21, 12:25, 13:15, 14:3, 15:5, 15:9, 15:20, 15:25, 16:7, 17:14, 17:17, 17:19, 17:22, 18:1, 18:8, 18:21, 18:23, 19:2, 20:5, 20:14, 21:10, 21:21, 22:1, 22:7, 23:16, 24:9, 24:15, 24:20, 24:24, 28:1, 29:9, 30:14, 32:6, 32:7, 32:14, 33:1, 33:13, 33:16, 34:12, 34:13, 34:15,

36:15, 36:24, 37:7, 37:11, 37:14, 42:14, 44:8, 44:17, 44:20, 46:23, 47:9, 48:25, 50:17, 50:22, 51:5, 51:9, 51:24, 52:4, 53:19, 53:21, 54:2, 54:20
 Commission's [4] - 18:3, 38:4, 52:2, 52:14
 COMMISSIONER [46] - 1:11, 3:16, 3:17, 20:19, 22:10, 23:7, 24:2, 25:5, 26:4, 26:18, 27:1, 27:16, 28:15, 28:22, 29:2, 30:1, 30:20, 31:11, 31:15, 31:24, 32:21, 33:22, 34:22, 35:14, 35:22, 36:19, 36:25, 37:15, 38:10, 38:24, 39:13, 41:5, 41:25, 46:17, 48:10, 48:22, 50:10, 50:12, 51:11, 51:14, 52:17, 54:13, 54:17, 54:20, 55:1, 55:3
 Commissioner [25] - 20:17, 20:18, 23:18, 27:15, 28:24, 28:25, 29:11, 31:14, 35:13, 36:7, 39:20, 41:1, 41:4, 41:7, 50:2, 50:9, 50:11, 50:13, 53:1, 54:12, 54:24, 54:25, 55:2, 55:4
 Commissioners [2] - 3:13, 46:9
 Commissioners' [1] - 46:15
 COMMUNICATIONS [1] - 1:4
 Communications [9] - 1:18, 1:18, 3:2, 8:15, 8:24, 10:2, 14:20, 22:7, 29:7
 company [5] - 3:2, 4:23, 7:3, 43:5, 43:6
 COMPANY [1] - 1:4
 Company [4] - 1:18, 1:18, 5:25, 6:1
 Complainant [1] - 8:12
 Complaint [19] - 3:2, 9:13, 9:16, 9:19, 10:11, 11:1, 12:4, 14:5, 15:7, 19:23, 19:24, 27:11, 30:7, 30:10, 30:16, 30:17,

36:23, 44:11, 44:13 2
 complaint [1] - 8:22
 COMPLAINT [1] - 1:4
 Complaints [1] - 14:15
 complete [2] - 27:9, 27:25
 completed [1] - 51:7
 component [1] - 15:6
 concern [3] - 12:23, 13:3, 14:1
 concerned [1] - 30:4
 concluded [2] - 12:16, 55:6
 conclusion [2] - 8:8, 18:12
 conditions [1] - 12:11
 conducting [1] - 23:21
 conference [5] - 37:2, 43:4, 43:10, 44:23, 45:6
 Conferencing [1] - 43:12
 conferencing [5] - 40:9, 43:5, 43:6, 44:3, 52:12
 confined [1] - 17:13
 confronted [2] - 19:15, 32:10
 Congress [11] - 9:24, 10:1, 10:5, 11:10, 11:18, 14:21, 15:3, 20:22, 42:15, 44:20, 49:7
 Congressional [2] - 18:6, 18:5
 Congressman [1] - 41:16
 connected [1] - 52:13
 connection [1] - 45:7
 connections [1] - 44:4
 consider [1] - 12:18
 consideration [2] - 7:9, 15:2
 considered [1] - 53:22
 Constitution [3] - 25:10, 25:14, 28:6
 construction [1] - 9:8
 Construction [1] - 42:7
 construed [1] - 8:23
 continue [2] - 50:16, 50:20
 contract [1] - 30:9
 controls [1] - 44:1
 conversation [1] - 46:21
 convinced [1] - 49:17
 corporate [1] - 4:22
 corporation [2] - 43:7,

<p>44:3 Corporation (1) - 43:12 correct (6) - 31:24, 32:24, 34:14, 46:24, 50:23, 56:11 council (3) - 28:6, 28:10, 28:14 counsel (2) - 8:16 country (2) - 22:22, 23:4 COUNTY (1) - 56:3 course (6) - 4:16, 5:20, 16:24, 37:25, 38:16, 54:10 court (14) - 4:10, 4:11, 8:21, 19:15, 22:25, 24:12, 24:16, 26:13, 30:24, 32:25, 33:25, 34:1, 34:4, 36:13 Court (13) - 4:14, 4:20, 5:25, 6:4, 6:6, 6:7, 6:12, 6:17, 6:19, 7:18, 7:19, 7:23, 8:20, 8:23, 8:25, 9:3, 9:5, 9:10, 11:14, 11:23, 11:25, 12:5, 12:10, 12:16, 12:20, 13:20, 14:6, 14:9, 14:10, 14:11, 14:12, 14:24, 18:20, 19:5, 19:6, 19:13, 19:24, 20:8, 21:17, 21:19, 21:23, 21:24, 22:8, 23:4, 24:5, 24:8, 24:11, 24:24, 25:4, 27:10, 27:14, 28:2, 28:3, 28:8, 28:13, 28:18, 29:6, 29:19, 30:6, 30:8, 30:12, 30:15, 30:16, 32:3, 32:7, 32:9, 32:18, 32:19, 33:3, 33:4, 33:5, 33:8, 33:9, 33:11, 33:18, 33:25, 34:5, 34:6, 34:7, 34:9, 34:14, 34:16, 35:16, 35:18, 35:20, 35:23, 36:5, 36:18, 36:20, 37:1, 37:4, 37:21, 38:4, 38:11, 39:7, 39:11, 41:8, 42:13, 42:16, 44:10, 44:12, 45:7, 46:1, 46:3, 46:5, 47:5, 47:7, 47:11, 47:21, 53:20 Court's (2) - 16:6, 18:15 court's (2) - 7:8, 27:22</p>	<p>courthouse (1) - 20:1 courts (7) - 4:18, 4:19, 11:13, 18:13, 18:16, 22:19, 32:2 Courts (12) - 6:14, 6:22, 6:23, 11:16, 11:19, 11:22, 31:20, 32:10, 33:21, 34:21, 35:6, 38:7 crack (4) - 7:24, 20:9, 23:5, 33:19 create (1) - 14:14 created (4) - 5:3, 11:16, 40:15, 43:20 Creek (16) - 4:10, 4:13, 5:2, 5:3, 5:13, 6:4, 8:21, 13:6, 15:14, 24:4, 24:11, 25:8, 25:16, 25:24, 41:9, 53:2 Cremer (4) - 1:13, 16:16, 16:17, 19:9 CREMER (4) - 16:17, 26:10, 26:21, 54:6 Crow (16) - 4:10, 4:13, 5:2, 5:3, 5:13, 6:4, 8:21, 13:6, 15:14, 24:4, 24:11, 25:8, 25:16, 25:24, 41:9, 53:2 CRR (1) - 1:22 cumbersome (6) - 34:19, 36:10, 37:16, 38:8, 47:14, 48:19 curlous (1) - 37:23 customer (4) - 43:14, 43:15, 43:16, 48:4</p>	<p>dealing (5) - 21:3, 21:4, 31:9, 33:17, 38:15 deals (2) - 5:4, 48:25 death (1) - 8:19 Deb (1) - 1:15 December (6) - 8:20, 15:24, 24:3, 28:19, 45:21, 45:23 decide (1) - 14:5 decided (2) - 9:5, 38:21 decision (28) - 14:7, 14:18, 22:1, 22:11, 23:6, 23:18, 24:8, 25:2, 26:9, 27:6, 28:14, 29:15, 29:18, 29:19, 29:22, 29:25, 30:22, 31:4, 34:7, 37:11, 43:13, 44:9, 46:12, 48:14, 48:23, 49:5, 51:3, 51:10 declsions (1) - 32:10 deeply (1) - 18:14 defer (16) - 9:18, 11:23, 21:22, 22:8, 47:4, 48:8, 51:16, 52:20, 53:9, 53:11, 53:24, 54:3, 54:5, 54:9, 54:21 deference (6) - 18:16, 32:11, 47:10, 49:23, 52:18, 52:23 deferred (1) - 51:3 defers (1) - 26:2 definitely (3) - 29:13, 47:4, 47:21 delay (5) - 9:11, 9:18, 15:2, 42:11, 47:16 delaying (1) - 49:4 delineated (1) - 15:3 demarcation (1) - 26:2 Demaris (1) - 1:16 denied (1) - 16:9 deny (4) - 9:20, 15:9, 15:25, 48:11 details (1) - 40:22 determination (6) - 18:6, 18:17, 21:24, 22:9, 33:9, 34:12 determine (4) - 4:21, 8:25, 19:5, 37:5 determined (8) - 8:21, 11:4, 14:11, 14:22, 17:12, 17:20, 18:25, 39:7 determining (4) - 7:24, 11:22, 18:16, 20:9 development (3) -</p>	<p>4:18, 7:10, 40:18 dichotomy (3) - 9:24, 15:4, 31:9 