STATE OF SOUTH DAKOTA : § COUNTY OF BUFFALO	)	IN CIRCUIT COURT FIRST JUDICIAL CIRCUIT CIV. 11-8

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

PUBLIC UTILITIES COMMISSION'S OPPOSITION TO NATIVE AMERICAN TELECOM, LLC'S APPLICATION FOR STAY OF ADMINISTRATIVE PROCEEDINGS PENDING JUDICIAL REVIEW

The South Dakota Public Utilities Commission (Commission), by and through its counsel, submits the following Brief in Opposition to Native American Telecom, LLC's (NAT) Application for Stay of Administrative Proceedings Pending Judicial Review (Application for Stay).

PROCEDURAL HISTORY

On May 4, 2010, the Commission received a complaint from Sprint Communications Company, LP (Sprint) against NAT. In its complaint, Sprint sought: 1) a determination that the Commission has the sole authority to regulate Sprint's intrastate interexchange services and that NAT lacks authority to bill Sprint for switched access services without a Certificate of Authority and valid tariff on file with the Commission; 2) a declaration that because the Commission has the sole authority over Sprint's intrastate interexchange services, the Crow Creek Sioux Tribe Utility Authority is without jurisdiction over Sprint; and 3) a determination that NAT must repay Sprint the amounts it inadvertently paid NAT for unauthorized and illegal switched access charges. On May 5, 2010, Sprint filed an Amended Complaint.

Intervention was subsequently granted to the South Dakota Telecommunications Association (SDTA), South Dakota Network, LLC (SDN), Midstate Communications (Midstate), AT&T Communications of the Midwest, Inc., (AT&T), and the Crow Creek Sioux Tribe Utility Authority (CCSTUA). On June 1, 2010, NAT filed a Motion to Dismiss. On June 29, 2010, NAT filed a Motion to Stay based on the doctrine of tribal exhaustion. After briefing and oral arguments, the Commission denied the Motion to Stay (Order Denying Stay).

Throughout this brief, the Commission will refer to four different proceedings: 1) the proceeding before the Commission that is the subject of this stay request (Sprint's PUC Complaint); 2) the proceeding filed by NAT against Sprint in Tribal Court (NAT's Tribal Court Complaint); 3) the proceeding filed by Sprint against NAT in federal district court (Sprint's Federal Court Complaint); and the appeal of the Commission's Order Denying Stay to this Court (NAT's Intermediate Appeal to Circuit Court).

ARGUMENT

NAT is requesting a stay of the proceedings before the Commission pending judicial review. As the basis for its request, NAT states that the Commission's order which denied NAT's motion to stay encompasses the legal issue of whether South Dakota state courts and administrative agencies should recognize the tribal exhaustion doctrine and that the decision was made "without guidance from either a South Dakota Circuit Court or the South Dakota Supreme Court."

I. NAT'S REQUEST FOR A STAY IS UNTIMELY

The Commission agrees with Sprint that NAT's application for a stay is not timely.[1] As pointed out in Sprint's brief, SDCL 1-26-32 requires that an application for a stay of an agency decision may be made only within ten days of the receipt of the

[1] *See* Sprint's Opposition to NAT's Application for Stay of Administrative Proceedings Pending Judicial Review at 1-3.

agency's order.[2] NAT received the Order Denying Stay on May 4, 2011,[3] which is the date of service listed on the certificate of service at the end of the Commission's Order Denying Stay. It is clear from SDCL 1-26-32 that an agency's decision is effective ten days after the date of receipt of the decision by the parties. Thus, any application for a stay must be made within ten days of the date of receipt and NAT failed to meet that deadline.

