BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE COMPLAINT FILED BY SPRINT COMMUNICATIONS COMPANY, LP AGAINST NATIVE AMERICAN TELECOM, LLC REGARDING TELECOMMUNICATIONS SERVICES	))))))	**Docket No. TC10-026**

Respondent Native American Telecom LLC's Brief in Support of Motion to Stay South Dakota Public Utilities Commission's Docket No. TC10-026

STATEMENT OF THE ISSUE

The primary issue before the South Dakota Public Utilities Commission (SDPUC or Commission) at this time is whether Respondent Native American Telecom, LLC's (NAT) "Motion to Stay," based on the "Tribal Exhaustion Doctrine," should be granted.

STATEMENT OF THE CASE

NAT respectfully requests that the Commission stay all proceedings in this duplicative action until Sprint Communications Company L.P. (Sprint) exhausts all tribal court remedies in an action recently filed by NAT in the Crow Creek Tribal Court (Tribal Court), and involving the same questions of law and fact that Sprint seeks to litigate before the Commission. It is an elementary tenet of federal Indian law that a party may not circumvent or collaterally attack the jurisdiction of a tribal court by filing a parallel action in federal court. This rule, which promotes tribal self-government and the authority and development of tribal courts, mandates that a federal or state court (or state regulatory authority) "stay its hand" until the Tribal Court has had a full and fair opportunity to determine its jurisdiction, and, if the Tribal Court finds such jurisdiction to exist, to adjudicate the merits of the dispute between NAT and Sprint. The Commission

should follow the lead of this well-established federal court doctrine and "stay its hand" until the proceedings in Tribal Court have been exhausted.

STATEMENT OF FACTS

A. The Structure and Purpose of NAT

NAT is a full-service, tribally-owned limited liability company organized under the laws of the State of South Dakota. NAT's ownership structure consists of the Crow Creek Sioux Tribe (51%) (Tribe), Native American Telecom Enterprise, LLC (25%) (NAT ENTERPRISE), and WideVoice Communications, Inc. (24%) (WideVoice).[1] Affidavit of Gene DeJordy ¶ 2 (hereinafter DeJordy Affidavit ¶ -).

NAT provides high-speed Internet access, basic telephone, and long-distance services on and within the Crow Creek Sioux Tribe Reservation (Reservation). NAT's services take place exclusively within the exterior boundaries of the Reservation. NAT *does not* provide services within the State of South Dakota outside the exterior boundaries of the Reservation. As a result of its efforts, NAT has created jobs and provided much-needed economic opportunities on the Reservation.[2] DeJordy Affidavit ¶ 4.

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[1] *For sake of clarity, it should be noted that NAT ENTERPRISE is a telecommunications development company and is a* ***separate and distinct entity*** *from NAT.* The Tribe is a federally recognized Indian tribe with its tribal headquarters located on the Crow Creek Sioux Tribe Reservation in Fort Thompson, South Dakota. WideVoice is a Competitive Local Exchange Carrier (CLEC). DeJordy Affidavit ¶ 3.

[2] The lack of sufficient telephone and other telecommunications services upon Native American reservations has been a long-standing problem. While 94% of all Americans have at least one telephone in their home, the Federal Communications Commission (FCC) has found that only 47% of Native Americans living on reservations or other tribal lands have telephone service. The FCC has determined that this lower telephone subscribership is "largely due to the lack of access to and/or affordability of telecommunications services in these areas" *Federal-State Joint Board on Universal Services: Promoting Development and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas, Twelfth Report and Order,* 15 FCC Red. 12208 (2000), at ¶¶ 20, 26 (2000 FCC Report). The FCC has also found that "by enhancing tribal communities' access to telecommunications, including access to interexchange services,

B. NAT's Efforts on the Crow Creek Sioux Tribe Reservation and Sprint's Refusal to Pay the Crow Creek Sioux Tribal Utility Authority's Lawfully-Imposed Access Tariffs

In 1997, the Crow Creek Sioux Tribal Council established the Crow Creek Sioux Tribe Utility Authority (Tribal Utility Authority) for the purpose of planning and overseeing utility services on the Reservation and to promote the use of these services "to improve the health and welfare of the residents." DeJordy Affidavit ¶ 5.

On August 19, 2008, the Tribe issued its "Crow Creek Indian Reservation - Telecommunications Plan to Further Business, Economic, Social, and Educational Development" (Telecommunications Plan).[3] DeJordy Affidavit ¶ 6.

On October 28, 2008, the Tribal Utility Authority entered its "Order Granting Approval to Provide Telecommunications Service" (Approval Order).[4] Under this Approval Order, NAT was "granted authority to provide telecommunications service on the Crow Creek Reservation subject to the jurisdiction of the laws of the Crow Creek Sioux Tribe."[5] DeJordy Affidavit ¶ 7.

As a result of the Approval Order, NAT properly filed two Access Service Tariffs (Access Tariff) governing termination of telephone traffic on the Reservation. One Access Tariff

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advanced telecommunications, and information services, we increase tribal communities' access to education, commerce, government and public services." *Id.* at ¶ 23. *See* Tracey A. LeBeau, *Reclaiming Reservation Infrastructure: Regulatory and Economic Opportunities for Tribal Development,* 12 Stan. L & Pol'y Rev. 237, 238 (2001) ("Reservation infrastructures, including basic services such as water, electricity, gas and telecommunications, are currently incapable of supporting tribal populations").

[3] The Telecommunications Plan is attached as "Exhibit 1."

[4] The Approval Order is attached as "Exhibit 2." The Approval Order was signed by then-Crow Creek Tribal Chairman Brandon Sazue.

[5] The Approval Order "is akin to competitive local exchange (CLEC) approval provided to carriers outside of reservations."

was filed with the Federal Communications Commission (FCC) for interstate traffic. A second Access Tariff was filed with the Tribal Utility Authority.[6] DeJordy Affidavit ¶ 8.

In September 2009, pursuant to the Approval Order, and after over one year of planning and infrastructure development, NAT launched one of the first new tribally-owned telephone systems in the United States.[7] NAT provides telephone and advanced broadband service to residential and business customers on the Reservation. DeJordy Affidavit ¶ 9.

The telephone and advanced broadband network system on the Reservation enables the Tribe to pursue new economic development opportunities. The Tribe describes its advanced telecommunications system as a vehicle for "paving the way for much-needed business, economic, social and educational development on the Crow Creek Reservation." Specifically, the broadband network supports high-speed broadband services, voice service, data and Internet access, and multimedia.[8] DeJordy Affidavit ¶ 12.

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[6] The Approval Order requires that the basic telephone service offered by NAT must be "consistent with the federal universal service requirements of 47 U.S.C. § 214(e) and the rules of the Federal Communications Commission." NAT has always complied with this portion of the Approval Order. DeJordy Affidavit ¶ 8.

[7] NAT has physical offices, telecommunications equipment, and telecommunications towers on the Reservation. NAT also provides a computer training facility with free Internet and telephone service to tribal members. In September 2010, NAT will be opening a new stand-alone Internet Library and Training Facility, which will include Internet stations and educational facilities for classes. DeJordy Affidavit ¶ 10. The Tribe's press release announcing the launch of its tribally-owned telephone and advanced broadband telecommunications system is attached as "Exhibit 3."

[8] The broadband network uses WiMax (Worldwide Interoperability for Microwave Access) technology operating in the 3.65 GHZ licensed spectrum, providing service to residential, small business, hospitality, and public safety customers. WiMax is a Broadband Wireless Access technology based on the IEEE 802.16 standard that enables the delivery of high-speed personal, business, and enterprise class broadband services to subscribers anytime, anywhere. Through the use of advanced antenna and radio technology with OFDM/OFDMA (Orthogonal Frequency Division Multiplexing), NAT delivers wireless IP (Internet Protocol) voice and data communications. WiMax was selected because this technology offers flexible, scalable, and economically viable solutions that are key components to deploying in vast rural environments, such as the Reservation. DeJordy Affidavit ¶ 13.

Shortly after NAT launched its tribally-owned telephone system, Sprint improperly refused to pay NAT's lawfully-imposed Access Tariff.[9] In March 2010, NAT filed a complaint with the Tribal Utility Authority seeking enforcement of its Access Tariff. Specifically, NAT alleged that Sprint was not paying the required Access Tariff for services NAT rendered on the Reservation.[10] DeJordy Affidavit ¶¶ 14, 16.

On March 29, 2010, the Tribal Utility Authority entered an Order agreeing with NAT and finding that Sprint's "self-help" in refusing to pay NAT's Access Tariff violated the "filed rate doctrine."[11] DeJordy Affidavit ¶ 17. Specifically, the Tribal Utility Authority found that "[Sprint's] self-help actions could jeopardize the ability of a carrier, like [NAT], to serve the essential telecommunications needs of the residents of the Crow Creek reservation." The Tribal Utility Authority also held "[NAT] commenced providing essential telecommunications services

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[9] Sprint is a limited partnership that provides interexchange services on the Reservation. It should be noted that Sprint initially paid NAT its lawfully-imposed Access Tariffs. However, shortly after making these initial payments, Sprint engaged in the improper "self-help" actions that have resulted in this (and other) lawsuits. DeJordy Affidavit ¶ 15.

[10] Sprint has taken the position, despite its earlier Access Tariff payments and the applicability of lawful tariffs in effect, that the termination of traffic by NAT on the Reservation is not subject to compensation, even though NAT incurs costs to terminate Sprint's traffic. DeJordy Affidavit ¶ 16.

[11] The Tribal Utility Authority's Order is attached as "Exhibit 4." The Order was signed by then-Crow Creek Tribal Chairman Brandon Sazue. The "filed rate doctrine" requires all customers, such as Sprint, who avail themselves of tariffed services, to pay lawfully-imposed tariff rates. The "filed rate doctrine" is a common law construct that originated in judicial and regulatory interpretations of the Interstate Commerce Act and was later applied to the Communications Act of 1934 (as amended). The doctrine has been consistently applied to a variety of regulated industries and stands for the principle that a validly filed tariff has the force of law and may not be challenged in the courts for unreasonableness, except upon direct review of an agency's endorsement of the rate. *See, e.g. Maislin Industries, U.S., Inc. v. Primary Steel, Inc.,* 497 U.S. 116, 117 (1990). The doctrine is premised on two tenets – (1) it prevents carriers from engaging in price discrimination between ratepayers; and (2) it preserves the exclusive role of authorities in approving "reasonable" rates for telecommunications services. *Marcus v. AT&T Corp.,* 138 F.3d 46, 58 (2nd Cir. 1998).

. . . to the residents of the Crow Creek reservation pursuant to [the Tribal Utility Authority's Approval Order]. . . . It is also a matter of public record that [NAT] has commenced offering new and critically needed services on the reservation." DeJordy Affidavit ¶ 17.

The Tribal Utility Authority's Order concluded by stating:

> The Crow Creek reservation is a rural, high-cost service area. Access service revenue has historically been a critically important source of revenue for rural carriers, like [NAT], to support operations. . . . If carriers, like Sprint, are able to take self-help actions and not pay for services rendered subject to a lawful tariff, it would not only put at risk the continued operation of carries like [NAT], but would also put at risk the services relied upon by, and in some cases essential to[,] the health and safety of . . . consumers."

As such, the Tribal Utility Authority found "Sprint's non-payment of [NAT's] access tariff charges to be a violation of the laws of the Crow Creek Sioux Tribe."[12] DeJordy Affidavit ¶ 18.

As of today's date, Sprint continues to entirely ignore this Order and refuses to pay the Tribal Utility Authority's lawfully-imposed Access Tariff. DeJordy Affidavit ¶ 20.

C. Sprint's Actions Have Resulted in Duplicative Federal Court and State Regulatory Authority Legal Proceedings

i.) Sprint's South Dakota Public Utilities Commission Complaint

Less than two months after the Tribal Utility Authority issued its Order, Sprint filed a complaint with this Commission. Sprint's complaint concerns issues identical to those decided by the Tribal Utility Authority. In its SDPUC complaint, Sprint alleges that (1) the SDPUC has the sole authority to regulate Sprint's interexchange services within the State of South Dakota; (2) the Tribal Utility Authority lacks jurisdiction over Sprint; and (3) NAT must seek a

[12] The Tribal Utility Authority's Order also provided Sprint with an invitation to address Sprint's concerns. However, Sprint has also entirely ignored this part of the Order. DeJordy Affidavit ¶ 19.

Certificate of Authority from the SDPUC and file a tariff with the Commission before NAT can access charges for switched access service.

At this time, Sprint's complaint is pending before the SDPUC. NAT (along with the Tribal Utility Authority) has requested that Sprint's SDPUC complaint be stayed based on the doctrine of "tribal exhaustion" and dismissed for lack of jurisdiction.

ii.) NAT's Complaint in Crow Creek Tribal Court

On July 7, 2010, NAT filed a complaint with the Crow Creek Tribal Court.[13] NAT's complaint concerns issues identical to those decided by the Tribal Utility Authority. In its Tribal Court complaint, NAT alleges that (1) Sprint is unlawfully refusing to compensate NAT for Access Tariffs; and (2) the Tribal Utility Authority and Tribal Court have proper jurisdiction over Sprint in this matter.

At this time, NAT's complaint is pending before the Tribal Court. Sprint has requested that NAT's Tribal Court complaint be dismissed for lack of jurisdiction. NAT has requested that a scheduling order be entered by the Tribal Court.

iii.) Sprint's Complaint in Federal District Court

On August 16, 2001, Sprint filed a complaint with the South Dakota Federal District Court (Central Division).[14] Sprint's complaint concerns issues identical to those decided by the Tribal Utility Authority and contained in NAT's Tribal Court complaint. In sum, Sprint alleges that the Tribal Utility Authority and Tribal Court have no jurisdiction over its activities on the Reservation and requests damages, declaratory relief, and injunctive relief.

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[13] NAT's Tribal Court Complaint is attached as "Exhibit 5."

[14] Sprint's federal district court Complaint is attached as "Exhibit 6." The Honorable Chief Judge Karen Schreier has been assigned to hear this case.