dictate (1) - 20:8 difference (2) - 21:14, 23:24 different (1) - 38:9 digest (1) - 47:1 directed (2) - 31:17, 51:23 direction (1) - 48:9 directions (1) - 13:12 directly (1) - 42:8 disagree (2) - 31:21, 38:24 disagreed (1) - 35:3 disagreement (1) - 16:23 discontinued (1) - 5:21 discovery (2) - 51:7 discretion (1) - 32:8 discretionary (6) - 22:1, 22:11, 32:3, 32:13, 32:18, 32:19, 49:13, 49:15 discuss (1) - 3:12 discussing (1) - 3:21 discussion (3) - 32:22, 46:10, 54:24 Dismiss (11) - 3:9, 15:12, 50:16, 50:18, 51:1, 51:5, 51:8, 51:16, 52:3, 54:3, 54:21 dismiss (1) - 3:12 dispute (8) - 6:5, 7:1, 7:3, 7:5, 7:11, 11:1, 39:5, 40:14 disputed (3) - 40:20, 40:23, 42:25 distance (1) - 5:1 distinguishable (1) - 11:24 district (1) - 6:19 District (5) - 8:20, 9:3, 27:13, 30:5, 30:12 divested (1) - 19:2 divided (1) - 10:2 division (1) - 26:16 DMS-100 (1) - 40:5 DO (1) - 56:8 Docket (7) - 15:23, 27:24, 32:22, 32:24, 37:20, 37:21, 38:12 Docket's (1) - 49:2 Doctrine (29) - 4:16, 6:2, 6:10, 6:12, 6:13, 6:22, 7:23, 8:3, 9:4, 11:7, 19:14, 20:7,</p>	<p>21:17, 21:20, 23:2, 31:23, 32:1, 32:5, 33:4, 33:7, 33:17, 33:21, 34:3, 36:9, 36:12, 36:14, 37:8, 37:25, 38:6 doctrine (16) - 4:18, 6:13, 11:9, 31:19, 31:22, 32:8, 32:12, 32:15, 32:16, 34:4, 34:21, 35:11, 35:21, 36:16, 39:24, 47:5 documents (2) - 5:8, 7:14 done (8) - 24:5, 25:25, 28:18, 28:20, 34:20, 38:6, 41:1, 42:17 double (1) - 25:1 double-booking (1) - 25:1 doubt (7) - 7:21, 21:9, 22:18, 32:16, 33:14, 33:15, 47:8 down (2) - 21:21, 37:16 Doyle (1) - 6:18 draw (1) - 52:25 due (3) - 8:18, 47:15, 47:16 duly (2) - 28:11, 56:8 duly-appointed (1) - 56:8 during (2) - 33:23, 35:9</p>
E				
<p>easily (1) - 13:12 East (7) - 2:3 economic (2) - 7:10, 40:17 effect (2) - 16:10, 31:4 efficiency (1) - 38:3 efficient (2) - 24:22, 42:13 effort (1) - 13:22 efforts (1) - 7:10 egg (1) - 46:11 either (8) - 14:9, 20:23, 22:22, 24:22, 32:8, 41:22, 42:17, 52:10 El (1) - 14:17 eligible (1) - 13:23 emphasis (1) - 49:11 employment (2) - 7:12, 40:15 empowered (2) - 9:22, 12:2</p>				

<p>encompassed [1] - 30:8 encompassing [3] - 26:11, 26:20, 27:5 encourages [1] - 18:7 end [1] - 39:2 ended [2] - 27:3, 27:5 ends [1] - 10:15 enforce [1] - 14:4 engineer [1] - 40:22 enjoin [3] - 14:11, 30:6, 30:24 enjoined [3] - 14:13, 27:13, 44:10 enjoining [1] - 30:13 entails [1] - 29:12 entire [4] - 27:12, 30:10, 30:19, 36:3 entirely [1] - 23:11 entitled [3] - 2:2, 44:17, 56:10 entity [1] - 7:20 enunciates [1] - 42:7 equipment [13] - 5:17, 5:18, 10:15, 23:9, 40:3, 40:12, 40:17, 40:20, 40:22, 43:4, 43:19, 52:12 error [1] - 17:19 essentially [1] - 44:2 established [2] - 9:8, 25:8 evidentiary [5] - 17:7, 17:11, 17:20, 18:2, 18:9 exactly [3] - 20:4, 26:22, 27:7 examining [1] - 26:7 exception [1] - 42:7 exchange [1] - 39:1 exchanges [3] - 12:8, 12:12, 12:15 exclusive [3] - 8:25, 9:2, 14:14 excuse [5] - 36:14, 39:19, 40:16, 42:1, 43:23 executive [1] - 25:12 exercise [3] - 12:3, 18:4, 44:17 exercising [1] - 12:14 exhaust [3] - 9:2, 9:10, 15:1 exhaustion [31] - 8:5, 11:19, 12:1, 12:24, 14:2, 14:23, 15:2, 19:17, 19:20, 19:25, 20:3, 21:18, 21:22, 22:2, 22:3, 22:5, 22:12, 23:25, 24:14,</p>	<p>25:3, 33:2, 35:4, 35:5, 35:11, 35:16, 37:12, 42:8, 42:10, 45:12, 47:5, 49:12 Exhaustion [29] - 4:16, 6:2, 6:10, 6:12, 6:13, 6:22, 7:23, 8:3, 9:4, 11:7, 19:14, 20:6, 21:17, 21:20, 23:2, 31:23, 32:1, 32:5, 33:3, 33:7, 33:16, 33:21, 34:3, 36:9, 36:12, 36:14, 37:8, 37:25, 38:6 exhausts [2] - 4:9, 6:6 Exhibit [4] - 10:21, 10:23, 13:18, 42:20 exhibit [1] - 13:19 expect [2] - 28:8, 44:17 experience [1] - 18:20 explained [1] - 16:19 extend [1] - 11:12 extended [1] - 6:23 extensive [1] - 22:24 extensively [2] - 8:7, 16:19 exterior [5] - 5:2, 5:5, 7:4, 17:13, 23:21, 40:21 extremely [2] - 29:24, 47:19</p>	<p>8:20, 8:23, 8:25, 9:3, 10:2, 11:11, 11:16, 11:22, 13:20, 14:6, 14:9, 14:10, 14:11, 21:17, 21:19, 22:7, 28:8, 29:6, 32:3, 32:7, 32:9, 32:10, 32:18, 33:2, 33:4, 33:5, 33:21, 34:21, 37:4, 38:7, 44:10, 46:1, 46:3, 49:8, 53:19 federal [21] - 8:24, 11:17, 11:19, 12:19, 12:22, 14:15, 14:20, 14:25, 16:4, 16:7, 20:23, 22:4, 31:19, 31:22, 32:2, 32:14, 35:5, 43:8, 49:6, 49:17 federal/state [1] - 15:4 fee [2] - 13:8, 43:5 fellow [1] - 46:15 felt [2] - 18:22, 33:24 few [1] - 33:24 file [5] - 10:18, 11:1, 23:19, 45:19, 45:20 filed [18] - 3:2, 7:14, 9:14, 10:21, 10:24, 13:18, 15:24, 17:1, 19:23, 19:24, 27:11, 30:7, 30:16, 36:20, 36:21, 36:23, 44:11</p>	<p>follow-up [9] - 28:16, 30:2, 30:21 following [2] - 23:3, 26:15 follows [1] - 45:16 footnote [1] - 42:9 form [1] - 23:13 formed [1] - 23:14 forth [1] - 36:12 forum [1] - 14:15 forums [2] - 18:7, 36:11 forward [12] - 14:4, 15:6, 15:10, 19:17, 20:14, 24:18, 30:15, 37:14, 44:25, 46:1, 51:7, 51:8 four [1] - 7:7 frankly [1] - 46:23 free [2] - 43:6, 44:3 Free [1] - 43:12 frequently [1] - 48:25 front [5] - 4:12, 24:15, 32:6, 34:18, 51:4 full [3] - 14:12, 44:7, 49:23 fully [1] - 24:12 functioning [1] - 24:12 functions [1] - 44:1 fundamental [3] - 7:16, 20:6, 20:7</p>	<p>Gregg [1] - 1:15 ground [4] - 22:14, 22:16, 22:20, 23:1 guess [2] - 31:16, 36:8 guidance [1] - 19:20</p>
F		G		H
