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December 6, 2010

Scott G. Knudson
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Public Utilities Commission
Capitol Building, 1st Floor
500 E. Capitol Avenue
Pierre, SD 57501-5070

Re: In Re: Sprint Communications Company, L.P. v. Native American Telecom, LLC
Commission File Number: TC10-026

Dear Sir/Madame:

Enclosed for filing is the Reply of Sprint Communications Company to the Staff's Brief, plus the Second Affidavit of Scott Knudson dated December 6, 2010. Karen Cremer had previously granted Sprint a one-week extension to file this brief.

Yours truly,

Scott G. Knudson

SGK/npw
Enclosures

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BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN RE:

SPRINT COMMUNICATIONS COMPANY L.P.,

Complainant,

v.

NATIVE AMERICAN TELECOM, LLC,

Respondent.

Docket No.TC10-026

SPRINT COMMUNICATIONS COMPANY L.P.'S REPLY TO STAFF'S BRIEF IN RESPONSE TO NATIVE AMERICAN TELECOM'S MOTION TO STAY AND MOTION TO DISMISS

INTRODUCTION

Sprint Communications Company L.P. ("Sprint") submits this reply memorandum to the Commission Staff's brief. In its brief, Staff recommended that the Commission stay any further proceedings to "permit[ ] either the tribal court or the federal district court to resolve questions of its jurisdiction regarding Sprint first." Staff Brief at 7. On December 1, the federal district court determined that it (or the FCC) had *exclusive* jurisdiction over the claims that Native American Telecom, LLC ("NAT") was asserting against Sprint in tribal court. Second Affidavit of Scott Knudson dated December 6, 2010 ("Second Knudson Aff.), Ex. U. This ruling thus moots NAT's motion to stay.

Sprint concurs with Staff's recommendation to deny NAT's motion to dismiss. The federal court's ruling does not resolve important issues of state telecommunications law that Sprint's complaint raised and which the Commission must address. *Montana v. United States*, 450 U.S. 544 (1981), has no direct bearing on the Commission, as that case addressed the two very limited circumstances when a tribal court might have jurisdiction

over a non-member. Moreover, moving forward on Sprint's complaint will not implicate either of the *Montana* two exceptions to the general rule that tribes do not have jurisdiction over non-members.

Pursuant to Staff's directive, Sprint also addresses its request for money damages. As Sprint has requested separate and distinct relief from the Commission and the federal court, this action may proceed under SDCL § 49-31-1.3.

I. THE FEDERAL DISTRICT COURT HAS DETERMINED THAT NAT'S CLAIMS AGAINST SPRINT MUST BE DECIDED IN A FEDERAL FORUM

Nearly two months after Sprint initiated its Commission action, NAT brought a claim against Sprint in Crow Creek Sioux Tribal Court alleging violations of the Federal Communications Act ("FCA"). In response, Sprint sued NAT in federal district court asserting that NAT's traffic pumping scheme violated the FCA. Second Knudson Aff. at Ex. V. As part of its federal action, Sprint moved for a preliminary injunction seeking an order from the federal district court enjoining NAT's tribal court action. NAT in turn moved for a stay, arguing that Sprint should first be required to exhaust its tribal court remedies.

The federal district court rejected NAT's tribal exhaustion argument. The court looked to the Supreme Court's decisions in *Nevada v. Hicks*, 533 U.S. 353 (2001), *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473 (1999), and *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), to conclude that when tribal court jurisdiction was lacking, the exhaustion rule was inapplicable. *See* District Court Order at 16 (Ex. U). For instance, in *Hicks*, the question of tribal court exhaustion came up when a tribal member brought a

§ 1983 claim in tribal court against Nevada state game wardens who had searched his home located on tribal lands for evidence of violations of Nevada hunting laws. The Supreme Court held that because tribal courts did not have jurisdiction to hear § 1983 claims, the tribal exhaustion rule was "unnecessary" as it "would serve no purpose other than delay." 533 U.S. at 369. *Strate* reached a similar conclusion for suits against non-members for torts committed on fee-owned land within a reservation, while *El Paso* concluded tribal courts had no jurisdiction over Price-Anderson Act claims.

The district court concluded that in enacting the FCA, Congress intended to occupy the field when regulating interstate telecommunications. District Court Order at 7 (Ex. U). The district court thus accepted Sprint's argument that 47 U.S.C. § 207 mandated only a federal forum for NAT's claims against Sprint.[1] The district court reasoned:

> The FCA and the ICA[2] where adopted for the purpose of bringing the telecommunications field under one federal regulatory scheme. It logically follows that Congress intended to have that regulatory scheme consistently interpreted in a federal forum.

District Court Order at 10 (Ex. U). Because Congress had acted to preempt tribal court jurisdiction, the court concluded "the doctrine of tribal court exhaustion must give way."

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1 Section 207 reads: "Any person claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the Commission . . . or may bring suit . . . in any district court of the United States . . . but such person shall not have the right to pursue both such remedies."

2 The court referred to the ICA, or Interstate Commerce Act, because the ICA was the predecessor to the FCA, and Congress relied on the ICA when drafting the FCA. District Court Order at 6 n.2. (citing *AT&T Co. v. Central Office Tel., Inc.*, 524 U.S. 214, 222 (1998)).

District Court Order at 16 (Ex. U). The district court then granted Sprint's motion to enjoin NAT's tribal court action against Sprint.[3]

The district court's decision renders NAT's motion to stay the Commission proceeding moot. While Sprint believed the Commission should (and could) have gone forward without waiting for the federal court decision, the Commission can now move forward on Sprint's complaint without any concern over interfering with the jurisdictional determinations of either the federal or tribal court. The federal law issues Sprint has against NAT will be decided in a federal forum; the question of NAT's state law violations can be decided by the Commission.

II. IN KEEPING WITH STAFF'S RECOMMENDATION, NAT'S MOTION TO DISMISS SHOULD BE DENIED

A. The Commission has the authority to regulate NAT both on and off the Reservation.

Sprint supports the Staff's recommendation that the Commission deny NAT's motion to dismiss. South Dakota law is clear – the Commission has the power and authority to regulate telecommunications services in South Dakota and to protect South Dakota residents. The legislature has granted the Commission broad and sweeping authority to regulate telecommunications within the state: "The commission has general supervision and control of all telecommunications companies offering common carrier

[3] The district court's exhaustion ruling tracks squarely with what the Supreme Court said in *Strate*: "When, as in this case, it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by *Montanta's* main rule, it will be equally evident that tribal courts lack adjudicatory authority over disputes arising from such conduct." 520 U.S. at 459 n.14. Here, Congress did more than simply not conferring jurisdiction, it acted expressly to preclude tribal court jurisdiction.

services within the state to the extent such business is not otherwise regulated by federal law or regulation." SDCL § 49-31-3. The Commission is empowered to require a certificate of authority from every such telecommunications company. *Id.* ("Each telecommunications company that plans to offer or provide interexchange telecommunications service shall file an application for a certificate of authority with the commission pursuant to this section.").

The South Dakota Supreme Court agrees. In *Cheyenne River Sioux Tribe Telephone Authority v. Public Utilities Commission of South Dakota*, 1999 SD 60, 595 N.W.2d 604, the court addressed the question whether the Commission had jurisdiction over the sale of US West's (now Qwest) on-reservation portion of a local exchange. US West and the tribal utility authority argued the Commission's assertion of jurisdiction was "barred by federal preemption and violated well-established principles of federal Indian law." *Id.* at ¶ 14, 595 N.W.2d at 608. The South Dakota Supreme Court rejected that argument, holding that the Commission had express "authority and jurisdiction over intrastate facilities" and that the Commission's authority was "extensive and crucial to the overall regulatory scheme." *Id.* at ¶ 21, 595 N.W.2d at 595. Thus, the Commission had the authority "to regulate the activities of US West and its sale of telephone exchanges, whether on or off the reservation." *Id.* at ¶ 22, 595 N.W.2d at 609.

The evidence before the Commission is uncontroverted that a significant portion of the Reservation's population is non-tribal. *See* Knudson Aff. Ex. Q. Moreover, a significant portion of the land within the Reservation is non-fee land. *See* Knudson Aff. ¶¶ 20-21 and Exs. S and T. At a hearing before the South Dakota federal district court, a

NAT representative testified that NAT is ready, willing, and able to provide services to non-tribal members. Second Knudson Aff., Ex. W. Indeed, NAT's very business model requires traffic pumping to work – without revenues from interexchange carriers NAT cannot not compete with the existing LEC's for business from on-Reservation customers. NAT operates in South Dakota without a certificate of authority, and does so for the improper purpose of traffic pumping.

NAT's tribal tariff demonstrates that NAT is offering services outside of the Reservation and clearly within the scope of the Commission's authority. Knudson Aff. Ex. F. The Commission undoubtedly has complete authority to rule on the legality of that tariff. *See* SDCL § 49-1-11 (giving the Commission the power to promulgate rules over tariffs for the state). In a previous proceeding before the Commission, when NAT sought a certificate of authority from the PUC, NAT and the Tribal Utility Authority represented that NAT would provide services only *within* the Reservation. *See* Knudson Aff. Exs. J and L.

NAT later withdrew its application for a certificate of authority, but the need for Commission authorization and action remains. On its face, the tribal tariff applies outside the Reservation, within South Dakota and even outside the State of South Dakota. The tribal tariff defines its scope as providing "Intrastate Access Services . . . by Native American Telecom, LLC into, out of and within the State of South Dakota." Tariff at 11 (Knudson Aff. Ex. F). Under the so-called tribal tariff, Customers and End Users do not even need to be located on the Reservation. *See* Knudson Aff. Ex. F at 9, 10. And by using the radio technology of WiMax, NAT's services need not stop at the Reservation

boundary. Even if NAT's services remain within Reservation boundaries, NAT is still serving a significant number of non-tribal members residing on the Reservation. *See* Knudson Aff. Ex. Q.

By their very terms, not only do NAT's tribal and interstate tariffs attempt to usurp the Commission of its authority to regulate telecommunications services in South Dakota, but these tariffs indicate a LEC that is out of control. In particular, NAT's interstate tariff contains completely one-sided and improper terms concerning billing disputes, including provisions allowing for NAT to collect attorneys' fees based on any collection action, even if NAT does not prevail, and prohibiting customers from withholding disputed billing amounts. *See* Second Knudson, Ex. Y at §§ 2.10.4-5; 3.1.5; 3.1.7.[4] NAT's filing of its tribal complaint after Sprint brought this matter to the attention of the Commission, and then within a matter of days seeking to delay these proceedings because of a tribal exhaustion claim, further exemplify NAT's attempts to deprive the Commission of its jurisdiction and authority. In keeping with the mandate of the South Dakota State legislature, the South Dakota Supreme Court and the FCC, the Commission is obligated to act to require NAT to operate with a certificate of authority.

B. The *Montana* exceptions do not apply to the Commission's regulation of NAT's intra-state services to non-members or outside the Reservation.

None of the facts in this case, whether disputed or not (Staff Brief at 8), supports the application of either of the *Montana* exceptions to this case. *Montana* addressed only

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[4] On November 15, 2010, NAT issued its FCC Tariff No. 2, which is found at Second Knudson Aff. Ex. Y. AT&T, Sprint and other interexchange carriers are contesting the validity of that tariff. *See* Second Knudson Aff. Ex. X.

779

the limited scope tribes might have to regulate the activities of non-members within a reservation, carving out two limited circumstances when that might occur: (1) in consensual relationships with the tribe or tribal members, or (2) to protect the political integrity or economic security of the tribe. 450 U.S. at 565-66. "Outside of these two exceptions, as the Court emphasized in *Montana*, the tribes' inherent sovereignty does not give them jurisdiction to regulate the activities of nonmembers." *Philip Morris USA, Inc. v. King Mountain Tobacco Co.*, 569 F.3d 932, 938 (9th Cir. 2009). It is important to note that *Montana* does not extend to off-reservation activities or displace state regulation. Thus, the Commission can regulate NAT irrespective of whether the tribe can also arguably regulate Sprint.

Assuming, *arguendo*, that the *Montana* exceptions might be relevant, neither applies. With respect to the first *Montana* exception, as argued previously to the Commission, Sprint has not entered into a consensual relationship with a tribal entity. Nor does Sprint have any presence on the Reservation. It is undisputed that Sprint's services as an interexchange carrier end at the switch South Dakota Network LLC has in Sioux Falls. From there South Dakota Network routes calls destined to NAT's exchange prefix as TDN (traditional) traffic to WideVoice's switch in Los Angeles, where the traffic is rerouted as VoIP information services traffic back to South Dakota Network, for further routing on South Dakota's Network fiber optic to Fort Thompson.

There can be no dispute that Sprint does not have a presence on the Reservation, and the fact that WideVoice and/or NAT has located conference bridge hardware in Fort Thompson does not change that fact. Furthermore, the FCC has ruled that traffic

pumping does not constitute switched access service because pumped calls are not terminated at or delivered to an end user's premises. *Qwest Commc'ns Corp. v. Farmers and Merchants Mut. Tel Co.*, Second Order on Reconsideration 24 FCC Rcd. 14801, ¶¶ 10-25 (Nov. 25, 2009). Thus, Sprint has no presence on the Reservation, and the FCC has ruled that any Sprint traffic routed by South Dakota Network would not be considered switched access service on the Reservation.

The Eighth Circuit Court of Appeals made clear in *Hornell Brewing Co. v. Rosebud Sioux Tribal Court*, 133 F.3d 1087 (8th Cir. 1998), that the power of Indian tribes with respect to civil jurisdiction over non-Indians is limited to activities "on their reservations." *Id.* at 1091. In *Hornell Brewing*, the Estate of Tasunke Witko (Crazy Horse) sued two breweries in tribal court to halt the brewing and distribution of "The Original Crazy Horse Malt Liquor." *Id.* at 1089. Among the claims asserted against the breweries were defamation, violation of privacy and infliction of emotional distress. *Id.* While the lower tribal court held there was no personal or subject matter jurisdiction, the tribal appellate court ruled there was both personal and subject matter jurisdiction to hear the case. The breweries then sued in federal district court, which ordered that the tribal court should first rule on whether it had jurisdiction. *Id.* at 1091.

The Eighth Circuit reversed the district court's directive that the exhaustion rule required the tribal court to be the first to decide whether it had jurisdiction. *Id* at 1090-91. Judge Lay wrote for the Eighth Circuit:

> Neither *Montana* nor its progeny purports to allow Indian tribes to exercise civil jurisdiction over the activities or conduct of non-Indians occurring *outside their reservations* .... 133 F.3d at 1091(emphasis in original).

> …because the conduct and activities at issue here did not occur on the Rosebud Sioux Reservation, we do not believe *Montana's* discussion of activities of non-Indians on fee land within a reservation is relevant to the facts of this case. More importantly, the parties fail to cite a case in which the adjudicatory power of the tribal court vested over activity occurring outside the confines of a reservation …. *Id.*
>
> …we think it plain that the Breweries' conduct outside the Rosebud Sioux Reservation does not fall within the Tribe's inherent sovereign authority …. *Id.* at 1093.
>
> … the Rosebud Sioux Tribal Court lacks adjudicatory authority over the dispute arising from the Breweries' use of the Crazy Horse name in the manufacturing, sale and distribution of Crazy Horse Malt Liquor outside the Rosebud Sioux Reservation. *Id.* at 1093-94.

The Eighth Circuit then vacated the order requiring exhaustion. *Id.* at 1093-94.

A similar analysis and result is seen in *Christian Children's Fund, Inc.* ["CFF"] *v. Crow Creek Sioux Tribal Court,* 103 F. Supp. 2d 1161 (D.S.D. 2000). There a South Dakota non-profit, Hunkpati, had an agreement with CFF, a national charity based in Virginia, to administer CCF's program on the Crow Creek Sioux Reservation. After CCF terminated the relationship, Hunkpati sued CCF in Crow Creek Sioux Tribal Court. *Id.* at 1162. In granting CCF's motion to dismiss, the district court, per Judge Kornmann, found that no critical activities had taken place on the reservation. For example, CCF made its decision to terminate Hunkpati in Virginia and had no employees on the Reservation. And Hunkpati had its bank account outside the Reservation, and all funds were solicited and received off the Reservation. *Id.* at 1166. Citing to and quoting *Hornell,* the district court found the Tribal Court had no adjudicatory power over conduct "outside the confines of a reservation." *Id. Hornell* and *Christian Children's Fund* establish that the Tribal Court lacks jurisdiction over NAT's claims because the Sprint

calls at issue interconnect to South Dakota Network on its switch in Sioux Falls, *not* to NAT.

Similarly, the second *Montana* exception is not implicated in this case. None of Sprint's actions in this case "'imperil the subsistence" of the tribal community, which is the standard for assessing the second exception. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, ___ U.S. ___, 128 S. Ct. 2709, 2726 (2008) (quoting *Montana v. United States*, 450 U.S. 544, 566 (1981)). One commentator has described the second *Montana* exception as one where "tribal power must be necessary to avoid *catastrophic* consequences." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW at 232 n.220 (2005 ed.) (emphasis added). In *Cheyenne River Sioux Tribe Telephone Authority,* the South Dakota Supreme Court expressly rejected any argument that the Commission's authority impinged upon tribal self-government. 1999 SD 60 at ¶ 21, 595 N.W.2d at 610.

The FCC also supports this conclusion. The FCC has recognized the primacy of the Commission to protect non-tribal members living on a reservation. *In re Western Wireless Corp. Pet. for Designation as an Eligible Telecommc'ns Carrier for the Pine Ridge Reservation in South Dakota,* [*Western Wireless*], FCC 01-284, 16 F.C.C. Rcd. 18145 (2001), determined that the telecommunications regulatory scheme gives the FCC jurisdiction to determine ETC status over tribal members on the reservation. The FCC also addressed tribal sovereignty concerns in *Western Wireless*:

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

783

> therefore, we believe it may do so. We conclude, therefore, that under principles of federal Indian law, the Tribe has jurisdiction over aspects of Western Wireless' service to tribal members living within the Reservation boundaries, but the State commission has authority over the carrier's provision of service to non-tribal members.

Id. at ¶ 23. While the FCC carved out authority for the tribe to act within the reservation with tribal members, that authority did not extend beyond reservation boundaries. Hence, the Commission also has the authority to regulate NAT's services to tribal members which extend outside the Reservation. In keeping with Staff's recommendation, NAT's motion to dismiss should be denied.

III. SPRINT REQUESTS THAT THE COMMISSION ORDER NAT TO RETURN AMOUNTS NAT CHARGED FOR INTRASTATE TRAFFIC

In its May 5, 2010 Amended Complaint, Sprint requested that the Commission direct that NAT repay those amounts Sprint inadvertently paid NAT for intrastate traffic. *See* Amended Complaint, ¶ 24. In its federal Complaint, Sprint requested an order directing NAT to repay those amounts Sprint inadvertently paid NAT for interstate traffic. *See* Complaint, ¶¶ 43, 45 (Second Knudson Aff., Ex. V). Because Sprint has requested separate and distinct damages relief from the Commission and the federal court, Sprint's requests are allowed under SDCL § 49-13-1.1.

This rule provides as follows:

> 49-13-1.1. **Complaint to commission or suit by private person—Election of remedies.** Any person claiming to be damaged by any telecommunications company or motor carrier may either make complaint to the commission or may bring suit on his own behalf for the recovery of damages in any court of competent jurisdiction in this state, but no person may pursue both remedies at the same time.

Sprint's claims seek to recover separate and distinct damages. Before the Commission, Sprint requests relief based upon NAT's tribal tariff and those amounts Sprint mistakenly paid for intrastate pumped traffic. Before the federal court, Sprint requests relief based upon NAT's FCC tariff and those amounts Sprint mistakenly paid for interstate pumped traffic. *Compare* PUC Amended Complaint ¶ 24 (seeking monetary damages for those inadvertently paid intrastate access charges) *with* federal Complaint ¶¶ 43, 45 (Second Knudson Aff., Ex. V) (seeking monetary damages for those inadvertently paid interstate access charges).

The South Dakota Supreme Court has recognized that SDCL § 49-13-1.1 limits a party's ability to present claims before the Commission when those claims have been already asserted in another venue. *See State ex rel. Johnson v. Public Utilities Comm'n of South Dakota*, 381 N.W.2d 226, 230 (S.D. 1986) (upholding the lower court's decision to deny a party's petition to intervene in commission proceedings when the party had elected to pursue its remedy in circuit court, citing to SDCL § 49-3-23 (the predecessor statute to 49-13-1.1)). This statute and result, however, is inapplicable to this case where Sprint has carefully requested separate and distinct damages relief from the Commission and the federal court.

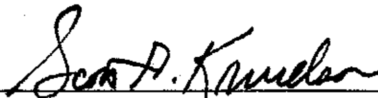
CONCLUSION

The federal district court has determined that the tribal court does not have jurisdiction over NAT's complaint against Sprint. The Commission, under its mandate from the South Dakota State legislature, the South Dakota Supreme Court and the FCC, has the authority, power and duty to bring NAT into compliance with South Dakota law.

Sprint's Complaint also complies with SDCL § 49-13-1.1 because Sprint has requested separate and distinct damages before the federal court and the Commission. NAT's motions for a stay or to dismiss must therefore be denied.

Dated: December 6, 2010

BRIGGS AND MORGAN, P.A.



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Counsel for Sprint Communications Company, LP

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN RE:	Docket No. TC10-026
SPRINT COMMUNICATIONS COMPANY L.P.,	
Complainant,	**SECOND AFFIDAVIT OF**
v.	**SCOTT G. KNUDSON**
NATIVE AMERICAN TELECOM, LLC,	
Respondent.	

COUNTY OF HENNEPIN)
) S.S.
STATE OF MINNESOTA)

Scott G. Knudson, being duly sworn, states under oath as follows:

1. My name is Scott G. Knudson. I am an attorney licensed to practice in Minnesota and representing the Complainant, Sprint Communications Company, L.P. ("Sprint"), in this action. I provide this second affidavit in support of Sprint's Reply to Staff's Brief in Response to Native American Telecom's Motion to Stay and Motion to Dismiss.

2. Attached as Exhibit U is a copy of the South Dakota United States District Court's Order Denying Defendants' Motion for a Stay and Motion to Strike Plaintiff's Memorandum and Granting Plaintiff's Motion For a Preliminary Injunction, dated December 1, 2010.

787

3. Attached as Exhibit V is a copy of the complaint Sprint filed in South Dakota Federal District Court, Case No. 10-4110. In the complaint, Sprint requests only those damages relating to interstate traffic.

4. Attached as Exhibit W are excerpts from the transcript of the October 14, 2010 hearing held before the South Dakota Federal District Court on Sprint's Motion for a Preliminary Injunction.

5. Attached as Exhibit X is a copy of the Joint Petition of AT&T, Qwest, Sprint, T-Mobile, and Verizon to Reject, Or, In the Alternative, To Suspend and Investigate NAT's Tariff F.C.C. No. 2, filed before the FCC on November 22, 2010

6. Attached as Exhibit Y is a copy of Native American Telecom, LLC's Tariff No. 2 issued November 15, 2010.

This concludes my affidavit.

By: ______________________
Scott G. Knudson

Subscribed and sworn to before
me this 6th day of December, 2010.