At the present time, Sprint's complaint is pending before the South Dakota Federal District Court. NAT has filed its Motion to Stay in this federal district court lawsuit based upon the "Tribal Exhaustion Doctrine."

DISCUSSION OF LAW

I. THE "TRIBAL COURT EXHAUSTION DOCTRINE" AND ITS UNDERLYING POLICIES REQUIRE THAT SPRINT EXHAUST ITS REMEDIES IN THE CROW CREEK TRIBAL COURT

In *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987) and *Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians,* 471 U.S. 845 (1985), the Supreme Court announced the doctrine of "Tribal Court Exhaustion." This doctrine is designed to protect the integrity of tribal courts, vital as those courts are to the exercise of tribal self-government. Under this doctrine, Sprint may not, before the Commission, challenge the jurisdiction of the Crow Creek Tribal Court or litigate the merits of the dispute already pending before the Tribal Court until Sprint first exhausts all remedies available in the Tribal Court regarding similar issues.

The federal courts have uniformly held that, under the tribal court exhaustion doctrine, a party may not circumvent or attack a tribal court's jurisdiction by filing a duplicative federal court action. Because this dispute strikes at the very heart of the Tribe's self-determination – including Sprint's efforts to pierce the Tribe's sovereign immunity and the Tribe's exercise of regulatory and adjudicatory oversight over economic development activities on the reservation – it presents a classic case for application of the tribal court exhaustion doctrine. Accordingly, the Commission should "stay its hand" until Sprint exhausts its remedies in Crow Creek Tribal Court.

A. The Tribal Court Exhaustion Doctrine Applies Here Where Sprint Has Filed Duplicative SDPUC and Federal Court Actions Regarding the Same Questions of Law and Fact as the Tribal Court Action

"Tribal courts play a vital role in tribal self-government, and the Federal Government has consistently encouraged their development." *Iowa Mut. Ins. Co. v. LaPlante,* 480 U.S. 9, 14-15 (1987) (internal citation and footnote omitted). "A federal court's exercise of jurisdiction over matters relating to reservation affairs can . . . impair the authority of tribal courts[.]" *Id.* at 15 (citations omitted). Accordingly, a party may not attack or circumvent the jurisdiction of the tribal court in a collateral or parallel federal action unless and until it first exhausts all remedies available in tribal court. *Id.* at 16-17; *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians,* 471 U.S. 845, 856-57 (1985).[15] In fact, the Eighth Circuit Court of Appeals has even gone as far as to hold that the exhaustion of tribal court remedies is required even when *no tribal court action is pending* at the time a federal court action is filed. *See e.g., Duncan Energy Co. v. Three Affiliated Tribes of Fort Berthold Reservation,* 27 F.3d 1294, 1295-96, 1299-1301 (8th Cir. 1994).

While the exhaustion of tribal court remedies is "required as a matter of comity, not as a jurisdictional prerequisite[,]" *Iowa Mut.,* 480 U.S. at 16 n. 8, the doctrine is a mandatory "inflexible bar" to a federal court's exercise of jurisdiction. *Bowen v. Doyle,* 230 F.3d 525, 529-30 (2nd Cir. 2000). Further, because the "federal policy of promoting tribal self-government encompasses the development of the entire tribal court system, . . ." "[a]t a minimum, exhaustion of tribal remedies means that tribal appellate courts must have the opportunity to review the determination of the lower tribal courts[,]" *Iowa Mut.,* 480 U.S. at 16-17, and a federal court

[15] The tribal court exhaustion doctrine applies regardless of whether a party collaterally attacks the jurisdiction of a tribal court directly, see *Nat'l Farmers,* 471 U.S. at 856-57, or indirectly by seeking to litigate the merits of a dispute already before a tribal court, see *Iowa Mut.,* 480 U.S. at 11-13, 16-17.

must "stay[] its hand" until tribal appellate review is complete, *Nat'l Farmers,* 471 U.S. at 857. Following the exhaustion of tribal court remedies, the tribal courts' determination of tribal jurisdiction is subject to challenge in federal court – until then, "it would be premature for a federal court to consider any relief." *Id.; see also Iowa Mut.,* 480 U.S. at 19.

To NAT's knowledge, the federal courts have arrived at complete unanimity on the precise question presented here. With the exception of occasional district court opinions that have been overturned on appeal, the federal courts have uniformly held that the tribal court exhaustion doctrine precludes a party such as Sprint from litigating in federal court those very same issues that are pending in a parallel tribal court action.

For example, in *Gaming World Int'l Ltd. v. White Earth Band of Chippewa Indians,* 317 F.3d 840 (8th Cir. 2003), the Eighth Circuit considered a dispute stemming from a casino management agreement between Gaming World and the Band. The dispute arose when the tribal council terminated the agreement and Gaming World initiated arbitration proceedings. *Id.* at 846-47. The Band subsequently sued Gaming World in tribal court, seeking a declaration that the management agreement was invalid. *Id.* at 846. Gaming World objected to tribal court jurisdiction and, one month later, sued the Band in federal court, seeking a declaratory judgment as to the validity of the agreement and an order compelling arbitration. *Id.* Recognizing that "[t]he first filed declaratory action [in tribal court] encompasses all of the issues between the parties . . . [and that] Gaming World's subsequent petition for declaratory relief and arbitration was a clear attempt to evade tribal court jurisdiction," the Eighth Circuit held:

> [T]he district court erred by not deferring for exhaustion of tribal court remedies and by proceeding to rule on the motion to compel arbitration. *Our decision in* [Bruce H. Lien Co. v. Three Affiliated Tribes, *93 F.3d 1412 (8th Cir. 1996)] and those in similar cases decided by the Fifth, Ninth, and Second Circuits teach that exhaustion should be required when a party tries to avoid tribal*

> *court jurisdiction by seeking an order to compel arbitration in federal court.* This is especially true if the underlying dispute involves *activities undertaken by tribal government within reservation lands.* Failure to require exhaustion in these circumstances would undermine the important federal policy to foster tribal self government through the development of tribal courts as enunciated in *Nat'l Farmers Union Ins. Co.* and *Iowa Mut. Ins. Co.*

Id. at 851-52 (emphasis added) (footnote omitted).

The Eighth Circuit was also confronted with the exhaustion doctrine in *Bruce H. Lien Co. v. Three Affiliated Tribes,* 93 F.3d 1412 (8th Cir. 1996). There, the Chairman and Secretary of the Three Affiliated Tribes Tribal Business Council, purportedly acting on behalf of the Tribes, executed a gaming management agreement with the Bruce H. Lien Company that included an arbitration clause and corresponding waiver of sovereign immunity. *Id.* at 1414-15 n.2. When the company demanded arbitration, the Tribes sued in tribal court seeking a ruling that the management agreement was "null and void under Tribal law due to lack of proper authority and failure to garner approval by the [Tribal Business Council]." *Id.* at 1415-16. After the Tribes obtained a preliminary injunction from the tribal court enjoining the company and the American Arbitration Association from proceeding with the arbitration, the company filed suit in federal court seeking to enforce the arbitration clause. *Id.* at 1416. The Eighth Circuit concluded:

> [T]he Tribes are challenging the legal validity of the contract itself, specifically the actions of its former Chairman leading to the execution of the contract. This challenge to the document itself therefore calls into question all provisions contained therein (including provisions relating to arbitration, sovereign immunity, and federal district court jurisdiction). . . .
>
> [T]he issue becomes where the decision regarding the contract's validity is to be made. In the end we are convinced that the question must first be promptly addressed in the Tribal Court, subject to appropriate review by the District Court.

Id. at 1417.

In *Reservation Telephone Cooperative v. Three Affiliated Tribes of the Fort Berthold Reservation*, 76 F.3d 181 (8th Cir. 1996), three telephone cooperatives challenged the authority of multiple tribes to impose possessory interest tax on telephone lines and rights-of-way within their reservation. *Id.* at 182. Each cooperative provided telephone service to the reservation through telephone cables crossing reservation lands by virtue of rights-of-way granted by the Secretary of the Interior.[16] *Id.* at 182-83.

In 1990, the tribes enacted a tax on interests in real and personal property located within the exterior boundaries of the reservation and used for business or profit. This possessory interest tax was assessed on 100 percent of the actual value of the possessory interest as determined by the Tribal Tax Commission. *Id.* at 183. Under tribal law, the cooperatives' property interests situated within the reservation were subject to the possessory interest tax and to tribal remedies and appeal provisions. As such, the Tribal Tax Commission sent the possessory interest tax forms to the cooperatives with a letter indicating the tribes' intent to collect the taxes. Subsequently, the tribes sent a notice to the cooperatives setting a deadline for filing possessory interest tax returns. *Id.*

In an attempt to avoid paying the taxes, the cooperatives filed an action for declaratory judgment in the United States District Court for the District of North Dakota. The cooperatives asserted various grounds for invalidation of the tribal tax and sought to enjoin the tribes from enforcing the tax. *Id.* The district court held that the cooperatives were required to present their

[16] Congress authorized the Secretary of the Interior to grant these rights-of-way in Section 3 of its Act of March 3, 1901, 31 Stat. 1083 (codified at 25 U.S.C. § 319) (1901 Act). The 1901 Act further authorizes the Secretary of the Interior to tax telephone lines for the benefit of Indian tribes, but leaves intact the authority of state, territorial, or municipal authorities to assess a tax on telephone lines laid pursuant to federal rights-of-way. *Id.* at 183.

arguments to the tribal court before the federal court action would be allowed to proceed.[17] *Id.* at 184. In affirming the district court's decision, the Eighth Circuit found the cooperatives' opposition to the tribal exhaustion doctrine to be "both incongruous and inconsistent with the policy of tribal self-governance. . . ." *Id.* at 185. The Eighth Circuit concluded by opining that "if a federal court 'accepts the reasoning that a party does not have to exhaust tribal remedies in a case where the party says the underlying tribal action is preempted, there will never be an exhaustion rule.'" *Id.* (internal citations omitted).

In this case, Sprint seeks to litigate a dispute before the Commission involving (1) NAT (a tribally-owned company), (2) NAT's actions on and within the exterior boundaries of the Reservation, (3) the scope of the Tribe's and Tribal Utility Authority's regulatory authority, (4) the scope of the Tribal Court's adjudicatory authority, (5) the Tribe's financial stability, (6) the Tribe's economic development efforts, (7) employment opportunities for the Tribe's members, and (8) the Tribe's sovereign immunity.

Sprint initially filed a Complaint against NAT with the Commission. NAT then filed an appropriate (and identical) action in Tribal Court. Approximately one month later, Sprint filed a plainly duplicative (and identical) action in the South Dakota Federal District Court and informed the Tribal Court that it contests the jurisdiction of the Tribal Court over it and the subject matter of the dispute. The tribal court exhaustion doctrine unquestionably bars Sprint's transparent attempt to circumvent (and disregard) the jurisdiction of the Tribal Court. Accordingly, the Commission should not proceed further in this action until Sprint fully exhausts its remedies in the Tribal Court.

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[17] Shortly thereafter, upon a motion by the cooperatives, the district court amended its stay order to provide instead that the case be dismissed without prejudice pending exhaustion by the cooperatives of their tribal remedies. *Id.* at 184.

B. Exhaustion in this Dispute – a Quintessential Tribal Affair Stemming from the Crow Creek Sioux Tribe's Exercise of Self-Government and Turning on the Interpretation of Tribal Law -- Fulfills the Policies Underlying the Tribal Court Exhaustion Doctrine

The policies underlying the tribal court exhaustion doctrine underscore the importance of its application to this dispute. In addition to promoting the substantive federal policies of tribal self-government, self-determination, and the authority and development of tribal courts, the tribal court exhaustion doctrine advances several prudential policies. *See Iowa Mut.,* 480 U.S. at 14-17; *Nat'l Farmers,* 471 U.S. at 856-57. Judicial efficiency, the "orderly administration of justice," and the avoidance of "procedural nightmare[s]" demand that a tribal court be afforded full opportunity to determine its jurisdiction, evaluate any challenges thereto, rectify any errors, and develop a full record before a federal court intervenes.[18] *Nat'l Farmers,* 471 U.S. at 856-57. Moreover, exhaustion encourages tribal courts "to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review." *Id.* at 857 (footnote omitted).

By contrast, allowing litigants like Sprint to evade proper exercises of tribal court authority through the filing of duplicative actions in federal courts (or before state regulatory authorities) would sap tribal courts of their authority and undermine tribal self-government:

> [U]nconditional access to the federal forum *would place it in direct competition with the tribal courts,* thereby impairing the latter's authority over reservation affairs. Adjudication of such matters by any nontribal court also infringes upon tribal law-making authority, because tribal courts are best qualified to interpret and apply tribal law.

[18] As a procedural matter, when a court finds that tribal exhaustion is required, the court can either stay or dismiss the action. If dismissal may result in the running of the applicable statute of limitations, the court should stay the action instead of dismissing it. *Farmers Union Oil Co. v. Guggolz, et al.,* 2008 WL 216321 (U.S.D.C. – South Dakota – Northern Division, January 24, 2008 – Honorable Charles B. Kornmann) (citing *Sharber v. Spirit Mountain Gaming Inc.,* 343 F.3d 974, 976 (9th Cir. 2003)).

Iowa Mut., 480 U.S. at 16 (emphasis added) (citations omitted). The importance of the tribal court exhaustion doctrine has accordingly been affirmed in numerous cases. *See, e.g., Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 32-33 (1st Cir. 2000) ("[H]aving a tribal court address, in the first instance, the scope of its jurisdiction over a dispute that stems from actions taken in the course of tribal governance promotes efficiency and sensibly allocates scarce judicial resources"); *Calumet Gaming Group-Kansas, Inc. v. Kickapoo Tribe of Kansas,* 987 F.Supp. 1321, 1329 (D. Kan. 1997) ("If exhaustion is not required, the legitimacy and independence of the tribal court system come into serious question. Allowing litigants to bypass tribal institutions by filing an action in federal court would undercut the tribal court system").