II. NAT'S REQUEST FOR A STAY SHOULD BE DENIED

1. The Commission properly denied NAT'S request for a stay.

If the Court determines that it will proceed to the merits of the request, the Commission requests that the Court deny NAT's request for a stay. The Commission properly denied NAT's request for a stay and Sprint's PUC Complaint should be allowed to go forward. In its Order Denying Stay, the Commission noted its extensive jurisdiction over intrastate telecommunications. The Commission cited to the South Dakota Supreme Court's decision in *Cheyenne River Sioux Tribe Telephone Authority v. Public Utilities Commission of South Dakota*, 1999 S.D. 60, 595 N.W.2d 604. In that case the

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[2] The statute provides:

> 1-26-32. When agency decision in contested case becomes effective--Application for stay pending appeal--Time--Granting of further stay--Security or other supervision--Inapplicability to determinations of benefits under Title 61. Any agency decision in a contested case is effective ten days after the date of receipt or failure to accept delivery of the decision by the parties. An application to the circuit court for a stay of the agency's decision may be made only within ten days of the date of receipt or failure to accept delivery of the agency's decision. Upon receiving a timely application for a stay and notice of hearing thereon, the court may enter a temporary stay pending a hearing on the application. Following a hearing, the court may order a further stay, pending final decision of the court. The court, as a condition to granting a stay, may require the appellant to furnish a bond or other such security or order supervision as the court may direct to indemnify or protect the state or agency or any person from loss, damage, or costs which may occur during the stay. This section does not apply to determinations of benefits made by the Department of Labor pursuant to Title 61.

[3] *See* NAT's Notice of Appeal at 1 in which NAT states that the Commission Order Denying Motion to Stay was "provided to NAT on May 4, 2011."

Supreme Court found the following:

> The regulatory scheme of telecommunications services specifically grants PUC authority and jurisdiction over intrastate facilities. *See* 47 USC §152(b). The authority of PUC is extensive and crucial to the overall regulatory scheme. *See* SDCL ch 49-31. Among other things, it has "general supervision and control of all telecommunications companies offering common carrier services within the state to the extent such business is not otherwise regulated by federal law or regulation." SDCL 49-31-3.

Id. at ¶ 21, 595 N.W.2d at 609. As explained in the Commission's order, our Supreme Court rejected arguments that the Commission infringed on the Cheyenne River Sioux Tribe Telephone Authority's exercise of self-government with respect to the portion of the telephone exchange located on the Cheyenne River Sioux Indian Reservation when the Commission did not approve the sale of the exchange to the tribal telephone authority. The Supreme Court found that the "extensive congressional and legislative authority authorizes PUC to regulate the activities of US WEST and its sale of telephone exchanges, whether on or off the reservation." *Id.*

In addition, the Commission properly recognized that the doctrine of tribal exhaustion is a prudential, not jurisdictional rule. It is a doctrine is based on the principle of comity. *See Strate v. A-1 Contractors*, 520 U.S. 438, 451 (1997). This is a federal doctrine that, if followed, results in a court deferring to the tribal court to give the tribal court the opportunity to determine its own jurisdiction. *Strate*, 520 U.S. at 451. In Sprint's Federal Court Complaint, the federal court *declined* to follow the doctrine of tribal exhaustion and issued an order *enjoining* the tribal court from hearing the matter. See *Sprint Communications v. Native American Telecom*, et al, 2010 WL 4973319 (D.S.D.) As stated in the Commission's Order Denying Stay, "[t]he Commission will not grant a stay pending proceedings in tribal court when it appears that the tribal court is barred from proceeding." Order

Denying Stay at 3.

The Commission further cited to the lack of any caselaw or statutory authority cited to by the parties that would show that the doctrine of tribal exhaustion has been "adopted by our state courts or by state law or that this doctrine is binding on a state administrative agency." *Id.* Based on the record in before the Commission, the Commission properly denied NAT's request for a stay.