____
Notary Public

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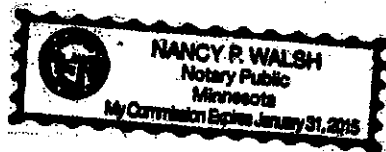

788

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

SPRINT COMMUNICATIONS COMPANY, L.P., Plaintiff, vs. NATIVE AMERICAN TELECOM, LLC; B.J. JONES, in his official capacity as Special Judge of Tribal Court; and CROW CREEK SIOUX TRIBAL COURT, Defendants.	)	CIV. 10-4110-KES ORDER DENYING DEFENDANTS' MOTION FOR A STAY AND MOTION TO STRIKE PLAINTIFF'S MEMORANDUM AND GRANTING PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

Defendants, Native American Telecom (NAT) and the Crow Creek Sioux Tribal Court (CCSTC), move for an order staying this action until CCSTC determines if it has jurisdiction over this matter. Plaintiff, Sprint Communications Company, resists the motion and moves for a preliminary injunction to enjoin CCSTC from hearing this matter. Defendants also move to strike Sprint's memorandum in support of its motion for a preliminary injunction because it violates the local rules of civil procedure.

BACKGROUND

The facts viewed in the light most favorable to NAT pertinent to this order are as follows: Sprint provides nationwide long-distance telephone services and is known under the telecommunications regulatory framework as an interexchange carrier (IXC). Sprint delivers long-distance

EXHIBIT U

telecommunication calls to a local exchange carrier (LEC) for termination. Sprint pays the LEC a terminating access charge based on the LEC's filed tariff.

In 1997, the Crow Creek Sioux Tribe established the Crow Creek Sioux Tribal Utility Authority (Tribal Utility Authority). In October of 2008, the Tribal Utility Authority authorized NAT, a tribally owned limited liability company organized under the laws of South Dakota, to provide telecommunications service on the Crow Creek Reservation subject to the tribe's laws. Under the telecommunications regulations, NAT is known as an LEC because NAT terminates calls on the reservation. NAT then filed two access service tariffs for telephone traffic on the reservation, one with the FCC for interstate traffic and one with the Tribal Utility Authority for intrastate traffic within the reservation.

Shortly after NAT began operating as an LEC, Sprint refused to pay NAT's terminating access tariffs. In March of 2010, NAT filed a complaint against Sprint with the Tribal Utility Authority seeking enforcement of its access tariffs. On March 29, 2010, the Tribal Utility Authority entered an ex parte order finding that Sprint's refusal to pay NAT's tariffs violated the "filed rate doctrine." In response, Sprint filed a complaint with the South Dakota Public Utilities Commission (SDPUC) to enjoin NAT's collection efforts with

respect to interstate traffic.[1] On July 12, 2010, NAT filed a complaint in CCSTC to collect the unpaid access service tariffs. CCSTC has directed the parties to brief the tribal court jurisdiction issue and has not determined whether it has jurisdiction over this matter. On August 16, 2010, Sprint filed a complaint with this court to enjoin CCSTC from further proceedings.

DISCUSSION

I. Motion to Strike

Defendants move to strike Sprint's memorandum in support of its motion for a preliminary injunction for failure to seek leave before filing an overlength brief. Defendants request that this court strike pages 26-47 of Sprint's brief.

Local Civil Rule 7.1(B)(1) requires that a brief not exceed 25 pages *or* 12,000 words unless the court granted prior approval. If the brief does exceed 25 pages, it must be accompanied by a certificate stating that the brief complies with the type-volume limitation. D.S.D. Civ. LR 7.1(B)(1).

Sprint's brief in support of its motion for a preliminary injunction is 47 pages and contains 10,656 words. Because the brief is under the 12,000 word limit, Sprint did not need prior approval to file an overlength brief, but it should have filed a word count compliance certificate. D.S.D. Civ. LR 7.1(B)(1).

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[1] The parties are currently briefing the issue of whether the SDPUC has jurisdiction over NAT in the matter pending before the SDPUC.

791

Sprint failed to comply with Local Rule 7.1(B)(1). After receiving notice of its failure, Sprint rectified the situation by filing a "Word Count Compliance Certificate." Docket 42. While the court prefers that parties comply with the local rules without prompting by the opposing party, NAT and CCSTC suffered no prejudice because Sprint failed to file a word count certificate. To strike almost half of Sprint's brief would work an injustice against Sprint and preclude a full resolution of the issues pending before this court. Defendants' motion to strike is denied.

II. Defendants' Motion for a Stay and Exhaustion of the Jurisdiction Question in Tribal Court

Before a federal court grants preliminary relief, it must have jurisdiction over the matter. *Bruce H. Lien Co. v. Three Affiliated Tribes*, 93 F.3d 1412, 1422 (8th Cir. 1996). Whether a tribal court has adjudicative authority over a non-tribal member presents a federal question. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S. Ct. 2709, 2716-17 (2008) (citing *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 15 (1987)). Federal law governs the outcome. *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 852 (1985). Accordingly, the question falls under this court's "arising under federal law" jurisdiction in 28 U.S.C. § 1331. *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 483 (1999).

The Supreme Court has long recognized that Indian tribes are " 'distinct, independent political communities.' " *Plains Commerce*, 128 S. Ct. at 2718

792

(quoting *Worcester v. Georgia,* 31 U.S. 515, 559 (1832)). "Tribal courts play a vital role in tribal self-government, and the Federal Government has consistently encouraged their development." *Iowa Mut.*, 480 U.S. at 14-15 (internal citation omitted). Given these long-held policy considerations, the doctrine of tribal exhaustion requires parties to exhaust their case in tribal court before seeking relief in a federal court, including questions of jurisdiction. *Nevada v. Hicks,* 533 U.S. 353, 369 (2001). Exhaustion is appropriate because " 'Congress is committed to a policy of supporting tribal self-government . . . [which] favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal basis for the challenge.' " *Neztsosie,* 526 U.S. at 484 (alteration in original) (quoting *Nat'l Farmers Union,* 471 U.S. at 856).

While the policy considerations favoring tribal courts are strong, the tribal court exhaustion rule is only a prudential rule based on comity. *Strate v. A-1 Contractors,* 520 U.S. 438, 450-51 (1997) (citing *Nat'l Farmers Union,* 471 U.S. at 857); *see also Iowa Mut.*, 480 U.S. at 16 n.8 ("[E]xhaustion is required as a matter of comity, not as a jurisdictional prerequisite."). Generally, when the tribal court has jurisdiction, however, comity requires that tribal courts handle the matter. *Bruce H. Lien,* 93 F.3d at 1420.

In *National Farmers Union,* the Supreme Court recognized three exceptions to the tribal exhaustion doctrine: (1) where "tribal jurisdiction is

793

motivated by a desire to harass or is conducted in bad faith;" (2) where the case "is patently violative of express jurisdictional prohibitions;" and (3) "where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction." 471 U.S. at 856-57. The Supreme Court has also recognized that "[a]ny generalized sense of comity toward nonfederal courts is obviously displaced by the provisions of preemption." *Neztsosie*, 526 U.S. at 485. A federal preemption defense, however, affects tribal exhaustion only in rare situations where "statutory provisions for conversion of state law claims to federal ones and removal to federal courts express congressional preference for a federal forum." *Id.* at 485 n.7

The question here is, with regard to claims arising under an interstate tariff, whether Congress expressed a preference for a federal forum both by federal preemption of claims and by limiting jurisdiction over a claim to a federal forum.

A. Claim Preemption

Both Sprint and NAT seek relief under the FCA, specifically under 47 U.S.C. §§ 201, 203, and 206. The Supreme Court has concluded that the Interstate Communications Act, the FCA's predecessor,[2] "was an exertion of

[2] In 1887, Congress passed the Interstate Commerce Act (ICA). 24 Stat. 379. Congress amended the ICA in 1910 to include regulation over telephones. 36 Stat. 539. In 1934, Congress passed the FCA. 47 U.S.C. § 151. In enacting the FCA, Congress heavily relied on the ICA. *AT&T Co. v. Central Office Tele., Inc.*, 524 U.S. 214, 222 (1998).

794

Congress of its authority to bring under federal control the interstate business of telegraph companies and therefor was an occupation of the field by Congress which excluded state action." *Postal Tel.-Cable Co. v. Warren Godwin Lumber Co.*, 251 U.S. 27, 31 (1919) (citations omitted). More recent courts have agreed: "The Supreme Court has held that the establishment of this broad scheme [the FCA] for the regulation of interstate service by communication carriers indicates an intent on the part of Congress to occupy the field to the exclusion of state law." *Ivy Broadcasting Co. v. AT&T Co.*, 391 F.2d 486, 490 (2d Cir. 1968).

The Supreme Court has held that the federal tariff laws preempt state-law causes of action. *See AT&T Co. v. Central Office Tele., Inc.*, 524 U.S. 214, 226-27 (1998) (holding that 47 U.S.C. § 203, the "filed rate doctrine," preempted state-law claims for breach of contract and tortious interference with a contract). From the FCA's sweeping claim preemption, the Supreme Court has concluded that the FCA is "a comprehensive scheme for the regulation of interstate communication." *Benanti v. United States*, 355 U.S. 96, 104 (1957). If a cause of action arises under an FCA provision, it is governed by federal law. *MCI Telecomms. Corp. v. Garden State Inv. Corp.*, 981 F.2d 385, 387 (8th Cir. 1992).

795

As in *Neztsosie*, here Congress has determined that the regulation of interstate tariffs is governed exclusively by federal law, and state-law or tribal-law claims regarding these interstate tariffs are completely preempted.

B. Federal Jurisdiction

While Sprint and NAT seek relief under 47 U.S.C. §§ 201, 203, and 206, it is § 207 that gives parties aggrieved under the FCA the right to sue and enforce their rights. 47 U.S.C. § 207; *see also Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc.*, 550 U.S. 45, 55 (2007) (reasoning that it is plain that parties aggrieved under the FCA may bring suit to enforce their rights under § 207). Section 207 provides:

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

47 U.S.C. § 207.

The question is whether § 207 vests exclusive jurisdiction in federal district courts and the FCC. While the Eighth Circuit Court of Appeals has not addressed this issue, the Ninth Circuit did in *AT&T Corp. v. Coeur d'Alene Tribe*, 295 F.3d 899 (9th Cir. 2002). In *Coeur d'Alene*, an Indian tribe created the National Indian Lottery and entered into a management contract between the tribe and a non-tribal gaming company to allow people living off the

reservation to participate telephonically in the lottery. *Id.* at 902. After the tribe negotiated with AT&T to establish toll-free telephone service for callers in states that operate their own state-run lotteries, several state attorneys general contacted AT&T and stated that furnishing interstate toll-free service would violate federal and state laws. *Id.* After receiving these letters, AT&T withdrew from the plan. *Id.* The tribe filed suit in tribal court. *Id.* at 903. Among its claims, the tribe alleged FCA violations, specifically under §§ 201(a), 202, 206 and sought relief under § 207. *Id.* at 904-05. The tribal court ruled against AT&T and the tribal appellate court affirmed. *Id.* at 903. AT&T then sought relief in the federal district court and challenged the tribal court's jurisdiction. *Id.* The district court found the tribal court's decision to be erroneous as a matter of federal law and denied as moot AT&T's motion for judgment that the tribal court lacked jurisdiction. *Id.* The tribe appealed. *Id.*

The Ninth Circuit reasoned that district courts may not relitigate a tribal court's decision unless the tribal court lacked jurisdiction or the judgment should be denied comity for some other reason. *Id.* at 904. As a result, the Ninth Circuit engaged in a de novo review of whether the tribal court in fact had jurisdiction and answered in the negative:

> By its express language, § 207 *establishes concurrent jurisdiction in the FCC and federal district courts only*, leaving no room for adjudication in any other forum–be it state, tribal, or otherwise. The Tribe had no recourse to its own courts for vindication of its FCA-based claim and–like any other plaintiff–

L 797

> could choose only between filing a complaint with the FCC or suing AT & T in federal district court.
>
> Because exclusive jurisdiction rested in either of the two statutorily-provided federal fora, the Tribal Court lacked jurisdiction to entertain the Tribe's claim.

Id. at 905 (emphasis added).

This court finds the logic and reasoning of the Ninth Circuit in *Coeur d'Alene* to be persuasive. The FCA and the ICA were adopted for the purpose of bringing the telecommunications field under one federal regulatory scheme. It logically follows that Congress intended to have that regulatory scheme consistently interpreted in a federal forum.

"The issue, then, is whether Congress would have chosen to postpone resolution of the enjoinable character of this tribal-court litigation, when it would not have postponed federal resolution of the functionally identical issue pending in a state court." *Neztsosie*, 526 U.S. at 485. Here, as in *Neztsosie*, the court finds that Congress has expressed a preference for a federal forum both by preempting all non-federal substantive law claims regarding interstate tariffs and by limiting the forum where such a claim can be brought to a federal forum. Thus, the "generalized sense of comity toward nonfederal courts" is outweighed here by the congressional provisions for preemption and exclusive jurisdiction in a federal forum. *See id.* at 485-86.

This conclusion is consistent with the Eighth Circuit opinion of *Blue Legs v. United States Bureau of Indian Affairs*, 867 F.2d 1094 (8th Cir. 1989),

798

and the United States Supreme Court opinion of *Nevada v. Hicks*, 533 U.S. 353 (2001). In *Blue Legs*, the Eighth Circuit found that Congress placed jurisdiction for claims under the Resource Conservation and Recovery Act in federal courts and that the tribal court did not have jurisdiction to hear the case. 867 F.2d at 1097-98. As a result, the court found that exhaustion of tribal remedies was not necessary. *Id.* In *Hicks*, the Supreme Court found that no provision in federal laws granted tribal courts jurisdiction over § 1983 claims and that tribal courts did not have jurisdiction to hear the case. 533 U.S. at 367-68. As a result, the Court found that because the tribal court lacked jurisdiction over § 1983 claims, "adherence to the tribal exhaustion requirement in such cases 'would serve no purpose other than delay,' and is therefore unnecessary." *Id.* at 369.

Defendants argue that § 207 uses "may" and, therefore, Congress did not clearly limit jurisdiction to only federal courts or the FCC. *See* 47 U.S.C. § 207 ("Any person claiming to be damaged by any common carrier subject to the provisions of this chapter *may* either make complaint to the Commission as hereinafter provided for, or *may* bring suit . . . in any district court . . . ." (emphasis added)). Sprint, relying on *Neztsosie*, contends that the use of "may" means that litigants must choose either federal court or the FCC.

The Ninth Circuit Court of Appeals in *Coeur d'Alene* held that in § 207, Congress left "*no room* for adjudication in any other forum–be it state, tribal, or

L 799

otherwise." 295 F.3d at 905 (emphasis added). The Ninth Circuit's reasoning is in line with other circuits that have interpreted Congress's choice of language in § 207.[3] Thus, this court concludes that "may" refers to choosing between either a federal district court or the FCC.

Defendants further argue that the FCC supports tribal sovereignty in the telecommunications realm. The FCC has expressed concern for improving telephone and internet services in Indian country.[4] In its *Indian Telecom Initiatives* booklet, the FCC stated that it "is committed to facilitating increased access to telecommunications in Indian Country." Docket 46-4 at 1. The FCC has listed the benefits of increased telecommunications services on tribal lands, including access to education and employment opportunities, public safety services, and government programs. *See* Docket 46-4. The agency has also pledged its support in securing services for tribal lands: "In a series of

[3] *See, e.g., Mexiport v. Frontier Comms. Servs., Inc.*, 253 F.3d 573, 575 (11th Cir. 2001) (reasoning that § 207 "allows a complainant to file a complaint with the FCC or in federal district court but not both" (citations omitted)); *Stiles v. GTE, Sw. Inc.*, 128 F.3d 904, 906-07 (5th Cir. 1997) (same); *Cincinnati Bell Tel. Co. v. Allnet Comms. Serv., Inc.*, 17 F.3d 921, 923-24 (6th Cir. 1994 (same).

[4] *See, e.g.*, Fed. Commc'n Comm'n, Expanding Telecommunications Access in Indian Country, Docket 46-5; Fed. Commc'n Comm'n, FCC Establishes Office of Native Affairs and Policy, FCC News Release, Aug. 12, 2010, Docket 47-1; Fed. Commc'n Comm'n, Statement of Commissioner Michael J. Copps, Docket 47-2; Fed. Commc'n Comm'n, Commissioner Michael J. Copps Applauds the Appointment of Geoffrey Blackwell to Lead New Initiatives for Indian Country, FCC News Release, June 22, 2010, Docket 47-3.

800

steps undertaken since 1998, the FCC, in consultation with tribal leaders and other government agency officials, has sought to address concerns about barriers to telecommunications service deployment and subscribership in Indian Country. Concerns addressed include geographic isolation, lack of information, and economic obstacles." Docket 46-5 at 9.

The FCC has further acknowledged that Indian tribes are sovereign and that the FCC "has a trust responsibility to and a government-to-government relationship with recognized tribes." Docket 46-5 at 18. "The FCC recognizes the rights of tribal governments to set their own communications priorities and goals for the welfare of their membership." Docket 46-5 at 3. The FCC has clearly expressed a need for greater telecommunications access in Indian country and a respect for tribal sovereignty in choosing the services best suited for that tribe. But the FCC has never stated that tribal courts have jurisdiction over interstate tariff claims brought under § 207, because Congress, not the FCC, has the power to determine where jurisdiction for these claims lie.

Congress has not only occupied the telecommunications field for interstate tariffs, but has also chosen to preempt state and tribal court jurisdiction for interstate tariff claims brought under § 207. Like *Hicks* and *Neztsosie,* because Congress has "expressed an unmistakable preference for a

801

federal forum," *Neztsosie*, 526 U.S. at 484, there is no need to exhaust the jurisdictional issue in CCSTC.

III. The Preliminary Injunction Motion

Federal Rule of Civil Procedure 65(a) allows a court to issue a preliminary injunction. "A preliminary injunction is an extraordinary remedy, and the burden of establishing the propriety of an injunction is on the movant." *Watkins Inc. v. Lewis*, 346 F.3d 841, 845 (8th Cir. 2003) (internal citations omitted). The Eighth Circuit has established four factors for determining whether to issue a preliminary injunction: (1) the threat of irreparable harm by the movant; (2) the balance between this harm and the injury that granting the injunction will inflict on the other parties; (3) the probability that the movant will succeed on the merits; and (4) the public interest. *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981).

No single factor is dispositive. *Calvin Klein Cosmetics Corp. v. Lenox Labs., Inc.*, 815 F.2d 500, 503 (8th Cir. 1987). But the two most critical factors are the probability that the movant will succeed on the merits and whether the movant will suffer irreparable harm if the preliminary injunction is not granted. *Chicago Stadium Corp. v. Scallen*, 530 F.2d 204, 206 (8th Cir. 1976). A district court has wide latitude to issue a preliminary injunction, and the

appellate court reviews a preliminary injunction decision under an abuse of discretion standard. *See id.*

A. Probability of Success on the Merits

Sprint seeks a preliminary injunction to enjoin CCSTC from hearing this case. As stated above, this court has determined that CCSTC does not have jurisdiction over this matter. Accordingly, this factor weighs heavily in favor of granting the preliminary injunction.

B. The Threat of Irreparable Harm

The movant for a preliminary injunction must show a threat of irreparable harm, and the failure to do so is sufficient grounds for a court not to grant a preliminary injunction. *Glenwood Bridge, Inc. v. City of Minneapolis*, 940 F.2d 367, 371 (8th Cir. 1991). The movant need only show the possibility of harm and not actual harm. *See, e.g., United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953) ("The purpose of an injunction is to prevent future violations . . . and, of course, it can be utilized even without a showing of past wrongs.").

Sprint argues that it has met its burden because it has shown the likelihood of success on the merits of this action. The Eighth Circuit has held that irreparable harm can be found if the probability of success on the merits is met. *Lenox Labs.*, 815 F.2d at 505 ("The court correctly noted that it could

presume irreparable injury from finding of probable success" on the merits.). This factor weighs in favor of Sprint.

C. Balance Between the Irreparable Harm and Injury of Granting the Injunction

Sprint argues that NAT and CCSTC will not suffer any harm if this court issues a preliminary injunction because they can pursue their claims against Sprint in the proper forum and CCSTC can focus its attention on matters where it has jurisdiction. Defendants respond that CCSTC would be precluded from determining its own jurisdiction and interpreting its own laws, intruding on the Crow Creek Tribe's sovereignty and sovereign immunity.

Tribes are sovereign nations and courts have repeatedly recognized the need to allow tribal courts to determine disputes first, and wrongly interfering with a tribe's authority to determine its jurisdiction does irreparable harm to a tribe's sovereignty. But the Supreme Court in *Hicks*, *Strate*, and *Neztsosie*, and the Eighth Circuit in *Bruce H. Lien* and *Blue Legs*, have held that the doctrine of tribal court exhaustion must give way when Congress has preempted tribal court jurisdiction. As stated above, CCSTC does not have jurisdiction in this case because § 207 has preempted state and tribal jurisdiction for interstate tariff claims arising under § 207. Thus, Sprint will also experience irreparable harm if forced to exhaust the issue in CCSTC. These competing irreparable harms that would result by an incorrect holding reveal that this factor weighs both in favor of, and against, granting the preliminary injunction.

D. Public Interest

Sprint argues that many traffic-pumping cases are pending in federal district courts across the country and that these cases should be uniformly decided by the federal courts. Defendants respond that divesting CCSTC of jurisdiction would impede the Crow Creek Tribe's sovereignty.

As stated above, there is a strong policy favoring tribal self-government. But this policy ends when CCSTC lacks jurisdiction to hear the matter before it. *Nat'l Farmers Union*, 471 U.S. at 856-57. Litigation, no matter the forum, is expensive. Both parties will incur considerable expense if CCSTC first hears this action and then this court, another federal district court, or the FCC also hears this case. Because Congress chose to vest jurisdiction for interstate tariff claims with the federal courts and the FCC, the public is best served when the action is heard in federal court or the FCC in the first instance.

The irreparable harm, success on the merits, and the public interest factors all weigh in favor of granting the preliminary injunction. The balance of the harms factor weighs both in favor of and against the preliminary injunction. The court finds that Sprint is entitled to a preliminary injunction.

CONCLUSION

The motion to strike is denied because defendants suffered no prejudice from Sprint's failure to comply with the local rules. The tribal exhaustion rule is inapplicable because CCSTC does not have jurisdiction over this matter.

805

Because Congress has preempted tribal court jurisdiction for interstate tariff claims brought under § 207, and after weighing the *Dataphase* factors, this court grants the preliminary injunction and denies the motion for a stay. Accordingly, it is

ORDERED that NAT's motion to strike (Docket 37) is denied, defendants' motion for a stay (Docket 14) is denied, and Sprint's motion for a preliminary injunction (Docket 20) is granted.

Dated December 1, 2010.

BY THE COURT:

/s/ *Karen E. Schreier*
KAREN E. SCHREIER
CHIEF JUDGE

AUG

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.

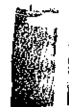
6. NAT has two tariffs it purports to enforce in tribal court. One is NAT's tariff it filed with the FCC on September 14, 2009, with an effective date of September 15, 2009. A copy of NAT's FCC tariff is attached as Exhibit A to this Complaint. NAT

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



809

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

815

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.

814

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

815

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.); *Northern 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.

818

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.

819

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

820

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.