<p>fact [15] - 4:15, 18:20, 19:1, 23:9, 23:23, 25:7, 25:15, 29:6, 31:1, 35:17, 40:2, 40:23, 49:12, 51:15, 52:7 factors [1] - 22:3 facts [6] - 11:24, 13:24, 21:25, 38:18, 39:22, 45:21 factual [6] - 12:25, 39:3, 39:9, 40:13, 42:2, 50:25 failure [1] - 44:13 fails [2] - 42:8, 42:11 Falls [2] - 43:21, 43:25 family [1] - 8:19 far [4] - 21:5, 27:11, 30:4, 41:17 farmers [1] - 43:13 Farmers [1] - 6:1 FCC [1] - 8:25 Federal [39] - 6:12, 6:17, 6:19, 6:22,</p>	<p>FILED [1] - 1:4 final [2] - 27:6, 45:19 finally [2] - 7:11, 14:6, 44:22 financial [3] - 7:10, 44:1, 48:2 finish [2] - 27:16, 35:1 first [31] - 3:11, 3:25, 6:16, 7:19, 7:24, 9:14, 9:21, 11:4, 11:6, 11:9, 11:13, 12:2, 13:14, 18:23, 19:7, 19:23, 20:2, 20:9, 23:5, 26:10, 28:10, 33:19, 33:25, 34:5, 34:21, 37:4, 37:5, 38:21, 39:8, 42:5, 43:24 first-chance [1] - 11:13 five [2] - 7:9, 15:24 flesh [1] - 39:11 fleshed [1] - 39:10 flowing [1] - 48:16 follow [6] - 5:24, 26:18, 28:16, 30:2, 30:21, 32:15</p>	<p>GARY [1] - 1:11 generally [1] - 52:18 generated [1] - 21:7 gentlemanly [1] - 47:12 given [4] - 14:5, 32:11, 44:19, 48:20 government [6] - 4:17, 12:16, 12:20, 14:1, 18:6, 18:24 Government [3] - 26:2, 49:8, 49:9 grant [9] - 3:6, 3:8, 9:9, 14:25, 42:10, 42:14, 42:15, 46:23, 50:17 granted [5] - 5:11, 14:8, 17:6, 18:16, 27:24, 52:3 granting [4] - 8:2, 19:4, 20:12, 49:12 great [4] - 23:3, 32:11, 41:2 Greg [1] - 1:14</p>	<p>hand [2] - 4:20, 18:23 handle [3] - 3:11, 25:9, 33:21 Hanson [5] - 28:24, 31:14, 41:1, 50:2, 50:11, 55:2 HANSON [24] - 1:11, 3:17, 31:15, 31:24, 32:21, 33:22, 34:22, 35:14, 35:22, 36:19, 36:25, 37:15, 38:10, 38:24, 39:13, 46:17, 50:12, 51:11, 51:14, 52:17, 54:13, 54:17, 54:20, 55:3 Hanson's [1] - 41:7 hear [11] - 7:21, 9:13, 15:14, 15:17, 17:23, 24:13, 27:17, 32:22, 34:5, 36:15, 45:17 heard [7] - 9:12, 17:9, 34:9, 34:18, 46:2, 46:4, 53:24 hearing [10] - 17:7, 17:11, 17:20, 18:2, 18:9, 27:19, 42:12, 45:22, 53:5, 54:25 heavily [1] - 19:19 held [3] - 2:1, 17:7, 38:17 hence [1] - 18:2 HEREBY [1] - 56:8 Hicks [2] - 9:8, 14:24 hold [4] - 3:22, 17:10, 17:20, 18:8 Honor [1] - 53:1 hour [1] - 52:22 huge [1] - 29:12 hundreds [1] - 40:8</p>	
I				
				<p>Ignore [1] - 44:5 implicate [1] - 12:22 implying [1] - 36:5 importance [3] - 36:17, 41:8, 41:11 important [6] - 10:10, 12:18, 18:22, 25:3, 33:7, 48:23 improperly [1] - 5:21</p>

<p>IN [1] - 1:4 Indeed [2] - 5:13, 26:3 Independent [1] - 28:5 Indian [4] - 13:7, 18:15, 18:16, 18:19 Indians [1] - 13:9 Indicate [1] - 45:4 indicated [3] - 20:5, 32:4, 45:9 indicates [1] - 30:23 Individuals [1] - 13:17 information [5] - 46:12, 46:25, 47:2, 47:3, 51:9 Informed [1] - 44:8 infrastructure [1] - 40:12 Infused [1] - 30:11 initial [3] - 8:9, 21:24, 33:9 Injunction [8] - 26:8, 26:19, 26:20, 27:5, 27:9, 27:23, 28:3, 30:4 Instead [1] - 14:3 Insurance [2] - 5:25, 6:1 intend [1] - 52:25 intended [1] - 20:22 intent [1] - 16:7 interest [1] - 12:22 interexchange [1] - 10:25 interfere [1] - 12:15 Internet [3] - 4:25, 40:8, 40:10 interpretation [1] - 14:23 interpreted [4] - 14:14, 14:17, 32:14, 33:3 interpreting [1] - 9:3 interstate [2] - 8:23, 9:1, 9:25, 10:3, 14:15, 24:7, 26:9, 26:13, 26:14, 29:5, 29:13, 29:15, 29:21, 29:23, 30:8, 30:10, 30:12, 31:2, 31:7, 31:10, 37:5, 38:16 Intertwined [1] - 30:18 intervene [1] - 45:17 Intervener [1] - 15:16 Intervenor [3] - 16:13, 41:10, 53:3 Intervenors [5] - 1:19, 15:18, 15:21, 35:3, 35:4 intra [6] - 10:13, 29:17, 31:5, 31:7,</p>	<p>48:18, 50:4 intra-reservation [2] - 10:13, 48:18 intra-tribe [1] - 50:4 Intrastate [26] - 9:23, 10:4, 10:7, 10:9, 10:12, 10:13, 10:17, 10:20, 10:22, 11:2, 11:5, 15:6, 21:10, 26:16, 26:17, 29:8, 30:4, 30:13, 30:25, 31:10, 38:21, 42:19, 42:21, 42:22, 44:14, 44:19, 51:25, 52:7 invoke [6] - 22:2, 32:8, 34:4, 36:13, 37:7 invoked [7] - 24:1, 24:14, 25:3, 26:3, 32:17, 34:21, 37:12 Invoking [2] - 23:2, 32:12 involve [2] - 11:21, 14:20 involved [4] - 10:11, 10:25, 15:7, 27:11 involves [7] - 7:2, 7:3, 7:5, 7:7, 7:11, 38:13, 47:24 involving [1] - 14:15 Iowa [2] - 5:25, 43:13 issue [23] - 7:16, 7:19, 7:20, 8:6, 10:10, 11:6, 12:7, 12:13, 15:12, 16:25, 17:8, 18:9, 19:7, 19:17, 19:21, 19:25, 28:19, 32:10, 33:2, 34:5, 35:4, 51:24 issued [1] - 5:8 issues [7] - 3:20, 4:14, 11:14, 33:18, 37:5, 39:9, 48:24 Itself [1] - 23:15 IXCs [2] - 42:21, 43:11</p> <p style="text-align: center;">J</p> <p>Jacobson [1] - 1:14 job [1] - 41:2 Join [1] - 30:18 Jones [8] - 25:17, 28:5, 37:3, 44:23, 44:24, 45:1, 45:9, 46:4 Jones' [1] - 37:3 Judge [9] - 11:10, 24:13, 25:17, 25:19, 25:23, 28:9, 37:13, 45:15</p>	<p>Judge [13] - 24:3, 24:7, 26:7, 27:7, 29:11, 29:16, 30:3, 30:23, 37:3, 38:16, 45:9, 46:4 Judge's [3] - 29:4, 29:14, 48:14 judge-made [1] - 11:10 judicial [2] - 25:9, 25:12 Judiciary [1] - 11:11 July [2] - 36:22, 37:1 jump [1] - 29:1 Jurisdiction [6] - 4:21, 6:4, 7:18, 7:24, 8:22, 9:1, 9:2, 9:9, 9:19, 10:3, 11:15, 11:23, 12:3, 12:14, 14:22, 15:1, 16:8, 17:15, 17:18, 17:24, 18:1, 18:4, 18:9, 18:10, 18:17, 19:3, 19:5, 20:9, 21:10, 21:19, 23:16, 29:7, 29:17, 31:4, 32:23, 33:1, 33:4, 33:6, 33:10, 33:12, 34:8, 34:15, 34:17, 36:1, 36:6, 38:17, 39:7, 42:10, 42:15, 42:16, 47:6, 47:7, 47:9, 49:10, 49:15, 49:18, 50:7, 51:24, 52:2, 52:4, 52:15 jurisdiction [9] - 7:20, 16:24, 17:8, 22:9, 23:5, 34:5, 34:6, 34:11, 48:24 jurisprudence [1] - 18:15</p> <p style="text-align: center;">K</p> <p>Karen [2] - 1:13, 16:17 keen [1] - 46:14 keep [2] - 8:6 kept [1] - 43:24 kind [2] - 11:12, 28:7 Knadle [1] - 1:15 knowledge [2] - 24:4, 28:20 KNUDSON [9] - 8:13, 27:9, 27:22, 28:20, 30:5, 42:1, 42:5, 51:22, 52:25 Knudson [4] - 1:18, 8:14, 22:22, 52:17 KOLBECK [30] - 1:10,</p>	<p>3:1, 3:23, 6:10, 15:13, 16:12, 19:9, 20:16, 27:18, 28:24, 31:13, 39:19, 40:24, 42:3, 46:6, 48:13, 49:20, 50:11, 50:13, 51:13, 53:2, 53:12, 53:23, 54:4, 54:8, 54:15, 54:19, 54:22, 55:2, 55:4 Kolbeck [4] - 27:21, 39:20, 50:13, 