2. NAT has failed to show that review of the final Commission decision would not provide an adequate remedy.

NAT's appeal of the Commission's Order Denying Stay is an appeal of an intermediate agency order. As an appeal of an intermediate agency order, NAT must demonstrate, pursuant to SDCL 1-26-30, that review of the final Commission decision would not provide an adequate remedy. This statute provides as follows:

> 1-26-30. Right to judicial review of contested cases--Preliminary agency actions. A person who has exhausted all administrative remedies available within any agency or a party who is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter. If a rehearing is authorized by law or administrative rule, failure to request a rehearing will not be considered a failure to exhaust all administrative remedies and will not prevent an otherwise final decision from becoming final for purposes of such judicial review. This section does not limit utilization of or the scope of judicial review available under other means of review, redress, or relief, when provided by law. A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy. (emphasis added)

The South Dakota Supreme Court has declared that "[w]hen the legislature provides for appeal to circuit court from an administrative agency, the circuit court's appellate jurisdiction depends on compliance with conditions precedent set by the legislature." *Clagget v. Dept of Revenue*, 464 N.W.2d 212, 214 (S.D. 1990). Accordingly, under SDCL 1-26-30, a condition precedent to obtaining review of an intermediate agency ruling requires NAT to show that review of the final agency decision would not provide an adequate remedy.

The Commission asserts that the provisions of SDCL 1-26-30 are jurisdictional and must be met. In a case involving a very similar statute, the Supreme Court of Iowa found that the failure of the appellant to show that review of the final agency action would not provide an adequate remedy was a jurisdictional defect. *Richards v. Iowa State Commerce Commission*, 270 N.W. 2d 616, 619 (Iowa 1978). In *Richards*, the statute in question provided, in relevant part, as follows:

> A preliminary, procedural, or intermediate agency action is immediately reviewable if all adequate administrative remedies have been exhausted and review of the final agency action would not provide an adequate remedy.

Id.

Due to a lack of showing that review of the final agency action would be inadequate, the Iowa Supreme Court found that the trial court should have dismissed the petition for judicial review. *Id.* at 624. The Court stated that "[s]ince review of agency action is purely statutory the 'procedure prescribed by the statutes must be followed in seeking the review especially those particulars which are jurisdictional or mandatory . . . .'" *Id.* at 619 (*quoting* 2 Am.Jur.2d Administrative Law § 716 at 618.) The Iowa Court further recognized that "[a] contrary rule 'would inundate the courts with innumerable appeals, initiated without statutory foundation, and frequently of a petty or unmeritorious character.'" *Id.* (*quoting McAuliffe v. Carlson*, 30 Conn. Supp. 118, 121, 303 A.2d 746, 748.)

NAT has failed to demonstrate that review of the Commission's final decision regarding Sprint's PUC Complaint will not provide an adequate remedy. NAT cites to costly discovery and interrogatory requests as a reason why it will be "adversely affected and aggrieved." NAT's Application for Stay at 3. However, as recognized in *Richards*, "expenses incident to completion of the administrative proceeding do not justify intermediate judicial review." *Richards*, 270 N.W. 2d at 620.

NAT also alleges it will be "adversely affected and aggrieved" by the Commission's Order Denying Stay because "the applicability of the 'tribal exhaustion doctrine' is an issue of first impression in South Dakota. . . ." *Id.* The Commission first notes that NAT has made no allegation that the issue regarding the doctrine of tribal exhaustion will be unable to be presented to an appellate court after the Commission has made its final decision.[4] In *Richards*, the Iowa Supreme Court found that if an issue raised in the intermediate proceeding could be heard in the final review this constitutes "telling proof that final review is an adequate remedy." *Richards*, 270 N.W.2d at 621. Second, as noted in the Commission's order denying NAT's request for a stay, NAT argued before the Commission that the Commission has discretion on whether to invoke the tribal exhaustion doctrine. *Order Denying Stay* at 2. Finally, as stated in the Commission's Order Denying Stay, it appears that the federal court hearing Sprint's Federal Court Complaint has stayed the entire proceeding in tribal court. *Id.* It would have made little sense for the Commission to have granted NAT's request for a stay of Sprint's PUC Complaint under these circumstances. If both the Commission and the Tribal Court are subject to court ordered stays, the end result may be that the parties are left without judicial remedies.

[4] The Commission further points out that NAT has not shown that it will suffer any irreparable harm if a stay is not granted.

CONCLUSION

For all of the reasons set forth above, the Commission respectfully requests that the Court deny NAT's Application for Stay of Administrative Proceedings Pending Judicial Review.

Dated at Pierre, South Dakota, this 16th day of June, 2011.

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