823

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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1 UNITED STATES DISTRICT COURT
2 DISTRICT OF SOUTH DAKOTA
3 SOUTHERN DIVISION
4
* *
5 Case Civ. 10-4110
6 SPRINT COMMUNICATIONS COMPANY, L.P.,
7
Plaintiff,
8
-vs-
9
10
THERESA MAULE, in her official capacity
11 as Judge of Tribal Court, CROW CREEK
SIOUX TRIBAL COURT, and
12 NATIVE AMERICAN TELECOM, LLC,
13 Defendants.
14
15
16
U.S. District Courthouse
17 Sioux Falls, SD
October 14, 2010
18 9:00 o'clock a.m.
* *
19
HEARING
20
* *
21 BEFORE: The Honorable Karen E. Schreier
22
APPEARANCES:
23
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24 Whiting Law Office
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21
22
23 **EXHIBIT W**
24
25

3

1 INDEX TO WITNESS

2

Witness	Direct	Cross	Redirect	Recross
3 Keith Williams	13	29	40	44
4 Thomas Reiman	45	81 125	116 125	123
5 Peter Lengkeek	127 142			

6

7 INDEX TO EXHIBITS

	OFFERED	RECEIVED
8 PLAINTIFF'S EXHIBITS		
9 Exhibit 101 10 (Affidavit of Keith Williams)	83	83
11 Exhibit 102 (Affidavit of Thomas Reiman)	104	104
12 Exhibit 103 13 (Order Granting Approval to Provide Telecommunications Service)	104	104
14 Exhibit 104 15 (Application for Certificate of Authority)	104	104
16 Exhibit 105 (Agreement for Interconnection and Ancillary Services)	104	104
17 Exhibit 106 18 (Joint Venture Agreement)	110	110
19 DEFENDANTS' EXHIBITS		
20 Exhibit 41 21 (Existing WideVoice, LLC - NAT - Crow Creek Network Topology)	29	28
22 Exhibit 41A 23 (Hand drawn map by Keith Williams)	27	28
24 Exhibits 42 - 45 (Photographs)	65	65

25

4

1 THE COURT: This is the time scheduled for a
2 hearing in the matter entitled Sprint Communications
3 Company, LP, versus Theresa Maule, Crow Creek Sioux Tribal
4 Court, and Native American Telecom, LLC.
5 Would counsel please note their appearances for
6 the record?
7 MR. WHITING: Your Honor, my name is Stan
8 Whiting. I'm here on behalf of Sprint. With me is Tom
9 Tobin from Winner, South Dakota. Bret Lawson is in-house
10 corporate counsel from Kansas City. The gentleman that
11 will be handling the matters today is Scott Knudson from
12 Minneapolis.
13 THE COURT: Thank you.
14 MR. SWIER: Good morning, Your Honor. Scott
15 Swier. I represent Native American Telecom in this matter.
16 MS. ROBERTS: Good morning, Your Honor. Judith
17 Roberts. I represent Crow Creek Tribal Council, and in
18 extension of them the Utility Authority and the Tribal
19 Court.
20 MS. DAMON: Your Honor, my name is Jamie Damon.
21 I represent Theresa Maule, in her official capacity as
22 Judge of the Tribal Court.
23 THE COURT: Thank you. First I wanted to take up
24 the motion filed by Theresa Maule to dismiss the claim
25 against her, because she no longer serves as a Tribal Court

13

1 convenient way for us to set it up? Should we direct it
2 toward the Court, or how would you like us to do that?
3 THE COURT: If you want me to see what's on
4 there, it would help if you would turn it so I can see it.
5 MR. SWIER: May I proceed?
6 THE COURT: You may.
7 KEITH WILLIAMS,
8 called as a witness, being first duly sworn, testified as
9 follows:
10 MR. KNUDSON: If we could move the easel back
11 towards the screen, both the Court and counsel could see
12 what is on the screen.
13 THE COURT: Another option is we have an overhead
14 camera. If you wanted to write something on a sheet of
15 paper there, I can see it on my screen here, and the
16 attorneys can see it on their screens. Unless you are
17 really tied to using the easel.
18 MR. SWIER: As long as everybody can see it,
19 that's all I care about, Your Honor.
20 DIRECT EXAMINATION
21 BY MR. SWIER:
22 Q. Keith, would you please introduce yourself to the
23 Court.
24 A. **My name is Keith Williams. I'm a network engineer**
25 **with WideVoice Communications. I've been doing**

14

1 **telecommunications and IP networking for over 10 years.**
2 Q. You are an employee of WideVoice Communications. Is
3 that right?
4 A. **That's correct.**
5 Q. Tell us about your experience in dealing with
6 telecommunications networks that are similar to what is
7 found on the Crow Creek Reservation.
8 A. **I've worked for a couple CLECs, which are competitive**
9 **local exchange carriers, phone companies, doing voiceover**
10 **IP, in scenarios not unlike what is going on at Native**
11 **American Telecom.**
12 Q. Real briefly, tell you what your duties are for
13 WideVoice. What do you do everyday when you get up?
14 A. **Network design, implementation, troubleshooting.**
15 Q. Keith, are you familiar with the network that is owned
16 on the Crow Creek Reservation by Native American Telecom?
17 A. **I am.**
18 MR. SWIER: At this time I do have a sheet of
19 paper. Could I approach and give this to Mr. Williams, and
20 we can put it on the screen so everyone can see it?
21 THE COURT: Sure.
22 BY MR. SWIER:
23 Q. Keith, you indicated to the Judge before you are
24 familiar with the system that is used by NAT in this case.
25 Is that right?

15

1 A. **That's correct.**
2 MR. SWIER: With the Court's permission, could
3 the witness approach the easel?
4 THE COURT: It did just zoom in now, if you want
5 to try it.
6 BY MR. SWIER:
7 Q. Keith, I'd like you to explain to the Court how this
8 complex system that we are all arguing about works. Would
9 you take us through a call simply from say Fargo, North
10 Dakota, and how that routes and ultimately gets to the
11 Reservation at Ft. Thompson?
12 A. **Okay. I'll start by drawing just the United States,**
13 **or something similar to.**
14 Q. Keith, could you turn that so -- there we go. Okay.
15 You've drawn a picture of the United States. Mark for the
16 Court where North Dakota would be, and where would South
17 Dakota be?
18 A. **(Witness indicating).**
19 Q. Mark where the Crow Creek Reservation would be,
20 approximately, in South Dakota.
21 A. **(Witness indicating).**
22 Q. Keith, let's say my grandmother lives in Fargo, and
23 she wants to make a call from Fargo to the Crow Creek
24 Reservation to NAT's facility there.
25 A. **Okay.**

16

1 Q. Take us through the first step that grandma does.
2 A. **The first step is obviously she would pick up her**
3 **telephone and would be given dial tone by the local**
4 **exchange carrier, the LEC.**
5 Q. That would be the LEC, the local exchange carrier in
6 Fargo?
7 A. **Correct. Depending on the digits she dialed, for**
8 **instance, if she wanted to dial someone on the Crow Creek**
9 **Reservation, it would be 605-477. 605 is the area code or**
10 **NPA. That's how you discern what area of the country you**
11 **are calling.**
12 Q. The 605 area code is obviously all of South Dakota.
13 A. **All of South Dakota, correct. They only have one area**
14 **code. 477 designates Ft. Thompson, Crow Creek. So 477**
15 **anything would go to Ft. Thompson.**
16 Q. Grandma picks up the phone and dials 605 for the area
17 code in South Dakota. 477 is the prefix for Ft. Thompson.
18 Correct?
19 A. **Correct.**
20 Q. Let's say it's 477-1111, for example. That then would
21 be the number grandma would be using to call her friend in
22 Crow Creek.
23 A. **Ft. Thompson.**
24 Q. Okay. What happens next after she picks up the phone
25 and dials?

17

1 **A. Well, the switch in Fargo would then go to the LERG,**
2 **which is the local exchange routing guide. It's an**
3 **industry standard database that lists switch identifiers,**
4 **the NPAs NXXs they serve and how to get to them.**
5 Q. So the LERG, what does that stand for again, just so
6 we're straight?
7 **A. Local exchange routing guide.**
8 Q. Tell me if I'm wrong. That's a database in the
9 industry that shows how grandma's call would initially get
10 routed from Fargo to Ft. Thompson.
11 **A. Sure. I mean ultimately TeleCourier manages that**
12 **database and keeps track of all the switches in North**
13 **America and the rate centers and phone numbers that would**
14 **be served by those switches.**
15 Q. So grandma picks up the phone. She dials her
16 Ft. Thompson number. It's then -- that's Step No. 1. Then
17 what happens? You go to the LERG.
18 **A. Yes. So the LERG would tell you in this case to get**
19 **to Ft. Thompson, you would go to SDN.**
20 Q. What does SDN stand for?
21 **A. South Dakota Network.**
22 Q. Where is that located?
23 **A. Sioux Falls.**
24 Q. Is it safe to say -- let's think about this as a road
25 going somewhere. Is that our first leg on the road?

18

1 **A. It would be your first leg into getting to 605-477.**
2 **Yes. You have to go to South Dakota Network to get to**
3 **there.**
4 Q. When grandma's phone call travels from Fargo to the
5 South Dakota Network on the way to Ft. Thompson, what is
6 the next step? Where does that call go?
7 **A. Once the South Dakota Network gets it, they would see**
8 **it's destined for Ft. Thompson, in which point they would**
9 **route the call to WideVoice, who has a switch in**
10 **Los Angeles.**
11 Q. That's what I want to talk about. Why if the call is
12 coming from grandma in Fargo down to SDN in Sioux Falls
13 with the ultimate termination stop being Ft. Thompson, why
14 is it going from SDN to WideVoice's facility in
15 Los Angeles?
16 **A. Native American Telecom does not own their own**
17 **telephone infrastructure, per se, switching equipment in**
18 **Ft. Thompson.**
19 Q. So if anyone is going to make a call to
20 Ft. Thompson, be it from Fargo, Canada, wherever, you never
21 have that interconnection directly from SDN to
22 Ft. Thompson. It just doesn't exist. Right?
23 **A. Correct.**
24 Q. So we go from Fargo, the call travels to Sioux Falls,
25 because there is no facility in Ft. Thompson, it goes to

19

1 WideVoice's facility in Los Angeles.
2 **A. That's correct.**
3 Q. What leg of the route then would SDN to Los Angeles
4 be?
5 **A. I would say that's 2.**
6 Q. That's the second place. When grandma's call then
7 gets routed to WideVoice's high-tech facility in Los
8 Angeles, then what happens?
9 **A. At that point that is the end of what would be the**
10 **traditional telephone call using the TDM PSTN network?**
11 Q. The old network.
12 **A. Correct. At that point WideVoice takes that call and**
13 **routes it to Ft. Thompson via IP.**
14 Q. Again, I don't think any of us are technical gurus.
15 Explain to the Judge what IP is.
16 **A. IP would be Internet protocol, basically using the**
17 **Internet, as opposed to the public switch telephone**
18 **network.**
19 Q. Is that done based on the technology that's now
20 available to both WideVoice and what's on the Reservation?
21 **A. Yes. I mean ultimately most new telephone,**
22 **telecommunication deployments would be using IP at this**
23 **point.**
24 Q. So then from the WideVoice facility in Los Angeles to
25 Ft. Thompson, what leg of the journey would that be?

20

1 **A. I would say that's 3.**
2 Q. Okay. So grandma's call goes from Fargo to SDN in
3 Sioux Falls to Los Angeles and ultimately ends in
4 Ft. Thompson.
5 **A. Correct.**
6 Q. Explain then the technology that is present at
7 Ft. Thompson that makes this whole thing work.
8 **A. In Ft. Thompson obviously they have a router which**
9 **terminates that IP leg, at which point, depending on where**
10 **grandma is at within the Reservation, they also have a**
11 **wireless network out there, WiMax, that would direct where**
12 **to send that phone call.**
13 Q. Is that any different than any other system in the
14 country?
15 MR. KNUDSON: Objection. Foundation.
16 THE COURT: Overruled. You may answer.
17 **A. Not at its core, no. It's pretty traditional in that**
18 **sense. WiMax is a little different, but this is what would**
19 **be considered the last mile. It's how you reach the end**
20 **users from the local rate center.**
21 Q. Again, one of the keys here, tell me if I'm wrong, is
22 that there's simply not the infrastructure equipment for
23 any call to go from SDN directly to the Ft. Thompson-Crow
24 Creek Reservation.
25 **A. Correct. That switching equipment is expensive. I**

21

1 **mean ultimately Midstate, who serves Ft. Thompson as the**
2 **traditional LEC in that area, their switching equipment is**
3 **in Kimball. It's not in Ft. Thompson, per se, either.**
4 Q. Explain to the Court the kind of high-tech technology
5 that NAT has invested out on the Crow Creek Reservation?
6 What is out there? What makes this thing work?
7 A. **Again, they've got a network facility out there that**
8 **obviously terminates these IP connections, allows the**
9 **wireless WiMax connection to customers throughout the**
10 **Reservation, at which point they would deploy within the**
11 **end user locations, ATAs, which are basically digital --**
12 **analog-to-digital phone converters, or digital-to-analog**
13 **phone converters, but allows you to turn that IP signal**
14 **into a traditional phone signal. They also within that**
15 **network facility house application services, so they have**
16 **servers, and they are offering services, as well.**
17 Q. Some pretty serious infrastructure out there?
18 A. **Yes.**
19 Q. Just so I understand this, grandma picks up the phone
20 in Fargo. She calls her granddaughter in Ft. Thompson.
21 Dials 605-477-1111. Grandma's call goes to Sioux Falls to
22 SDN. Because there's no infrastructure from SDN in
23 Sioux Falls to Ft. Thompson, the call then goes from
24 Sioux Falls to WideVoice's technology in Los Angeles.
25 A. **Correct, and this leg, too, is over dedicated**

22

1 **facilities. I mean WideVoice is paying for dedicated**
2 **services back to SDN. So the trunk side of this call is on**
3 **private line, leased line facilities.**
4 Q. So the call travels down on that private leased line
5 from Sioux Falls to Los Angeles. WideVoice's technology
6 takes grandma's call and ships it to the facilities on the
7 Reservation in Ft. Thompson.
8 A. **That is correct.**
9 Q. Keith, let's say when grandma picks up the phone in
10 Fargo, her local exchange is let's just say AT&T. Would
11 the process be any different if AT&T were that provider?
12 A. **No. I mean the local exchange carrier, as well as the**
13 **IXC, who would be the interexchange carrier, or the**
14 **long-distance carrier, it wouldn't matter. Again, the LERG**
15 **would tell you if you are dialing Ft. Thompson, regardless**
16 **of where you are coming from, you would go to SDN, and then**
17 **to the Ft. Thompson rate center.**
18 Q. So AT&T would use the same routing system, same
19 dedicated line system as what is being used here. Is that
20 right?
21 A. **That is correct.**
22 Q. How about Sprint instead of AT&T? Let's put Sprint in
23 that situation. Would that be the same?
24 A. **Two and three for sure are always the same. One, you**
25 **could be anywhere. The end is always going to look the**

23

1 **same.**
2 Q. But ultimately grandma's call from Fargo gets to
3 granddaughter in Ft. Thompson on the Reservation because of
4 the facility that's been built on the Reservation?
5 A. **That is correct.**
6 Q. Keith, we're talking in this case, also, about
7 conference calling. We have seen how a single call from a
8 grandma to a granddaughter works.
9 Do this. Put a point down in Florida, put a point in
10 Texas, and put a point in New York. Let's say those three
11 points are involved in a business dealing, and instead of
12 traveling to wherever, they want to conduct their business
13 meeting via a conference call.
14 A. **Okay.**
15 Q. Explain to the Court then how this conference calling
16 with these three companies works.
17 A. **In that case, I mean depending on the number you dial**
18 **for that conference call, that still would decide where the**
19 **call routes. In this case if they are dialing 605-477-1112**
20 **is their conference bridge --**
21 Q. Then all three of them would use the same number?
22 A. **They would all dial the same number. That's correct.**
23 **So when they dial that number, the routing again would stay**
24 **the same. In the end you would end up going to South**
25 **Dakota Network, who would tell you to route that call to**

24

1 **Ft. Thompson. To get there, it would go via WideVoice's**
2 **dedicated facilities to Los Angeles, at which point we**
3 **would redirect the call back to Ft. Thompson where they**
4 **house and own their own conferencing equipment.**
5 Q. If we have three people on this conference call, is
6 the way that that call is routed, ultimately terminating
7 and ending in Ft. Thompson, any different than grandma's
8 call to granddaughter on the Reservation?
9 A. **It is not.**
10 Q. It's the exact same?
11 A. **Yes.**
12 Q. Let me ask you this. What if Sprint were the company
13 that -- let's say they were using Sprint's calling
14 conference services. All right? How does that change this
15 route?
16 A. **In that case you would need to know where the Sprint**
17 **local was. But if Sprint were in Florida, say, I mean it**
18 **would end up the same. All these people would call. It**
19 **would go to the LERG database, which would say send that**
20 **call to whatever that NPA NXX was, and that's where that**
21 **call would terminate.**
22 Q. So that route is the same, whether it's Sprint, AT&T,
23 or a conference calling company.
24 A. **Correct. I mean in the end, depending on the number**
25 **you dial, the call will always go to whatever the rate**

29

1 Plaintiff then?
2 THE COURT: The Clerk will mark it for you.
3 MR. KNUDSON: We'll solve that when we get to it.
4 CROSS-EXAMINATION
5 BY MR. KNUDSON:
6 **Q.** So, Mr. Williams, Scott Knudson. I represent Sprint
7 Communications, the Plaintiff in this action. I believe
8 you testified that you hadn't been to Ft. Thompson yet. Is
9 that correct?
10 **A. That is correct.**
11 **Q.** Is this your first time to South Dakota?
12 **A. It is not.**
13 **Q.** Now, I'd like you to turn your attention to this
14 schematic. I believe it's still showing up on the screen.
15 Do you have it in front of you?
16 **A. Yes.**
17 **Q.** What you have described then is how I believe you said
18 all calls that could end up at the Ft. Thompson 477
19 exchange are routed. Is that correct?
20 **A. That is correct.**
21 **Q.** If I understand your testimony correctly, from the
22 schematic, all the traffic that ends up at the Ft. Thompson
23 477 exchange goes first to this switch owned by South
24 Dakota Network. Is that correct?
25 **A. Correct.**

30

1 **Q.** And that's based on the LERG data you've analyzed.
2 Correct?
3 **A. Yes.**
4 **Q.** You believe the LERG data to be something you can rely
5 on?
6 **A. I would say so.**
7 **Q.** And if I follow this schematic correctly, then all
8 this traffic that is intended for the Ft. Thompson 477
9 exchange goes out to WideVoice in Los Angeles. Correct?
10 **A. Yes.**
11 **Q.** You've reviewed the Amy Clouser Affidavit. Haven't
12 you?
13 **A. Yes.**
14 **Q.** You agree with her analysis that is where the traffic
15 goes?
16 **A. Yes.**
17 **Q.** There is a switch owned by WideVoice in Los Angeles.
18 Correct?
19 **A. Yes.**
20 **Q.** You receive traffic from other areas of the country,
21 as well, traffic destined for 477. Correct?
22 **A. Correct.**
23 **Q.** In fact, let me ask you this. Freeconferencecall.com,
24 is that a company owned by WideVoice?
25 **A. It is not.**

31

1 **Q.** Is it reverse? Freeconferencecall.com owns WideVoice?
2 **A. I don't know that. There's definitely a business**
3 **dealing there.**
4 **Q.** Then if I understand correctly then, you switched all
5 of this traffic intended back to Ft. Thompson 477 exchange
6 from Los Angeles back, and if I follow the schematic
7 correctly, it ends up back at a router owned by South
8 Dakota Network?
9 **A. Yes. Basically this would be the demarc or the edge**
10 **of the equipment today owned by WideVoice. So, yes, it**
11 **would end up back at an SDN router here in South Dakota.**
12 **Q.** From the Sioux Falls switch owned by South Dakota
13 Network, it goes over the fiberoptic South Dakota Network
14 phones to Ft. Thompson. Isn't that true?
15 **A. Yes.**
16 **Q.** Now, you have this little cloud between a router in
17 Los Angeles and a router in Sioux Falls. It says ATT IP
18 Network. Can you explain what that is?
19 **A. Sure. The internet is obviously -- I mean ultimately**
20 **incumbents own the networks, so everyone is paying access**
21 **to get on the network. In this case WideVoice pays AT&T**
22 **for dedicated facilities to access the Internet in**
23 **Los Angeles.**
24 **Q.** So the calls that go from your WideVoice switch in
25 Los Angeles back to the South Dakota Network switch in

32

1 Sioux Falls are an Internet protocol?
2 **A. Correct. They are using the public Internet.**
3 **Q.** You use this term "voiceover Internet protocol." Is
4 that right?
5 **A. Yes.**
6 **Q.** Is that the kind of signal that's going from the
7 switch in Los Angeles to the South Dakota Network?
8 **A. It is.**
9 **Q.** I want to clarify then what you call the traditional
10 service, when grandma was calling her granddaughter. The
11 traditional service ends at the South Dakota Network switch
12 in Sioux Falls. Correct?
13 **A. It does not. It actually ends at the WideVoice switch**
14 **in Los Angeles.**
15 **Q.** I see. The traditional, that would be the first leg.
16 The second leg, that's a traditional.
17 **A. Correct. That would be using traditional TDM**
18 **facilities.**
19 **Q.** Would we call that the legacy network?
20 **A. Yes. That would be the PSTN.**
21 **Q.** Now, you indicated that Native American Telecom is
22 using WiMax technology. Are you familiar with that
23 technology?
24 **A. I am somewhat, yes.**
25 **Q.** That's a radio-based technology. Correct?

1 A. **The services are on the Reservation. Our bridge is on**
2 **the Reservation.**
3 Q. But they are outside the Reservation. Right?
4 A. **Yes.**
5 Q. So when they hear -- the person in New York hears an
6 answer from the person in Florida, that person in New York
7 isn't on the Reservation. Right?
8 A. **Correct.**
9 Q. And the voice, the sound that is carrying over to the
10 person in New York is coming off the Reservation. Correct?
11 A. **Yes.**
12 Q. Likewise, when the person in Florida is talking, that
13 person's voice is going into the Reservation. Correct?
14 A. **Yes.**
15 Q. Through a roundabout way. It has to go to Los Angeles
16 first.
17 A. **Yes.**
18 Q. That's coming from outside the boundaries of the
19 Reservation. Isn't it?
20 A. **Yes.**
21 Q. Now, you mentioned, and we heard from Mr. Williams,
22 about the WiMax technology, and that's kind of a step up,
23 isn't it, from Wi-Fi technology?
24 A. **It's a different technology.**
25 Q. It has the ability to go farther out. Doesn't it?