55:4</p> <p style="text-align: center;">L</p> <p>lacked [1] - 8:21 lacks [1] - 18:21 land [3] - 13:8, 40:4, 40:6 larger [1] - 50:5 last [5] - 8:20, 13:21, 25:5, 33:23, 34:1 launched [1] - 5:14 law [14] - 4:14, 16:5, 16:7, 16:20, 16:23, 16:24, 18:7, 18:19, 20:23, 22:4, 25:17, 49:6, 49:17 laws [3] - 4:24, 5:12, 23:14 lead [1] - 5:24 leading [1] - 26:14 leads [1] - 30:1 learning [1] - 49:21 learned [1] - 43:8 least [2] - 22:8, 39:11 legislative [2] - 16:6, 25:12 Legislature [1] - 9:22 legislature [7] - 10:6, 10:8, 11:4, 12:2, 14:4, 42:17, 44:20 less [1] - 38:8 level [2] - 14:2, 20:25 liability [1] - 4:23 library [1] - 40:10 lies [1] - 14:22 lieu [1] - 51:14 fight [2] - 39:25, 41:13 likely [2] - 17:14, 29:17 limited [5] - 4:23, 6:22, 21:7, 26:8, 29:23 limiting [1] - 29:15 line [2] - 6:1, 26:1 lines [1] - 24:25 list [1] - 40:11 litigants [1] - 19:16</p>	<p>litigate [1] - 6:4 litigation [2] - 13:20, 43:9 live [1] - 13:3 lives [1] - 43:21 LLC [6] - 1:5, 3:3, 23:14, 23:20, 23:24, 43:20 local [2] - 8:16, 29:18 located [2] - 5:19, 23:10 look [14] - 20:4, 20:6, 21:11, 21:25, 22:2, 22:3, 26:21, 36:8, 38:2, 38:6, 38:18, 40:19, 49:6, 51:2 looked [1] - 26:10 looking [3] - 26:25, 49:6, 50:3 love [1] - 27:17 LP [2] - 1:4, 3:2</p> <p style="text-align: center;">M</p> <p>majority [1] - 23:3 mandate [1] - 14:4 mandatory [1] - 32:6 March [2] - 5:20, 5:21 matter [18] - 2:2, 3:1, 4:12, 4:13, 11:11, 16:8, 16:19, 16:21, 17:8, 17:24, 18:1, 21:12, 24:20, 33:15, 37:9, 45:10, 53:22, 56:10 MATTER [1] - 1:4 matters [5] - 5:4, 17:23, 21:20, 38:21, 40:18 McComsey [2] - 1:22, 56:18 MCCOMSEY [1] - 56:5 mean [5] - 24:25, 31:6, 34:1, 36:14, 45:4 meaning [1] - 31:22 meant [1] - 27:8 melding [1] - 25:21 member [2] - 42:24, 42:25 members [9] - 4:4, 5:1, 6:8, 7:12, 13:4, 13:22, 15:20, 40:16, 50:21 mention [2] - 20:24, 49:9 mentioned [3] - 19:22, 23:8, 45:12 merely [1] - 19:6 merits [9] - 6:5, 9:17,</p>
---	--	--	---	--

<p>15:2, 15:10, 17:9, 34:8, 34:17, 39:4, 39:6</p> <p>met [1] - 45:24</p> <p>microphone [2] - 27:18, 42:4</p> <p>midstate [1] - 15:17</p> <p>Midstate [2] - 15:22, 53:5</p> <p>might [5] - 26:6, 28:15, 30:20, 41:22, 53:10</p> <p>migrated [1] - 43:25</p> <p>million [1] - 43:10</p> <p>mind [1] - 41:3</p> <p>mine [1] - 41:2</p> <p>missing [1] - 52:4</p> <p>moment [2] - 24:2, 39:13</p> <p>money [2] - 24:23, 38:2</p> <p>months [6] - 9:15, 36:23, 37:10, 44:16, 49:2</p> <p>Morgan [1] - 8:14</p> <p>morning [3] - 8:9, 15:19, 16:17</p> <p>most [4] - 16:22, 20:13, 39:20</p> <p>Motion [48] - 3:6, 3:7, 3:9, 4:7, 8:2, 9:20, 14:8, 15:9, 15:12, 16:1, 16:8, 17:5, 17:6, 19:4, 20:12, 27:23, 28:1, 46:20, 46:21, 46:22, 46:23, 48:6, 48:12, 48:13, 49:19, 49:22, 50:16, 50:17, 50:25, 51:3, 51:5, 51:8, 51:12, 51:16, 51:21, 52:3, 52:19, 53:8, 53:11, 54:2, 54:3, 54:5, 54:9, 54:13, 54:14, 54:18, 54:21, 54:23</p> <p>motions [1] - 3:21</p> <p>move [11] - 8:12, 15:5, 15:10, 20:13, 24:2, 37:13, 48:11, 49:19, 51:6, 51:8, 54:20</p> <p>moving [4] - 4:3, 24:18, 24:24, 25:4</p> <p>MR [39] - 4:4, 8:13, 19:11, 21:2, 22:15, 23:17, 24:6, 25:14, 27:9, 27:15, 27:20, 27:22, 28:20, 29:4, 30:5, 31:1, 31:22, 31:25, 32:25, 34:3, 35:13, 35:15, 36:7,</p>	<p>36:21, 37:2, 37:24, 38:15, 39:3, 39:18, 40:7, 41:14, 42:1, 42:5, 45:3, 50:21, 51:22, 52:25, 53:15, 54:1</p> <p>MS [6] - 15:19, 16:17, 26:10, 26:21, 53:10, 54:6</p> <p>multi [1] - 29:20</p> <p>multi-states [1] - 29:20</p> <p>multiple [2] - 38:1, 38:9</p> <p>must [1] - 52:3</p> <p>Mutual [1] - 5:25</p>	<p>29:2, 30:1, 30:20, 31:11, 41:5, 41:25, 48:10, 48:22, 50:10, 55:1</p> <p>Nelson [10] - 20:18, 23:18, 27:15, 28:25, 29:11, 41:1, 41:4, 50:9, 54:12, 54:25</p> <p>nerve [1] - 44:5</p> <p>network [1] - 43:18</p> <p>Nevada [1] - 9:8</p> <p>never [6] - 19:14, 19:16, 32:1, 35:17, 36:15, 45:17</p> <p>new [5] - 22:14, 22:16, 22:20, 22:25, 41:16</p> <p>New [1] - 6:20</p> <p>next [2] - 8:12, 15:14</p> <p>non [3] - 13:7, 13:9, 13:22</p> <p>non-Indian [1] - 13:7</p> <p>non-Indians [1] - 13:9</p> <p>non-tribal [1] - 13:22</p> <p>nonaction [1] - 53:8</p> <p>none [2] - 45:24, 54:25</p> <p>nonmember [1] - 52:10</p> <p>normally [1] - 19:3</p> <p>North [2] - 25:18, 41:17</p> <p>Notary [2] - 56:7, 56:18</p> <p>note [1] - 19:13</p> <p>noted [1] - 16:18</p> <p>notes [3] - 37:16, 45:4, 45:5</p> <p>nothing [2] - 28:21, 83:5</p> <p>Notice [1] - 41:15</p> <p>November [2] - 45:18, 45:20</p> <p>nuances [2] - 18:19, 37:22</p> <p>number [10] - 7:3, 7:5, 7:7, 7:9, 21:2, 22:18, 22:20, 34:13, 34:15, 37:3</p> <p>numbers [1] - 48:14</p>	<p>obviously [11] - 3:20, 21:3, 22:15, 25:8, 33:1, 35:17, 37:10, 40:7, 41:19, 49:24, 50:2</p> <p>occurring [1] - 19:1</p> <p>October [3] - 5:10, 13:20, 45:16</p> <p>odd [1] - 38:10</p> <p>OF [5] - 1:2, 1:4, 2:1, 58:1, 58:3</p> <p>office [1] - 23:19</p> <p>offices [4] - 5:16, 5:18, 44:2, 44:3</p> <p>often [1] - 46:13</p> <p>omelet [1] - 46:18</p> <p>once [1] - 35:23</p> <p>one [26] - 5:13, 7:2, 10:24, 16:12, 18:11, 18:21, 21:3, 22:18, 26:5, 28:15, 33:14, 34:13, 34:14, 35:24, 35:25, 37:4, 37:24, 39:13, 40:25, 41:5, 41:7, 42:24, 45:24, 51:22, 52:8, 54:18</p> <p>ongoing [1] - 47:17</p> <p>Onida [1] - 56:13</p> <p>open [4] - 13:6, 27:3, 27:5, 49:2</p> <p>open-ended [2] - 27:3, 27:5</p> <p>operated [2] - 43:5, 43:6</p> <p>operating [1] - 48:5</p> <p>operation [1] - 23:12</p> <p>opinion [5] - 3:13, 29:5, 29:14, 31:2, 31:8</p> <p>opinions [1] - 46:15</p> <p>opportunities [1] - 7:12</p> <p>opportunity [4] - 4:21, 11:13, 34:11, 47:1</p> <p>opposed [2] - 29:19, 51:20</p> <p>option [1] - 49:13</p> <p>ordained [1] - 10:5</p> <p>order [3] - 24:17, 27:23, 29:10</p> <p>ordinary [1] - 38:23</p> <p>organized [1] - 4:24</p> <p>originally [1] - 36:20</p> <p>originates [1] - 43:2</p> <p>originating [1] - 10:14</p> <p>otherwise [2] - 52:1, 54:1</p> <p>ourselves [1] - 25:1</p> <p>outside [7] - 13:12, 17:16, 19:1, 43:2,</p>	<p>43:18, 50:6, 52:9</p> <p>overall [1] - 10:1</p> <p>own [6] - 4:21, 18:5, 20:9, 37:20, 37:21, 41:3</p> <p>owned [4] - 4:23, 5:14, 7:2, 13:9</p>