The federal courts have therefore not hesitated to require exhaustion in cases implicating these policies. *See, e.g., Duncan Energy Co. v. Three Affiliated Tribes of the Fort Berthold Reservation,* 27 F.3d 1294, 1300 (8th Cir. 1994) (dispute over tribal taxation and employment rights); *Navajo Nation v. Intermountain Steel Bldgs., Inc.*, 42 F.Supp.2d 1222, 1229 (D.N.M. 1999) (case turning on tribal law and custom of insurance, contract, and tort). "Federal court restraint is 'especially appropriate' where the issues between the parties grow out of '[t]ribal governmental activity involving a project located within the borders of the reservation.'" *Gaming World,* 317 F.3d at 850 (quoting *Bruce H. Lien,* 93 F.3d at 1420).

Disputes such as the present one between the parties go to the heart of tribal self-government, self-determination, and the disposition of tribal resources. By filing a federal action and state regulatory action which are clearly duplicative of the Tribal Court action, Sprint seeks to place the Commission, the federal district court, and the Tribal Court on the very "collision course" that the exhaustion doctrine forbids. Sprint's strategy offends the policies of judicial

efficiency, the orderly administration of justice, tribal-court development, and tribal law-making authority set forth by the Supreme Court in *Iowa Mut.* and *Nat'l Farmers*. Therefore, in keeping with the numerous decisions set forth above, the exhaustion doctrine and the important policies underpinning it dictate that the Crow Creek Tribal Court must have the first opportunity to address this quintessential tribal affair.

II. THE EXCEPTIONS TO THE EXHAUSTION DOCTRINE DO NOT EXCUSE ITS MANDATORY APPLICATION HERE

In *Nat'l Farmers Union*, the Supreme Court articulated three exceptions to the requirements of the exhaustion doctrine:

> We do not suggest that exhaustion would be required where an assertion of tribal jurisdiction "is motivated by a desire to harass or is conducted in bad faith," or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction.

471 U.S. at 856 n.21 (internal citation omitted). In *Strate v. A-1 Construction,* 520 U.S. 438 (1997), the Supreme Court added that the exhaustion doctrine also "must give way" and "would serve no purpose other than delay" when "it is plain" that the tribal court lacks jurisdiction as a matter of federal law. 520 U.S. at 459 n.14. It is patently clear, however, that none of these exceptions apply here.

With respect to the first exception (bad faith or harassment), NAT's decision to seek judicial relief from the Tribal Court to enforce the Tribal Utility Authority's Order arising out of NAT's activities on and within the Reservation's exterior boundaries cannot reasonably be viewed as an exercise in bad faith or harassment.

Under the second exception, exhaustion is not required when a federal law expressly vests jurisdiction over a dispute in the federal courts to the exclusion of other forums. *See, e.g.,*

El Paso Natural Gas v. Neztsosie, 526 U.S. 473, 483-87 (1999) (Price-Anderson Act); *Blue Legs v. United States Bureau of Indian Affairs,* 867 F.2d 1094, 1096-98 (8th Cir. 1989) (Resource Conservation and Recovery Act). The "federal exclusion" exception also does not apply to this matter before the Commission.

Nor may Sprint claim under the third exception that exhaustion would be futile due to any inability to challenge the Crow Creek Tribal Court's jurisdiction. "As long as a tribal forum is arguably in existence, as a general matter, [the federal court] [is] bound by *National Farmers* to defer to it." *Basil Cook Enterprises, Inc. v. St. Regis Mohawk Tribe,* 117 F.3d 61, 66 (2nd Cir. 1997). Thus, if "the availability of a remedy at tribal law is facially apparent[,]" federal plaintiffs "must direct their arguments to the [t]ribal [c]ourt in the first instance." *Id.*

Here, the Crow Creek Tribal Court has a fully functioning and vital court system. Proceedings before the Tribal Court are governed by a comprehensive set of rules which are designed to ensure the orderly and impartial administration of justice, and litigants enjoy a right of appeal from the determinations of the Tribal Court. If Sprint chooses not to avail itself of the procedures and protections being afforded it by the Tribal Court, that decision cannot operate to undermine the application of the exhaustion doctrine. *See Bank of Oklahoma v. Muscogee (Creek) Nation,* 972 F.2d 1166, 1170 (10th Cir. 1992); *see also Williams-Willis v. Carmel Fin. Corp.,* 139 F.Supp.2d 773, 780-81 (S.D. Miss. 2001) (holding that alleged potential for bias in tribal forum does not excuse failure to exhaust).

While the Supreme Court noted in *Strate* that application of the exhaustion doctrine is not required where "it is plain" that tribal court jurisdiction is lacking as a matter of federal law, 520 U.S. at 459 n.14, such is clearly not the case here. While an exhaustive jurisdiction analysis at this juncture would be premature and would contravene the fundamental purpose of the

exhaustion doctrine – *see Petrogulf Corp. v. Arco Oil & Gas Co.*, 92 F.Supp.2d 1111, 1117 (D. Colo. 2000) ("By arguing that this case falls under neither of the *Montana* exceptions, Plaintiff addresses whether the tribal court has jurisdiction over this case, not whether the tribal court should be permitted to address that question *before* the case is brought in state or federal court. As the Supreme Court has stated, the questions are distinct") (emphasis in original) – it is clear in this case that the Crow Creek Tribal Court has jurisdiction over the dispute between NAT and Sprint.

Finally, the Commission undoubtedly has the discretion to invoke "tribal court exhaustion doctrine" and grant NAT's Motion to Stay. In *Tohono O'odham Nation v. Schwartz,* 837 F.Supp. 1024 (D.Ariz. 1997), a tribal housing authority and federally-recognized Indian tribe received a federal court's temporary restraining order against further state court proceedings in a breach of contract action by a non-Indian contractor. *Id.* at 1026. By ruling in the Indian tribe's favor, the federal court stated "the question of tribal court jurisdiction should be determined, in the first instance, by the tribal court [not the state court]" and that the contractor acted improperly by bringing its state court action before exhausting tribal court remedies. *Id.* at 1030, 1033-34.

Similarly, in *Bowen v. Doyle*, 880 F.Supp. 99 (W.D.N.Y. 1995), the federal court found that the tribal exhaustion doctrine should have equal application in both federal and state courts. The court reasoned that litigation of reservations disputes "in a forum other than the tribe's simply 'cannot help by unsettle a tribal government's ability to maintain authority.' . . . The same disruption occurs whether it is a federal or a state court that asserts jurisdiction over a civil dispute that is otherwise within the tribal court's authority." *Id.* at 124.

The *Schwartz* and *Bowen* cases suggest that the "tribal court exhaustion doctrine" applies to state courts (or state regulatory authorities) when a claim involves a reservation matter. Sprint simply cannot "run" to a state courthouse, state regulatory authority, or federal courthouse in an attempt to avoid the Crow Creek Tribal Court. The Commission should invoke the "tribal exhaustion doctrine" and grant NAT's Motion to Stay pending Sprint's exhaustion of tribal court remedies.

III. THE COMMISSION SHOULD STAY THIS ACTION UNTIL THE CROW CREEK TRIBAL COURT EITHER DETERMINES IT LACKS JURISDICTION OVER THIS DISPUTE OR ADJUDICATES THE DISPUTE ON THE MERITS

Under the tribal exhaustion doctrine, the Commission should "stay[] its hand until after the Tribal Court has had a full opportunity to determine its own jurisdiction[.]" *Nat'l Farmers,* 471 U.S. at 857. The Crow Creek Tribal Court will be called upon to address its jurisdiction over Sprint and the subject matter of NAT's action. In the event the Crow Creek Tribal Court concludes it possesses jurisdiction, the Supreme Court has outlined the downstream sequence and parameters of federal court judicial review:

> If the Tribal Appeals Court upholds the lower court's determination that the tribal courts have jurisdiction, petitioner may challenge that ruling in the District Court. Unless a federal court determines that the Tribal Court lacked jurisdiction, however, *proper deference to the tribal court system precludes relitigation of issues raised by the [underlying] claim and resolved* in the Tribal Courts.

Iowa Mut., 480 U.S. at 19 (emphasis added) (citations omitted). If the Crow Creek Tribal Court upholds its jurisdiction, then, it should proceed to adjudicate the merits of the underlying claim,

and the proper appellate process should be exhausted, before Sprint may challenge the jurisdictional determination.[19]

As the First Circuit succinctly summarized the exhaustion procedure in *Ninigret Dev. Corp.:*

> [A]s a matter of comity, it is for the tribal court, in the first instance, (a) to determine the contours of its own jurisdiction . . . and if it determines that it has the authority to proceed, (b) to effectuate its jurisdictional determination by adjudicating the merits of the appellant's claims. . . .
>
> Should the case return to the federal court, all preserved jurisdictional issues . . . are subject to plenary district court review. Nevertheless, as long as the tribal court has property defined its own jurisdiction, respect for the tribal court system will bar the relitigation of merits-related issues that were presented to and decided by that court.

207 F.3d at 35 (citations omitted). Accordingly, a party must exhaust its tribal court remedies with respect to the underlying claims as well as the threshold question of jurisdiction. *See Calumet Gaming Group-Kansas, Inc.,* 987 F.Supp. at 1328-29. The failure to do so precludes the federal plaintiff from challenging in federal court even the jurisdictional determination of the tribal court, let alone its decision on the merits of the underlying claim. *See Davis,* 193 F.3d at 991-92.

CONCLUSION

This dispute involves (1) NAT (a tribally-owned company), (2) NAT's actions on and within the exterior boundaries of the Reservation, (3) the scope of the Tribe's and Tribal Utility Authority's regulatory authority, (4) the scope of the Tribal Court's adjudicatory authority, (5)

---

[19] Following exhaustion, in making its jurisdictional determination, a federal district court should review the tribal court's finding of facts under a deferential, clearly erroneous standard, while reviewing legal determinations under a *de novo* standard. *See Mustang Prod. Co. v. Harrison,* 94 F.3d 1382, 1384 (10th Cir. 1996); *Duncan Energy Co. v. Three Affiliated Tribes of Fort Berthold Reservation,* 27 F.3d 1294, 1300 (8th Cir. 1994).

the Tribe's financial stability, (6) the Tribe's economic development efforts, (7) employment opportunities for the Tribe's members, and (8) the Tribe's sovereign immunity.

It is essential that the Crow Creek Tribal Court make the initial jurisdictional and adjudicative determinations in this case. Under the well-established doctrine of tribal court exhaustion, NAT respectfully requests that the Commission stay this action until the Tribal Court has had a full and fair opportunity to determine its jurisdiction over the dispute, and if the Tribal Court upholds that jurisdiction, to adjudicate the merits of this matter.

Dated this 6th day of September, 2010.

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CERTIFICATE OF SERVICE

I, *Scott R. Swier*, certify that on *September 6th, 2010, Respondent Native American Telecom LLC's Brief in Support of Motion to Stay South Dakota Public Utilities Commission's Docket No. TC10-026,* was served *via electronic mail* upon the following:

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BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE COMPLAINT FILED BY SPRINT COMMUNICATIONS COMPANY, LP AGAINST NATIVE AMERICAN TELECOM, LLC REGARDING TELECOMMUNICATIONS SERVICES	))))))	**Docket No. TC10-026**

AFFIDAVIT OF GENE DEJORDY

Gene DeJordy, being first duly sworn upon his oath deposes and states as follows:

1. I am the Chief Executive Officer of Native American Telecom Enterprise, LLC (NAT ENTERPRISE), a limited liability company organized under the laws of the State of South Dakota.
2. Native American Telecom, LLC (NAT) is a full-service, tribally-owned limited liability company organized under the laws of the State of South Dakota. NAT's ownership structure consists of the Crow Creek Sioux Tribe (51%) (Tribe), NAT ENTERPRISE (25%), and WideVoice Communications, Inc. (24%) (WideVoice).
3. NAT ENTERPRISE is a telecommunications development company and is a *separate and distinct entity* from NAT. WideVoice is a Competitive Local Exchange Carrier (CLEC).
4. NAT provides high-speed Internet access, basic telephone, and long-distance services on and within the Crow Creek Sioux Tribe Reservation (Reservation). NAT's services take place exclusively within the exterior boundaries of the Reservation. NAT *does not* provide services within the State of South Dakota outside the exterior

boundaries of the Reservation. As a result of its efforts, NAT has created jobs and provided much-needed economic opportunities on the Reservation.

5. In 1997, the Crow Creek Sioux Tribal Council established the Crow Creek Sioux Tribe Utility Authority (Tribal Utility Authority) for the purpose of planning and overseeing utility services on the Reservation and to promote the use of these services "to improve the health and welfare of the residents."

6. On August 19, 2008, the Tribe issued its "Crow Creek Indian Reservation – Telecommunications Plan to Further Business, Economic, Social, and Educational Development."

7. On October 28, 2008, the Tribal Utility Authority entered its "Order Granting Approval to Provide Telecommunications Service" (Approval Order). Under this Approval Order, NAT was "granted authority to provide telecommunications service on the Crow Creek Reservation subject to the jurisdiction of the laws of the Crow Creek Sioux Tribe."

8. As a result of the Approval Order, NAT properly filed two Access Service Tariffs (Access Tariff) governing termination of telephone traffic on the Reservation. One Access Tariff was filed with the Federal Communications Commission (FCC) for interstate traffic. A second Access Tariff was filed with the Tribal Utility Authority. The Approval Order requires that the basic telephone service offered by NAT must be "consistent with the federal universal service requirements of 47 U.S.C. § 214(e) and the rules of the Federal Communications Commission." NAT has always complied with this portion of the Approval Order.

9. In September 2009, pursuant to the Approval Order, and after over one year of planning and infrastructure development, NAT launched one of the first new tribally-owned telephone systems in the United States. NAT provides telephone and advanced broadband service to residential and business customers on the Reservation.

10. NAT has physical offices, telecommunications equipment, and telecommunications towers on the Reservation. NAT also provides a computer training facility with free Internet and telephone service to tribal members. In September 2010, NAT will be opening a new stand-alone Internet Library and Training Facility, which will include Internet stations and educational facilities for classes.