1 A. **Yes.**
2 Q. You heard Mr. Williams say it might go out as far as
3 20 miles. Right?
4 A. **I heard him say that.**
5 Q. Do you dispute that?
6 A. **The tower we built projects a signal around two miles.**
7 **But that technology, by building a larger tower, you could**
8 **get it to go that far.**
9 Q. You are talking about expanding your services to other
10 parts of the Reservation. Aren't you?
11 A. **Yes.**
12 Q. It's possible for these radio waves to go outside the
13 boundaries of the Reservation.
14 A. **Depending where they are located.**
15 Q. They don't stop at the boundary. Do they?
16 A. **We can erect a tower and point our antennas towards**
17 **the Reservation.**
18 Q. The Reservation is irregular in shape, isn't it?
19 A. **Yes.**
20 Q. In order to get coverage over all the Reservation, you
21 have to go outside the boundaries, as well, won't you?
22 A. **Depending where the tower is positioned.**
23 Q. But it's possible.
24 A. **It's possible.**
25 Q. There's nothing from the boundary itself that would

1 stop the radio waves from going outside the boundaries of
2 the Reservation. Correct?
3 A. **Correct.**
4 Q. Let's go back to the handwritten map. This person who
5 is calling here from New York, and they make a connection
6 to the person in Florida, and maybe they even talk to the
7 person in Texas at the same time. Do they pay per minute
8 for that call?
9 A. **Depending what type of arrangements they have with**
10 **their long-distance carriers.**
11 Q. In fact, isn't it true, Mr. Reiman, that your business
12 model, looking for minutes of usage, depends on callers who
13 effectively have unlimited calling plans?
14 A. **I am not aware of that.**
15 Q. That's how people can talk for an hour without
16 worrying what it cost. Isn't that true?
17 A. **You can set up the plans.**
18 Q. But if you are paying 25 cents a minute, you would be
19 more mindful of the cost of the call. Wouldn't you?
20 A. **If who is paying the 25 cents?**
21 Q. The initial caller.
22 A. **They would be mindful, yes.**
23 Q. In fact, if it's an unlimited calling plan, the
24 interexchange carriers, the long-distance carriers, they're
25 not getting any additional revenue from that call. Are

1 they?
2 MR. SWIER: Objection. Lack of foundation and
3 speculation.
4 THE COURT: Overruled. You may answer, if you
5 know.
6 A. **I don't know.**
7 Q. You can't say one way or the other if there's any
8 incremental revenues from one of your calls to the
9 long-distance carrier. Can you?
10 MR. SWIER: Same objection.
11 THE COURT: Overruled. You may answer.
12 A. **I don't know what plan they are on.**
13 Q. My question is you don't know if the long-distance
14 carrier gets any more incremental revenue from the person
15 using your conference bridge?
16 A. **I don't know.**
17 Q. But if the caller in New York or Florida or Texas has
18 one of these unlimited calling plans, that person wouldn't
19 pay any more to be on your bridge. Would that person?
20 A. **If they have an unlimited plan, no.**
21 Q. In fact, as you testified earlier in your direct, your
22 business model depends on lots of people calling in on your
23 conference bridge. Doesn't it?
24 A. **Yes.**
25 Q. When you set up this network and based your business

1 may be submitted to binding arbitration. It's not
2 mandatory.
3 THE COURT: The objection is sustained. I can
4 read the document myself, too.
5 MR. KNUDSON: If we agree it's unambiguous, that
6 would be sufficient with respect for Exhibit 105.
7 BY MR. KNUDSON:
8 Q. Mr. Reiman, I'm handing you what's been marked for
9 identification purposes by the Clerk as Plaintiff's Exhibit
10 106. Take a moment to look at it and tell me if you can
11 identify it.
12 **A. It appears to be the Joint Venture Agreement Between**
13 **the Crow Creek Sioux Tribe and Native American Telecom.**
14 Q. Is that Native American Telecom Enterprise?
15 **A. Crow Creek Sioux Tribe and Native American Telecom**
16 **Enterprise, LLC, and WideVoice Communications, Inc.**
17 Q. If you go back and see the signature on Page 33.
18 **A. Yes.**
19 Q. Is that again Mr. DeJordy's signature?
20 **A. I don't have one with a signature on it. I have one**
21 **with Brandon Sazue's signature on it.**
22 Q. There should be another Page 33.
23 **A. Yes. That is the signature of Gene DeJordy.**
24 Q. So we agree this is a copy of that Joint Venture
25 Agreement?

1 **A. Yes.**
2 MR. KNUDSON: I offer 106.
3 MR. SWIER: No objection, Your Honor.
4 THE COURT: 106 is received.
5 BY MR. KNUDSON:
6 Q. All right. Let's look here at a few of these
7 provisions. Page 5, if you could turn to the last recital
8 called the "Whereas." I'm directing your attention,
9 Mr. Reiman, to what I have highlighted here. Do you see
10 the language, "an array of other telecommunication services
11 outside the exterior boundaries of the Crow Creek Indian
12 *Reservation*"?
13 **A. Yes.**
14 Q. What are the services that Native American Telecom is
15 going to provide outside the exterior boundaries of the
16 Reservation?
17 **A. It's yet to be determined. Business is trying to**
18 **develop out there.**
19 Q. But if I understand correctly, the entity that is
20 being formed here is Native American Telecom-CC.
21 **A. Yes.**
22 Q. Crow Creek.
23 **A. Yes.**
24 Q. It's going to rename Native American Telecom to Native
25 American Telecom - Crow Creek. Right?

1 **A. It's Native American Telecom, LLC, yes.**
2 Q. So Native American Telecom-CC is going to promote
3 services outside the exterior boundaries, and that's one of
4 the purposes of this Joint Venture. Is that right?
5 **A. Yes, it has the capabilities of doing that.**
6 Q. Now, let's take a look then of your understanding of
7 the deal terms here that Crow Creek Sioux Tribe, Section
8 1.03, made a capital contribution in exchange for 51
9 percent of the membership units of the LLC by contributing
10 what, sir?
11 MR. SWIER: Objection. I believe that relates to
12 the financial matters earlier discussed as to how we were
13 going to handle this.
14 THE COURT: Sustained. I will allow this
15 question at the end of the hearing.
16 MR. KNUDSON: This has already been made a public
17 record. This is one of the exhibits he filed not under
18 seal. Having to delay asking the question again.
19 MR. SWIER: Obviously the exhibit that I admitted
20 doesn't have the information for a reason, and the reason
21 is because it's proprietary.
22 THE COURT: Can you point me to where the
23 information is?
24 MR. KNUDSON: Yes, Your Honor. Let's just take a
25 look here. Section 1.03. "At the closing date, CCST will

1 contribute the necessary easements and other land rights."
2 That's the quid pro quo.
3 THE COURT: Mr. Swier?
4 MR. SWIER: It talks about easements and other
5 land rights. It doesn't talk in there specifically as to
6 what was given with easement land rights. Again, I don't
7 have any trouble if we want to have that information, but
8 let's have it all grouped together with the financial
9 issues we've discussed that we are going to do later.
10 THE COURT: Mr. Knudson, did you plan to go into
11 anything more than what is contained on Page 6?
12 MR. KNUDSON: I have a question about 1.04. I'm
13 happy to hold off the dollar amount and keep that --
14 THE COURT: I'm just trying to find out. Are you
15 just asking him to say that they can ask for necessary
16 easement and land rights, or do you want him to go into the
17 particular of what those were?
18 MR. KNUDSON: I don't need the particulars.
19 THE COURT: The objection is overruled.
20 BY MR. KNUDSON:
21 Q. Mr. Reiman, as part of the deal, the Crow Creek Sioux
22 Tribe contributed land rights and easements where you could
23 erect your equipment. In exchange, they got 51 percent of
24 the ownership membership units of the LCC. Right?
25 **A. Yes.**

832

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Native American Telecom, LLC Tariff F.C.C. No. 2	)	Transmittal No. 3

JOINT PETITION OF AT&T, QWEST, SPRINT, T-MOBILE, AND VERIZON TO REJECT, OR, IN THE ALTERNATIVE, TO SUSPEND AND INVESTIGATE NAT'S TARIFF F.C.C. NO. 2

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November 22, 2010

EXHIBIT X

TABLE OF CONTENTS

INTRODUCTION AND SUMMARY 1

LEGAL STANDARDS APPLICABLE TO NAT'S TARIFF NO. 2 9

NAT'S UNLAWFUL TARIFF PROVISIONS 11

I. NAT's TARIFF NO. 2 IS UNLAWFULLY VAGUE AND AMBIGUOUS 11

II. NAT's TARIFF VIOLATES THE CLEC ACCESS CHARGE RULES. 15

III. NAT's UNLAWFUL DISPUTE RESOLUTION PROVISIONS. 22

IV. NAT's UNLAWFUL CUSTOMER DEPOSITS PROVISIONS. 25

CONCLUSION 27

834

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Native American Telecom, LLC	)	**Transmittal No. 3**
Tariff F.C.C. No. 2	)	

JOINT PETITION OF AT&T, VERIZON, QWEST, SPRINT, AND T-MOBILE TO REJECT, OR, IN THE ALTERNATIVE, TO SUSPEND AND INVESTIGATE NAT'S TARIFF F.C.C. NO. 2

Pursuant to Sections 201, 203 and 204 of the Communications Act, 47 U.S.C. §§ 201, 203, 204, and Section 1.773 of the Commission's Rules, 47 C.F.R. § 1.773, Joint Petitioners[1] respectfully request that the Bureau reject, or in the alternative suspend, Transmittal No. 3, Tariff F.C.C. No. 2 ("Tariff No. 2") filed by Native American Telecom LLC ("NAT").[2] The Bureau also has authority to prescribe just and reasonable tariff terms pursuant to 47 U.S.C. § 205.

INTRODUCTION AND SUMMARY

NAT's Tariff No. 2 is the latest in a flood of patently unlawful tariff filings transparently designed to evade Commission precedent and rules in order to promote traffic stimulation schemes that the Commission has recognized as mere "arbitrage" that "ultimately cost[s] consumers money."[3] In 2007, when the Commission was faced with a large number of

[1] The Joint Petitioners are: AT&T Corp. ("AT&T"), Qwest Communications Company, LLC. ("Qwest"), Sprint Communications Company L.P. ("Sprint"), T-Mobile USA Inc. ("T-Mobile"), and Verizon.

[2] Native American Telecomm LLC, Transmittal No. 3, Tariff FCC No. 2 (issued Nov. 15, 2010, on fifteen (15) day's notice) ("Tariff No. 2").

[3] Connecting America: The National Broadband Plan, Federal Communications Commission, at 142 ("National Broadband Plan"). In traffic stimulation schemes, a "rural" local exchange

incumbent local exchange carrier ("ILEC") tariff filings designed to facilitate these schemes, it took decisive action that prevented those tariffs from taking effect and that has largely deterred ILECs from filing similar tariffs.[4] But as quickly as the unscrupulous ILECs abandoned this field, they were replaced by unscrupulous new "competitive" local exchange carriers ("CLECs"), many of which compete with no one and were created *solely* for the purpose of bilking interexchange and interconnected wireless carriers through traffic stimulation schemes.

Emboldened by Commission inaction, these CLECs recently came up with a new scheme: rather than continuing to attempt to fit the square peg of traffic stimulation schemes into the round hole of traditional switched access tariffs, the CLECs would file new "switched access" tariffs that purport to define away that problem. Under these new tariffs, "switched access service" could include activities that involve neither switching nor access to any true local exchange network, the LEC would "terminate" traffic that is merely routed through its network, and the "end users" to whom the LEC purports to terminate calls need not purchase anything from the LEC. These tariffs are, of course, patently unlawful, and when Joint Petitioners discovered them before they became effective, we urged the Commission to reject or suspend them. But the Commission has allowed most of these tariffs to become effective, and it has not yet issued any suspension or rejection order that specifically addresses the CLECs' unlawful attempts to redefine access services.

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carrier with high switched access rates premised on low traffic volumes provides telephone numbers to a calling service provider ("CSP"). The CSP uses those numbers to offer free and low cost calling services (*e.g.*, chat, conference, international calling) that often generate millions calls to those numbers. The LEC bills interexchange carriers ("IXCs") and interconnecting wireless carriers switched access charges for these calls and shares the access revenues with the CSPs under various kick-back arrangements. *See Qwest Commn'cs Corp.* v. *Superior Tel. Coop.*, 2009 WL 3052208 (Iowa Utils. Bd. Sept. 21, 2009); *Qwest Commc'ns Corp.* v. *Farmers & Merchants Mut. Tel. Co.*, 23 FCC Rcd. 1615, ¶¶ 10-25 (2009) ("*Farmers*").

[4] *See* Order, *Investigation of Certain 2007 Annual Access Tariffs*, WC Docket No. 07-184; WCB/Pricing No. 07-10 (Nov. 30, 2007).

836

Not surprisingly, what was a trickle is now a flood with new tariffs now surfacing weekly. The CLECs no longer even bother to disguise their efforts to legitimize their assessment of access charges on non-access traffic. When customers point out the obvious legal defects in these tariffs, the CLECs no longer bother even to defend them, and instead simply boast that many other tariffs with the same or similar provisions have sailed through the Commission. And why not? Unless and until the Commission actually issues a detailed written order rejecting or suspending one or more of these tariffs that states with specificity that these tariff provisions raise substantial questions of lawfulness, CLECs will continue to follow their "anything goes" approach.

NAT is a putative CLEC in South Dakota that was set up for the express purpose of engaging in traffic stimulation schemes. As its founder has admitted, NAT was established for the purpose of participating in what the Commission has referred to as "traffic stimulation" arrangements with "FreeConferenceCall" and similar entities.[5] As its name suggests, FreeConferenceCall generally does not charge for its services. Instead, it enters into arrangements under which it sells traffic generated by its widely advertised calling services to a LEC for a share of the access charges that the LEC is able to collect from IXCs and interconnecting wireless carriers for purported access services associated with that traffic.[6]

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[5] Ted Gotsch, *Firms Pitching FCC In Favor of Current Access Charge Regime*, TR Daily (Mar. 8, 2010) (*quoting* NAT founder Gene DeJordy) (NAT's "business model is largely dependent on the use of FreeConferenceCall and other services that use its networks to terminate calls").

[6] *See, e.g.*, Letter from David C. Erickson (President and CEO of FreeConferenceCall) to Nicholas Alexander (FCC, Associate Bureau Chief, Wireline Competition Bureau) (Apr. 15, 2010); Notice of Proposed Rulemaking, *In re Establishing Just and Reasonable Rates for Local Exch. Carriers*, 22 FCC Rcd. 17989, ¶ 12 (2007).

837

NAT initially applied for a certificate to operate as a CLEC in South Dakota, but withdrew the request when discovery was sought into its business plans.[7] NAT instead made arrangements with the Crow Creek Sioux Tribe that purport to allow it to operate on that tribe's Reservation even in the absence of state authority.[8]

NAT began operations in the fall of 2009. In the intervening months, NAT's access billings have soared. The traffic is all one direction – to NAT numbers. Analysis and test calls conducted by AT&T show that 99% of the minutes billed to AT&T are generated by only five telephone numbers – all assigned to FreeConferenceCall.

Based upon NAT's bills, its entries in the Local Exchange Routing Guide ("LERG") and its public statements, it does not appear that NAT provides wireline local exchange services to *any* actual residences or businesses located on the Crow Creek Reservation or that NAT owns or operates any wireline local exchange networks there (or anywhere else).[9] NAT's LERG entries indicate that its single "Point of Interconnection" (or "POI") is served by a switch located in California that is operated by its CLEC owner WideVoice. And WideVoice, which is majority-

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[7] *See* Application for Certificate of Authority, *Application of Native American Telecom, LLC for Certificate of Authority To Provide Local Exchange Service On The Crow Creek Indian Reservation*, Docket TC 08-110, Exhibits A & B (S.D.P.U.C. Sep. 8, 2008); Intervenors' Motion to Compel, Docket No. TC08-110 (Jan. 16, 2009); Order Granting Motion To Dismiss And Closing Docket, Docket No. TC08-110 (Feb. 5, 2009).

[8] Order Granting Approval to Provide Telecommunications Service, *Native American Telecom, LLC Request to Provide Telecommunications Service Within the Exterior Boundaries of the Crow Creek Reservation* (Crow Creek Utility Authority, Oct. 28, 2008). According to NAT, its owners are Native American Telecom Enterprise, LLC, "a telecommunications development company," WideVoice Communications, Inc., a "CLEC," and the Crow Creek Sioux Tribe. Respondent Native American Telecom LLC's Reply Brief in Support of Motion to Stay/Motion to Dismiss South Dakota Public Utilities Commission's Docket No. TC10-026, at 1 (S.D. PUC, filed October 26, 2010), available at http://puc.sd.gov/commission/dockets/telecom/2010/tc10-026/102610.pdf ("*NAT SD Reply*").

[9] In filings with the S.D. PUC, NAT claims that it provides "wireless IP (Internet Protocol) voice and data communications" "free-of-charge" to approximately 100 "residential and business locations on the reservation" using Wimax wireless technology. *NAT SD Reply* at 6, 14.

838

owned by the family trust of FreeConferenceCall principal David Erickson,[10] has admitted in sworn testimony that the disputed traffic "is transported to a WideVoice . . . switch in Los Angeles" which "then transmits the call to NAT's subscribers and subscriber equipment located on the Crow Creek reservation" at NAT's "radio hut."[11]

NAT recognized from the outset that its plan to bill tariffed switched access charges for traffic pumping calls merely routed through its exchange could not be reconciled with the established definitions and limits of originating and terminating switched access charges. In litigation before courts, state public utility commissions and the Commission, it was abundantly clear that traffic associated with schemes in which a LEC pays a calling service partner a portion of access revenues and traffic is merely routed through the LEC's facilities, en route not to any real end user subscribers of the LEC, but to bridging equipment that might be located anywhere, lack the essential elements of tariffed switched access services. The Commission has since confirmed that a LEC engaged in traffic stimulation schemes is not providing switched access functionality, because the LEC does not terminate the calls to actual end user subscribers or deliver them to actual end user premises.[12]

Rather than conform its conduct to the law, NAT continues to look for ways to skirt it. This is NAT's third attempt to write a tariff that it hopes will insulate its unlawful billing of switched access services for calls to its traffic stimulation partners. NAT filed two versions of its

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[10] *See* Application of WideVoice for a Certificate of Public Convenience and Necessity (S.D. PUC, August 10, 2009), available at http://puc.sd.gov/commission/dockets/telecom/2009/tc09-083/081109.pdf ("*WideVoice SD Application*").

[11] *NAT SD Reply*, Attached Affidavit of Keith Williams at ¶¶ 4-5. *See also WideVoice SD Application.*

[12] *Qwest Commc'ns Corp.* v. *Farmers and Merchants Mut. Tel. Co.*, Order on Reconsideration, 23 FCC Rcd. 1615, ¶¶ 10-25 (2009) ("*Farmers*").

839

Tariff No. 1 in late 2009. But AT&T recently filed an Informal Complaint against that tariff,[13] and just two days after that Informal Complaint was transmitted to NAT, NAT filed this revised tariff (Tariff No. 2) purporting to replace the tariff challenged by AT&T.

NAT's new tariff is, if anything, even more manifestly unlawful. NAT did not fix the unlawful provisions that existed in its prior tariff. It merely tried to disguise them by renaming them, moving them around, splitting them up, and connecting them with a patchwork of confusing cross references. While it was at it, NAT also added *additional* unlawful provisions that did not exist in its prior tariff.

1. NAT's tariff still violates 47 U.S.C. §§ 203 & 201(b) and the Commission's rules that require tariffs to specify in clear and unambiguous language the circumstances under which a customer will obtain service and the precise charges that will apply.[14] Now, even NAT's definition of "Access Services" is impenetrable. "Access Service" now "includes, but is not limited to" distinctly *non*-access functionality including "local exchange, long distance, and data communications services that may use TDM or Internet Protocol ('IP') or other technology" – in other words, apparently anything and everything on which NAT may decide it wants to assess access charges.

NAT has likewise expanded the definition of "Local Exchange" beyond all bounds – the tariff does not specify how the geographic area of its local exchange will be determined, but it does emphasize that NAT "is not bound" by "the definition of 'exchange' or 'local exchange' as

[13] *See* Informal Complaint of AT&T Corp., Letter from David L. Lawson to Marlene H. Dortch (Nov. 1, 2010).

[14] 47 C.F.R. § 61.2; *Bell Atlantic-Delaware* v. *Global NAPs*, 15 FCC Rcd. 20665, ¶ 23 (2000) ("[A] tariff must be clear and explicit on its face as to when it applies, in order to give fair notice to carriers or other customers about the terms under which they might be taking service and incurring charges."); *Amendment of Part 61 of the Commission's Rules*, 40 FCC 2d 149, ¶ 5 (1973) ("failure to comply with [the Part 61] rules has always been recognized as grounds for rejection").

840

defined by the [NECA tariff], by IXCs, or by the ILECs whose tariffed rates the Company matches" or apparently anything else. Here, too, NAT purports to grant itself complete discretion. The tariff provides "unless otherwise defined by the Company" (and how will an access customer know when or if that happens?), NAT's local exchanges will be the geographic areas where it "provides service to End Users," but that too is meaningless, because NAT has defined "End User" as a customer of *any* "Interstate or Foreign Telecommunications Service" that need not "purchase any service provided by the company" (and thus how will an access customer know who these "End Users" are and where they are located?).

Indeed, NAT's attempt to disguise the many unlawful terms it has retained from its prior unlawful tariff (and those that it added) has served no purpose other than to create complex tapestry of nested Russian doll-like service definitions and descriptions that are inconsistent and meaningless. For example, NAT's tariff creates a new type of End User called a "Volume End User." To determine the meaning of Volume End User, one must wade through at least five other nested and cross-referenced definitions, and the end result is a dead end: a Volume End User is an End User that purchases "Services" that, by definition, cannot be purchased by End Users, but only by IXCs (which cannot be End Users under the tariff). In addition, NAT defines Volume End User in terms of subjective criteria (such as whether the End User obtains service from NAT "in order to provide high-traffic services") and facts that cannot be known to anyone but NAT (such as whether the End User has installed equipment in NAT's central office). To make matters worse, NAT's failure to properly define End User makes it impossible for a purported customer to determine from the tariff the rates it will be billed (the tariff provides separate rates for calls to or from "regular" end users and those to or from "Volume End Users"). The tariff is replete with other omissions, ambiguities and inconsistencies that render it

841

impossible for a putative access customer to predict whether and how much it will be billed. As just one other example, NAT's tariff lists a rate for "Information Surcharge (if applicable)," but nowhere explains the circumstances under which it will be applicable.

2. NAT's tariff and billing practices also violate 47 U.S.C. § 201(b) and the Commission's implementing CLEC access charge rulings. It is settled law that tariffed rates have meaning only in relation to the services to which they are "attached."[15] Thus, the Commission has emphasized that although its rules authorize CLECs to tariff and assess rates that "mirror" the rates charged by the "competing" ILEC, a CLEC may do so only to the extent it actually provides "the functional equivalent of the ILEC [service]."[16] NAT's tariff purports to mirror the rates of Midstate Communications, Inc. ("Midstate"), which uses the National Exchange Carrier Association ("NECA") tariff. But NAT is applying Midstate's tariffed rates to functions for which Midstate does not – and cannot lawfully – apply those rates. For example, NAT assesses MidState's access rate elements on calls routed to FreeConferenceCall even though the Midstate/NECA tariff does not allow access charge billing to IXCs for calls routed to such conference service providers that do not subscribe to a Midstate service (the holding in *Farmers III*). In addition, NAT's tariff appears to permit NAT to assess switched access charges on calls destined to other states and foreign countries, and for calls destined to equipment collocated in NAT's offices, which is not permitted by the Midstate/NECA tariff. By "attaching" Midstate's rates for the end office switching and other switched access services to its own very different activities, NAT is violating the Commission's CLEC access charge rulings and committing an unreasonable practice.