N				
<p>name [1] - 15:20</p> <p>NAT [37] - 4:22, 5:11, 5:14, 5:16, 5:22, 6:16, 10:24, 11:3, 11:25, 13:14, 13:21, 15:6, 17:12, 19:10, 19:23, 20:4, 23:13, 23:15, 23:18, 23:23, 27:11, 30:7, 30:16, 40:15, 40:16, 42:25, 43:9, 43:15, 43:23, 44:2, 44:6, 44:11, 45:18, 47:23, 51:8, 51:15, 53:19</p> <p>NAT's [11] - 8:2, 8:22, 10:15, 14:11, 20:12, 39:1, 43:24, 48:11, 52:5, 54:3, 54:21</p> <p>nation [2] - 6:17, 47:25</p> <p>national [1] - 49:24</p> <p>National [1] - 6:1</p> <p>Native [8] - 1:19, 3:3, 3:6, 3:8, 4:2, 4:7, 50:17, 50:19</p> <p>NATIVE [1] - 1:5</p> <p>nature [1] - 39:21</p> <p>necessarily [2] - 17:21, 39:23</p> <p>need [8] - 9:2, 9:10, 15:1, 18:2, 33:22, 34:24, 42:2, 47:18</p> <p>needed [1] - 54:17</p> <p>needs [4] - 17:7, 17:12, 42:6, 47:17</p> <p>NELSON [23] - 1:11, 3:16, 20:19, 22:10, 23:7, 24:2, 25:5, 26:4, 26:18, 27:1, 27:16, 28:15, 28:22,</p>	<p>name [1] - 15:20</p> <p>NAT [37] - 4:22, 5:11, 5:14, 5:16, 5:22, 6:16, 10:24, 11:3, 11:25, 13:14, 13:21, 15:6, 17:12, 19:10, 19:23, 20:4, 23:13, 23:15, 23:18, 23:23, 27:11, 30:7, 30:16, 40:15, 40:16, 42:25, 43:9, 43:15, 43:23, 44:2, 44:6, 44:11, 45:18, 47:23, 51:8, 51:15, 53:19</p> <p>NAT's [11] - 8:2, 8:22, 10:15, 14:11, 20:12, 39:1, 43:24, 48:11, 52:5, 54:3, 54:21</p> <p>nation [2] - 6:17, 47:25</p> <p>national [1] - 49:24</p> <p>National [1] - 6:1</p> <p>Native [8] - 1:19, 3:3, 3:6, 3:8, 4:2, 4:7, 50:17, 50:19</p> <p>NATIVE [1] - 1:5</p> <p>nature [1] - 39:21</p> <p>necessarily [2] - 17:21, 39:23</p> <p>need [8] - 9:2, 9:10, 15:1, 18:2, 33:22, 34:24, 42:2, 47:18</p> <p>needed [1] - 54:17</p> <p>needs [4] - 17:7, 17:12, 42:6, 47:17</p> <p>NELSON [23] - 1:11, 3:16, 20:19, 22:10, 23:7, 24:2, 25:5, 26:4, 26:18, 27:1, 27:16, 28:15, 28:22,</p>	<p>O'dodham [1] - 6:17</p> <p>objection [1] - 54:2</p> <p>obligation [2] - 17:23, 18:4</p> <p>obtain [1] - 24:17</p> <p>obvious [2] - 31:6, 47:19</p>	<p>obviously [11] - 3:20, 21:3, 22:15, 25:8, 33:1, 35:17, 37:10, 40:7, 41:19, 49:24, 50:2</p> <p>occurring [1] - 19:1</p> <p>October [3] - 5:10, 13:20, 45:16</p> <p>odd [1] - 38:10</p> <p>OF [5] - 1:2, 1:4, 2:1, 58:1, 58:3</p> <p>office [1] - 23:19</p> <p>offices [4] - 5:16, 5:18, 44:2, 44:3</p> <p>often [1] - 46:13</p> <p>omelet [1] - 46:18</p> <p>once [1] - 35:23</p> <p>one [26] - 5:13, 7:2, 10:24, 16:12, 18:11, 18:21, 21:3, 22:18, 26:5, 28:15, 33:14, 34:13, 34:14, 35:24, 35:25, 37:4, 37:24, 39:13, 40:25, 41:5, 41:7, 42:24, 45:24, 51:22, 52:8, 54:18</p> <p>ongoing [1] - 47:17</p> <p>Onida [1] - 56:13</p> <p>open [4] - 13:6, 27:3, 27:5, 49:2</p> <p>open-ended [2] - 27:3, 27:5</p> <p>operated [2] - 43:5, 43:6</p> <p>operating [1] - 48:5</p> <p>operation [1] - 23:12</p> <p>opinion [5] - 3:13, 29:5, 29:14, 31:2, 31:8</p> <p>opinions [1] - 46:15</p> <p>opportunities [1] - 7:12</p> <p>opportunity [4] - 4:21, 11:13, 34:11, 47:1</p> <p>opposed [2] - 29:19, 51:20</p> <p>option [1] - 49:13</p> <p>ordained [1] - 10:5</p> <p>order [3] - 24:17, 27:23, 29:10</p> <p>ordinary [1] - 38:23</p> <p>organized [1] - 4:24</p> <p>originally [1] - 36:20</p> <p>originates [1] - 43:2</p> <p>originating [1] - 10:14</p> <p>otherwise [2] - 52:1, 54:1</p> <p>ourselves [1] - 25:1</p> <p>outside [7] - 13:12, 17:16, 19:1, 43:2,</p>	<p>43:18, 50:6, 52:9</p> <p>overall [1] - 10:1</p> <p>own [6] - 4:21, 18:5, 20:9, 37:20, 37:21, 41:3</p> <p>owned [4] - 4:23, 5:14, 7:2, 13:9</p>
P				
<p>page [2] - 27:22, 52:6</p> <p>paid [1] - 43:11</p> <p>papers [1] - 10:21</p> <p>parse [1] - 30:17</p> <p>part [5] - 5:9, 16:22, 22:12, 24:7, 41:21</p> <p>particular [5] - 9:6, 12:22, 12:24, 24:10, 53:21</p> <p>parties [8] - 3:19, 16:18, 16:22, 26:15, 28:12, 38:1, 48:2, 51:20</p> <p>party [3] - 4:3, 35:9, 52:24</p> <p>Paso [1] - 14:17</p> <p>pay [1] - 44:14</p> <p>paying [2] - 5:21, 43:15</p> <p>pending [4] - 4:13, 6:5, 44:12, 44:16</p> <p>people [4] - 5:19, 13:3, 23:10, 40:3</p> <p>percent [2] - 43:1, 43:11</p> <p>perhaps [1] - 9:15</p> <p>permit [1] - 18:8</p> <p>permits [1] - 19:6</p> <p>person [1] - 52:9</p> <p>perspective [3] - 24:23, 38:2, 38:3</p> <p>physical [1] - 5:16</p> <p>piece [1] - 43:4</p> <p>Pierre [1] - 2:3</p> <p>place [8] - 7:4, 11:6, 24:19, 37:1, 38:19, 44:5, 45:24, 47:20</p> <p>plan [1] - 5:8</p> <p>play [1] - 28:12</p> <p>pleasure [1] - 28:9</p> <p>point [16] - 13:14, 14:6, 15:11, 22:6, 26:12, 26:13, 28:23, 31:6, 39:12, 42:18, 44:22, 45:25, 46:21, 49:16, 50:24, 54:10</p> <p>pointed [1] - 29:11</p> <p>policies [1] - 18:5</p> <p>policy [1] - 36:16</p>	<p>page [2] - 27:22, 52:6</p> <p>paid [1] - 43:11</p> <p>papers [1] - 10:21</p> <p>parse [1] - 30:17</p> <p>part [5] - 5:9, 16:22, 22:12, 24:7, 41:21</p> <p>particular [5] - 9:6, 12:22, 12:24, 24:10, 53:21</p> <p>parties [8] - 3:19, 16:18, 16:22, 26:15, 28:12, 38:1, 48:2, 51:20</p> <p>party [3] - 4:3, 35:9, 52:24</p> <p>Paso [1] - 14:17</p> <p>pay [1] - 44:14</p> <p>paying [2] - 5:21, 43:15</p> <p>pending [4] - 4:13, 6:5, 44:12, 44:16</p> <p>people [4] - 5:19, 13:3, 23:10, 