11. NAT has never applied for, nor received, federal stimulus funding, Universal Service Funds (USF), or any other federal or state funding mechanisms relating to its tribally-owned telephone company.

12. The telephone and advanced broadband network system on the Reservation enables the Tribe to pursue new economic development opportunities. The Tribe describes its advanced telecommunications system as a vehicle for "paving the way for much-needed business, economic, social and educational development on the Crow Creek Reservation." Specifically, the broadband network supports high-speed broadband services, voice service, data and Internet access, and multimedia.

13. The broadband network uses WiMax (Worldwide Interoperability for Microwave Access) technology operating in the 3.65 GHZ licensed spectrum, providing service to residential, small business, hospitality, and public safety customers. WiMax is a Broadband Wireless Access technology based on the IEEE 802.16 standard that enables the delivery of high-speed personal, business, and enterprise class broadband

services to subscribers anytime, anywhere. Through the use of advanced antenna and radio technology with OFDM/OFDMA (Orthogonal Frequency Division Multiplexing), NAT delivers wireless IP (Internet Protocol) voice and data communications. WiMax was selected because this technology offers flexible, scalable, and economically viable solutions that are key components to deploying in vast rural environments, such as the Reservation.

14. Shortly after NAT launched its tribally-owned telephone system, Sprint Communications Company L.P. (Sprint) improperly refused to pay NAT's lawfully-imposed Access Tariff.

15. Sprint is a limited partnership that provides interexchange services on the Reservation. It should be noted that Sprint initially paid NAT its lawfully-imposed Access Tariffs. However, shortly after making these initial payments, Sprint engaged in the improper "self-help" actions that have resulted in this (and other) lawsuits.

16. In March 2010, NAT filed a complaint with the Tribal Utility Authority seeking enforcement of its Access Tariff. Specifically, NAT alleged that Sprint was not paying the required Access Tariff for services NAT rendered on the Reservation. Sprint has taken the position, despite its earlier Access Tariff payments and the applicability of lawful tariffs in effect, that the termination of traffic by NAT on the Reservation is not subject to compensation, even though NAT incurs costs to terminate Sprint's traffic.

17. On March 29, 2010, the Tribal Utility Authority entered an Order agreeing with NAT and finding that Sprint's "self-help" in refusing to pay NAT's Access Tariff violated the "filed rate doctrine." Specifically, the Tribal Utility Authority found that

"[Sprint's] self-help actions could jeopardize the ability of a carrier, like [NAT], to serve the essential telecommunications needs of the residents of the Crow Creek reservation." The Tribal Utility Authority also held "[NAT] commenced providing essential telecommunications services . . . to the residents of the Crow Creek reservation pursuant to [the Tribal Utility Authority's Approval Order]. . . . It is also a matter of public record that [NAT] has commenced offering new and critically needed services on the reservation."

18. The Tribal Utility Authority's Order concluded by stating "The Crow Creek reservation is a rural, high-cost service area. Access service revenue has historically been a critically important source of revenue for rural carriers, like [NAT], to support operations. . . . If carriers, like Sprint, are able to take self-help actions and not pay for services rendered subject to a lawful tariff, it would not only put at risk the continued operation of carries like [NAT], but would also put at risk the services relied upon by, and in some cases essential to[,] the health and safety of . . . consumers." As such, the Tribal Utility Authority found "Sprint's non-payment of

[NAT's] access tariff charges to be a violation of the laws of the Crow Creek Sioux Tribe."

19. The Tribal Utility Authority's Order also provided Sprint with an invitation to address Sprint's concerns. However, Sprint has also entirely ignored this part of the Order.

20. As of today's date, Sprint continues to entirely ignore this Order and refuses to pay the Tribal Utility Authority's lawfully-imposed Access Tariff.

Dated this 23 day of September, 2010.

Gene DeJordy

Subscribed and sworn to before me this 23 day of September, 2010.

Notary Public

(SEAL)

GINA VOLPACCHIO
Notary Public
My Commission Expires Feb. 28, 2011

My Commission Expires: _____

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BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE COMPLAINT FILED BY SPRINT COMMUNICATIONS COMPANY, LP AGAINST NATIVE AMERICAN TELECOM, LLC REGARDING TELECOMMUNICATIONS SERVICES	))))))	**Docket No. TC10-026**

Declaration of Scott R. Swier in Support of
Defendant Native American Telecom, LLC's Motion to Stay

Scott R. Swier declares that the attached are true and correct copies of the following documents:

1. Crow Creek Indian Reservation – Telecommunications Plan to Further Business, Social, and Educational Development (August 19, 2008).
2. Order Granting Approval to Provide Telecommunications Service (October 28, 2008).
3. Crow Creek Sioux Tribe – Press Release (February 8, 2010).
4. Tribal Utility Authority Order (March 29, 2010).
5. NAT's Complaint – Crow Creek Tribal Court (Civ. 10-07-086) (July 7, 2010).
6. Sprint's Complaint – South Dakota Federal District Court (Civ. 10-4110) (dated August 16, 2010).

I DECLARE UNDER PENALTY OF PERJURY that the foregoing statements are true and correct

Respectfully submitted this 6th day of September, 2010.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on *September 6th, 2010,* the foregoing *Declaration of Scott R. Swier in Support of Defendant Native American Telecom LLC's Motion to Stay,* was was served *via electronic mail* upon the following:

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CROW CREEK SIOUX TRIBE
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Crow Creek Indian Reservation

Telecommunications Plan

To Further Business, Economic, Social, and Educational Development

August 19, 2008 – Fort Thompson, South Dakota. The Crow Creek Indian Reservation is home to the Crow Creek Sioux Tribe which lies mostly in Buffalo County in South Dakota. The Crow Creek reservation is the nation's poorest Indian Reservation; more than 97% of the 3,000 residents are unemployed, compared to the rest of American who fret over a recession that has driven unemployment from 4% up to 6%,--and it's been that way for as long as anyone can remember.

With the poverty come staggering rates of homelessness, alcoholism, disease, drug abuse, murders, suicide, infant mortality, teen-age pregnancy and school dropouts.

To address these issues and more, the Crow Creek Indian Reservation has developed a Telecommunications Plan for the establishment of a telecommunication infrastructure on the reservation that will enable business, economic, social and educational development.

- The Crow Creek Sioux Tribe will supplement the wireless and wire line services available on the reservation with advanced broadband services through the establishment of a new competitive local exchange carrier ("CLEC") utilizing state-of-the-art advanced fixed wireless technology on the reservation. The CLEC, Native American Telecom LLC, will initially provide broadband internet access to critical tribal government locations, schools, and other educational or medical locations, and then will expand service to other businesses and residents on the reservation.

- The Crow Creek Sioux Tribe will use its telecommunications infrastructure to attract new businesses to generate economic development, employment opportunities, and revenue. The tribe will take advantage of its telecommunications infrastructure to (i) develop private sector incentive programs, such as the Minority Business Enterprise Program, (ii) take advantage of its tribal sovereignty in engaging in business, and (iii) apply for status as a foreign trade zone.
- The Crow Creek Sioux Tribe will use its access to information and services to position the tribe to take advantage of programs and services aimed at addressing the social needs of the reservation. Each year, the tribe will establish goals and objectives, and programs aimed at achieving these goals and objectives, to address social and economic development issues, such poverty, medical needs, unemployment, dependencies, and education.

The Crow Creek Sioux Tribe Chairman's Office can be reached at 605-245-2221.

Crow Creek Sioux Tribe

Crow Creek Utility Authority

In the Matter of	}
Native American Telecom, LLC	}
Request To Provide Telecommunications	}
Service Within The Exterior Boundaries	}
of the Crow Creek Reservation	}

Order Granting Approval To Provide Telecommunications Service

Native American Telecom, LLC ("Native Telecom") is hereby granted authority to provide telecommunications service on the Crow Creek reservation.[1]

Under the Constitution and By Laws of the Crow Creek Sioux Tribe, the Tribal Council is empowered and authorized to enact resolutions and ordinances governing the management of all economic and educational affairs and enterprises of the Tribe. The Crow Creek Utility Authority Ordinance was amended in September 1997 to establish the Crow Creek Utility Authority. Under the Crow Creek Utility Authority Plan of Operation, the stated purpose of the Crow Creek Utility Authority is to "plan for, provide, and furnish utility services in all areas of the Crow Creek Sioux Reservation" (Section 3.A.1.).

Native Telecom proposes to: (i) provide basic telephone and advanced broadband services, which are "utility services" essential to the health and welfare of the tribe; and (ii) provide these services in "all areas of the Crow Creek Sioux Reservation." Furthermore, Native Telecom proposes to provide basic telephone service, consistent with the federal universal service requirements of 47 U.S.C. § 214(e) and the rules of the Federal Communications Commission ("FCC"). In addition, Native Telecom commits to work with the Crow Creek Sioux Tribe to identify and pursue economic development opportunities and make basic telephone and advanced broadband services readily available and affordable to residents of the reservation.

The Crow Creek Utility Authority concludes that Native Telecom's proposal to provide basic telephone and advanced broadband services on the reservation is consistent with the "Crow Creek Indian Reservation Telecommunications Plan To Further Business, Economic, Social, and Educational Development" on the reservation.[2] Based upon

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[1] This approval is akin to competitive local exchange carrier (CLEC) approval provided to carriers outside of reservations.

[2] On August 19, 2008, the Crow Creek Sioux Tribe released its Telecommunications Plan To Further Business, Economic, Social, and Educational Development on the reservation.

Native Telecom's proposal and commitments, Native Telecom is hereby granted authority to provide telecommunications services on the Crow Creek Reservation subject to the jurisdiction of the laws of the Crow Creek Sioux Tribe.

Dated: October 28, 2008

Brandon Sazue
Crow Creek Tribal Chairman

CROW CREEK SIOUX TRIBE
FORT THOMPSON, SOUTH DAKOTA 57339

Crow Creek Sioux Tribe Launches New Tribally Owned Telephone and Advanced Broadband Telecommunications System

February 8, 2010 – Fort Thompson, South Dakota. The Crow Creek Sioux Tribe has launched one of the first new tribally-owned telephone systems in the United States, paving the way for much-needed business, economic, social and educational development on the Crow Creek reservation. In September 2009, Native American Telecom – Crow Creek, a tribally owned local exchange carrier providing telephone and advanced broadband service on the Crow Creek reservation, launched service to residential and business customers. Brandon Sazue, Chairman of the Crow Creek Sioux Tribe, stated:

> "The Crow Creek Sioux Tribe is a sovereign Nation that has endured its share of heartache and challenges, but it is also a Tribe with much pride that has persevered over the years with the Will of a warrior Nation intent on fighting the injustices of the past and present. We must take our destiny into our own hands, which we have done with the establishment of Native American Telecom – Crow Creek, a new tribally-owned telephone and broadband service provider. Native American Telecom – Crow Creek, however, is not just a service provider, like non-tribally-owned service providers, but is structured to serve the needs of the Tribe and its people by providing jobs, opportunities for economic development, and affordable access to essential services, like the Internet, that is necessary for self-sufficiency, prosperity, and tribal independence."

The deployment of an advanced broadband network on the reservation by Native American Telecom – Crow Creek has enabled the Tribe to pursue new economic development opportunities, such as the recently announced EcoTech Fuels waste project. According to Brandon Sazue, "The Tribe's plans for a fuel production plant were made

possible, in part, by the tribal infrastructure on the reservation, such as the new advanced broadband telecommunications network deployed by Native American Telecom – Crow Creek."

Vice Chairman, Randy Shields, further stated:

> "One small step for Indian Country, one large step for the Crow Creek Sioux Nation. The importance of establishing a new enterprise on the Crow Creek reservation needs to be considered in light of the poor economic and social conditions that exists on the reservation. Native American Telecom – Crow Creek will not only lift up and provide hope and opportunities for our people, but will hopefully serve as an example for all of Indian Country."

Crow Creek Housing Authority Executive Director Joe Sazue II stated:

> "It will definitely benefit our people. At Housing, we are in the process of developing a web site that will keep our residents informed of things that are going on with the reservation. With Native American Telecom – Crow Creek's initiatives to provide residents having Internet access and educate people on the value of this service, we have much hope for the future. It's good that the Tribe has taken the steps necessary to move forward with this technology."

Peter Lengkeek, Tree of Life Construction Supervisor, who is also affiliated with Can-Do.org, stated:

> "This service is long over-do. Our people have been in the dark when it comes to modern technologies that are available elsewhere. This will get us up to speed with the outside world and it will make things easier for the residents of the Crow Creek Reservation. Having internet access available will further our people in their ability to learn."

Crow Creek Ambulance Director Larry Blaine emphasized:

> "Wow, is this Internet fast. We are able to download information quickly and easily. Many of the residents of the Crow Creek Reservation do not have computers or the know-how to access the Internet, but now with the Internet Library open to the residents of Crow Creek they have a place to go and learn about the Internet and computers. Native American Telecom-Crow Creek understands our people and our needs, and is working to help us through education, resources and empowerment.

The Tribe has been diligently working with Native American Telecom Enterprise, LLC ("NATE"), a telecommunications service and economic development company, to: (i) construct and operate the wireless broadband network on the reservation using advanced WiMAX technology; (ii) attract companies to locate on the reservation and take advantage of the capabilities of the new broadband network; (iii) work with tribal members to establish new Internet-based businesses on the reservation, taking advantage of the capabilities of the new broadband network; and (iv) establish a state-of-the-art Internet Library, providing free computer and Internet access to tribal members. In September 2009, after months of work, Native American Telecom – Crow Creek commenced operations by providing broadband and local telephone service to residential and tribal locations on the reservation. According to Gene DeJordy, Chief Executive Officer of NATE, "After more than one year of working closely with Crow Creek Sioux tribal officials and other tribal members, it is very satisfying to see our collective vision for the Tribe come to fruition. We have established an enterprise, not just a service provider, that is building a foundation for the future of the Tribe."