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[15] *AT&T* v. *Central Office Tel. Co.*, 524 U.S. 214, 223 (1998).

[16] 47 C.F.R. § 61.26; *CLEC Access Charge Order,* 16 FCC Rcd. 9923 (2001).

842

3. NAT has also added ludicrously one-sided dispute resolution provisions, including one that purports to deprive customers of their statutory right to file overcharge actions under the two-year statute of limitations in Section 415 of the Act and another that purports to entitle NAT to attorneys' fees any time it elects to bring a collection action – even an unsuccessful one. Further, NAT's tariff provides NAT with unilateral and unfettered discretion to demand a deposit from any access customer for any (or no) reason, which, as explained below, the Commission has previously recognized is unlawful.

LEGAL STANDARDS APPLICABLE TO NAT'S TARIFF NO. 2

The Commission and the courts have long recognized that tariffs that, like NAT's Tariff No. 2, fail to make clear and explicit the applicability of the tariff rate and its terms, that facially conflict with provisions of the Act or the Commission's implementing rules or orders, and that have technical or procedural flaws are "patent nullities as a matter of substantive law" and should be "rejected" outright.[17]

Section 204 of the Communications Act, 47 U.S.C. § 204, also grants the Commission broad authority, on its own initiative or upon request, to suspend and investigate tariff filings that propose rates that are of questionable lawfulness. Suspension and investigation of tariffs is an essential element of the core mandate to ensure just and reasonable rates where highly suspect

[17] *Capital Network System* v. *FCC*, 28 F.3d 201, 204 (D.C. Cir. 1994) ("The Commission's authority to reject filings extends to those . . . with technical or procedural flaws"). *See also RCA American Communications, Inc.*, 89 FCC 2d 1070, n.12 (1982) ("Failure to comply with prior Commission orders, policies or prescriptions may warrant rejecting a tariff as a patent nullity as a matter of substantive law"); *AT&T Revisions to Tariff FCC Nos. 258 and 267*, 69 FCC 2d 1696, n.2 (1978) ("We may find a tariff revision null and void if, as here, it patently conflicts with the provisions of the Communications Act"); *All American Telephone Company, Inc. Tariff F.C.C. No. 3*, 25 FCC Rcd. 5661, ¶ 4 (2010) (rejecting "tariff revisions [that] violate the Commission's rules requiring tariffs to clearly establish a rate"); *ITT World Communications, Inc.*, 73 FCC 2d 709, n.4 (1979) ("Where the Commission can determine that the tariff is unlawful on its face, it may be rejected without further investigation").

843

tariffs that raise substantial questions of lawfulness are filed on a streamlined basis.[18] As such, the Bureau (*see* §§ 0.91, 0.291), acting on delegated authority, clearly has independent authority pursuant to 47 U.S.C. § 204 to suspend and investigate tariffs on its own motion where, as here, there are significant questions concerning the lawfulness of the tariffs.[19]

The Bureau also has authority to suspend and investigate tariffs under Rule 1.773(a)(1)(ii), 47 C.F.R. § 1.773(a)(1)(ii), if it determines (1) "there is a high probability that the tariff would be found unlawful after investigation"; (2) "the alleged harm to competition would be more substantial than the injury to the public arising from the unavailability of the service pursuant to the rates and conditions proposed in the tariff filing;" (3) "irreparable injury will result if the tariff is not suspended"; and (4) "the suspension would not otherwise be contrary to the public interest."

These elements are clearly satisfied here. First, as demonstrated below, NAT's tariff is facially unlawful in numerous respects. Second, the substantial harm caused by allowing NAT's tariff to go into effect – *e.g.*, overcharges to IXCs and interconnected wireless carriers, diversion of resources away from customer-oriented investment to dealing with NAT's misconduct, increased uncertainty and attendant decreased in investment in customer-oriented services – are substantial costs that are ultimately born by consumers, whereas there is little or no potential that a suspension will make any NAT service "unavailable." The only services at issue here are

[18] *See, e.g.*, Memorandum Opinion and Order, *July 1, 2004, Annual Access Charge Tariff Filings*, 19 FCC Rcd. 23877, ¶ 7 (2004) ("*NECA Investigation Order*") ("When tariffs . . . are filed pursuant to the 'deemed lawful' provisions of the statute . . . it is incumbent upon us to suspend and investigate the tariff filing if it may reflect unjust and unreasonable rates").

[19] *See* Memorandum Opinion and Order, *Investigation of Access and Divestiture Related Tariffs*, CC Docket No. 83-1145, FCC 84-70, 1983 FCC LEXIS 396, ¶ 8 n.6 (1983) (rejecting argument that a "request for suspension should be denied as premature and not in compliance with Section 1.773" and finding that the Commission "need not reach these arguments, since the Commission has the authority on its own motion to suspend and investigate tariffs, 47 U.S.C. § 204(a), and we [the Commission] have concluded that the circumstances of this case warrant such suspension").

844

provided to IXCs and interconnected wireless carriers (which are challenging the tariff), not any services that NAT may provide to one of its actual customers. Third, irreparable injury will result if the tariffs are not suspended because the tariff terms may be "deemed lawful," which may foreclose refunds for excessive and improper charges.[20] Fourth, suspension is clearly in the public interest because it will help to prevent millions of dollars in overcharges that, as the Commission has found, are ultimately borne by consumers.

NAT'S UNLAWFUL TARIFF PROVISIONS

NAT's Tariff No. 2 contains terms that are not "clear and explicit," that facially conflict with provisions of the Act or the Commission's implementing rules or orders, and that have numerous technical and procedural flaws, and the Commission should exercise its ample authority (described above) to reject tariffs with these types of defects.

I. NAT's TARIFF NO. 2 IS UNLAWFULLY VAGUE AND AMBIGUOUS.

Section 201(b) prohibits unjust and unreasonable rates, classifications and practices.[21] Section 203 states that a tariff must show a carrier's charges and "the classifications, practices, and regulations affecting these charges,"[22] and that carriers cannot deviate from the rates that are "specified" by the tariff.[23] The Commission's rules implementing these provisions thus require carriers to provide tariff terms that "remove all doubt as to their proper application."[24] NAT's tariff violates these requirements. The definitions and structure of Tariff No. 2 make it impossible for IXCs and interconnected wireless carriers (or anyone else) to determine from the

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[20] *NECA Investigation Order*, ¶ 7 ("Rates that are 'deemed lawful' are not subject to refund").

[21] 47 U.S.C. § 201(b).

[22] *Id.* § 203(a).

[23] *Id.* § 203(c).

[24] 47 C.F.R. 61.2. *See also id.* § 61.1 ("Failure to comply with any provision of these rules may be grounds for rejection . . ., a determination that it is unlawful, or other action").

845

tariff what services it provides, where such services are provided, or the rates applicable to such services.

Even the definition of "Access Service"[25] in Tariff No. 2 is unlawfully vague. Under Tariff No. 2, "Access Services" now "include" decidedly *non*-access services, such as "local exchange, long distance, and data services." Local exchange services are governed by states pursuant to state tariffs, not federal access tariffs; long-distance services were mandatorily detariffed years ago; and many "data services" are "information services" that cannot be tariffed. To add more confusion, Access Service "is not limited" to these "local exchange, long distance, and data services," but the tariff never states what other services might be included.[26] Similarly, Access Service "includes" the "functional equivalent of the ILEC access services," indicating that it might also include services that are *not* the functional equivalent of the ILEC access service, which, as demonstrated in Part II, below, would be patently unlawful.

NAT has likewise expanded the definition of "Local Exchange" in such a way that makes it literally impossible to know where NAT's Tariff No. 2 is applicable. The tariff defines "Local Exchange" as the "geographic area established by [NAT] for the administration and pricing of Telecommunications Service."[27] This definition is circular. It states that the prices in Tariff No. 2 are applicable where NAT applies the prices in Tariff No. 2. This definition also contains no bounds limiting what or where NAT may choose as a Local Exchange. The tariff expressly states that NAT "is *not* bound by the definition of 'exchange' or 'local exchange' as defined by [NECA], by IXCs, or by the ILECs whose tariffed rates the Company matches."[28] And, until

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[25] Tariff No. 2, Original Page 7.

[26] *Id.*

[27] *Id.*, Original Page 8.

[28] *Id.* (emphasis added).

846

NAT unilaterally chooses the bounds of its Local Exchange (and it is unclear how a putative customer will know when NAT does so), the tariff states that NAT's Local Exchange is where "NAT provides service to End Users."[29] But there is no way for a putative customer to know where all of NAT's End Users are located; only NAT can know that. Under the tariff, End Users need not even be customers of NAT. An "End User" can be anyone that "sends or receives a an interstate or foreign Telecommunications Service" that is, at some point along the way, merely "transmitted" over NAT's facilities.[30]

Similarly vague provisions pervade Tariff No. 2. NAT has created multiple new definitions, renamed old ones, and divided various definitions and service descriptions into piece-parts that are now spread throughout the tariff and that are attached by endless cross-references. The effect is a complex nested Russian doll-like set of definitions and descriptions that defy meaningful interpretation.

A perfect example is NAT's attempt to create a new type of "End User," called "Volume End User."[31] The tariff defines a Volume End User as "[a]n End User that obtains *Service* from NAT."[32] To understand what this means, it is necessary to look to the tariff's definition of "Service," which is a "service provided to a *Buyer* by [NAT] pursuant to this Tariff."[33] To understand what this means, it is necessary to look to the definition of "Buyer," which is an "Interexchange Carrier utilizing [NAT's] Access Service."[34] Thus, after walking through this

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[29] *Id.*

[30] *Id.*, Original Pages 7-8 (definitions of "End User" and "Customer of an Interstate of Foreign Telecommunications Service").

[31] *Id.*, Original Page 10.

[32] *Id.* (emphasis added).

[33] *Id.*, Original Page No. 9 (emphasis added).

[34] *Id.*, Original Page No. 7.

847

maze of definitions, it turns out that NAT has defined a Volume End User as an End User that purchases "Services" that only IXCs, not End Users, can purchase under the tariff.[35] NAT's definition of Volume End User describes an entity that *cannot exist* under the terms of the tariff.

In addition, according to Tariff No. 2, a Volume End User is an entity that obtains service from NAT "*in order to provide* high-traffic services,"[36] thus requiring one to know the subjective purpose of an entity generating high traffic volumes to know whether that entity is a Volume End User. If an entity obtains service from NAT "in order to" be a high-traffic provider, it is apparently a Volume End User, but if it just happens to have high volumes, it is not. A putative customer would also have to know the configuration of a high volume entity to know whether it is a Volume End Users. Only entities that "designate[] [NAT's] central office as its [End User Designated Premises ("EDP")], and accordingly, installs equipment in the [NAT's] central office"[37] can be Volume End Users. But there is no way to determine from reading the tariff (or typically by any other reasonable means) whether an entity has designated NAT's central office as its EDP or whether it has installed equipment there.

The fact that it is impossible to determine from the face of NAT's tariff whether a particularly entity is a Volume End User also makes it impossible to determine the tariffed rates that will be applied under the tariff. NAT's Tariff No. 2 contains different rates for "regular" End Users and Volume End Users.[38] Consequently, the inability of putative customers under Tariff No. 2 to determine from the face of tariff which entities are Volume End Users also makes it impossible for them to determine the applicable rates under the tariff.

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[35] *Id.*, Original Page 8 ("The term 'End User' means any Customer of an Interstate or Foreign Telecommunications Service *that is not a carrier*. . . .") (emphasis added).

[36] *Id.*, Original Page No. 10 (emphasis added).

[37] *Id.*

[38] *Id.* § 7.2.2.

848

Another example where NAT has made it impossible for putative customers to determine the applicable rates in Tariff No. 2 is NAT's "Information Surcharge."[39] The tariff contains a rate element called "Information Surcharge" that will be assessed "if applicable." But Tariff No. 2 nowhere explains what this surcharge is, or when it is "applicable."

II. NAT's TARIFF VIOLATES THE CLEC ACCESS CHARGE RULES.

Under the Commission's CLEC access charge rules, a CLEC violates § 201(b) and § 203,[40] if it imposes access charge rates that exceed the rates that the "competing" ILEC charges for its functionally equivalent services.[41] NAT's Tariff No. 2 violates this rule because it has mirrored the access rates of a competing ILEC, but has applied these rates to activities that are *not* functionally equivalent to the "access services" of that ILEC to which the rates are attached. In effect, it is applying this ILEC's rates for "apples" to NAT's "oranges."

The Commission adopted its CLEC access charge rules to prevent CLECs from tariffing excessive access charges. The Commission recognized that CLECs have monopoly power over the calls placed to their telephone numbers.[42] Under the CLEC access charge rules, the rate that an ILEC charges for its functionally equivalent service is the "benchmark" that establishes the rate that CLECs can lawfully tariff.[43] These rules allow a CLEC to charge the ILEC's access

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[39] *Id.* § 7.2.1(g) & § 7.2.2.

[40] 47 U.S.C. §§ 201(b), 203.

[41] 47 C.F.R. § 61.26; *CLEC Access Charge Order*, 16 FCC Rcd. 9923 (2001); *CLEC Access Charge Recon. Order*, 19 FCC Rcd. 9108 (2004). *See Global Crossing Telecomm., Inc.* v. *Metrophones Telecomm., Inc.,* 550 U.S. 45, 52-55 (2007) (to violate a regulation that lawfully implements the substantive requirements of Sections 201-205 of the Communications Act "is to violate the statute.")

[42] *CLEC Access Charge Order*, ¶¶ 28-31.

[43] 47 C.F.R. § 61.26.

849

rates only when CLEC's services are "the functional equivalent of the ILEC interstate exchange access services."[44]

Conversely, the rules prohibit CLECs from charging the competing ILEC's rate if the CLEC is not actually providing a functionally equivalent service.[45] As the Supreme Court has held, rates have meaning only in relation to the services to which they are "attached."[46] Thus, the rules provide that a CLEC may tariff a rate at the ILEC benchmark only to the extent that the CLEC's rate is attached to a functionally equivalent service. As explained by the Commission,

> we . . . reject the argument made by some [C]LECs that they should be permitted to charge the full benchmark rate when they provide any component of the interstate switched access services used in connecting an end-user to an IXC. Th[is] approach, . . . in which rates are not tethered to the provision of particular services, would be an invitation to abuse. . . .[47]

Under the Commission's rules, CLEC charges that exceed the benchmark are "mandatorily detariffed and may be imposed only pursuant to a negotiated agreement," and tariffs that impose rates that exceed the benchmark are unlawful.[48]

Accordingly, the Commission's rules prohibit CLECs from applying the ILEC's access rates for services *that are not equivalent to the "competing" ILEC's tariffed services.* But that is what NAT has done. NAT's Tariff No. 2 purports to mirror the "equivalent rates" in the tariff of Midstate Communications, Inc. ("Midstate"), which provides service pursuant to National

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[44] *Id.* Since 2004, the "benchmark" has been the "rate charged for similar services by the competing ILEC." 47 C.F.R. § 61.26(c).

[45] 47 C.F.R. § 61.26; *CLEC Access Charge Recon Order*, ¶¶ 17-21.

[46] *AT&T* v. *Central Office Telephone Co.*, 524 U.S. 214, 223 (1998) ("Rates . . . do not exist in isolation. They have meaning only when one knows the services to which they are attached").

[47] *CLEC Access Charge Recon. Order*, 19 FCC Rcd. 9108, ¶ 14 (2004).

[48] *See id.*

Exchange Carrier Association ("NECA") Tariff No. 5.[49] The definitions of switched access services in NAT's tariff, however, purport to authorize NAT to impose the Midstate/NECA rates for services that are *not* functionally equivalent to the switched access service functions to which those rates are attached.

Rather, NAT's tariff was drafted in a transparent attempt to eliminate the features and limitations of the NECA tariff that caused the Commission to bar the assessment of access charges on calls to FreeConferenceCall and other CSPs in *Farmers*. Thus, NAT's tariff purports to apply Midstate's access rates to services – the delivery of calls to CSPs under traffic pumping deals – for which Midstate cannot assess access charges under the terms of the Midstate/NECA tariff. In many instances, NAT's tariff further purports to authorize it to assess local switching and other access charges on services that are functionally equivalent not to those ILEC switched access services but to ILEC "transiting" services that typically are not tariffed at all.

Most fundamentally, based upon its own descriptions of its services, NAT does not appear to be providing exchange access services at all. As NAT describes it, the only services it provides to any actual persons or businesses resident on the Crow Creek Reservation are wireless broadband and VoIP services for which it could not unilaterally tariff exchange access services. And with regard to FreeConferenceCall, NAT contends only that it has allowed "subscriber equipment" to be housed in its "radio hut" with WideVoice – which has no certificate of public convenience and necessity even to operate in South Dakota – handling the switching and routing to that hut. NAT's provision of space in its radio hut is hardly the functional equivalent of the exchange access services for which Midstate charges tariffed switched access rates.[50]

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[49] *See* Tariff No. 2, § 1.1.

[50] *See NAT SD Reply*, ¶¶ 4-5.

851

There are additional features of NAT's tariff that have the effect of authorizing charges that are higher than the benchmark rates for Midstate's/NECA's functionally equivalent services in violation of the Commission's CLEC access charge rules and 47 U.S.C. §§ 201(b) & 203.

Under the Midstate/NECA tariff that NAT purports to mirror, a service cannot be an access service unless it transmits a call between a Customer (normally an IXC) and an "End User." The NECA tariff defines End User as follows: "any customer of an interstate or foreign telecommunications service that is not a carrier," where a "customer" is an entity that "subscribes to the services offered under this tariff."[51] In *Farmers,* the Commission held that a "subscriber" is a purchaser of tariffed LEC services who makes payments to the LEC for the Subscriber Line Charge and other fees, whose relationship with the LEC is governed by the tariff, and who obtains service in the same manner as other local exchange customers who subscribe to tariffed services.[52] Because CSPs that receive payments from LECs under traffic pumping agreements are not such entities, the Commission held that access charges cannot apply to calls to numbers assigned to them.[53]

To evade this limitation, and apparently to disguise its attempt to do so, NAT has changed the definition of "Switched Access Services," and tied that definition to a newly added term, "Buyer" (which is similar to the previous NAT tariff's definition of "Customer"). NAT then ties the term "Buyer" to a new definition of End User, which in turn refers to a newly created definition for "Customer of an Interstate or Foreign Telecommunications Service" (which is essentially defined as what NAT's prior tariff defined as an "End User"). Untangling

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[51] NECA FCC Tariff No. 5, § 2.6.

[52] *Farmers*, ¶¶ 10-26.

[53] *Id.*

852

these provisions, however, confirms that NAT's Tariff No. 2 applies its switched access rates to functions that cannot be billed as such under the Midstate/NECA tariff it purports to mirror.

NAT's Tariff No. 2 states that "Switched Access Service provides for the use of switching and/or transport facilities or services to enable a Buyer to utilize the Company's Network to accept Calls or to deliver Calls."[54] This definition standing alone is limitless. To determine what if any limitations there are on this service, it is necessary to examine the definition of the term "Buyer." The tariff states that the "term 'Buyer' refers to an Interexchange Carrier utilizing the Company's Access Service to complete a Call to or from End Users,"[55] where the term "End User" is separately defined as "any Customer of an Interstate or Foreign Telecommunications Service that is not a carrier. . . . An End User need not purchase any service provided by [NAT]."[56] Thus the final piece in this puzzle is the definition of the term "Customer of an Interstate or Foreign Telecommunications Service," which Tariff No. 2 defines as "any . . . entity who sends or receives an interstate or foreign Telecommunications service transmitted to or from a Buyer across the Company's Network, without regard to whether and how much payment is tendered to either [NAT] or the Buyer for the interstate or foreign Telecommunications Service. . . . [And] may include, but is not limited to, conference call providers, chat line providers, calling card providers, call centers, help desk providers, and residential and/or business service subscribers."[57]

Taking these definitions together, the tariff states that "Switched Access Service" occurs whenever a "Buyer" "utilizes" NAT's network to accept calls or deliver calls; "Buyers" are IXCs

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[54] Tariff No. 2, § 5.1.

[55] *Id.*, Original Page No. 7.

[56] *Id.*, Original Page No. 8.

[57] *Id.*, Original Page 7.

853

that "complete a Call to or from an End User"; and an End User is any non-carrier entity, including CSPs, that "sends or receives" traffic "transmitted to or from a Buyer," regardless of whether that non-carrier entity purchases any service from either NAT or the IXC. Thus, in contrast to the Midstate/NECA tariff it purports to mirror, under NAT's Tariff No. 2 an "End User" does not have to be the calling or the called party that subscribes to NAT's local telephone service and that makes payments to NAT, and Tariff No. 2 expressly includes as "End Users" conference call and chat providers, whether or not they are subscribers to LEC service and whether or not they make payments to NAT for NAT local services.

There are many ways in which this definition can result in the assessment of access charges on services that are not the functional equivalent of the access services within the meaning of the Midstate/NECA tariff. Most obviously, this definition was drafted to permit the assessment of access charges for the delivery of calls dialed to a CSP that has a business relationship with NAT that is materially indistinguishable from the LEC-CSP business relationship in *Farmers.* But *Farmers* held that the NECA tariff does not permit the assessment of access charges on calls to such a CSP.[58]

In addition, because the NAT tariff defines End User as any "entity" that "sends or receives" a telecommunications service that is "transmitted across" NAT's network, NAT will undoubtedly contend that it permits access charges to be assessed if a call was routed through NAT's facilities en route to another part of the country (or even a foreign country). This feature of the tariff violates the CLEC access charge rules because the Midstate/NECA tariff does not

[58] *Farmers*, ¶¶ 11-25.

854

(and could not) impose access charges on such a "transiting" service.[59] As the Commission has recognized, transiting services are established by agreements or other contracts, not by tariff.[60]

Indeed, consider the implications of the NAT definition of End User when NAT delivers a call to an entity that provides "free international telephone service." In that scenario, NAT would be delivering the call to an intermediate "platform" that prompts the caller to dial a second telephone number and then routes the call to the final destination. But under the Commission's "end to end" analysis, access charges can only be imposed at the two "end points" and not for NAT's role of routing the call to an intermediate platform.[61]

NAT's tariff's definition of "End User Designated Premises" ("EDP") also violates the CLEC access charge rules. NAT's Tariff No. 2 defines the EDP as "[a] location designated by the End User for the purposes of connecting to the Company's services" and specifically allows that "[i]n some instances, the EDP may be located in [NAT's] central office."[62] By contrast, the Midstate/NECA tariff permits access charges only when calls are delivered to the separate premises of customers who subscribe to service under LEC tariffs at their separate premises.[63] Subscribers cannot reside in a LEC's central office or make and receive long-distance calls from

[59] Further Notice of Proposed Rulemaking, *Developing a Unified Intercarrier Compensation Regime*, 20 FCC Rcd. 4685, ¶ 120 (2005).

[60] Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, *Universal Service Support,* 24 FCC Rcd 6475, ¶ 347 & n. 888 (2008).

[61] *See, e.g., In re Long Distance/USA,* 10 FCC Rcd. at ¶¶ 12, 15; *id.* ¶ 13 ("the configuration is a single interstate communication that does not become two communications because it passes through intermediate switching facilities"); *id.* ¶ 13 (a call "extends from the inception of a call to its completion, regardless of any intermediate facilities"); *Teleconnect Co.* v. *Bell Tel. Co.*, 10 FCC Rcd. 1626 (1995) (communication analyzed as a single call where caller first dials an 800 number and then a long-distance number).