40:3</p> <p>percent [2] - 43:1, 43:11</p> <p>perhaps [1] - 9:15</p> <p>permit [1] - 18:8</p> <p>permits [1] - 19:6</p> <p>person [1] - 52:9</p> <p>perspective [3] - 24:23, 38:2, 38:3</p> <p>physical [1] - 5:16</p> <p>piece [1] - 43:4</p> <p>Pierre [1] - 2:3</p> <p>place [8] - 7:4, 11:6, 24:19, 37:1, 38:19, 44:5, 45:24, 47:20</p> <p>plan [1] - 5:8</p> <p>play [1] - 28:12</p> <p>pleasure [1] - 28:9</p> <p>point [16] - 13:14, 14:6, 15:11, 22:6, 26:12, 26:13, 28:23, 31:6, 39:12, 42:18, 44:22, 45:25, 46:21, 49:16, 50:24, 54:10</p> <p>pointed [1] - 29:11</p> <p>policies [1] - 18:5</p> <p>policy [1] - 36:16</p>	<p>O'dodham [1] - 6:17</p> <p>objection [1] - 54:2</p> <p>obligation [2] - 17:23, 18:4</p> <p>obtain [1] - 24:17</p> <p>obvious [2] - 31:6, 47:19</p>	<p>43:18, 50:6, 52:9</p> <p>overall [1] - 10:1</p> <p>own [6] - 4:21, 18:5, 20:9, 37:20, 37:21, 41:3</p> <p>owned [4] - 4:23, 5:14, 7:2, 13:9</p>	

<p>POLLMAN (1) - 15:19 Pollman (3) - 1:19, 15:20, 22:23 pool (1) - 14:23 population (1) - 13:7 portion (1) - 10:4 position (3) - 35:7, 41:16, 45:4 possible (1) - 26:1 possibly (1) - 34:1 potentially (1) - 29:19 power (2) - 30:6, 44:19 powers (2) - 25:11, 28:7 practical (1) - 20:13 practically (1) - 31:17 pragmatic (1) - 20:13 precedent (1) - 35:19 preempted (1) - 45:11 preemption (2) - 45:15, 45:19 preliminary (1) - 27:23 premature (2) - 50:24, 51:6 prepared (5) - 25:9, 46:19, 46:22, 49:4, 49:18 present (2) - 3:14, 45:5 presentation (1) - 8:9 presenter (1) - 16:2 president (2) - 43:21, 43:22 presume (1) - 24:13 pretty (2) - 7:17, 20:22 prevent (1) - 30:14 previous (2) - 16:2, 41:18 Price (1) - 14:18 Price-Anderson (1) - 14:18 primarily (1) - 6:12 principal (1) - 44:5 principle (1) - 18:14 principles (1) - 36:9 problem (2) - 17:25, 49:25 procedurally (1) - 34:19 procedures (1) - 24:19 proceed (3) - 3:10, 19:3, 24:14 proceeding (4) - 41:9, 43:1, 44:11, 55:6 Proceedings (1) - 1:7 proceedings (7) - 4:9, 27:10, 27:13, 30:7, 38:1, 56:9, 56:12</p>	<p>PROCEEDINGS (1) - 2:1 process (14) - 24:19, 35:9, 36:2, 36:3, 36:10, 38:8, 38:11, 38:12, 39:1, 45:7, 47:11, 47:15, 47:16, 47:22 processing (1) - 48:3 Professional (2) - 56:6, 56:19 professor (1) - 25:18 progress (2) - 9:16, 49:2 prohibit (1) - 37:19 prohibits (1) - 53:18 promote (1) - 12:19 promotes (1) - 4:17 promoting (2) - 14:1, 18:5 proper (1) - 39:10 proposing (1) - 13:10 proven (1) - 48:1 provide (4) - 5:11, 10:17, 19:19, 25:15 provides (2) - 4:25, 28:7 PUBLIC (2) - 1:1, 1:10 Public (4) - 33:12, 47:9, 56:7, 56:18 PUC (3) - 12:9, 12:14, 15:8, 32:22, 32:23, 34:18, 37:19, 47:7 pull (1) - 27:18 pure (1) - 44:13 pursue (1) - 34:24 pursuing (3) - 37:20, 53:18 put (2) - 21:5, 54:11</p>	<p>16:19, 52:22 read (3) - 17:2, 26:12, 29:22 reading (3) - 27:4, 27:6, 29:24 ready (1) - 37:13 real (4) - 21:6, 26:12, 26:13, 44:15 realizes (1) - 33:4 really (4) - 7:17, 27:3, 44:12, 51:23 Realtime (2) - 56:6, 56:19 reason (3) - 25:20, 49:18, 52:18 reasonable (1) - 29:24 reasons (4) - 9:21, 15:25, 36:16, 48:6 rebuttal (1) - 19:10 received (2) - 27:25, 43:9 recognition (1) - 18:24 recognize (5) - 7:1, 21:22, 33:6, 33:8, 37:22 recognized (2) - 23:24, 29:16 recognizing (2) - 36:16, 36:17 recollection (1) - 45:1 recommendation (3) - 8:1, 8:4, 20:11 recommendations (1) - 17:4 recommended (1) - 14:8 recommending (1) - 9:17 recommends (1) - 8:1 record (3) - 5:9, 21:5, 41:22, 44:8, 45:2, 50:25, 51:2 records (1) - 43:24 redirect (1) - 27:2 reference (4) - 31:3, 35:10, 42:9, 45:11 referenced (1) - 14:19 references (1) - 31:2 regard (2) - 4:7, 17:18 REGARDING (1) - 1:5 regarding (8) - 3:3, 8:5, 17:5, 24:10, 35:19, 38:12, 45:10, 45:15 regards (1) - 34:25 Registered (2) - 56:5, 56:19 regulate (8) - 9:22, 10:4, 10:7, 10:9,</p>	<p>12:10, 15:6, 44:18, 52:15 regulated (1) - 20:23 regulating (1) - 11:5 regulation (3) - 9:24, 10:2, 20:24 regulatory (10) - 4:19, 6:14, 6:24, 7:7, 11:20, 20:1, 22:14, 22:19, 23:1, 32:20 Relman (3) - 10:23, 42:20, 43:20 relates (1) - 29:5 relating (2) - 30:15, 30:24 relationship (2) - 43:16, 48:4 relationships (1) - 25:24 relegated (1) - 21:12 relieved (1) - 19:18 relief (1) - 27:25 rely (4) - 17:3, 19:12, 41:18, 50:22 remedies (2) - 4:10, 6:6 remind (2) - 9:13, 12:25 repeat (2) - 16:3, 17:2 repeatedly (1) - 18:13 replete (2) - 31:2, 52:23 reply (1) - 45:21 Reported (1) - 1:22 Reporter (4) - 56:6, 56:19, 56:19 reporter (1) - 56:9 represent (1) - 41:19 representing (2) - 8:15, 8:18 requested (2) - 26:19, 27:25 requesting (1) - 4:8 require (1) - 11:18 Reservation (3) - 5:2, 12:9, 13:6 reservation (47) - 5:6, 5:12, 5:18, 5:19, 7:5, 7:11, 10:13, 13:3, 13:6, 13:8, 13:9, 13:13, 13:17, 17:14, 17:17, 19:2, 21:8, 21:14, 23:9, 23:11, 23:12, 23:22, 26:16, 38:14, 38:19, 39:2, 40:10, 40:11, 40:13, 40:16, 40:17, 40:20, 42:24, 42:25, 43:2, 43:3, 43:15, 43:18, 43:19, 47:21, 48:3,</p>	<p>48:18, 52:5, 52:9, 52:10, 52:11, 52:13 reserve (1) - 15:11 resident (1) - 52:9 resolved (1) - 17:8 respect (3) - 14:7, 36:5, 45:11 respond (1) - 28:4 responded (1) - 42:2 response (1) - 45:3 rest (1) - 15:11 result (2) - 9:11, 45:14 retire (1) - 47:1 revenue (1) - 43:12 revenues (1) - 43:9 reverse (1) - 3:7 reviewing (1) - 16:4 revolve (1) - 4:14 rise (1) - 14:2 Rislov (1) - 1:14 River (7) - 12:6, 12:9, 13:2, 13:25, 19:12, 19:16 Roberts (1) - 41:15 ROGERS (1) - 15:19 Rogers (4) - 1:19, 15:21, 17:1, 22:23 Rolayne (2) - 1:13, 53:8 role (1) - 29:9 rolled (1) - 26:22 Room (1) - 2:3 room (1) - 45:6 rooted (1) - 18:14 router (1) - 40:5 RPR (1) - 1:22 rule (14) - 11:11, 11:13, 11:17, 11:19, 12:1, 12:3, 12:19, 32:24, 33:1, 35:5, 36:1, 42:8, 47:18 ruled (2) - 14:10, 14:14 Rules (1) - 16:5 ruling (6) - 14:10, 16:9, 24:3, 24:4, 26:7, 29:8 rulings (1) - 35:25 running (1) - 43:23 runs (1) - 20:1</p>