The network will support high-speed broadband services, voice service, data and Internet access, and multimedia. Most significantly, according to Tom Reimer, President of NATE, "an Internet Library has been established that provides free computer and Internet access to tribal members. For over one year, the Tribe has been planning and putting in place the necessary infrastructure for the Internet Library and now all of the hard work and dedication of many Tribal members involved in this project has come together in a uniquely tribal way with the Crow Creek Yes We Can Foundation, a non-profit organization responsible for managing the Internet Library."

"Native American Telecom – Crow Creek is using WiMAX technology operating in the 3.65 GHz licensed spectrum providing service to residential, small business, hospitality

and public safety", according to Benjamin Martello, Chief Operating Officer of WireFree Communications, Inc. ("WFC"). WFC was selected by Native American Telecom – Crow Creek as the wireless turnkey firm responsible for EF&I (Engineer, Furnish and Install) on the reservation based on the company's vast technical and operational experience in rural deployments. WiMAX (Worldwide Interoperability for Microwave Access) is a Broadband Wireless Access technology based on the IEEE 802.16 standard that enables the delivery of high-speed personal, business and enterprise class broadband services to subscribers anytime, anywhere. Through the use of advanced antenna and radio technology with OFDM/ OFDMA (Orthogonal Frequency Division Multiplexing), Native American Telecom – Crow Creek is able to deliver wireless IP (Internet Protocol) voice and data communications. WiMAX was selected because this 4G technology offers flexible, scalable and economically viable solutions that are key components to deploying in vast rural environments, such as the Crow Creek reservation.

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605-245-2752 Facsimile

Order

Before the Crow Creek Sioux Tribe Utility Authority ("Utility Authority") is a Complaint filed by Native American Telecom, LLC ("Native American Telecom – Crow Creek") seeking enforcement of its Access Service Tariff, filed with the Utility Authority and in effect as of September 1, 2009. Native American Telecom – Crow Creek contends that Sprint is not paying for services rendered on the Crow Creek reservation. In particular, Native American Telecom - Crow Creek states that Sprint has provided the following response to its recent access services invoice:[1]

> "Sprint objects to the nature of certain traffic for which Cabs Agents/Native American Telecom is billing access charges and Sprint disputes the terminating charges in full. It is Sprint's position that traffic volumes associated with, but not limited to; artificially stimulated usage, chat lines, free conferencing, and revenue sharing are not subject to access charges. If you have any questions please call Julie Walker at 913-762-6442 or email at julie.a.walker@sprint.com.

On March 26, 2010, Native American Telecom – Crow Creek provided this Utility Authority with a copy of the billing dispute by Sprint. While normally this Utility Authority would not intervene in a billing dispute that involves factual issues to be addressed by the parties, this situation involves a legal issue that requires the intervention of the Utility Authority. By taking the position the termination of traffic by Native American Telecom – Crow Creek on the reservation is "not subject to access charges," even though Native American Telecom – Crow

[1] Email from Candice Clark, billing agent of Native American Telecom – Crow Creek, to Gene DeJordy, CEO of Native American Telecom – Crow Creek.

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Creek has a lawful tariff in effect at the Utility Authority, Sprint appears to be challenging the jurisdiction and laws of the Crow Creek Sioux Nation and this Utility Authority.

Sprint's self-help in refusing to pay Native American Telecom – Crow Creek's tariffed rates violates the "filed rate doctrine," which require all customers, such as Sprint, who avail themselves of tariffed services, to pay the rates contained in effective tariffs. The filed rate doctrine, also known as the filed tariff doctrine, is a common law construct that originated in judicial and regulatory interpretations of the Interstate Commerce Act, and was later applied to the Communications Act of 1934, as amended. It has been applied consistently to a variety of regulated industries for almost a century. The filed rate doctrine stands for the principle that a validly filed tariff has the force of law, and may not be challenged in the courts for unreasonableness, except upon direct review of an agency's endorsement of the rate.[2] This Utility Authority looks to common law practices to guide its decisions and be precedent for future actions.

The FCC has reaffirmed the filed rate doctrine in its *CLEC Access Charge Order* and expressly applied it to access charges, like those imposed by Native American Telecom – Crow Creek through its tariff in effect with the Utility Authority. The FCC stated "[t]ariffs require IXCs to pay the published rate for tariffed CLEC access services, absent an agreement to the contrary or a finding by the Commission that the rate is unreasonable."[3]

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[2] *E.g., Maislin Industries, U.S. v. Primary Steel, Inc.*, 497 U.S. 116, 117 (1990); *Telecom International America, Ltd. v. AT&T Corp.*, 67 F. Supp. 2d 189, 216-17 (S.D.N.Y.1999); *MCI Telecommunications Corp. v. Dominican Communications Corp.*, 984 F.Supp.185, 189 (S.D.N.Y.1997).

[3] *CLEC Access Charge Order*, 16 FCC Rcd 9923 ¶28. It should be noted that Native American Telecom – Crow Creek's intrastate tariffed rates mirror its interstate tariffed rates, which are based upon the interstate access rates of MidState Communications, who is the incumbent local exchange carrier.

The filed rate doctrine is motivated by two principles: (1) it prevents carriers from engaging in price discrimination between ratepayers; and (2) it preserves the exclusive role of authorities in approving "reasonable" rates for telecommunications services by keeping courts out of the rate-making process.[4] Thus, if a carrier acquires services under a filed tariff, only the rate contained in the tariff for that service would apply. The filed rate doctrine is applied strictly, and it requires a party that receives tariffed services to pay the filed rates, even if that party is dissatisfied with the rates or alleges fraud. Rather, a party seeking to challenge a tariffed rate must pay the rate in the tariff and then file a complaint with this Utility Authority challenging the rate. Sprint's has not filed a complaint with this Utility Authority and its self-help actions could jeopardize the ability of a carrier, like Native American Telecom – Crow Creek, to serve the essential telecommunications needs of the residents of the Crow Creek reservation. In fact, this Utility Authority takes notice that Native American Telecom – Crow Creek commenced providing essential telecommunications services, including local exchange telephone service and high-speed broadband service, to residents of the Crow Creek reservation pursuant to an *Order Granting Approval To Provide Telecommunications Service* by this Utility Authority on October 28, 2008. It is also a matter of public record that Native American Telecom – Crow Creek has commenced offering new and critically needed services on the reservation.[5]

In approving Native American Telecom – Crow Creek's provision of service on the reservation, the Utility Authority relied on Native American Telecom – Crow Creek's commitments to:

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4 *Marcus v. AT&T Corp.*, 138 F.3d 46, 58 (2nd Cir. 1998).

5 *See* Crow Creek Sioux Tribe Notice dated February 8, 2010, *Crow Creek Sioux Tribe Launches New Tribally Owned Telephone and Advanced Broadband Telecommunications System*.

(i) "provide basic telephone and advanced broadband services . . . essential to the health and welfare of the tribe;"

(ii) "provide these services in "all areas of the Crow Creek Sioux Reservation;"

(iii) "provide basic telephone service, consistent with the federal universal service requirements of 47 C.F.R. § 214(e) and the rules of the Federal Communications Commission ("FCC");" and

(iv) "make basic telephone and advanced broadband services readily available and affordable to residents of the reservation."

Order Granting Approval To Provide Telecommunications Service at page 1. The Crow Creek reservation is a rural, high-cost service area. Access service revenue has historically been a critically important source of revenue for rural carriers, like Native American Telecom – Crow Creek, to support operations. Native American Telecom – Crow Creek's commitments, which are now obligations, are significant and justify its access service tariff for the termination of traffic, including conference calling traffic, on the Crow Creek reservation. If carriers, like Sprint, are able to take self-help actions and not pay for services rendered subject to a lawful tariff, it would not only put at risk the continued operation of carriers like Native American Telecom – Crow Creek, but would also put at risk the services relied upon by, and in some cases essential to the health and safety of, consumers.

For the foregoing reasons, this Utility Authority finds Sprint's non-payment of Native American Telecom – Crow Creek's access tariff charges to be a violation of the laws of the Crow Creek Sioux Tribe. This finding applies to both the intrastate access services subject to the tariff in effect at this Utility Authority and the interstate access services subject to the tariff in effect at the FCC. To the extent Sprint believes that Native American Telecom – Crow Creek's

access rates are unreasonable or not applicable, it should file a Complaint with this Utility Authority and not take matters into its own hands by not paying for services provided by Native American Telecom – Crow Creek.

Dated: March 29, 2010

/s/ Brandon Sazue
Brandon Sazue, Chairman
Crow Creek Sioux Tribe Utility Authority

CROW CREEK SIOUX TRIBE	)	IN TRIBAL COURT
	)	
CROW CREEK SIOUX RESERVATION	)	
	)	
CROW CREEK SIOUX JURISDICTION	)	CIVIL DIVISION

* *

NATIVE AMERICAN TELECOM, LLC,

CIV. CASE 10-07-086

Petitioner/Plaintiff,

vs.

CIVIL COMPLAINT

SPRINT COMMUNICATIONS COMPANY L.P.,

Respondent/Defendant.

* *

Plaintiff, Native American Telecom, LLC, by and through its counsel, and for its Complaint against Defendant Sprint Communications Company L.P., states and alleges as follows:

INTRODUCTION

This is a collection action arising from Defendant Sprint Communications Company L.P.'s ("Defendant" or "Defendant Sprint") unlawful refusal to pay Plaintiff Native American Telecom, LLC ("Plaintiff" or "Plaintiff NAT") for completing and terminating Defendant Sprint's long distance traffic. At its core, this Complaint seeks to enforce Plaintiff NAT's well-established legal rights to collect compensation for terminating Defendant Sprint's telecommunications calls on the Crow Creek Sioux Tribe Reservation.

The charges for the work provided by Plaintiff NAT are known as "access charges." Plaintiff NAT is entitled to charge Defendant Sprint for these "access charges" for allowing Defendant Sprint to utilize Plaintiff NAT's local network services to complete long distance

calls. Defendant Sprint has deliberately ignored its legal obligations to compensate Plaintiff NAT for the services Plaintiff NAT has rendered for completing calls for Defendant Sprint and Defendant Sprint's customers. Defendant Sprint's obligation to compensate Plaintiff NAT is mandated by Plaintiff NAT's lawfully-filed tariffs, established case law, the Communications Act of 1934, as amended ("Communications Act" or "Act"), and the Federal Communications Commission's ("FCC" or "Commission") implementing rules and policies.

Defendant Sprint's self-help in refusing to pay Plaintiff NAT's tariffed rates violates the "filed rate doctrine" and FCC precedent, which require all customers who avail themselves of tariffed services to pay the rates contained in effective tribal and federal tariffs. Settled FCC orders prohibit carriers, such as Defendant Sprint, from engaging in self-help by refusing to pay tariffed rates.

Plaintiff NAT has performed its duties as a telecommunications carrier to allow Defendant Sprint to utilize Plaintiff NAT's network to terminate calls. However, Defendant Sprint refuses to pay Plaintiff NAT's lawfully assessed access charges for terminating the calls. Defendant Sprint's unlawful actions place Plaintiff NAT and its customers at risk, which the tariffs were intended to address and prohibit.

On or about March 29, 2010, the Crow Creek Sioux Tribe Utility Authority ("Tribal Utility Authority") issued an Order finding Defendant Sprint's "non-payment of Native American Telecom – Crow Creek's access tariff charges to be a violation of the laws of the Crow Creek Sioux Tribe" and a violation of the "filed rate doctrine."

THE PARTIES

1. Plaintiff NAT is a tribally-owned, limited liability company that provides telecommunications services exclusively on the Crow Creek Sioux Tribe reservation.

2. Upon information and belief, Defendant Sprint is a limited liability partnership with its principal place of business at 6200 Sprint Parkway, Overland Park, Kansas. Upon information and belief, Defendant Sprint is authorized to do business in South Dakota. Upon information and belief, Defendant Sprint is also an international communications corporation, providing interexchange service. In providing interexchange services, Defendant Sprint receives payments from its customers and then must compensate carriers, like Plaintiff NAT, to originate or terminate its customers' calls.

JURISDICTION

3. This Court has jurisdiction over the parties and subject matter of this action as the conduct alleged below occurred within the Crow Creek Sioux Reservation.

FACTUAL ALLEGATIONS

4. On or about October 28, 2008, the Tribal Utility Authority granted Plaintiff NAT "authority to provide telecommunications services on the Crow Creek reservation subject to the jurisdiction and laws of the Crow Creek Sioux Tribe." Plaintiff NAT is considered a competitive local exchange carrier ("CLEC") providing local, long distance, and access telephone service to customers on the Crow Creek reservation.

5. Historically, telephone service in the United States was largely provided by a single integrated company, known as AT&T. In 1984, AT&T was split into "local" and "long distance" or interexchange companies ("IXCs"). The local telephone companies, known as local exchange carriers ("LECs"), maintained exclusive franchises to provide telephone service within defined geographic service territories. By contrast, the long distance portion of AT&T was faced with competition from other IXCs, such as MCI, Sprint, and many others.

6. IXCs generally utilized their own lines to carry calls across a state or across the country. They did not, however, own the telephone lines within the local exchange. Rather, those lines were owned by the LECs. To enable long distance competition, the FCC required LECs to allow IXCs to use their local lines for purposes of "originating" and "terminating" telephone calls. For example, when a consumer made a long distance call, the consumer's LEC would "originate" the call and hand it off to the IXC. The IXC would carry the call across its network and deliver it to a LEC to "terminate" the call to the dialed customer. Without this requirement, LECs could have frustrated long distance competition by refusing to allow IXCs to use the local exchange network for routing long distance calls.

7. To compensate LECs for the use of their networks, the FCC required IXCs to pay "access charges" for "originating" and "terminating" long distance telephone calls. These access charges were set forth in regulated price lists, known as tariffs, filed with the FCC, state, or tribal utility authorities. These tariffs ensured that IXCs were treated fairly by making like-service offerings available to all IXCs.