[62] Tariff No. 2, Original Page 8.

[63] NECA Tariff F.C.C. No. 5, § 6.1 ("Switched Access Service . . . provides a two-point communications path between a customer designated premises and an *end user's premises*") (emphasis added).

855

there. Rather, it is other *carriers* and *business partners* of a LEC that have collocation arrangements.[64]

The definition of "Local Exchange" adopted by NAT in Tariff No. 2 also violates the CLEC access charge rules. Tariff No. 2 expressly purports to allow NAT to apply the rates in Tariff No. 2 outside of the area served by the "ILEC whose tariffed rates [NAT] matches."[65] As such, Tariff No. 2 permits NAT to apply the rates in its tariff in areas where the competing ILEC has rates below those in NAT's tariff, which is a stark violation of the Commission's access charge rules, which mandatorily detariffs CLEC access rates that are above those of the competing ILEC.[66]

III. NAT's UNLAWFUL DISPUTE RESOLUTION PROVISIONS.

NAT's tariff unlawfully purports to (1) require customers to pay all disputed bills and to waive any rights to challenge those bills unless a bill is formally disputed within 90 days and (2) deny its customers the right to withhold payment of disputed charges where the customer claims that NAT did not provide the services that were billed, and require its customers to pay late fees on any withheld amounts (even if the dispute is resolved in their favor) and to pay NAT's *attorneys fees* for any action NAT may file to recover charges (regardless of whether NAT

[64] Further, delivering calls to collocated equipment is not the equivalent of end office switching or other access services under the Midstate/NECA tariff. To the contrary, ILECs offer separate services for such connections, that typically include "collocation" charges for allowing equipment to be placed in their offices and "cross-connect" charges to recover the cost of connecting that equipment to switches, using relatively short cables. Therefore, to the extent that NAT connects calls to equipment collocated in its central offices, NAT would be, at best, providing collocation, not switched access, services to the CSP.

[65] Tariff No. 2, Original Page 8.

[66] *CLEC Access Charge Recon. Order* ¶ 14.

856

prevails in such cases or how frivolous a court or agency may find NAT's claims).[67] These provisions are patently unlawful.

Unlawful Waiver & Dispute Resolution Provisions. Congress provided that "[a]ny person claiming to be damaged by any common carrier subject to the provisions of this Act may either make a complaint to the Commission [under Section 208] or may bring suit . . . in any district court of the United States of competent jurisdiction."[68] Congress further provided that such actions are subject to a 2 year statute of limitations, depending on the nature of the claim.[69]

NAT's tariff, however, purports to severely truncate this statute of limitations:

> All bills are presumed accurate, and shall be binding on the Buyer unless written notice [sic] a good faith dispute is received by [NAT] within 90 days. . . . The bill *shall be deemed to be correct*, and Buyer *shall* be deemed to have waived any and all rights and claims with respect to both the bill and the underlying dispute, if a good faith dispute is not timely received.[70]

This provision unlawfully purports to bar a customer from exercising its statutory right to file a complaint within the 2 year statute of limitations enacted by Congress and to challenge bills issued under an unlawful tariff. Indeed, this provision is indistinguishable from a tariff provision that has already been rejected by two district courts and a federal appeals court:

> All bills are presumed accurate, and shall be binding on the Customer, and such Customer shall be deemed to have waived the right to dispute the charges unless written notice of the disputed charge(s) is received by the Company within 90 days of the invoice date listed on the bill.[71]

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[67] *See* Tariff No. 2, § 3.1.7.

[68] 47 U.S.C. § 207.

[69] *Id.* § 415.

[70] Tariff No. 2, § 3.1.7.1(a).

[71] *Paetec Communications, Inc.* v. *MCI Communications Services, Inc.*, Civil Action No. 09-1639, 2010 U.S. Dist. LEXIS 41644, *11 (E.D.Pa. 2010).

857

The United States District Court for the Eastern District of Pennsylvania, following a prior ruling by the Eastern District of Virginia, which was upheld by the Fourth Circuit, correctly explained that:

> the [Eastern District of Virginia] issued an order wherein it found that the 90-day dispute resolution provision in [the] tariff could not preempt the federal statute of limitations in the context of a tariff because the terms of a tariff are not negotiated like the terms of a contract. If a term in the tariff could supersede the statute of limitations, it would mean that a carrier could unilaterally void federally codified consumer protections simply by filing a tariff. The Fourth Circuit affirmed. . . . [W]e . . . find that the Fourth Circuit's ruling on this matter was persuasive.[72]

Unlawful Anti-Withholding Provisions. NAT's Tariff No. 2 also unlawfully purports to force everyone to pay its bills, no matter what, even if it is facially absurd (*e.g.*, $100 trillion): "Any disputed charges must be paid in full prior to or at the time of submitting a good faith dispute and failure to tender payment for disputed invoices or portions thereof is a sufficient basis for [NAT] to deny a dispute. . . ."[73] This provision, is clearly unjust and unreasonable in violation of Section 201(b) of the Act. Moreover, it is settled that such provisions are unlawful as applied to claims that NAT did not provide the services for which it has billed an IXC, which is typically the case for bills related to NAT's traffic stimulation schemes.[74]

NAT's Tariff No. 2 also purports to punish those that withhold payment: (1) Late Payment Fees that, under the terms of the tariff, apparently apply even if the access customer

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[72] *Id.* *32-34.

[73] Tariff No. 2, § 2.10.4(B).

[74] *See, e.g., Advamtel, LLC* v. *AT&T Corp.*, 118 F. Supp. 2d 680, 683 (E.D. Va. 2000) (CLECs are not entitled to collect tariffed charges until they "demonstrate (1) that they operated under a federally filed tariff and (2) that they provided services to the customer pursuant to that tariff."); *Iowa Network Servs., Inc.* v. *Qwest Corp*, 385 F. Supp. 2d 850 (S.D. Iowa 2005), aff'd, 466 F.3d 1091 (8th Cir. 2006) (rejecting the argument that impermissible "self-help" occurred when the services provided were not within the scope of the tariff).

858

ultimately prevails on a claim that the billed service was not provided[75] and (2) "[i]n the event [NAT] pursues a claim in Court or before any regulatory body arising out of a Buyer's refusal to make payment pursuant to this Tariff, . . . Buyer shall be liable for the payment of [NAT's] reasonable attorneys' fees expended in collecting those unpaid amounts."[76] Thus, where NAT severely overbills customers or bills customers for tariffed services that NAT never provided, the customer/victim of the overcharges must come up with the money and pay it to NAT, or NAT will start charging penalties and initiate a lawsuit which will be paid for by the customer/victim of the overcharges, regardless of how frivolous NAT's lawsuit might be. Such "shake down" provisions are also facially unjust and unreasonable in violation of 47 U.S.C. § 201(b).

IV. NAT's UNLAWFUL CUSTOMER DEPOSITS PROVISIONS.

The provision in NAT's Tariff No. 2 allowing it unlimited discretion to collect a deposit from customers is patently unlawful.[77] The Commission addressed deposits in access tariffs in 2002, and it explained that such provisions should be "narrowly tailored" to address specific risks of nonpayment and to eliminate broad authority to require deposits without objective criteria.[78] The Commission explained that "broad, subjective triggers" for deposit provisions, that allow a LEC "considerable discretion in making demands, such as a decrease is 'creditworthiness' or 'commercial worthiness' falling below an 'acceptable level,' are particularly susceptible to discriminatory application.[79] NAT's tariff does not even have these

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[75] Tariff No. 2, § 3.1.7.1(c).

[76] Tariff No. 2, §§ 2.10.5.

[77] Tariff No. 2, § 3.1.5.

[78] Policy Statement, *Verizon Petition for Emergency Declaratory And Other Relief*, 17 FCC Rcd. 26884, ¶ 21-22 (2002).

[79] *Id.* ¶ 21; *id.* ¶ 22 (tariffs are not properly drafted when they provide LECs a "great deal of discretion in determining which customers will or will not be subjected to these [deposit] burdens").

859

limitations. It permits NAT to collect a deposit "[t]o safeguard its interests,"[80] with no limitations whatsoever as to how NAT can or will make deposit determinations for any particular customer. Because NAT could surely apply such a provision on a discriminatory basis – for example, against customers that are involved in litigation against NAT – it is patently unlawful.

[80] Tariff No. 2, § 3.1.5.

L 860

CONCLUSION

For the foregoing reasons, the Commission should (1) reject NAT's Tariff No. 2, or (2) in the alternative, suspend and investigate it.

Respectfully Submitted,

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Dated: November 22, 2010

861

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of November, 2010, I caused true and correct copies of the foregoing Petition of Joint Petitioners to be served on all parties as shown on the attached Service List.

Dated: November 22, 2010
Washington, D.C.

/s/ Christopher T. Shenk

862

<u>**SERVICE LIST**</u>

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863

ACCESS SERVICE

REGULATIONS, RATES AND CHARGES
APPLYING TO THE PROVISION OF ACCESS SERVICE
FOR CONNECTION TO INTERSTATE COMMUNICATIONS
FACILITIES AND SERVICES FURNISHED BY

NATIVE AMERICAN TELECOM, LLC

AND ANY CONCURRING CARRIERS BETWEEN
POINTS IN THE UNITED STATES AS SPECIFIED HEREIN

This FCC Tariff No. 2 CANCELS and REPLACES FCC Tariff No. 1 currently on file with the Commission, effective November 30, 2010.

Transmittal No. 3
Issued: November 15, 2010

Effective: November 30, 2010

Tom Reiman, President
6710 E. Split Rock Circle
Sioux Falls, SD 57110

EXHIBIT Y

864

ACCESS SERVICE

CHECK SHEET

Title Page and Pages 1 through 48 of this Tariff are effective as of the date shown. Original and revised pages as named below contain all changes from the original Tariff that are in effect on the date hereof.

Page	Revision	Page	Revision	Page	Revision
Title Page	Original	33	Original		
1	Original	34	Original		
2	Original	35	Original		
3	Original	36	Original		
4	Original	37	Original		
5	Original	38	Original		
6	Original	39	Original		
7	Original	40	Original		
8	Original	41	Original		
9	Original	42	Original		
10	Original	43	Original		
11	Original	44	Original		
12	Original	45	Original		
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32	Original				

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865

ACCESS SERVICE

TABLE OF CONTENTS

				Page
ISSUING CARRIER				Title Page
CHECK SHEET				1
TABLE OF CONTENTS				2
OTHER PARTICIPATING CARRIERS				5
SYMBOLS				6
ABBREVIATIONS				6
DEFINITIONS				7
REFERENCE TO OTHER TARIFFS AND/OR PUBLICATIONS				11
1.	APPLICATION OF TARIFF			12
	1.1	General		12
		1.1.1	No Waiver	12
		1.1.2	Partial Invalidity	12
		1.1.3	Title or Ownership Rights	12
2.	GENERAL REGULATIONS			13
	2.1	Undertaking of the Company		13
		2.1.1	Scope	13
		2.1.2	Limitations	14
		2.1.3	Provision of Services, Equipment and Facilities	17
		2.1.4	Services, Equipment or Facilities	18
		2.1.5	Notification of Service-Affecting Activities	19
	2.2	Obligations of the Buyer		20
		2.2.1	General Obligations	20
		2.2.2	Claims	23
		2.2.3	Buyer Equipment and Channels	23
3.	PAYMENT AND BILLING			27
	3.1	Payment Arrangements		27
		3.1.1	Payment for Service	27
		3.1.2	Billing and Collection of Charges	28
		3.1.3	Advance Payments	29
		3.1.4	Jurisdictional Reporting Requirements	29
		3.1.5	Deposits	30
		3.1.6	Discontinuance of Service	31
		3.1.7	Billing Disputes	32

ACCESS SERVICE

TABLE OF CONTENTS (Cont'd)

			Page
3.	PAYMENT AND BILLING (Cont'd)		
	3.2	Access Billing	34
	3.2.1	Billing Standards	34
	3.2.2	Distance Charges	35
	3.2.3	Suspension, Termination or Refusal of Service	36
4.	CONSTRUCTIVE ORDERING		37
	4.1	General	37
	4.1.1	Constructive Ordering	37
5.	SWITCHED ACCESS SERVICE		37
	5.1	General	37
	5.1.1	Rate Categories	38
	5.2	Switched Access Service Specifications - Company Requirements	41
	5.2.1	Network Management	41
	5.2.2	Transmission Specifications	41
	5.2.3	Testing	41
	5.2.4	Report Requirements	41
	5.3	Rate Regulations	42
	5.3.1	Description and Application of Rates	42
	5.3.2	Contracts and Individual Case Basis (ICB) Rates	42
	5.3.3	Pass-Through of Taxes and Regulatory Fees	42
6.	MISCELLANEOUS SERVICES		43
	6.1	General	43
	6.1.1	Presubscription	43
	6.1.2	Maintenance of Service	43
	6.1.3	International Blocking Service	44
	6.1.4	900 Blocking Service	44
	6.1.5	Access Order Charge	45

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867

ACCESS SERVICE

TABLE OF CONTENTS (Cont'd)

			Page
7.	RATES AND CHARGES		46
	7.1	General	46
	7.2	Switched Access Service	46
		7.2.1 Recurring Rate Elements	46
		7.2.2 Rates Reflecting National Exchange Carrier Association Tariff No. 5	47
		7.2.3 800 Database Access Service	47
	7.3	Other Services	48
		7.3.1 Technician Hourly Rates	48
		7.3.2 Unauthorized PIC Change Charge	48
		7.3.3 Access Order Charge	48

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868

ACCESS SERVICE

CONCURRING CARRIERS

NO CONCURRING CARRIERS

CONNECTING CARRIERS

NO CONNECTING CARRIERS

OTHER PARTICIPATING CARRIERS

NO OTHER PARTICIPATING CARRIERS

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869

ACCESS SERVICE

SYMBOLS

The following symbols shall be used in this Tariff for the purpose indicated below:

- (C) To Signify changed regulation
- (D) To Signify discontinued regulation or rate
- (I) To Signify increase
- (L) To Signify matter relocated without change
- (N) To Signify new rate or regulation
- (R) To Signify reduction
- (S) To Signify reissued matter
- (T) To Signify a change in text but no change in rate or regulation

ABBREVIATIONS

CABS	Carrier Access Billing System	MRC	Monthly Recurring Charge
FCC	Federal Communications Commission	PIC	Presubscribed Interexchange Carrier
FG	Feature Group	PIU	Percent Interstate Use
ICB	Individual Case Basis	POP(s)	Point(s) of Presence
ILEC	Incumbent Local Exchange Carrier	USF	Universal Service Fund
IXC	Interexchange Carrier	VEU	Volume End User
LEC	Local Exchange Carrier		
LERG	Local Exchange Routine Guide		
MOU	Minutes of Use		

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870

ACCESS SERVICE

DEFINITIONS

Access Charge: Charges assessed to the Buyer through which the Company is compensated for providing Access.

Access or Access Service: Access or Access Service includes services and facilities provided for the origination or termination of any interstate or foreign Telecommunication regardless of the technology used in transmission. This includes, but is not limited to, local exchange, long distance, and data communications services that may use either TDM or Internet Protocol ("IP") or other technology. Access Service includes the functional equivalent of the incumbent local exchange carrier interstate exchange access services typically associated with following rate elements: carrier common line (originating); carrier common line (terminating); local end office switching; interconnection charge; information surcharge; tandem switched Transport Termination (fixed); tandem switched Transport Facility (per mile); tandem switching.

Advance Payment: Part or all of a payment required before the start of service.

Buyer: The term "Buyer" refers to an Interexchange Carrier utilizing the Company's Access Service to complete a Call to or from End Users. The Buyer is responsible for the payment of charges for any service it takes from the Company, and compliance with the terms and conditions of this Tariff.

Call: A communication attempt for which the complete address code (e.g., 0-, 911, or 10 digits) is provided to the Company's switch or equivalent facility. The term "Call" expressly includes communications that are delivered to, or received from, persons or entities that include, but are not limited to: conference call providers, chat line providers, calling card providers, call centers, help desk providers, and residential and/or business users.

Company: Native American Telecom, LLC, the issuer of this Tariff, a competitive local exchange carrier.

Commission (FCC): The Federal Communications Commission.

Constructive Order: In the absence of a written or oral order, any delivery of Calls to or receipt of Calls from the Company's Network constitutes a Constructive Order to purchase Switched Access Services as described herein. Similarly, the selection of an IXC as an End User's Presubscribed Interexchange Carrier constitutes a Constructive Order for Switched Access Service by the IXC.

Customer of an Interstate or Foreign Telecommunications Service: A "Customer of an Interstate or Foreign Telecommunications Service" includes any person or entity who sends or receives an interstate or foreign Telecommunications service transmitted to or from a Buyer across the Company's Network, without regard to whether and how much payment is tendered to either the Company or the Buyer for the interstate or foreign Telecommunications service. Customer of an Interstate or Foreign Telecommunications Service may include, but is not limited to, conference call providers, chat line providers, calling card providers, call centers, help desk providers, and residential and/or business service subscribers.

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871

ACCESS SERVICE

DEFINITIONS (Cont'd)

End User Designated Premises (EDP): A location designated by the End User for the purposes of connecting to the Company's services. In some circumstances, the EDP may be located in Company's central office.

End User: The term "End User" means any Customer of an Interstate or Foreign Telecommunications Service that is not a carrier except that a carrier other than a telephone company shall be deemed to be an "End User" when such carrier uses a Telecommunications service for administrative purposes and a person or entity that offers Telecommunications services exclusively as a reseller shall be deemed to be an "End User" if all resale transmissions offered by such reseller originate on the premises of such reseller. Other carriers, including IXCs, are not considered to be End Users under the terms of this Tariff, unless the Company, at its sole discretion, consents to such classification in writing. An End User need not purchase any service provided by the Company.

Individual Case Basis or ICB: An arrangement whereby the terms, conditions, rates, charges and/or services are developed or modified based on the specific and unique circumstances of the Buyer's situation. ICB specialized rates, services or charges will be made available to similarly situated Buyers on a non-discriminatory basis.

Interexchange Carrier (IXC): Any individual, partnership, association, joint-stock company, trust, governmental entity, corporation or any other entity engaged in the provision of intrastate, interstate or international communication for hire by any means between two or more exchanges.

Late Payment Fee: An amount computed as 1.5% of the unpaid balance per month or portion thereof for the period from the due date of any bill until the payment is received.

Local Exchange: A geographic area established by the Company for the administration and pricing of Telecommunications services. The Company is not bound by the definition of "exchange" or "local exchange" as defined by the National Exchange Carrier Association, by IXCs, or by the ILECs whose tariffed rates the Company matches. Unless defined otherwise by the Company, the Company's Local Exchanges are the same as the geographic area where the Company provides service to End Users.

Minute of Use (MOU): Denotes the number of minutes for which a Buyer is billed in relation to any usage-sensitive service element provided by the Company.

Network: Refers to the Company's facilities, equipment, and services provided under this Tariff. The Company may provide and own its own facilities, equipment or services, or may obtain and use those of other providers.

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872

ACCESS SERVICE

DEFINITIONS (Cont'd)

Nonrecurring Charge: A one-time charge or special fee, generally applied to activities associated with the installation or establishment of services, facilities, or equipment, construction, rearrangements, and/or optional features and functions.

Point of Presence: A physical place where a carrier accesses the Company's Network.

Presubscription: An arrangement whereby an End User selects and designates to the Company or other local exchange carrier an IXC that the End User wishes to use, without dialing an access code, for making long-distance Calls. The selected IXC is referred to as the Presubscribed Interexchange Carrier (PIC).

Recurring Charges (MRCs): Monthly or other periodic (as specified) charges to the Buyer for services, facilities and equipment which continue for the agreed-upon duration of the service.

Service(s): Interstate Access Service(s). Service provided to a Buyer by the Company pursuant to this Tariff.

Simple Interest: The interest rate that is set for the Federal Reserve's two-year Treasury bill on the most recent January 31st.

Switched Access Service: Access to the Network of the Company for the purpose of receiving or delivering Calls.

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

Traffic: Another term for Calls. These terms expressly include communications that are delivered to, or received from, persons or entities that include, but are not limited to: conference call providers, chat line providers, calling card providers, call centers, help desk providers, and residential and/or business users.

Transport Facility: Where separately invoiced, provides for the transmission of calls between the End User designated premises and the switch(es) where the Traffic is switched to originate or terminate the End User's communication.

Transport Interconnection: Where separately invoiced, recovers the costs associated with Local Transport that are not recovered by the Entrance Facility, Direct Trunked Transport, Tandem Switched Transport, Multiplexing or dedicated signaling (i.e. SS7) rates. This rate applies to both Tandem Switched and Direct Trunked Access minutes. The rate is applied at the Company switch.

Transport Termination: Where separately invoiced, provides for the line or trunk side arrangements that terminate the Local Transport facilities on the Company switch(es).

ACCESS SERVICE

DEFINITIONS (Cont'd)

Volume End User ("VEU"): An End User that obtains Service from the Company in order to provide high-traffic services, including, but not limited to, chat line services, conference calling services, help desk assistance, or call center support, designates the Company's central office as its EDP, and accordingly, installs equipment in the Company's central office. Because of the high-volume of traffic generated to and from VEUs, origination and termination of Switched Access Services to this class of End User will be assessed at a lower composite rate, as outlined in Section 7.2.2 of this Tariff.

Wire Center: Generic term for point on a carrier network from which an End User normally receives a dial tone.

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ACCESS SERVICE

REFERENCE TO OTHER TARIFFS AND/OR PUBLICATIONS

The following tariffs are referenced in this Tariff and may be obtained as shown:

National Exchange Carrier Association
100 S. Jefferson
Whippany, NJ
Wire Center Information
Tariff FCC No. 4

National Exchange Carrier Association
100 S. Jefferson
Whippany, NJ
Wire Center Information
Tariff FCC No. 5

The Local Exchange Routing Guide (LERG) is referenced in this Tariff may be obtained from:

Telcordia Technologies
Customer Services Division
60 New England Avenue
Piscataway, NJ

ACCESS SERVICE

1. APPLICATION OF TARIFF

1.1 General

This Tariff sets forth the regulations, rates and charges for the provision of interstate Access Services and facilities (hereinafter "Services") by Native American Telecom, LLC. The rates for the Services, and associated elements, described herein mirror the rates of Midstate Communications, Inc., contained within the National Exchange Carrier Association Tariff No. 5. The Company will not provide telecommunications to End Users whose subject matter is adult content, nor will the Company engage in business practices that involve artificial traffic.

1.1.1 No Waiver

No term or provision in this Tariff shall be waived, unless such waiver or consent is in writing and signed by the Company and the Buyer to which it is attributed. No consent by the Company or Buyer, as applicable, to, or waiver of, a breach or default by the other, whether express or implied, shall constitute a consent to or waiver of, any subsequent breach or default.

1.1.2 Partial Invalidity

If any provision of this Tariff shall be held to be invalid or unenforceable, such invalidity or unenforceability shall not invalidate or render the terms of this Tariff unenforceable, but rather this Tariff shall be construed as if not containing the invalid or unenforceable provision.