	<p style="text-align: center;">Q</p> <p>questions (16) - 3:7, 8:8, 20:17, 21:6, 26:5, 28:11, 28:23, 31:12, 31:17, 39:15, 39:20, 40:25, 41:4, 41:7, 46:7, 46:8 quick (1) - 29:1 quickly (1) - 19:11 quite (1) - 48:6 quote (1) - 27:22</p>			<p style="text-align: center;">S</p> <p>sale (3) - 12:8, 12:11, 12:14 schedule (1) - 45:16 scheduling (2) - 24:17, 44:23 Schreier (7) - 24:3,</p>

<p>27:7, 29:11, 29:16, 30:3, 30:23, 38:16 Schreier's [2] - 24:7, 26:7 scope [2] - 7:6, 7:8 Scott [4] - 1:18, 1:19, 8:14, 20:21 screams [1] - 22:5 screen [1] - 13:22 SDCL [1] - 53:17 SDN [2] - 15:17, 15:22 SDTA [3] - 15:17, 15:22, 53:5 second [1] - 11:6 secondly [1] - 19:22 Secretary [1] - 23:19 Section [1] - 10:19 see [6] - 24:9, 24:20, 32:9, 33:20, 37:7, 49:3 seem [6] - 20:8, 20:12, 24:23, 36:10, 38:3, 38:10 self [7] - 4:17, 12:16, 12:20, 14:1, 18:6, 18:24 self-determination [1] - 18:6 self-government [6] - 4:17, 12:16, 12:20, 14:1, 18:6, 18:24 send [1] - 42:13 sense [5] - 3:25, 24:23, 38:4, 46:25, 49:16 sentences [1] - 33:24 separate [5] - 3:14, 3:16, 3:18, 25:15, 36:11 separately [1] - 3:24 separation [2] - 25:11, 28:7 September [2] - 5:7, 5:14 serve [2] - 13:16, 28:13 serves [1] - 28:9 service [4] - 3:4, 6:1, 13:23, 43:6 SERVICES [1] - 1:5 services [4] - 5:12, 9:25, 10:1, 15:7 set [5] - 9:24, 21:3, 36:12, 45:2, 45:15 sets [1] - 33:17 setups [1] - 40:8 several [4] - 9:21, 10:25, 20:19, 37:10 shall [4] - 3:5, 3:8, 3:9, 50:17</p>	<p>shed [2] - 39:25, 41:13 shorthand [2] - 56:9 showing [1] - 47:10 shows [1] - 39:1 significance [1] - 14:21 significant [1] - 13:7 similar [3] - 13:1, 13:4, 13:24 simple [3] - 6:2, 7:17, 44:13 simply [10] - 6:24, 7:1, 21:7, 23:23, 24:8, 28:13, 39:6, 51:16, 51:19, 54:2 simultaneously [2] - 38:5, 53:18 single [2] - 35:10, 45:25 Sioux [10] - 4:10, 5:3, 5:13, 15:14, 24:4, 25:8, 41:9, 43:21, 43:25, 53:2 situation [4] - 11:24, 13:24, 47:17, 47:19 slow [1] - 49:3 slowed [1] - 49:3 sole [1] - 10:9 solely [2] - 17:13, 26:8 someone [2] - 52:10, 52:19 sometime [1] - 45:23 somewhere [2] - 10:14, 50:6 soon [1] - 19:23 sorry [5] - 8:17, 29:2, 41:23, 42:5, 54:16 sounded [1] - 33:24 sounds [1] - 35:7 SOUTH [2] - 1:2, 56:1 South [23] - 2:2, 2:4, 4:24, 8:17, 9:21, 10:14, 12:5, 19:13, 22:16, 23:15, 23:19, 23:24, 32:23, 35:10, 35:16, 37:19, 43:20, 44:18, 47:9, 47:24, 52:8, 56:7, 56:13 sovereign [2] - 21:13, 23:8 sovereignty [5] - 18:24, 21:23, 33:8, 36:17, 41:8 specific [1] - 19:20 specifics [1] - 40:4 speculation [1] - 41:21 SPRINT [1] - 1:4 Sprint [31] - 1:18, 1:18, 3:2, 4:9, 5:21,</p>	<p>6:3, 6:6, 8:12, 8:15, 8:18, 8:22, 9:14, 10:16, 10:24, 17:16, 19:12, 19:19, 19:23, 26:19, 26:23, 27:4, 27:16, 27:19, 30:2, 31:19, 34:10, 42:19, 45:20, 47:25, 51:22, 53:18 Sprint's [12] - 9:13, 9:16, 9:19, 10:11, 10:22, 12:4, 14:5, 15:7, 27:23, 36:23, 38:25, 49:14 squarely [1] - 52:14 SS [1] - 56:2 stability [1] - 7:10 Staff [19] - 8:1, 8:4, 16:16, 16:18, 17:1, 17:5, 17:6, 18:11, 20:5, 20:11, 26:6, 35:3, 50:23, 51:6, 53:25, 54:4, 54:6 STAFF [1] - 1:12 Staff's [2] - 14:7, 17:4 standpoint [2] - 46:19, 47:15 start [4] - 4:3, 20:20, 24:18, 25:4 starting [1] - 46:17 State [24] - 2:2, 4:24, 6:14, 6:23, 10:14, 11:19, 11:25, 12:10, 12:14, 12:20, 20:23, 22:18, 23:14, 28:8, 31:20, 32:19, 35:6, 35:10, 42:16, 44:18, 47:24, 49:9, 56:7 state [12] - 6:24, 10:4, 10:6, 11:20, 11:22, 11:25, 16:5, 29:18, 31:20, 32:20, 35:6, 46:20 STATE [2] - 1:2, 56:1 State's [1] - 23:19 statement [2] - 33:23, 47:14 statements [1] - 42:2 states [4] - 4:18, 11:8, 11:17, 29:20 States [3] - 5:24, 9:4, 18:15 stay [8] - 3:7, 3:11, 3:25, 4:8, 4:20, 14:7, 20:12, 36:4 Stay [11] - 4:7, 8:2, 9:20, 14:8, 15:10, 16:1, 16:8, 17:5, 19:4, 46:23, 48:12 staying [1] - 18:23</p>	<p>stem [1] - 46:7 step [1] - 14:3 STEVE [1] - 1:10 still [1] - 46:4 stipulated [1] - 45:22 stopped [1] - 14:13 straight [2] - 9:7, 45:2 straightforward [1] - 14:25 strange [1] - 38:22 Strate [2] - 14:24, 42:6 stressing [1] - 18:14 structure [2] - 4:22, 33:17 subject [4] - 5:12, 17:24, 18:1, 23:15 submissions [1] - 41:18 submit [2] - 13:25, 16:9 submitted [1] - 15:23 subordinated [1] - 18:4 subsequently [1] - 46:3 substantial [3] - 13:8, 40:12, 48:16 suggested [1] - 45:17 SULLY [1] - 56:3 sum [1] - 7:16 summarize [1] - 17:4 supported [1] - 7:13 Supreme [13] - 5:25, 9:5, 12:5, 12:10, 12:16, 12:20, 14:24, 16:6, 18:15, 19:13, 35:16, 35:18, 35:20 suspect [1] - 48:25 sweeping [1] - 27:11 SWIER [29] - 4:4, 19:11, 21:2, 22:15, 23:17, 24:6, 25:14, 27:15, 27:20, 29:4, 31:1, 31:22, 31:25, 32:25, 34:3, 35:13, 35:15, 36:7, 36:21, 37:2, 37:24, 38:15, 39:3, 39:18, 40:7, 41:14, 50:21, 53:15, 54:1 Swier [20] - 1:19, 8:11, 9:6, 9:12, 9:17, 11:21, 20:20, 27:19, 28:17, 28:25, 29:3, 30:21, 31:16, 39:17, 39:21, 39:25, 41:6, 45:12, 51:23, 53:14 Swier's [3] - 45:3, 47:13, 49:11 switched [1] - 43:18</p>	<p>switching [1] - 38:13 system [4] - 5:15, 24:12, 47:24, 48:5</p> <p style="text-align: center;">T</p> <p>table [2] - 8:16, 51:18 talks [1] - 10:20 tariff [3] - 10:18, 10:19, 30:10 TC10-026 [2] - 1:5, 3:1 technical [1] - 39:21 technicality [1] - 41:2 technology [3] - 13:10, 13:11 TELECOM [1] - 1:5 Telecom [4] - 1:19, 3:3, 4:2, 4:8 telecom [1] - 9:25 telecommunication [2] - 5:17, 9:25 TELECOMMUNICATIONS [1] - 1:5 telecommunications [10] - 3:4, 5:5, 5:8, 5:11, 5:16, 7:2, 9:23, 10:5, 38:12, 48:5 teleconference [1] - 4:6 telephone [6] - 1:19, 4:25, 5:15, 12:8, 12:11, 43:18, 45:6, 50:19 telephones [2] - 3:6, 3:9 tenets [4] - 20:6, 20:7, 22:3, 37:24 tentative [1] - 45:15 terminate [2] - 39:2, 40:9 terminating [4] - 5:22, 10:16, 40:1, 43:10 terms [3] - 12:11, 23:1 testimony [1] - 13:20 THE [5] - 1:1, 1:2, 1:4, 1:10 themselves [2] - 17:21, 41:12 therefore [1] - 12:23 they've [1] - 43:25 thirdly [1] - 44:10 thoroughly [2] - 16:19, 26:12 thoughts [1] - 41:20 three [3] - 7:5, 25:15, 26:2 throughout [5] - 22:22, 23:3, 29:14, 31:8, 32:22</p>