8. In 1996, Congress amended the United States' telecommunications laws by enacting the Telecommunications Act ("1996 Act"). As part of the 1996 Act, Congress eliminated the four (4) exclusive franchises possessed by Incumbent LECs ("ILECs") and preempted state "statute[s]," "regulation [s]," and other "legal requirement[s]" that "prohibit or have the effect of prohibiting the ability of any entity to provide interstate or intrastate telecommunications services." 47 U.S.C. § 253(a). The effect of this section was to compel all states to open their local telecommunications market to competition from new entrants, known as competitive local exchange carriers ("CLECs").

9. Congress also required all telecommunications carriers - local and long distance carriers - to interconnect their networks "directly or indirectly with the facilities and equipment of other telecommunications carriers." 47 U.S.C. § 251(a). Interconnection ensures that all consumers can place calls to, and receive calls from, consumers that are served by a different telecommunications carrier. Without an interconnection requirement, consumers that purchase service from one carrier would have no assurance of their ability to place calls to consumers served by other carriers.

10. Federal, state, and tribal regulators have jurisdiction over the access charges that apply to any given interexchange call, depending upon whether the call is interstate, intrastate, or terminates on tribal lands. If the call originates in one state and terminates in another state, the access charges that apply fall exclusively under the FCC's jurisdiction. The access charges that are the subject of this Complaint reflect both interstate and tribal traffic. As is the case for all LECs, the CLECs generally file tariffs with the FCC, state, or tribal utility authorities describing their terms and conditions of service. Under FCC regulations, CLECs are generally entitled to charge the same rates as ILECs for providing originating and terminating access charges for interstate calls.

11. Prior to 2001, the FCC did not regulate CLEC access charges. In 2001, however, in its *CLEC Access Charge Order*, the Commission modified its rules to regulate CLEC access rates by more closely aligning CLEC access rates with those of the Incumbent LECs. The FCC established a "benchmark" or "safe harbor" at or under which CLEC access rates are presumed just and reasonable as a matter of law. *Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, 16 FCC Rcd 9923, ¶¶3, 40-63 (2001) ("*CLEC Access Charge Order I*"). *See also* 47 C.F.R. §61.26. Specifically, the Commission concluded that:

> [A]n IXC that refused payment of tariffed rates within the safe harbor would be subject to suit on the tariff in the appropriate federal district court, without the impediment of a primary jurisdiction referral to the Commission to determine the reasonableness of the rate. Similarly, because of the presumptive conclusion of reasonableness that we will accord to tariffed rates at or below the benchmark, a CLEC with qualifying rates will not be subject to a section 208 complaint challenging its rates. *Access Charge Reform Seventh Report and Order* at ¶60.

12. The FCC initially set the benchmark at 2.5 cents per minute, or the competing incumbent's rate, whichever was higher. *Id.* at ¶45. Under the FCC's plan, the benchmark declined over a three-year period until it reached the competing Incumbent LEC's rate. *Id.* The benchmark rate is the rate of the competing Incumbent LEC in the area served by the CLEC.

13. Since 2009, Plaintiff NAT has had on file an interstate tariff filed with the FCC and an intrastate/tribal tariff filed with the Utility Authority, both of which fully comply with the FCC's rules.

14. The filed rate doctrine (also known as the filed tariff doctrine) is a common law construct that originated in judicial and regulatory interpretations of the Interstate Commerce Act, and was later applied to the Communications Act. It has been applied consistently to a variety of regulated industries for almost a century. The filed rate doctrine stands for the proposition that a validly filed tariff has the force of law, and may not be challenged in the courts for unreasonableness, except upon direct review of an agency's endorsement of the rate. *See e.g., Maislin Industries, U.S. v. Primary Steel, Inc.*, 497 U.S. 116, 117 (1990); *Telecom International America, Ltd. v. AT&T Corp.*, 67 F. Supp. 2d 189, 216-17 (S.D.N.Y.1999); *MCI Telecommunications Corp. v. Dominican Communications Corp.*, 984 F.Supp.185, 189 (S.D.N.Y.1997).

15. The filed rate doctrine is motivated by two principles – (1) to prevent carriers from engaging in price discrimination between ratepayers; and (2) to preserve the exclusive role of federal agencies in approving "reasonable" rates for telecommunications services by keeping courts out of the rate-making process. *Marcus v. AT&T Corp.*, 138 F.3d 46, 58 (2nd Cir. 1998). Thus, if a carrier acquires services under a filed tariff, only the rate contained in the tariff for that service will apply. The filed rate doctrine is applied strictly, and it requires a party that receives tariffed services to pay the filed rates, even if that party is dissatisfied with the rates or alleges fraud. *Marcus*, 138 F.3d at 58-59. A party seeking to challenge a tariffed rate must pay the rate in the tariff and then file a complaint with the FCC challenging the rate.

16. The FCC reaffirmed the filed rate doctrine and expressly applied it to CLEC access charges in its *CLEC Access Charge Order I*, explaining that "[t]ariffs require IXCs to pay the published rate for tariffed C[ompetitive] LEC access services, absent an agreement to the contrary or a finding by the Commission that the rate is unreasonable." 16 FCC Rcd 9923 ¶28.

17. Despite the FCC's unequivocal statement of the law and its policies prohibiting self-help refusals to pay access charges, Defendant Sprint has illegally withheld access charge payments from Plaintiff NAT.

18. Plaintiff NAT provides interstate exchange access and other services on the Crow Creek reservation under federal and tribal tariffs. These tariffs are validly filed and consistent with Section 203 of the Act, 47 U.S.C. § 203.

19. Plaintiff NAT's tariffs have been in full force and effect during the time that it has been providing access services to Defendant Sprint.

20. Pursuant to its tariffs, Plaintiff NAT has submitted invoices to Defendant Sprint for access charges associated with the access services provided to Defendant Sprint.

21. Defendant Sprint continues to take access services from Plaintiff NAT, while withholding payment for the services it provides.

22. Plaintiff NAT has provided exchange access and other services to Defendant Sprint under a lawful tribal tariff. Plaintiff NAT's tariffed access rates are fully compliant with the FCC's regulations governing CLEC access charges.

23. Plaintiff NAT has been providing access service to Defendant Sprint since October of 2009, as prescribed in Plaintiff NAT's access tariffs filed with the Tribal Utility Authority and the FCC.

24. Prior to March 2010, Defendant Sprint paid Plaintiff NAT's invoices at the tariffed rates.

25. Beginning in March 2010, Defendant Sprint ceased paying for the access services it took from Plaintiff NAT.

26. On March 22, 2010, Defendant Sprint provided the following explanation for its refusal to pay Plaintiff NAT's invoices:

> Sprint objects to the nature of certain traffic for which Cabs Agents/Native American Telecom is billing access charges and Sprint disputes the terminating charges in full. It is Sprint's position that traffic volumes associated with, but not limited to; artificially stimulated usage, chat lines, free conferencing, and revenue sharing are not subject to access charges. If you have any questions please call Julie Walker at 913-762-6442 or email at julie.a.walker@sprint.com.

27. On March 26, 2010, Plaintiff NAT provided the Tribal Utility Authority with a copy of the billing dispute with Defendant Sprint.

28. On March 29, 2010, the Tribal Utility Authority issued an Order finding:

> Sprint's non-payment of Native American Telecom – Crow Creek's access tariff charges [are] a violation of the laws of the Crow Creek Sioux Tribe. This finding applies to both the

> intrastate access services subject to the tariff in effect at this Utility Authority and the interstate access services subject to the tariff in effect at the FCC. To the extent Sprint believes that Native American Telecom – Crow Creek's access rates are unreasonable or not applicable, it should file a Complaint with this Utility Authority and not take matters into its own hands by not paying for services provided by Native American Telecom – Crow Creek.

29. By failing to pay the full amount invoiced by Plaintiff NAT, Defendant Sprint has breached its obligations under Plaintiff NAT's lawful tariffs.

30. Because of Defendant Sprint's refusal to pay its bills, Plaintiff NAT has thus far been damaged in the amount of approximately $199,016.59, including interstate and intrastate charges. Additional damages are accruing daily as Defendant Sprint continues to withhold amounts due for interstate and intrastate access services rendered by Plaintiff NAT.

COUNT I

Breach of Contract/Collection Action Pursuant to Federal Tariffs

31. Plaintiff NAT re-alleges and incorporates by reference the foregoing paragraphs.

32. Plaintiff NAT has provided interstate switched access services to Defendant Sprint. Defendant Sprint is required to pay Plaintiff NAT's access charges as set forth in Plaintiff NAT's federal tariffs.

33. Defendant Sprint has failed to pay the access charges that Defendant Sprint owes under the tariffs and associated late fees, thus constituting a breach of the applicable tariffs and therefore a breach of contract.

34. Plaintiff NAT has been, and continues to be, damaged by Defendant Sprint's refusal to pay the access charges it owes, plus late fees as provided in the tariffs. Plaintiff NAT is entitled to recover these amounts, or such other damages as may be established at trial.

COUNT II

Breach of Implied Contract Resulting From Violation of Federal and Tribal Tariffs

35. Plaintiff NAT re-alleges and incorporates by reference the foregoing paragraphs.

36. Plaintiff NAT has validly filed tariffs with both the FCC and the Tribal Utility Authority.

37. Plaintiff NAT has supplied services and submitted invoices to Defendant Sprint pursuant to Plaintiff NAT's filed tariffs for services provided, which constitutes an implied contract.

38. Defendant Sprint has refused to pay the invoices. Defendant Sprint's actions constitute a material uncured breach of the tariffs and of the implied contract among the parties resulting from the filed tariffs.

COUNT III

Violation of Section 201 of the Communications Act, 47 U.S.C. § 201

39. Plaintiff NAT re-alleges and incorporates by reference the foregoing paragraphs.

40. Defendant Sprint is required to pay Plaintiff NAT's switched access charges as set forth in Plaintiff NAT's federal tariffs.

41. Defendant Sprint has failed to pay the access charges Defendant Sprint owes under the tariffs and associated late fees.

42. Section 201(b) of the Communications Act (47 U.S.C. § 201) imposes upon common carriers the duty that their practices in connection with communication services be "just and reasonable," and provides that all unjust and unreasonable practices are unlawful.

43. Defendant Sprint has engaged in unreasonable, unjustified, and unlawful self-help by refusing to pay to Plaintiff NAT the access charges that Defendant Sprint lawfully owes.

44. Defendant Sprint's refusal to pay the lawful access charges associated with services it has taken, and continues to take, from Plaintiff NAT constitutes an unreasonable practice in violation of Section 201(b) of the Act and the FCC's implementing decisions.

45. As a result of Defendant Sprint's unreasonable practice of refusing to pay for lawfully-tariffed services, Plaintiff NAT has been damaged in the amount previously set forth or such other damages as may be established at trial.

46. Because Defendant Sprint's conduct constitutes a violation of Section 201(b) of the Act, Plaintiff NAT is entitled to recover its reasonable attorneys' fees pursuant to Section 206 of the Act, 47 U.S.C. § 206.

COUNT IV

Violation of Section 203 of the Communications Act, 47 U.S.C. § 203

47. Plaintiff NAT re-alleges and incorporates by reference the foregoing paragraphs.

48. Defendant Sprint is required to pay Plaintiff NAT's switched access charges as set forth in Plaintiff NAT's federal tariffs.

49. Defendant Sprint has failed to pay the access charges Defendant Sprint owes under the tariffs and associated late fees.

50. Section 203 of the Communications Act (47 U.S.C. § 203) imposes upon common carriers the duty to file tariffed rates for regulated communications services and to pay the tariffed rates for such services. Section 203(c) states that no carrier shall "charge, demand, collect, or receive a greater or less compensation, for such communication [than the tariffed rate]."

51. Defendant Sprint has engaged in an unreasonable practice of refusing to pay Plaintiff NAT its tariffed rates for the access services it has utilized, thereby "demanding" and

"receiving" a rate less than the tariffed rate, in violation of Section 203(c) of the Act and the FCC's implementing decisions such as *MCI Telecommunications Corporation, American Telephone and Telegraph Company and the Pacific Telephone and Telegraph Company*, 62 F.C.C.2d 703 (1976).

52. As a result of Defendant Sprint's unreasonable practice of refusing to pay for lawfully-tariffed services, Plaintiff NAT has been damaged in the amounts set forth above or such other damages as may be proved at trial.

53. Because Defendant Sprint's conduct is willful, malicious, and includes, *inter alia*, an intentional refusal to abide by filed tariffs, disregard of controlling orders of the FCC, and illegal self-help, Plaintiff NAT is entitled to an award of punitive damages.

54. Because Defendant Sprint's conduct constitutes a violation of Section 203(c) of the Act, Plaintiff NAT is entitled to recover their reasonable attorneys' fees, pursuant to Section 206 of the Act, 47 U.S.C. § 206.

COUNT V

Breach of Contract/Collection Action Pursuant to Tribal Tariff

55. Plaintiff NAT re-alleges and incorporates by reference the foregoing paragraphs.

56. Plaintiff NAT has provided intrastate switched access services to Defendant Sprint. Defendant Sprint is required to pay Plaintiff NAT's access charges as set forth in its tribal tariff.

57. Defendant Sprint has failed to pay the access charges that it owes under Plaintiff NAT's tribal tariff and associated late fees.

58. Plaintiff NAT has been and continues to be damaged by Defendant Sprint's refusal to pay the access charges it owes, plus late fees as provided by the tariff.

59. Plaintiff NAT is entitled to recover these amounts, or such other damages as may be established at trial.

COUNT VI

Quantum Meruit

60. Plaintiff NAT re-alleges and incorporates by reference the foregoing paragraphs.

61. Count VI is pleaded in the alternative to the previous counts, in the event that the court does not find the existence of a valid contractual obligation.

62. Plaintiff NAT has provided, and continues to provide, valuable switched access services to Defendant Sprint.

63. Defendant Sprint accepted, used, and enjoyed the access services that Plaintiff NAT has provided, and continues to provide, to Defendant Sprint.

64. It was at all times foreseeable that Plaintiff NAT expected to be paid for the access services it provided to Defendant Sprint.