1.1.3 Title or Ownership Rights

The payment of rates and charges by Buyers for the Services offered under the provisions of this Tariff does not assign, confer, or transfer leasehold, title, or ownership rights to proposals, equipment, or facilities developed or utilized respectively by the Company in provision of such Services.

2. GENERAL REGULATIONS

2.1 Undertaking of the Company

2.1.1 Scope

The Company undertakes to provide the Service(s), subject to the availability of necessary facilities. The Company is responsible only for the installation, operation, and maintenance of the Services and facilities it provides. The Company does not warrant that its services and facilities meet standards other than those expressly set forth in this Tariff.

2.1.1.1 If any Buyer makes use of any Service, the Buyer shall be deemed to have made a Constructive Order for the Service, and the failure to enter into a written or oral service agreement will not eliminate any payment obligation under this Tariff.

2.1.1.2 The Buyer shall be solely responsible for message content.

2.1.1.3 The Company will, for maintenance purposes, test its service to the extent necessary to detect and/or clear troubles.

2.1.1.4 Service may be terminated by the Company on written notice to the Buyer if the Buyer is using the service in violation of the Tariff or if the Buyer is using the service in violation of the law.

2.1.1.5 Assignment or Transfer of Services

(a) The Buyer may assign or transfer the use of Service(s) provided under this Tariff only if approved by Company in writing and only if assignee or transferee assumes any and all outstanding indebtedness for such Services, and any applicable unexpired portion of a minimum period and/or any termination liability applicable to such Service(s).

(b) The assignment or transfer of Services does not relieve or discharge the assignor or transferor from remaining jointly or severally liable with the assignee or transferee for any obligations existing at the time of the assignment or transfer.

2. GENERAL REGULATIONS (Cont'd)

2.1 Undertaking of the Company (Cont'd)

2.1.2 Limitations

2.1.2.1 Provisioning Sequence

The Services offered herein will be provided to Buyers on a first-come, first-served basis.

2.1.2.2 Liability

(a) With respect to any and all claims or suits, regardless of the theory of liability, the liability of the Company for damages arising out of the installation, provision, furnishing, termination, maintenance, repair, or restoration of its Services and Facilities, including but not limited to mistakes, omissions, interruptions, delays, or errors or other defects, representations, or use of these services or arising out of failure to furnish the Service, whether caused by acts or omission, shall be limited to an amount which shall not exceed an amount equal to the proportionate charge for the period during which the Service was affected. The grant of such an amount for interruption shall be the sole remedy of the Buyer and the sole liability of the Company. The Company will not be liable for any direct, indirect, incidental, special, consequential, exemplary or punitive damages to Buyer as a result of any Company Service or equipment, or facilities, or the acts or omissions or negligence of the Company's employees, agents, or contractors.

2. GENERAL REGULATIONS (Cont'd)

2.1 Undertaking of the Company (Cont'd)

2.1.2 Limitations (Cont'd)

2.1.2.2 Liability (Cont'd)

(b) The Company shall not be liable for any delay or failure of performance or equipment due to causes beyond its control, including but not limited to: acts of unaffiliated third parties, acts of God, fire, flood, explosion, or other catastrophes; any law, order, regulation, direction, action, or request of the U. S. Government, or of any department, agency, commission, bureau, corporation, or other instrumentality of any one or more of these federal, state, or local governments, or of any civil or military authority; national emergencies; insurrections, riots, wars; unavailability of rights-of-way or materials; or strikes, lockouts, work stoppages, or other labor difficulties.

(c) The Company shall not be liable for: (a) any act or omission of any entity furnishing to the Company or to the Company's Buyers facilities or equipment used for connection to or in connection with the Company's Services; or (b) the acts or omissions of other common carriers or warehousemen.

(d) The Company shall not be liable for any damages or losses due to the fault or negligence of the Buyer arising from or related to the failure or malfunction of Buyer-provided equipment or facilities.

(e) The Company does not guarantee nor make any warranty with respect to Services it provides for use in an explosive atmosphere. The Buyer shall indemnify, defend, and hold the Company harmless from any and all loss, claims, demands, suits, or other action, or any liability whatsoever, whether suffered, made, instituted, or asserted by any loss, damage, or destruction of any property, whether owned by the Buyer or others, caused or claimed to have been caused directly or indirectly by the installation, operation, failure to operate, maintenance, removal or use of any Service so provided.

2. GENERAL REGULATIONS (Cont'd)

2.1 Undertaking of the Company (Cont'd)

2.1.2 Limitations (Cont'd)

2.1.2.2 Liability (Cont'd)

(f) The Company is not liable for any defacement of or damage to Buyer property resulting from the furnishing of Service(s) or equipment or the installation or removal thereof, unless such defacement or damage is caused by negligence or willful misconduct of the Company's employees, contractors, or agents.

(g) The Company shall be indemnified, defended and held harmless by the Buyer against any claim, loss or damage arising from the Buyer's use of Service(s), involving claims for libel, slander, invasion of privacy, or infringement of copyright arising from the Buyer's own communications.

(h) The Company makes no warranties, express or implied either in fact or by operation or otherwise, including warranties of merchantability or fitness for a particular use.

(i) No action or proceeding against the Company arising out of a Service provided under this Tariff shall be commenced more than two years after the Service is rendered.

ACCESS SERVICE

2. GENERAL REGULATIONS (Cont'd)

2.1 Undertaking of the Company (Cont'd)

2.1.3 Provision of Services, Equipment, and Facilities

2.1.3.1 The Company shall use reasonable efforts to make available Service(s) to a Buyer on or before a requested date, subject to the provisions of, and compliance by the Buyer with, the regulations contained in this Tariff, and subject to the availability of facilities and services, including those provided by other carriers relied upon by the Company for the provision of the Company's Service(s). The Company does not guarantee availability by any such date and shall not be liable for any delays in commencing Service to any Buyer.

2.1.3.2 The Company shall use reasonable efforts to maintain Services, facilities and equipment that it may furnish to the Buyer. The Buyer may not, nor may Buyer permit others to rearrange, disconnect, remove, attempt to repair, or otherwise interfere with any of the Services, facilities, or equipment installed by the Company, except upon written consent of the Company.

2.1.3.3 The Company may substitute, change, or rearrange any equipment or facility at any time and from time to time, but shall not thereby alter the technical parameters of the Service provided the Buyer.

2.1.3.4 Any equipment that the Company may provide or install on Buyer's property for use in connection with the Service(s) shall not be used for any purpose other than that for which the Company provided it.

2.1.3.5 The option exclusive to request a specific path or channel is not provided to the Buyer, but is within the purview of the Company.

2. GENERAL REGULATIONS (Cont'd)

2.1 Undertaking of the Company (Cont'd)

2.1.3 Provision of Services, Equipment, and Facilities (Cont'd)

2.1.3.6 The Company shall not be responsible for the installation, operation, or maintenance of any Buyer-provided communications equipment, unless approved by the Company. Where such equipment is connected to the facilities furnished pursuant to this Tariff, the responsibility of the Company shall be limited to the furnishing of facilities or Service(s) offered under this Tariff, and to the maintenance and operation of such facilities or Service(s). Subject to this responsibility, the Company shall not be responsible for:

(a) the transmission of signals by Buyer-provided equipment or for the quality of, or defects in, such transmission;

(b) the reception of signals by Buyer-provided Equipment.

2.1.4 Services, Equipment, or Facilities

2.1.4.1 The Company reserves the right to limit or allocate the use of existing facilities, or of additional facilities offered, when necessary due to a lack of facilities or some other cause beyond the Company's control.

2.1.4.2 The Company may, where such action is reasonably required in the operation of its business, substitute, change or rearrange any facilities used in providing Service(s) under this Tariff. The Company shall not be responsible if any such substitution, change or rearrangement renders any Buyer-provided equipment, facilities, or Service(s) obsolete or requires modification or alteration thereof or otherwise affects the operating characteristics of the equipment, facility or service. The Company will provide reasonable notification of any such change in facilities described above to the Buyer in writing where reasonably possible. The Company will work cooperatively with the Buyer and provide reasonable time for any redesign and implementation required by the change in operating characteristics.

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2. GENERAL REGULATIONS (Cont'd)

2.1 Undertaking of the Company (Cont'd)

2.1.4 Services, Equipment, or Facilities (Cont'd)

2.1.4.3 The Company shall use reasonable efforts to maintain only the facilities and equipment that it furnishes to the Buyer. The Buyer may not, nor may the Buyer permit others, to rearrange, disconnect, remove, attempt to repair, or otherwise interfere with any of the facilities or equipment installed by the Company, except upon the written consent of the Company.

2.1.4.4 The Company shall not be responsible for the installation, operation, or maintenance of any Buyer-provided equipment, unless otherwise agreed to upon terms mutually acceptable to both the Company and the Buyer and evidenced by a signed written document. Where such equipment is connected to the facilities furnished under this Tariff, the responsibility of the Company shall be limited to the furnishing of Services and associated facilities and equipment offered under this Tariff and to the maintenance and operation of such Services. Subject to this responsibility, the Company shall not be responsible for:

(a) the transmission of signals by Buyer-provided equipment or for the quality of, or defects in, such transmission; or

(b) the reception of signals by Buyer-provided equipment; or

(c) network control signaling where such signaling is performed by Buyer-provided network control signaling equipment.

2.1.5 Notification of Service-Affecting Activities

2.1.5.1 The Company will provide the Buyer reasonable notification of Service-affecting activities that may occur in normal operation of its business. Such activities may include, but are not limited to, equipment or facilities additions, removals or rearrangements, and routine preventive maintenance. No specific advance notice period is applicable to all Service activities. The Company will work cooperatively with the Buyer to determine the reasonable notification requirements. With some emergency or unplanned Service-affecting conditions, such as an outage resulting from cable damage, notification to the Buyer might not be possible.

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2. GENERAL REGULATIONS (Cont'd)

2.2 Obligations of the Buyer

2.2.1 General Obligations

2.2.1.1 The Buyer will ensure that the characteristics and methods of operation of any circuits, facilities or equipment not provided by the Company and associated with the facilities utilized to provide Service(s) under this Tariff shall not interfere with or impair Service over facilities of the Company; cause damage to their plant; impair privacy or create hazards to employees or the public.

2.2.1.2 The Service provided under this Tariff must not be used for an unlawful purpose or used in an abusive manner which would reasonably be expected to frighten, abuse, torment or harass another or interfere with use of Service by one or more other Buyers.

2.2.1.3 The Buyer is responsible for damage to or loss of the Company's facilities or equipment caused by acts or omissions of the Buyer; or noncompliance by the Buyer; or by fire or theft or other casualty at the Buyer's location, unless caused by the negligence or willful misconduct of the Company's employees or agents.

2.2.1.4 The Buyer will provide at no charge, as specified from time to time by the Company, any needed personnel, equipment, space, and power to operate Company facilities and equipment that may be installed at the Buyer's location, and the level of heating and air conditioning necessary to maintain proper operating environment at such location.

2.2.1.5 Where applicable, the Buyer will obtain, maintain, and otherwise have full responsibility for all permissions, approvals, consents, licenses, permits, and rights-of-way and conduit necessary for installation of cables and associated equipment used to provide services to the Buyer from the building service entrance or property line to the location of the equipment space. Any costs associated with obtaining and maintaining the permissions, approvals, consents, licenses, permits, and rights-of-way described herein, including the costs of altering the structure to permit installation of the Company-provided facilities, shall be borne entirely by, or may be charged by the Company, to, the Buyer.

ACCESS SERVICE

2. GENERAL REGULATIONS (Cont'd)

2.2 Obligations of the Buyer (Cont'd)

2.2.1 General Obligations (Cont'd)

2.2.1.6 The Buyer will provide a safe place to work and will comply with all laws and regulations regarding the working conditions at the location at which the Company employees and agents shall be installing or maintaining the Company's facilities and equipment. The Buyer may be required to install and maintain Company facilities and equipment within a hazardous area if, in the Company's opinion, injury or damage to the Company's employees or property might result from installation or maintenance by the Company. The Buyer shall be responsible for identifying, monitoring, removing, and disposing of any hazardous material (e.g., friable asbestos) prior to any construction or installation work.

2.2.1.7 The Company will comply with all laws and regulations applicable to, and will obtain all permissions, approvals, consents, licenses, and permits as may be required with respect to the location of Company facilities and equipment at any Buyer location or the rights-of-way for which Buyer is responsible, and will grant or obtain permission for Company agents or employees to enter such location of the Buyer at any time for the purpose of installing, inspecting, maintaining, testing, repairing, or upon termination of service as stated herein, removing the facilities or equipment of the Company.

2.2.1.8 The Buyer must not create or allow to be placed, any liens or other encumbrances on the Company's equipment or facilities.

2.2.1.9 Buyers must use the Service provided by the Company in a manner, and at all times, consistent with the Tariff obligations identified herein and shall not utilize the Company's Service(s) in any manner that:

(a) Interferes with or impairs the Services(s) of the Company, other carriers, or other Buyers;

(b) Causes damage to Company-provided facilities;

(c) Interferes with the privacy of communications;

L 885

2. GENERAL REGULATIONS (Cont'd)

2.2 Obligations of the Buyer (Cont'd)

2.2.1 General Obligations (Cont'd)

(d) Creates a hazard to the Company's employees, contractors, or agents or the public; or

(e) Interferes, frightens, abuses, torments, harasses any person or entity or unreasonably interferes with the use of the Company's Service by others.

2.2.1.10 The Buyer shall be fully liable for payment of all applicable rates, charges and fees for any Service provided by the Company, if that Service is received by the Buyer. Buyer is liable for payment of all calls that originate on its network, including actual calls made by Buyer, Buyer's End Users, or unauthorized third parties (*e.g.*, fraudulent calls).

2.2.1.11 The Buyer shall reimburse the Company for damages to Company facilities utilized to provide services under this Tariff caused by the negligence or willful act of the Buyer, or resulting from improper use of the Company facilities, or due to malfunction of any facilities or equipment provided for or by the Buyer. Nothing in the foregoing provision shall be interpreted to hold one Buyer liable for another Buyer's actions. The Company will, upon reimbursement for damages, cooperate with the Buyer in prosecuting a claim against the person causing such damage, and the Buyer shall be subrogated to the right of recovery by the Company for the damages to the extent of such payment.

2.2.1.12 The Buyer shall be responsible for the payment of technician charges as set forth herein for visits by the Company's employees, contractors, or agents to the Buyer's location when a Service difficulty or trouble report results from the use of equipment or facilities provided by any party other than the Company, including but not limited to the Buyer.

ACCESS SERVICE

2. GENERAL REGULATIONS (Cont'd)

2.2 Obligations of the Buyer (Cont'd)

2.2.2 Claims

With respect to any Service, facility, or equipment provided by the Company, Buyer shall indemnify, defend, and hold harmless the Company from and against all claims, actions, damages, liabilities, costs, and expenses for:

2.2.2.1 any loss, destruction, or damage to property of the Company or any third party, or the death or injury to persons, including, but not limited to, employees, or invitees of either party, arising out of any act or omission of the Buyer, its employees, agents, representatives, or invitees in the course of using the Services, facilities, or equipment provided under this Tariff; or

2.2.2.2 any claim, loss, damage, expense, or liability for infringement of any copyright, patent, trade secret, or any proprietary or intellectual property right of any third party, arising from any act or omission by the Buyer, including, without limitation, use of the Company's Service(s) and facilities in a manner not contemplated by the agreement between Buyer and Company.

2.2.3 Buyer Equipment and Channels

2.2.3.1 General

(a) A Buyer may transmit or receive information or signals via the facilities of the Company. The Company's Services are designed primarily, but not exclusively, for the transmission of voice grade telephonic signals, except as otherwise stated in this Tariff. The Company does not guarantee that its Service(s) will be suitable for any particular purposes other than as specifically and expressly stated in this Tariff.

2.2.3.2 Company Equipment

(a) If any Company equipment is installed at the Buyer location, the Buyer is required to maintain such equipment in good working order at the expense of the Buyer. The Buyer shall provide electric power to such equipment at its own expense, unless otherwise agreed to by the Company in writing.

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887

2. GENERAL REGULATIONS (Cont'd)

2.2 Obligations of the Buyer (Cont'd)

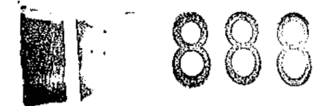
2.2.3 Buyer Equipment and Channels (Cont'd)

2.2.3.2 Company Equipment (Cont'd)

(b) The Buyer is responsible for ensuring that Buyer-provided equipment connected to Company equipment and facilities is compatible with such equipment and facilities. The magnitude and character of the voltages and currents impressed on Company-provided equipment and wiring by the connection, operation, or maintenance of such equipment and wiring shall be such as not to cause damage to the Company-provided equipment and wiring or injury to the Company's employees or to other persons. Any additional protective equipment required to prevent such damage or injury shall be provided by the Company at the Buyer's expense.

2.2.3.3 Interconnection of Facilities

(a) Service furnished by the Company may be interconnected with services or facilities of other authorized communications common carriers and with private systems, subject to technical limitations established from time to time by the Company. Service furnished by the Company is not part of a joint undertaking with such other common carriers or systems. Any special interface equipment necessary to achieve compatibility between the facilities and equipment of the Company used for furnishing Services and the channels, facilities, or equipment of others shall be provided at the Buyer's expense.



ACCESS SERVICE

2. GENERAL REGULATIONS (Cont'd)

2.2 Obligations of the Buyer (Cont'd)

2.2.3 Buyer Equipment and Channels (Cont'd)

2.2.3.3 Interconnection of Facilities (Cont'd)

(b) If harm to the Company's network, personnel or services is imminent or is occurring due to interconnection with another carrier's services or use of unauthorized or malfunctioning Buyer equipment, the Company reserves the right to terminate Buyer's service immediately, with no prior notice required.

(c) Upon request and in the sole discretion of Company, facilities furnished under this Tariff may be connected to Buyer-provided equipment. All such equipment shall be registered by the FCC pursuant to Part 68 of Title 47, Code of Federal Regulations; and all Buyer-provided wiring shall be installed and maintained in compliance with those regulations.

(d) The Buyer is responsible for taking all necessary legal steps for interconnecting Buyer-provided equipment or systems with Company's facilities. Buyer shall secure all licenses, permits, approvals, authorizations, consent, permissions, rights-of-way, and other arrangements necessary for such interconnection.

(e) Unless otherwise agreed by the Company, the Buyer shall ensure that the facilities or equipment provided by another carrier are properly interconnected with the facilities or equipment of the Company. The Company may require the use of protective equipment at the Buyer's expense.

L 889

2. GENERAL REGULATIONS (Cont'd)

2.2 Obligations of the Buyer (Cont'd)

2.2.3 Buyer Equipment and Channels (Cont'd)

2.2.3.4 Inspections

(a) Upon notification to the Buyer, and at a reasonable time, the Company may make such tests and inspections as may be necessary to determine that the Buyer is complying with the requirements set forth in this Section.

(b) If protective requirements for Buyer-provided equipment are not being complied with, the Company may take such action as it deems necessary to protect its facilities, equipment, and personnel. The Company will notify the Buyer promptly if there is any need for further corrective action. Within five days of receiving this notice, the Buyer must take this corrective action and notify the Company of the action taken. If the Buyer fails to do this, the Company may take whatever additional action is deemed necessary, including the suspension or termination of service, to protect its facilities, equipment and personnel from harm.

2.2.3.5 Prohibited Uses

(a) The Service(s) that the Company offers shall not be used for any unlawful purpose or for any use as to which the Buyer has not obtained all required governmental and other third-party approvals, authorization, licenses, consents, and/or permits.

(b) The Company may require applicants for Service who intend to use the Company's offerings for resale and/or shared use to file a letter with the Company confirming that their use of the Company's offerings complies with relevant laws, and FCC regulations, policies, guidelines, orders and decisions.

(c) The Company may require a Buyer to immediately stop its transmission of signals if said transmission is believed to be causing interference to others.

890

ACCESS SERVICE

3. PAYMENT AND BILLING

3.1 Payment Arrangements

3.1.1 Payment for Service

The Company will endeavor to bill on a current basis all charges incurred by and credits due to the Buyer under this Tariff attributable to Service(s) established or discontinued during the preceding billing period, as described in Section 3.1.2.

The Buyer is responsible for the payment of all charges for Service(s) furnished by the Company. All bills are due 31 days after the bill date (payment date) or by the next bill date, whichever is the shortest interval, and are payable in immediately available funds. If such payment date would cause payment to become due on a Saturday, Sunday, or holiday (as recognized by the federal government or applicable state government), such payment shall be due on the next business day.

3.1.1.1 The Buyer is responsible for payment of appropriate sales, use, gross receipts, excise, access or other local, state and federal taxes, charges or surcharges (however designated) (excluding taxes on the Company's net income) imposed or based upon the provision, sale or use of the Company's Service(s), unless otherwise agreed to in writing, pursuant to an ICB contract, the terms of which are available to similarly situated Buyers.

3.1.1.2 Without limitation to the foregoing, the Buyer is responsible for any and all cost(s) incurred as the result of:

(a) any delegation of authority resulting in the use of Buyer's communications equipment and/or network services which result in the placement of Calls via the Company;

(b) any and all use of Company Services, including Calls which the Buyer did not individually authorize, including any and all fraudulent or allegedly fraudulent calls that originate on the Buyer's network;

(c) any Calls placed by or through the Buyer's equipment via any remote access feature(s);

(d) any use of the Company's Services and/or activities, whether or not accompanied by a written order.

3. PAYMENT AND BILLING (Cont'd)

3.1 Payment Arrangements (Cont'd)

3.1.2 Billing and Collection of Charges

3.1.2.1 The Company will endeavor to bill usage charges monthly for the preceding billing period; however, the Company's failure to do so shall not affect the Buyer's liability for such charges irrespective of the length of delay between the date of usage and the Company's billing for such usage. Company is permitted to bill for usage within six (6) months of the date upon which service was provided, assuming that the Buyer was aware of the unbilled Services during the period the Services were unbilled.

3.1.2.2 Each bill will include industry standard descriptions of Service(s) rendered for the period covered, any known unbilled non-usage sensitive charges for prior periods and unbilled usage charges for any prior period.

(a) Buyer's billing will begin upon delivery of Calls to, or receipt of Calls from the Company. Billing accrues through and includes the day that the service, circuit, arrangement or component is discontinued and ceases to be used by Buyer.

3.1.2.3 A Nonrecurring Charge is due and payable within 31 days after the invoice date.

3.1.2.4 Charges based on measured usage will be included on the next invoice rendered following the end of the month in which the usage occurs.

3.1.2.5 When non-usage based Service does not begin on the first day of the month, or end on the last day of the month, the charge for the fraction of the month in which Service was furnished will be calculated on a pro-rated basis with every month considered to have 30 days.

3.1.2.6 If any portion of the Buyer's payment is received by the Company after the date due, or if any portion of the payment is received by the Company in funds which are not immediately available, then a Late Payment Fee shall be due to the Company. The Late Payment Fee shall be calculated at 1.5% of the unpaid balance per month or portion thereof for the period from the due date until the payment is received.

3. PAYMENT AND BILLING (Cont'd)

3.1 Payment Arrangements (Cont'd)

3.1.2 Billing and Collection of Charges (Cont'd)

3.1.2.7 In addition to other penalties or fees, the Buyer will be assessed a charge of twenty-five dollars ($25) for each check submitted by the Buyer to the Company which a financial institution refuses to honor for insufficient funds or a non-existent account.