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<p>ties [1] - 14:22</p> <p>Tobin [4] - 1:18, 8:16, 44:24, 44:25</p> <p>TOBIN [1] - 45:3</p> <p>today [13] - 3:5, 4:6, 5:24, 8:14, 8:18, 15:21, 41:11, 42:12, 46:15, 46:20, 48:15, 49:5, 53:22</p> <p>Tohono [1] - 6:17</p> <p>token [1] - 49:1</p> <p>Tom [3] - 1:18, 8:16, 43:20</p> <p>took [4] - 30:18, 45:5, 45:24, 56:9</p> <p>totality [2] - 18:13, 29:22</p> <p>totally [1] - 33:20</p> <p>toward [1] - 39:4</p> <p>towards [4] - 16:15, 39:20, 39:22, 41:2</p> <p>towers [2] - 5:17, 5:18</p> <p>traffic [49] - 8:23, 9:23, 10:3, 10:5, 10:7, 10:10, 10:12, 10:13, 10:14, 10:18, 10:20, 10:23, 11:2, 11:5, 14:16, 15:6, 17:11, 18:25, 21:7, 21:10, 24:10, 29:6, 29:8, 29:13, 29:20, 29:23, 30:4, 30:8, 30:12, 30:25, 31:7, 31:8, 31:10, 38:25, 40:2, 42:19, 42:22, 42:23, 43:1, 44:19, 47:20, 48:16, 50:1, 50:4, 51:25, 52:8</p> <p>trafficking [1] - 47:23</p> <p>TRANSCRIPT [1] - 2:1</p> <p>Transcript [1] - 1:7</p> <p>transcription [1] - 56:12</p> <p>traveled [1] - 29:20</p> <p>tremendous [1] - 48:2</p> <p>trespass [1] - 3:21</p> <p>tribal [51] - 4:10, 4:11, 4:17, 4:18, 7:8, 7:18, 8:5, 10:19, 11:13, 12:15, 12:19, 13:4, 13:22, 14:1, 18:5, 18:24, 19:17, 19:20, 19:25, 20:3, 20:24, 21:18, 21:22, 22:2, 22:3, 22:5, 22:12, 23:25, 24:14, 25:3, 27:10, 28:6, 28:9, 28:14, 33:2, 35:4, 35:5, 35:11, 35:16, 39:23, 40:2, 40:4,</p>	<p>40:6, 40:16, 41:17, 44:4, 44:11, 48:4, 49:9, 49:12</p> <p>Tribal [93] - 4:14, 4:16, 4:20, 5:4, 5:10, 6:4, 6:6, 6:7, 6:9, 6:11, 6:13, 6:21, 7:6, 7:18, 7:19, 7:22, 7:23, 8:2, 9:9, 10:18, 11:7, 11:14, 11:23, 14:9, 14:12, 18:20, 19:5, 19:6, 19:14, 19:24, 20:6, 20:8, 21:16, 21:20, 21:23, 22:8, 23:2, 23:4, 24:5, 24:8, 24:11, 24:24, 25:4, 27:10, 28:2, 28:3, 28:13, 28:18, 29:19, 30:6, 30:7, 30:14, 30:16, 31:22, 31:25, 32:5, 33:3, 33:8, 33:9, 33:11, 33:16, 33:18, 33:25, 34:3, 34:5, 34:6, 34:7, 34:9, 34:14, 34:16, 35:23, 36:5, 36:18, 36:20, 37:1, 37:7, 37:21, 38:4, 38:11, 39:7, 39:11, 41:8, 41:10, 42:13, 42:16, 44:12, 45:7, 46:5, 47:5, 47:7, 47:11, 47:21</p> <p>tribally [3] - 4:23, 5:14, 7:2</p> <p>tribe [19] - 7:6, 18:8, 18:18, 25:11, 25:20, 25:25, 36:1, 36:3, 37:20, 38:22, 45:17, 45:18, 48:20, 49:23, 50:3, 50:4, 50:7</p> <p>Tribe [8] - 4:10, 5:3, 5:13, 15:15, 25:8, 25:16, 25:25, 53:3</p> <p>Tribe's [1] - 8:21</p> <p>tribe's [2] - 7:9, 7:12</p> <p>tribunal [1] - 9:18</p> <p>tried [1] - 28:25</p> <p>trouble [1] - 27:19</p> <p>true [2] - 48:15, 56:11</p> <p>turn [1] - 16:15</p> <p>two [12] - 3:14, 3:21, 6:16, 7:3, 11:21, 22:20, 34:13, 34:15, 35:24, 36:11, 36:22, 52:22</p> <p>type [4] - 13:10, 14:2, 17:11, 33:18</p> <p>typical [1] - 43:16</p>	<p style="text-align: center;">U</p> <p>U.S.C [5] - 8:24, 10:1, 14:14, 15:4, 20:21</p> <p>ultimately [2] - 9:12, 26:24</p> <p>unanimously [1] - 32:12</p> <p>under [9] - 4:24, 7:22, 21:16, 23:14, 25:10, 29:7, 46:14, 49:17, 53:17</p> <p>underlying [1] - 14:1</p> <p>understood [1] - 42:6</p> <p>unfortunately [3] - 19:18, 34:23, 35:18</p> <p>Union [1] - 6:1</p> <p>unique [6] - 21:3, 21:11, 21:15, 22:17, 38:18, 38:20</p> <p>United [3] - 5:24, 9:4, 18:15</p> <p>University [1] - 25:18</p> <p>unless [1] - 8:7</p> <p>unnecessary [1] - 47:14</p> <p>up [13] - 9:24, 10:15, 12:13, 25:18, 26:15, 26:18, 28:16, 30:2, 30:21, 45:15, 49:3, 53:22, 54:11</p> <p>urge [3] - 9:20, 15:9, 16:9</p> <p>usage [1] - 42:20</p> <p>user [1] - 39:2</p> <p>utilities [1] - 43:13</p> <p>UTILITIES [2] - 1:1, 1:10</p> <p>Utilities [2] - 33:13, 47:9</p> <p>utility [2] - 20:22, 41:17</p> <p>Utility [9] - 5:4, 5:7, 5:10, 7:6, 10:19, 15:15, 41:10, 41:19, 53:3</p>	<p>virtually [1] - 39:1</p> <p>volume [2] - 50:1, 50:5</p> <p>voluminous [1] - 7:14</p> <p>vote [3] - 49:22, 50:8, 54:11</p> <p>votes [2] - 50:14, 55:5</p> <p style="text-align: center;">W</p> <p>wait [1] - 35:1</p> <p>waiting [2] - 24:9, 24:20</p> <p>wants [2] - 21:22</p> <p>western [1] - 6:19</p> <p>whatsoever [2] - 25:24, 49:9</p> <p>Whiting [2] - 8:17, 45:5</p> <p>whole [1] - 45:10</p> <p>wldvoice [1] - 43:22</p> <p>Wiest [2] - 1:13, 53:25</p> <p>WIEST [1] - 53:10</p> <p>willing [2] - 45:1, 48:6</p> <p>WIMAX [2] - 13:10, 43:22</p> <p>Winner [1] - 8:16</p> <p>wish [4] - 3:20, 48:9, 52:19, 52:20</p> <p>wishes [1] - 52:22</p> <p>wishing [1] - 53:13</p> <p>withdraw [1] - 52:19</p> <p>witness [1] - 13:21</p> <p>Wittler [2] - 1:22, 56:18</p> <p>WITTLER [1] - 56:5</p> <p>word [2] - 37:16, 52:5</p> <p>words [1] - 11:12</p> <p>works [1] - 34:4</p> <p>wrestle [1] - 41:3</p> <p>wrote [1] - 37:16</p> <p style="text-align: center;">Y</p> <p>year [2] - 5:13, 13:21</p> <p>York [1] - 6:20</p>
		<p style="text-align: center;">V</p> <p>various [2] - 21:19, 25:21</p> <p>venus [1] - 39:10</p> <p>venues [1] - 38:9</p> <p>verbatim [1] - 16:2</p> <p>via [1] - 4:5</p> <p>VICE [1] - 1:11</p> <p>violation [2] - 28:3, 44:13</p>	