65. The reasonable and fair market value of the services for which Defendant Sprint has refused to pay is established by Plaintiff NAT's tariffed switched access charge rates.

66. Defendant Sprint has been, and will continue to be, unjustly enriched unless it is required to pay to use Plaintiff NAT's access services.

COUNT VII

Declaratory Judgment

67. Plaintiff NAT re-alleges and incorporates by reference the foregoing paragraphs.

68. A present, actionable, and justiciable controversy exists with respect to the legal rights between the parties. Such controversy arises under the Federal Communications Act, 47

U.S.C. §§ 201, *et seq.*, and under the laws of the United States. Litigation between the parties is unavoidable.

69. Defendant Sprint's refusal to pay interstate and intrastate access charges for its use of Plaintiff NAT's switched access services and Defendant Sprint's refusal to pay associated late fees are ongoing and repeated practices.

70. On information and belief, absent a declaratory judgment, Defendant Sprint will continue its wrongful practices of refusing to pay interstate and intrastate access charges and late fees for these services from which Defendant Sprint benefits.

71. It would be unduly burdensome and inefficient for Plaintiff NAT to bring new actions for damages each time Defendant Sprint wrongfully refuses to pay an invoice.

72. Accordingly, Plaintiff NAT is entitled to a declaratory judgment and such further relief based upon that declaratory judgment as the Court deems proper, pursuant to 28 U.S.C. §§ 2201 and 2202, determining that Plaintiff NAT:

(a) Has lawfully charged Defendant Sprint for services rendered in the provision of interstate and intrastate access services, either pursuant to Plaintiff NAT's duly filed federal and tribal tariffs, or in accordance with the principles of equity.

(b) Defendant Sprint has breached the express contracts between it and Plaintiff NAT by refusing and failing to pay interstate access charges and associated late fees, either as set forth in Plaintiff NAT's federal and tribal tariffs, or as established as a matter of equity.

(c) Plaintiff NAT has been damaged by Defendant Sprint's breach of the express contracts between the parties; and

(d) Defendant Sprint is contractually and equitably obligated to make timely payment of these charges and late fees as said charges become due.

WHEREFORE, Plaintiff NAT demands judgment against Defendant Sprint as follows:

(a) For all lawful damages incurred by Plaintiff NAT, in an amount to be determined at trial, but no less than the access charges that Defendant Sprint owes Plaintiff NAT, together with associated tariffed late fees and prejudgment interest;

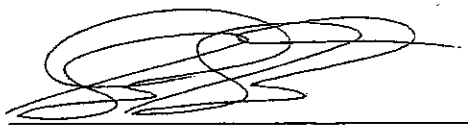
(b) For Plaintiff NAT's damages, reasonable attorneys' fees, and the costs of this action, pursuant to 47 U.S.C. § 206;

(c) For a declaratory judgment in favor of Plaintiff NAT; and

(d) For such other and further relief as the Court deems just, proper, and reasonable in this matter.

Dated this 7th day of July, 2010.

SWIER LAW FIRM, PROF. LLC



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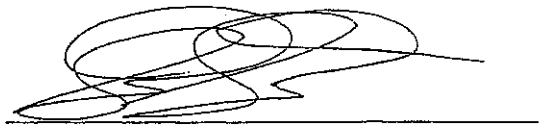
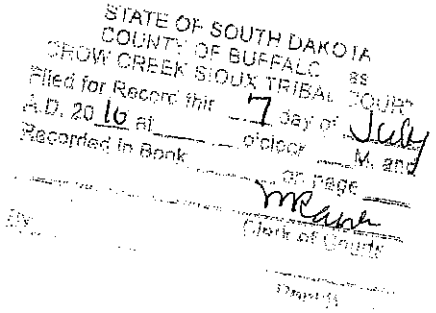
DEMAND FOR JURY TRIAL

Plaintiff NAT demands a Jury Trial on all matters of fact triable to a jury.

Dated this 7th day of July, 2010.



Scott R. Swier



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UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

SPRINT COMMUNICATIONS COMPANY L.P.,

Plaintiff,

v.

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

Defendants.

Civil No.10- 4110

COMPLAINT

INTRODUCTION

1. Sprint Communications Company L.P. ("Sprint") brings this action against Native American Telecom, LLC ("NAT") to bring to an end NAT's efforts to establish traffic pumping operations on the Crow Creek Sioux Reservation ("Reservation") in South Dakota in violation of federal and state law. NAT is a South Dakota limited liability company based in Sioux Falls. NAT is suing Sprint for hundreds of thousands of dollars in Crow Creek Tribal Court.

2. Traffic pumping is a scheme where a local exchange carrier ("LEC"), *i.e.*, local phone company, partners with free conference call centers or chat rooms to artificially stimulate telephone call volume. NAT purports to operate local exchange carrier operations on the Reservation but in reality exists only to engage in traffic pumping.

3. Sprint is a telecommunications company that provides telecommunications services nationwide and is known under the telecommunications regulatory framework as an interexchange carrier ("IXC"). Sprint is qualified to do business within the State of South Dakota and is certificated by the South Dakota Public Utilities Commission to provide intrastate interexchange services in South Dakota, and is authorized by the FCC to provide interstate interexchange services.

4. As an IXC, Sprint delivers long distance telecommunication calls to LECs. In simplest terms, when a customer places a long distance call, the call is routed to the customer's designated IXC (like Sprint), who carries the call (either directly or through a third party carrier) to the terminating LEC for connection to the recipient of the call. When done in compliance with law and tariff, this last step involves the provision of terminating switched access service by the LEC to the IXC. NAT has purported to establish itself as a LEC for the Crow Creek Reservation.

5. As a matter of state and federal law, switched access charges can only be assessed pursuant to an effective tariff on file with the state public utilities commission (for intrastate services) and with the Federal Communications Commission ("FCC") for interstate services. In the absence of tariff authority to bill for a call, switched access charges cannot be assessed, and no payment is due on any invoices illegally sent out by a LEC.

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

also claims a tariff it filed with the Crow Creek Sioux Tribal Utility Authority ("Tribal Utility Authority") on September 1, 2009, ostensibly effective that very day. A copy of NAT's tribal tariff is attached to this Complaint as Exhibit B.

7. On September 8, 2008, NAT also applied with the South Dakota Public Utilities Commission ("SD PUC") for a Certificate of Authority to provide competitive local exchange service on the Crow Creek Reservation pursuant to ARSD 20:10:32:03 and 20:10:32:15. On October 28, 2008, the Tribal Utility Authority authorized NAT to provide LEC services with the Crow Creek Reservation. In response, on December 1, 2008, NAT moved to dismiss its application pending before the SD PUC, which the agency granted on February 5, 2009. As a result NAT is operating within the State of South Dakota, purportedly as a LEC, and seeking to assess switched access charges *without* a Certificate of Authority from the SD PUC.

8. This specific dispute began in December 2009, when NAT began wrongly invoicing Sprint for allegedly providing switched access services to Sprint. NAT did not invoice Sprint directly but used a third party, called CABS Agent, to bill Sprint with CABS Agent as the payee. Sprint mistakenly paid two of CABS Agent's invoices; the third invoice from NAT's billing service was for an amount several times larger than the previous month. Sprint then investigated the invoices and determined that NAT was operating an illegal traffic pumping scheme.

9. As noted above, traffic pumping occurs when a LEC partners with a second company ("Call Connection Company") that has established free or nearly free conference calling, chat-line, or similar services that callers use to connect to other callers

or recordings. The Call Connection Company generates large call volumes to numbers assigned to the LEC. The LEC in turn unlawfully bills those calls to the IXCs as if they are subject to switched access charges, hoping that IXCs unwittingly pay those bills. If the IXC does so, the LEC and Call Connection Company share the revenues.

10. NAT claims the right to charge Sprint for terminating switched access service for calls made to the Crow Creek Reservation under tariffs on file with the Tribal Utility Authority and the FCC. NAT's claim that it provides competitive local exchange services to the Reservation is a sham: for all practical purposes NAT's traffic billed to Sprint terminates to conference bridge lines operated by non-tribal members. NAT has engaged in secret, *ex parte* communications with the Tribal Utility Authority, which has wrongfully attempted to assert jurisdiction over Sprint and ordered it to pay NAT pursuant to NAT's tariff on file with that entity.

11. Sprint has initiated an action against NAT before the SD PUC to stop NAT's scheme. NAT refuses to acknowledge the SD PUC's jurisdiction over NAT even though at one time NAT had a tariff on file with the SD PUC. NAT has also sued Sprint in Crow Creek Tribal Court for hundreds of thousands of dollars in damages. NAT is also bringing a claim for punitive damages in that forum. Because the tribal court is without jurisdiction, Sprint is seeking injunctive relief from this Court to prevent NAT and the tribal court from proceeding further with NAT's action in tribal court.

THE PARTIES

12. Sprint is a Delaware limited partnership with its principal place of business in Overland Park, Kansas. None of Sprint's partners are citizens of South Dakota or have their principal places of business in this state.

13. NAT is a South Dakota limited liability company. According to information on file with the South Dakota Secretary of State, NAT's principal office is in Sioux Falls and the members responsible for NAT's debts pursuant to SDCL § 47-34A 303(c) are Thomas Reiman and Gene DeJordy, who, on information and belief, are citizens of South Dakota and Arkansas, respectively. On information and belief, neither Reiman nor DeJordy are enrolled members of the Crow Creek Sioux Tribe or any other tribe.

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

15. The Honorable Theresa Maule is the Judge of the Crow Creek Tribal Court.

JURISDICTION

16. This Court has jurisdiction over this case under 28 U.S.C. § 1331, because several of Sprint's claims arise under the Communications Act of 1934, 47 U.S.C. § 151 *et seq.* and 47 U.S.C. § 207. Jurisdiction also exists under 28 U.S.C. § 1332, as Sprint and the defendants are citizens of different states and the amount in controversy exceeds $75,000. This Court has supplemental jurisdiction over Sprint's state law claims under 28 U.S.C. § 1367.

VENUE

17. Venue is proper in this district under 28 U.S.C. § 1391(b) because all defendants reside in South Dakota and a substantial part of the events giving rise to Sprint's claims arose in South Dakota.

BACKGROUND

A. Sprint's Services

18. Sprint is a telecommunications carrier offering long-distance wireline services to its customers around the country. Long-distance calls are those that are made from one local calling area to another. For example, in a typical situation (unlike in this case), a long-distance call may be made from a Sprint customer in Massachusetts to a called party, or "end user," in South Dakota. Sprint generally owns the facilities over which the call travels between the local calling area of the calling customer and the local calling area of the called customer (or it enters arrangements with other carriers to route the calls over their facilities).

19. Sprint does not ordinarily own the facilities within a local calling area over which the call travels its last leg to the called customer's premises. The facilities used to complete the last leg of these calls are typically provided by the called party's own LEC. Because Sprint does not generally own the facilities that physically connect to end users, it must pay local carriers for access to them. The charge that Sprint pays for access to the called party is known as a "terminating access" charge because the call "terminates" with the party that is called. In this way, Sprint is a customer of the local exchange carriers – it is purchasing the LEC's "terminating access service" in order to enable its customers to

complete long distance calls to their final destination, that is, to the premises of the called party.

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

B. Defendant NAT's Scheme

21. In this case, NAT has billed Sprint for services NAT asserts that Sprint has purchased under NAT's tariffs. Specifically, NAT devised a scheme artificially to inflate call volumes to phone numbers assigned to NAT's local calling area in order to bill

Sprint for what NAT wrongly characterizes as tariffed "terminating access" service. But under this scheme, Sprint is *not* connecting a call with a called party on the Reservation that is a customer of NAT. Instead, NAT's scheme with its Call Connection Company partners involves advertising "conference call," or similar services that allow callers, who do not reside on the Reservation, to talk to one another.

22. Callers throughout the nation access these services by dialing a ten-digit NAT phone number with a South Dakota area code. To Sprint, each call appears to be an ordinary long-distance call to a called party in South Dakota. Sprint thus carries the traffic close to the location of the NAT South Dakota number. At that point, Sprint (either directly or indirectly) transfers the call to a NAT-designated point of interface. At the point of interface, however, Sprint has learned that the call ostensibly going to a NAT customer is redirected to a telephone switch in California. The call then reaches the Call Connection Company's conference bridge where the call is terminated. It is Sprint's belief that the conference bridge equipment is very likely located at or near this switch. None of this activity qualifies as the provision of local exchange services on the Reservation.

23. If a Sprint customer were calling one of the residences or businesses that purchase local phone service from NAT, Sprint would be purchasing a typical "terminating access" service, and would be paying the local carrier's terminating access charge under the tariff. But that is not what happens in this traffic pumping scheme. Instead, with these calls, NAT transfers the call not to an end user customer, but to a Call Connection Company that is jointly engaged in this scam.

24. These Call Connection Companies are business partners or joint venturers, not "customers" of NAT, as that term is understood in common parlance. The Call Connection Companies do not pay money to NAT for any "service" as would be the case in a true customer relationship. Instead, they actually *receive* money in the form of kickbacks from NAT for their participation in this illegal scheme.

25. Moreover, the calling parties are not making terminating calls to these Call Connection Companies, but are seeking to talk to other parties outside of the service territory of NAT. The Call Connection Companies are simply connecting the calls like any other common carrier, and the calls do not actually "terminate" in the local exchange. Thus, unlike the typical scenario where a caller makes a long-distance call to a person in South Dakota and Sprint pays the LEC to "terminate" the call, Sprint is merely delivering the call to an *intermediate* point – delivering the call to NAT, who then delivers the call to the conference bridge provider which in turn connects callers who are geographically dispersed.

26. Sprint has not expressly agreed to pay terminating access charges for this service. Nor can it be deemed to have agreed to pay for this service. But NAT has been unlawfully billing Sprint "terminating access" charges for these calls, even though the calls do not terminate at an end user premises on the Reservation.