3.1.2.8 If Service is discontinued by the Company in accordance with Section 3.1.6 following, and later restored, restoration of Service will be subject to all applicable reconnection or reestablishment charges.

3.1.3 Advance Payments

To safeguard its interests, the Company may require a Buyer to make an Advance Payment before Services are furnished. The Advance Payment will not exceed an amount equal to the Nonrecurring Charge(s) and one month's charges for the Service. The Advance Payment will be credited to the Buyer's initial bill. An Advance Payment may be required in addition to a deposit.

3.1.4 Jurisdictional Reporting Requirements

3.1.4.1 For those circumstances in which the Company cannot determine the jurisdictional nature of Buyer traffic, the Company may require the Buyer to provide a projected estimate of its traffic, expressed as a percent of interstate use factor ("the PIU Factor") for the split between interstate and intrastate jurisdictions.

3.1.4.2 If a PIU Factor is required, unless otherwise agreed to in writing, the Company will rely exclusively on the PIU Factor. Company has no obligation to – and will not – verify or guarantee the correctness of Buyer's estimate. The Company reserves the right to audit a Buyer's traffic.

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893

ACCESS SERVICE

3. PAYMENT AND BILLING (Cont'd)

3.1 Payment Arrangements (Cont'd)

3.1.5 Deposits

3.1.5.1 To safeguard its interests, the Company may require a Buyer to make a deposit to be held as a guarantee for the payment of charges. A deposit may be requested prior to providing Service(s) or at any time after the provision of a Service to the Buyer. A deposit does not relieve the Buyer of the responsibility for the prompt payment of bills as provided for in this Tariff. The deposit will not exceed an amount equal to:

(a) two months' charges for a Service or facility which has a minimum payment period of one month; or

(b) the charges that would apply for the minimum payment period for a Service or facility which has a minimum payment period of more than one month; except that the deposit may include an additional amount in the event that a termination charge is applicable.

3.1.5.2 A deposit may be required in addition to an Advance Payment.

3.1.5.3 When a Service is discontinued, the amount of a deposit, if any, will be applied to the Buyer's account and any credit balance remaining will be refunded. Before the Service is discontinued, the Company may, at its option, return the deposit or credit it to the Buyer's account.

3.1.5.4 Simple Interest shall accrue on a deposit and shall be paid at the time the deposit is either refunded or applied to the Buyer's final bill for service. Simple Interest will be applied for the month or portion of a month from the date the Buyer deposit is received by the Company to and including the date such deposit is credited to the Buyer's account or the date the deposit is refunded by the Company.

3.1.5.5 Such a deposit may be refunded or credited to the Buyer's account after a one-year, prompt-payment record is established.

ACCESS SERVICE

3. PAYMENT AND BILLING (Cont'd)

3.1 Payment Arrangements (Cont'd)

3.1.5 Deposits (Cont'd)

3.1.5.6 In the event the provision of all service to the Buyer is terminated and the Company maintains a cash deposit from the Buyer, the deposit and any accrued, uncredited Simple Interest will be applied to any outstanding sums owed to the Company, and any remaining balance will be returned to the Buyer. If the amount of the deposit is insufficient to cover the balance due to the Buyer's account, the Company retains the right to collect any amounts owing after the deposit has been applied plus any costs related to the collection of any remaining balance.

(a) The Buyer will receive Simple Interest for each month or portion thereof that a deposit is held.

3.1.6 Discontinuance of Service

3.1.6.1 Upon nonpayment of any amounts owing to the Company, the Company may, by giving ten days' prior written notice to the Buyer, discontinue or suspend Service without incurring any liability.

3.1.6.2 In the Company's sole discretion, upon violation of any of the other material terms or conditions for furnishing Service, the Company may, by giving 10 days' prior notice in writing to the Buyer (or such shorter notice as may be provided elsewhere in this Tariff), discontinue or suspend Service without incurring any liability if such violation continues during the period.

3.1.6.3 Upon condemnation of any material portion of the facilities used by the Company to provide Service to a Buyer or if a casualty renders all or any material portion of such facilities inoperable beyond feasible repair, the Company, by giving notice to the Buyer, may discontinue or suspend Service without incurring any liability.

3. PAYMENT AND BILLING (Cont'd)

3.1 Payment Arrangements (Cont'd)

3.1.6 Discontinuance of Service (Cont'd)

3.1.6.4 Upon any governmental prohibition or required alteration of the Service(s) to be provided or any violation of any applicable law or regulation, the Company may immediately discontinue Service without incurring any liability.

3.1.6.5 Upon the Company's discontinuance of Service to the Buyer under the terms of this Tariff, the Company, in addition to all other remedies that may be available to the Company at law or in equity or under any other provision of this Tariff, may declare all future monthly and other charges which would have been payable by the Buyer during the remainder of the term for which such Service(s) would have otherwise been provided to the Buyer to be immediately due and payable.

3.1.7 Billing Disputes

3.1.7.1 General

(a) All bills are presumed accurate, and shall be binding on the Buyer unless written notice a good faith dispute is received by the Company within 90 days (commencing 5 days after the bill in question has been mailed or otherwise rendered per the Company's normal course of business). The bill shall be deemed to be correct, and Buyer shall be deemed to have waived any and all rights and claims with respect to both the bill and the underlying dispute, if a good faith dispute is not timely received. For the purposes of this Section, "notice of a good faith dispute" is defined as written notice to the Company's contact (which is listed on every page of this Tariff), containing sufficient documentation to investigate the dispute, including the account number under which the bill has been rendered, the date of the bill, and the specific items on the bill being disputed. A separate letter of dispute must be submitted for each and every individual bill that the Buyer wishes to dispute.

ACCESS SERVICE

3. PAYMENT AND BILLING (Cont'd)

3.1 Payment Arrangements (Cont'd)

3.1.7 Billing Disputes (Cont'd)

3.1.7.1 General (Cont'd)

(b) Any disputed charges must be paid in full prior to or at the time of submitting a good faith dispute and failure to tender payment for disputed invoices or portions thereof is a sufficient basis for the Company to deny a dispute for the Buyer's failure to demonstrate that the dispute was made in good faith.

(c) If payment of the originally billed amount is not made when due – whether or not a notice of dispute has been submitted – Buyer will incur a Late Payment Fee on the unpaid amount at the rate of 1.5% per month on the total unpaid balance.

(d) The Company will be the sole judge of whether any bill dispute has merit. If the Company does not respond to the Buyer's notice of dispute within 60 days after receiving such notice, the dispute will be deemed rejected. Buyer has the right to pursue any and all legal remedies if dissatisfied with Company's determination.

3.1.7.2 Late Payment Fee

All portions of the bill, whether disputed or undisputed, must be paid by the payment due date to avoid assessment of a Late Payment Fee.

3.1.7.3 Adjustments or Refunds to the Buyer

(a) In the event that the Company resolves the billing dispute in favor of a Buyer who has paid the total amount of the disputed bill as required by this Tariff, the Company will credit the Buyer's account for any overpayment by the Buyer, together with Simple Interest, in the billing period following the resolution of the dispute.

(b) In the event that the Company resolves the billing dispute in favor of a Buyer who has paid the total amount of the disputed bill as required by this Tariff, but canceled the service, the Company will issue a refund of any overpayment by the Buyer, together with Simple Interest.

ACCESS SERVICE

3. PAYMENT AND BILLING (Cont'd)

3.1 Payment Arrangements (Cont'd)

3.1.7 Billing Disputes (Cont'd)

3.1.7.3 Adjustments or Refunds to the Buyer (Cont'd)

(c) All adjustments or refunds provided by the Company to the Buyer at the Buyer's request, or provided by the Company to the Buyer by way of compromise of a billing dispute, and which are accepted by the Buyer, are final and constitute full satisfaction, settlement, and/or compromise of all of the Buyer's claims for the billing period for which the adjustment or refund was issued.

3.1.7.4 Attorneys' Fees

In the event that the Company pursues a claim in Court or before any regulatory body arising out of a Buyer's refusal to make payment pursuant to this Tariff, including refusal to pay for services originating or terminating to a Volume End User, Buyer shall be liable for the payment of the Company's reasonable attorneys' fees expended in collecting those unpaid amounts.

3.2 Access Billing

3.2.1 Billing Standards

3.2.1.1 The Company may produce Access bills in general conformance with accepted industry standards for companies that do not provide bills under a mechanized Carrier Access Billing System/Billing Output Specification (CABS/BOS) equivalent system.

3.2.1.2 An Access bill is comprised of one or more billing elements, including usage sensitive charges, distance sensitive charges, flat-rated charges, individual-case-based (ICB) charges, and Nonrecurring or special miscellaneous charges that may be appropriate.

ACCESS SERVICE

3. PAYMENT AND BILLING (Cont'd)

3.2 Access Billing (Cont'd)

3.2.2 Distance Charges

3.2.2.1 Where charges for an Access Service are based on distance, the distance between two points is measured as airline distance between the Company's Points of Presence as listed in the National Exchange Carrier Association FCC No. 4, Wire Center Tariff or Local Exchange Routing Guide (LERG) issued by Telcordia.

3.2.2.2 The airline distance between any two Points of Presence is determined as follows:

(a) Obtain the "V" (vertical) and "H" (horizontal coordinates for each POP from the above referenced document(s),

(b) Compute the difference between the "V" coordinates of the two POPs; and the difference between the two "H" coordinates,

(c) Square the difference obtained in (b) above,

(d) Add the square of the "V" difference and the square of the "H" difference obtained in (c) above,

(e) Divide the sum of the squares by 10. Round to the next higher whole number if any fraction is obtained,

(f) Obtain the square root of the whole number result obtained in (e) above. Round to the next higher whole number if any fraction is obtained. This is the airline mileage applicable.

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899

ACCESS SERVICE

3. PAYMENT AND BILLING (Cont'd)

3.2 Access Billing (Cont'd)

3.2.3 Suspension, Termination or Refusal of Service

3.2.3.1 Service may be suspended or terminated for nonpayment of any bill or deposit until such bill or deposit is paid. If Service is suspended or terminated for nonpayment, the Buyer must remit a connection charge as well as any payment due and any deposit requested by the Company prior to reconnection or reestablishment of Service.

3.2.3.2 When a Buyer refuses to pay bills rendered or deposits requested, the Company may refuse to process existing orders for Service(s) or to accept new orders for Service.

3.2.3.3 The Company reserves the right to suspend, terminate or refuse Service(s) in the event of unauthorized use of Service(s) or facilities received from the Company, where the Buyer is indebted to the Company for previously furnished Service(s) or facilities or where the use of Service(s) or facilities have been abandoned.

ACCESS SERVICE

4. CONSTRUCTIVE ORDERING

4.1 General

By receiving from or handing off traffic to the Company's Network, the Buyer will have constructively ordered the Company's Switched Access Service and is responsible for all charges incurred in connection with the use of such Service.

4.1.1 Constructive Ordering

A Constructive Order is initiated when Calls are delivered to or accepted from the Company by a Buyer. By accepting Traffic from the Company or delivering Traffic to the Company's Network, the Buyer agrees that it has ordered, and will pay for, the Company's Services pursuant to this Tariff. Similarly, the selection of an IXC as a PIC constitutes a Constructive Order for Switched Access Service by that IXC.

5. SWITCHED ACCESS SERVICE

5.1 General

Switched Access Service provides for the use of switching and/or transport facilities or services to enable a Buyer to utilize the Company's Network to accept Calls or to deliver Calls. Switched Access Service may be provided via a variety of means and facilities, where available, to be determined by the Company at its sole discretion.

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901

ACCESS SERVICE

5. SWITCHED ACCESS SERVICE (Cont'd)

5.1 General (Cont'd)

5.1.1 Rate Categories and Descriptions

The Company's Interstate Switched Access Service rate elements include the following rate elements or their functional equivalents:

5.1.1.1 Switching:

5.1.1.1 (a) "Tandem Switching" denotes an intermediate switching function between the originating point of a Call and its final destination. This function can be provided by a tandem switch or functionally equivalent equipment.

5.1.1.1 (b) "Local Switching" denotes the switching functionality closest to the calling party or called party, as applicable. This function can be performed by a switch or functionally equivalent equipment. These switching functions are charged on a per-MOU basis, unless otherwise specified by the Company.

5.1.1.1 (c) "Information" services denote functions associated with the provision of directory assistance and call routing. Examples include Information/intercept Surcharges.

5.1.1.2 Transport: Charges for the transmission of Calls.. Transport rate categories consist of two elements: a Transport Termination per path per MOU charge (in some ILEC areas, the rate may be per termination) and a Transport Facility rate per mile per MOU charge.

5.1.1.3 Network Charges: Charges that recover a portion of the costs of connecting the End User to the telephone network. Examples include the Primary Interexchange Carrier Charge and Transport Interconnection Charge.

ACCESS SERVICE

5. SWITCHED ACCESS SERVICE (Cont'd)

5.1 General (Cont'd)

5.1.1 Rate Categories and Descriptions

5.1.1.4 800 Database Access Service: 800 Database Access Service is provided with FGD Switched Access Service. When a 1+800 series+NXX-XXXX call is originated by an End User, the Company will utilize the Signaling System 7 (SS7) network to query an 800 database to perform the identification function. The Call will then be routed to the identified End User over FGD Switched Access. The 800 series includes the following service area codes: 800, 888, 877, 866, 855, 844, 833, and 822.

The manner in which 800 Database Access Service is provided is dependent on the availability of SS7 service at the end office from which the service is provided as outlined following:

When 800 Database Access Service originates at an end office equipped with Service Switching Point (SSP) capability for querying centralized data bases or at a non-SSP equipped end office that can accommodate direct trunking of originating 800 service Calls, all such service will be provisioned from that office.

When 800 Database Access Service originates at an end office not equipped with SSP End User identification capability, the 800 services Call will be delivered to the access tandem on which the end office is homed for 800 series service and which is equipped with SSP feature to query centralized databases.

When 800 Database Access Service originates at an end office equipped with SSP capability that is not capable of accommodating direct trunking of originating 800 series (other than the 800 service access codes) Call will be delivered to the access tandem on which the end office is homed and which is equipped with the SSP feature to query centralized data bases.

Query charges as set forth in following are in addition to those charges applicable for the Feature Group D Switched Access Service.
Charges for this service are provided in Section 7.2.3.

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ACCESS SERVICE

5. SWITCHED ACCESS SERVICE (Cont'd)

5.1 General (Cont'd)

5.1.1 Rate Categories and Descriptions (Cont'd)

5.1.1.4 800 Database Access Service (Cont'd)

The Commission has concluded that hoarding, defined as the acquisition of more toll free numbers that one intends to use for the provision of toll free service, as well as the sale of a toll free number by a private entity for a fee, is contrary to the public interest in the conservation of the scarce toll free number resource and contrary to the Commission's responsibility to promote ordinary use and allocation of toll free numbers.

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5. SWITCHED ACCESS SERVICE (Cont'd)

5.2 Switched Access Service Specifications – Company Requirements

5.2.1 Network Management

The Company maintains the right to apply protective controls in the provision of Switched Access Service. Generally protective controls would be taken as a result of occurrences such as failure or overload of Company or Buyer facilities, natural disasters, mass calling demands, or national security demands.

5.2.2 Transmission Specifications

Each Switched Access Service transmission path is provided with industry standard transmission for its type of service. The Company will work in cooperation with the Buyer to insure that those parameters are met. In the event the established specifications are not maintained, the Company may require immediate corrective action and may work independently or in cooperation with the Buyer to remedy the situation.

5.2.3 Testing

Acceptance Testing and Routine Testing shall be mutually arranged by the Company and the Buyer, as necessary.

5.2.4 Report Requirements

At the Company's request, the Buyer is responsible for providing reports to the Company, if applicable. Such reports include:

(a) Jurisdictional Reports – may be required when Buyer orders Access Service with both intrastate and interstate use so that charges may be apportioned in accordance with those reports. Whether such jurisdictional reports are necessary will be determined at the sole discretion of the Company.

(b) Buyer contact name(s) and telephone number(s) for order confirmation, order provisioning information, order negotiation, interactive engineering design, installation and billing.

ACCESS SERVICE

5. SWITCHED ACCESS SERVICE (Cont'd)

5.3 Rate Regulations

This section contains a brief description and the general regulations governing the rates and charges that apply for Switched Access Service.

5.3.1 Description and Application of Rates

Switched Access Service rates are generally of two types; Recurring Charges and Nonrecurring Charges. Recurring Charges include usage-based rates that are measured and billed on a per-minute of use (MOU) basis. Examples include the per-MOU Switched Access charges that are included in this Tariff. Recurring Charges also include "flat" rates that are charged one time per month, regardless of usage. Nonrecurring Charges are one-time charges that apply for a specific work activity. Examples would include charges for technician charges for maintenance and repair.

5.3.2 Contracts and Individual Case Basis (ICB) Rates

In lieu of the rates terms and/or conditions otherwise set forth in this Tariff, the Company's services may be established and provided at negotiated rates on an Individual Case Basis (ICB), taking into account any factors the Company deems necessary or appropriate, including the nature of the facilities and services involved, the costs of construction and operation, the volume of traffic, the length of service commitment and use of facilities. Such ICB arrangements will be established solely at the Company's discretion. ICB rates, terms, conditions, services, or charges will be made available to similarly situated Buyers on a non-discriminatory basis.

In addition to any rate or charge established by the Company, the Buyer will be responsible for any Recurring or Nonrecurring Charges imposed by local exchange telephone companies incurred by or on behalf of the Buyer in establishing and maintaining service. Such charges may be billed by the Company or directly by the local exchange telephone company, at the Company's option.

5.3.3 Pass-Through of Taxes and Regulatory Fees

The Company may, in its discretion and on a non-discriminatory basis, assess fees and surcharges, including, but not limited to state and federal taxes and regulatory fees.

906

ACCESS SERVICE

6. MISCELLANEOUS SERVICES

6.1 General

Miscellaneous services may be provided by the Company at the request of a Buyer on an Individual Case Basis if such service arrangements are not offered under other sections of this Tariff and the service is available and within the Company's technical, personnel and capital resources. Charges may include Nonrecurring, Recurring and/or special rates and charges, or combinations thereof.

6.1.1 Presubscription

Presubscription is the process by which an End User may select and designate an IXC for the provision of interstate telephone service. This IXC is referred to as the End User's Presubscribed Interexchange Carrier. If an unauthorized change takes place, the IXC that requested the change will be subject to an Unauthorized PIC Change Charge in addition to the normal PIC Change Charge.

6.1.2 Maintenance of Service

The Buyer shall be responsible for payment of a maintenance of service charge when the Company dispatches personnel to the Buyer's location and trouble is found to be with Buyer facilities or equipment. Such charge will be billed on a time and materials basis, reflecting hourly rates for the Company's technicians, and materials charges established on an ICB.

907

ACCESS SERVICE

6. MISCELLANEOUS ACCESS SERVICE

6.1 General (Cont'd)

6.1.3 International Blocking Service

Upon request, the Company will provide International Blocking Service at appropriately equipped Company Points of Presence. On each line or trunk for which International Blocking Service is ordered, the Company will block all direct-dialed international Calls that use the call sequence of 011+ or appropriate access code dialing arrangements for international calling. Terms and pricing for such service will be established on an ICB basis.

6.1.4 900 Blocking Service

Upon request, the Company will provide 900 Blocking Service to End Users at appropriately equipped POPs. On each line or trunk for which 900 Blocking Service is ordered, the Company will block all direct dialed Calls placed to a 900 number. Terms and pricing for such service will be established on an ICB basis.

6. MISCELLANEOUS ACCESS SERVICE

6.1 *General (Cont'd)*

6.1.5 Access Order Charge

The Access Order Charge is applied to all Buyer requests for new Switched Access Service. In addition, the Access Order Charge is applicable to Buyer requests for additions, changes or rearrangements to existing Switched Access Service with the following exceptions:

6.1.5.1 The Access Order Charge does not apply:

6.1.5.1.1 To administrative changes as set forth following.

6.1.5.1.2 When a change to a pending order does not result in the cancellation of the pending order and the issuance of a new order.

6.1.5.1.3 When the Interim NXX Translation charge is applicable.

6.1.5.1.4 When a Presubscription Charge is applicable.

6.1.5.1.5 When a Company initiated network reconfiguration requires a Buyer's existing Access Service to be reconfigured.

6.1.5.1.6 When a service with an ICE rate is converted to a similar service with a non-ICE tariff rate prior to the expiration of the ICB.

6.1.5.1.7 When a Billing Name and Address Order charge is applicable. When a 900 Blocking Service charge is applicable.

6.1.5.1.8 When Payphone Service Providers (PSPs) obtain Coin Supervision Additive Service in conjunction with local exchange service lines for the provision of pay telephone service.

The Access Order Charge will be applied on a per order basis to each order received by the Company or copy of an order received by the Company except by the Company applying the Interim NXX Translation charge, and is in addition to other applicable charges as set forth in this and other sections of this Tariff. The Access Order Charge will be applied on a per order basis for any change, rearrangement or addition to the delivery of signaling to an existing STP Port. The Access Order Charge will be applied on a per order basis for any change, rearrangement or addition of CICs to an existing trunk group.

ACCESS SERVICE

7. RATES AND CHARGES

7.1 General

Rates for Access Service and the other services listed in this Tariff will include usage charges for the rate elements, applicable Recurring Charges, Nonrecurring Charges and miscellaneous charges or combinations of same and are identified herein.

7.2 Switched Access Service

7.2.1 Recurring Rate Elements:

(a) Local Switching, per MOU

(b) Tandem Switching, per MOU

(c) Tandem-Switched Transport Facility, per MOU/mile

(d) Tandem-Switched Transport Termination, per MOU

(e) Common Transport Multiplexing, per MOU

(f) Common Trunk Port, per MOU

(g) Information Surcharge (if applicable)

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910

ACCESS SERVICE

7. RATES AND CHARGES (Cont'd)

7.2 Switched Access Service (Cont'd)

7.2.2 Switched Access Rates

(a) Local Switching, per MOU	$0.025829
(b) Tandem Switching, per MOU	$0.003117
(c) Tandem-Switched Transport Facility, per MOU/mile	$0.000237
(d) Tandem-Switched Transport Termination, per MOU	$0.001232
(e) Information Surcharge (if applicable), per 100 Access minutes	$0.0380

Mileage for the Tandem Switched Facility rate will be calculated in accordance with Section 3.2.2.

The Volume End User Composite Rates apply when the MOUs originated or terminated by the Company on behalf of a particular Buyer meets or exceeds 5,000,000 MOU per month to a particular Volume End User.

Volume End User Composite Rate, originating and terminating, 5,000,000 – 25,000,000 MOUs	$0.014 per MOU
Volume End User Composite Rate, originating and terminating, 25,000,001 – 100,000,000 MOUs	$0.008 per MOU
Volume End User Composite Rate, originating and terminating, over 100,000,001 MOUs	$0.0055 per MOU

7.2.3 800 Database Access Service

Per query $0.0054

911

7. RATES AND CHARGES (Cont'd)

7.3 Other Services

7.3.1 Technician Hourly Rates

(a) Rate per hour/per technician: $75.00 per hour or portion of an hour.

7.3.2 Unauthorized PIC Change Charge

(a) $500.00 per unauthorized PIC change request submitted by IXC.

7.3.3 Access Order Charge

Per Order $130.00

912