27. Moreover, the bogus terminating access charges are high enough to allow NAT and the Call Connection Companies to profit handsomely from this scheme. The Call Connection Companies are able to offer their services to calling parties for no cost, or nearly no cost. For customers who have long distance calling plans that do not charge

per minute, the calling party does not pay anything for the call at all. Of course, these caller connection services are not actually "free" – they are directly and unreasonably subsidized by long distance carriers such as Sprint who are being charged high "terminating access" rates when there is no provision of terminating access. They are thus being subsidized by all long distance carriers' customers throughout the country, including those who never use the Call Connection Companies' services.

28. The scam here is one of a number of similar scams recently perpetrated by certain rural LECs and their call connection partners. There is currently litigaton all over the country over these schemes. In Iowa, for example, there are several suits involving similar scams. *See, e.g., Sprint Communications Co., L. P. v. Superior Telephone Cooperative*, No. 4:07-cv-00194 (S.D. Iowa); *Qwest Communications Corp. v. Superior Telephone Cooperative*, No. 4:07-cv-0078 (S.D. Iowa), *AT&T Corp. v. Superior Telephone Cooperative*, No. 4:07-cv-0043 (S.D. Iowa); *AT&T Corp. v. Reasnor Telephone Co., LLC*, No. 4:07-cv-00117 (S.D. Iowa). There are also eight similar suits pending in South Dakota, including three suits involving Sprint. *See Sancom, Inc. v. Sprint Communications Co., L.P.*, No. CIV 07-4107 (D.S.D.); N*orthern Valley Commc'ns, LLC v. Sprint Communications Co., L.P.*, No. CIV. 08-1003 (D.S.D.); *Splitrock Properties, Inc. v. Sprint Communications Co., L.P.*, No. CIV 09-4075 (D.S.D.). And two other cases brought in the District of Minnesota involving a Minnesota LEC and Sprint and Qwest have been referred to the FCC and stayed pending the outcome of related proceedings at the Minnesota Public Utilities Commission. *See Tekstar Communications, Inc. v. Sprint Communications Co., L.P.*, No. 08-cv-01130-

JNE-RLE (D. Minn.); *Qwest Communications Company LLC v. Tekstar Communications, Inc.* No. 10-cv-00490 (MJD/SCN). Sprint is also involved with cases in California, Utah and Kentucky. *North County Communications Corp. v. Sprint Communications Co. L.P.*, 09-CV-2685 (S.D. Cal.); *Beehive Tel. Co., Inc. v. Sprint Communications Co., L.P.*, 2:10-CV-00052 (D. Ut.); *Bluegrass Tel. Co., Inc. v. Sprint Communications Co., L.P.*, 4:10-CV-104 (D. Ky).

29. Further, the Iowa Utilities Board has released an order in *In re Qwest Communications Corp. v. Superior Telephone Cooperative, et. al.*, Docket No. FCU-07-02 (IUB) (the "IUB Order"), holding that certain LECs' intrastate access charges for calls routed to conference call, chat line, and other call connection service providers did not fall within those LECs' tariff provisions defining access service. Finally, the FCC has found such traffic-pumping schemes to be likely unlawful and is still exploring ways to prohibit them going forward. *See Establishing Just and Reasonable Rates for Local Exchange Carriers, Notice of Proposed Rulemaking*, WC Docket No. 07-135, FCC 07-176, ¶¶ 11, 18-19, 34-37 (October 2, 2007). To date, the FCC's relief is prospective only. Long-distance carriers like Sprint must seek retroactive relief through litigation with LEC's over their traffic pumping scams.

30. After Sprint determined that NAT was engaging in a traffic-pumping, Sprint began disputing NAT's access bills. Sprint also initiated a complaint with the SD PUC seeking to stop NAT from offering telecommunication services without a Certificate of Authority from the SD PUC. In reality, however, it is NAT that owes Sprint a refund, since Sprint had already paid NAT access charges for traffic stemming

from NAT's scam before it came to realize the existence of the scam. Sprint has paid these erroneous charges to NAT, and is entitled to get them back.

31. Rather than defending itself before the SD PUC, NAT obtained an *ex parte* order from the Crow Creek Sioux Tribal Utility Authority and has now sued Sprint in tribal court to seek payment for its illegal traffic pumping services. The tribal court has no jurisdiction over Sprint to enforce the terms of NAT's federal tariff, which Congress has ruled must be enforced only in federal court or the FCC. *AT&T Corp. v. Coeur D'Alene Tribe*, 295 F.3d 899, 905 (9th Cir. 2002) (47 U.S.C. § 207 diverts state and tribal courts of jurisdiction to adjudicate Federal Communications Act claims); *see Northern States Power Co. v. Prairie Island Mdewakanton Sioux Indian Comty.*, 991 F.2d 458, 463 (8th Cir. 1993) (Hazardous Materials Transportation Act preempted tribal ordinance and excused any need to exhaust tribal remedies). Likewise, the tribal court cannot exercise jurisdiction over Sprint for it has not consented to that court's jurisdiction. *See Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 650 (2001) ("inherent sovereign powers of an Indian tribe do not extend to the activities with non members of the tribe.") (quotation omitted); *Alltel Communications, LLC v. Ogalala Sioux Tribe*, 2010 WL 1999 , at *12 (D.S.D.) (Federal Communications Act vests jurisdiction only in federal court or the FCC, and not in state or tribal court).

C. The Tariffs

32. There are many problems with NAT's scheme, foremost that NAT cannot lawfully charge Sprint for a terminating access service under its filed tariffs.

33. The services that NAT purports to offer related to handling calls from callers in other states are set forth in an interstate tariff filed with the FCC. The services that NAT purports to offer relating to in-state calls should be set forth in intrastate tariffs filed with the SD PUC. But NAT has no state tariff, only a tribal tariff. NAT's tariffs describe the access services that NAT claims that Sprint is taking. The tariffs also set the rates charged for those services. Under Section 203 of the Federal Communications Act, 47 U.S.C. § 203, carriers subject to tariff requirements cannot charge customers for services not specified in their interstate tariffs, and cannot charge rates other than those set out in those tariffs. *See American Tel. & Tel. Co. v. Central Office Tel., Inc.*, 524 U.S. 214, 222 (1998). Further, because carriers set the terms of their tariffs unilaterally, it is well settled that any ambiguity in the terms of a tariff must be strictly construed against the carrier that drafted it and in favor of customers. *See In re Theodore Allen Commc'ns., Inc. v. MCI Telecomc'ns. Corp.*, 12 F.C.C.R. 6623, ¶ 22 (1997). Similar rules govern intrastate tariffs.

34. NAT is subject to refund liability on both tariffs. NAT filed its FCC tariff with the FCC with only one day's notice before becoming effective. NAT's tribal tariff was effective immediately on filing. Under 47 U.S.C. § 204(a)(3), to be "deemed lawful," a LEC filing a tariff must give 15 days' notice before becoming effective. NAT's FCC tariff states it was issued September 14, 2009 and effective September 15, 2009; the tribal tariff issued September 1, 2009, with the same effective date. Consequently, neither of NAT's tariffs are "deemed lawful," and Sprint is entitled to a refund of the amounts it mistakenly paid.

35. When Congress enacted the Telecommunications Act of 1996 ("1996 Act") it made clear that the legacy access charge regime was locked into place and would not be expanded further. 47 U.S.C. § 251(g) provides:

> On and after February 8, 1996, each local exchange carrier, to the extent that it provide wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding February 8, 1996, under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after February 8, 1996. During the period beginning on February 8, 1996, and until such restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission. (Emphasis added.)

Section 251(g) means that access charges apply only to traffic for which there was a pre-1996 Act access payment obligation. *See PAETEC Commn'ns, Inc. v. CommPartners LLC*, Civ. No. 08-0397, 2010 WL 1767193 at *8 (D.D.C. Feb. 18, 2010) (Doc. 34-2); *WorldCom Inc. v. FCC*, 288 F.3d 429, 433 (D.C. Cir. 2002); *Competitive Telecomms. Ass'n v. FCC*, 117 F.3d 1068, 1073 (8th Cir. 1997) (legacy exchange carriers will continue to receive payment under pre-Act regulations). Thus, to the extent NAT's tariffs purport to apply to traffic that did not exist or was ineligible for access charges in 1996, section 251(g) prohibits such charges today.

36. The FCC has enacted regulations pursuant to statutory authorization that defines switched access services as involving the origination or termination of an interstate telephone call to or from an end user within the service area of the LEC. NAT's tariff severs that connection, which results in NAT claiming to terminate millions

of calls that never involve a bona fide end user actually receiving the call within NAT's service area. Because NAT's FCC tariff violates statutory authority and FCC regulations, NAT's tariff amounts to an unreasonable practice that Congress prohibited in 47 U.S.C. § 251. As a result, this Court is not bound by the filed rate doctrine. *Iowa Network Services, Inc. v. Qwest Corp.*, 466 F. 3d 1091, 1097 (8th Cir. 2006) (filed rate doctrine inapplicable where tariff does not cover services at issue); *Paetec, supra,* 2010 WL 1767193 at *4 (filed rate doctrine must yield when tariff is "inconsistent with the statutory framework pursuant to which it is promulgated").

37. NAT has filed a tariff with the Tribal Utility Authority that similarly violates federal law. The tribal tariff is not limited to regulating calls the Tribal Utility Authority arguably could regulate; instead it purports to regulate the same extent as NAT's FCC tariff. This, too, amounts to an unreasonable practice in violation of 47 U.S.C. § 201, and conflicts with 47 U.S.C. § 203 and the FCC's access charge rules. NAT's tribal tariff is also presumptively invalid because it attempts to regulate Sprint's off-reservation activities with non-tribal members who are also off the Reservation.

COUNT ONE

Breach of Federal Tariff Obligation and Communications Act (Defendant NAT)

38. Sprint repeats and realleges each and every allegation contained in paragraphs 12 through 37 of its Complaint as if fully set forth herein.

39. NAT has caused Sprint to be billed hundreds of thousands of dollars in charges denominated as "terminating access" charges based on routing interstate long-

distance calls from Sprint to NAT's joint venture partners that are carriers, not end user customers on the Reservation. These joint venture partners provide conference call or similar services that enable callers to connect to each other and, on information and belief, are themselves located outside of NAT's local calling areas and do not own or control the premises to which the calls are routed.

40. NAT's actions constitute an unreasonable practice prohibited by 47 U.S.C. § 201.

41. NAT's tariffs – both federal and tribal – attempt to regulate Sprint's interstate telephone services. By severing any connection between switched access services and a local exchange area, NAT has engaged in an unreasonable practice under 47 U.S.C. § 201, and the tariffs conflict with 47 U.S.C. § 203 and the FCC. To the extent NAT's tribal tariff purports to permit such charges, it is a presumptively invalid effort to regulate the off-reservation conduct of a non-member of the Crow Creek Sioux Tribe.

42. Sprint is authorized to bring suit for damages for this conduct in this Court pursuant to 47 U.S.C. § 207.

43. Sprint is entitled to reasonable damages in the amount of the unauthorized access charges paid to NAT under NAT's federal tariff, plus reasonable costs and attorneys' fees, pursuant to 47 U.S.C. §§ 206, 207. Sprint will establish the amount of damages at trial.

44. Sprint is also entitled to an order enjoining NAT from assessing charges on Sprint pursuant to their unlawful scheme. 28 U.S.C. §§ 2201, 2202.

45. Sprint is further entitled to a declaratory judgment and declaration of rights establishing that NAT has no right to charge or collect access charges based on routing interstate long-distance calls from Sprint to entities that provide conference call, chat line, international call, or similar services that enable callers to connect to each other. 28 U.S.C. §§ 2201, 2202.

COUNT TWO

Unjust Enrichment
(Defendant NAT)

46. Sprint repeats and realleges each and every allegation contained in paragraphs 12 through 45 of its Complaint as if fully set forth herein.

47. NAT, through its wrongful, improper, unjust, and unfair conduct has reaped substantial and unconscionable profits from Sprint by charging Sprint for services for which Sprint has not agreed to pay and which are not permitted by federal law. As such, Sprint has conferred a benefit on NAT, which has received monies to which it is not entitled.

48. In equity and good conscience, it would be unjust for NAT to enrich itself at the expense of Sprint. Among other reasons, NAT had no lawful authority to collect those charges from Sprint. NAT's unlawful conduct will continue unless the prayer for relief is granted.

49. Sprint has been damaged by the actions of NAT and is entitled to damages and restitution in the amount to be determined at trial, plus interest, attorneys' fees, and costs, and all available declaratory and injunctive relief.

COUNT THREE

Declaratory and Injunctive Relief
(Defendants Crow Creek Sioux Tribal Court and the Honorable Theresa Maule)

50. Sprint repeats and realleges each and every allegation contained in paragraphs 12 through 49 of its Complaint as if fully set forth herein.

51. NAT has sued Sprint in Crow Creek Tribal Court.

52. Jurisdiction to enforce NAT's FCC tariff on file with the FCC, rests exclusively with the federal courts or the FCC. Because NAT's tribal tariff purports to regulate interstate calls, it is presumptively invalid under federal law.

53. Sprint's provision of long distance services does not constitute voluntarily doing business on the Crow Creek Reservation.

54. Sprint has not consented to being sued in Crow Creek Tribal Court.

55. Because the trial court clearly lacks jurisdiction, Sprint is not required to exhaust its tribal court remedies, which in any case would be futile.

56. Sprint is entitled to a declaration that the Crow Creek Tribal Court lacks jurisdiction over Sprint and an injunction against that court and its judge from proceeding further with NAT's action against Sprint in tribal court.

PRAYER FOR RELIEF

WHEREFORE, for the reasons stated above, Sprint requests that judgment be entered in its favor and against NAT on each and all of its claims, including damages in an amount to be proven at trial, plus interest on that amount, reasonable costs and attorneys' fees. Sprint further requests that the Court order against NAT, the Crow Creek

Tribal Court and the Honorable Theresa Maule in her official capacity as the Judge of the Tribal Court, appropriate declaratory and injunctive relief, and any such other and further relief that the Court may deem just and equitable under the circumstances.

Dated: August 16th, 2010

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