

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

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

BRIEF BY CROW CREEK TRIBAL UTILITY AUTHORITY (CCTUA) ON THE MOTION TO STAY AND ON THE MOTION TO DISMISS FILED BY NATIVE AMERICAN TELECOM, LLC IN THE MATTER OF IN RE: SPRINT COMMUNICATIONS COMPANY, LP (“SPRINT”) V. NATIVE AMERICAN TELECOM, LLC (“NAT”)

Crow Creek Tribal Utility Authority (CCTUA), by appearance of its undersigned counsel, Judith H. Roberts, hereby files its Brief to NAT’s Motion to Stay and Motion to Dismiss in the above captioned proceeding.

Introduction

The case before the Public Utilities Commission (PUC) should be dismissed or stayed based upon two different but fundamentally complimentary federal policies and well established laws; (1) The Crow Creek Sioux Tribe and the CCTUA has appropriate and legal regulatory and adjudicatory authority over the issues raised by Sprint and NAT and should be given the opportunity to hear allegations and adjudicate them instead. As well, civil adjudication of this dispute is proper before the CCTUA and the Crow Creek Sioux Tribal Court. (2) Tribal courts and administrative commissions should be given the opportunity to hear allegations and adjudicate them before being challenged in a federal court proceeding (what is commonly known as the tribal exhaustion doctrine). Even if, *ad arguendo* the Crow Creek Tribal Utility Authority lacks jurisdictional authority the appropriate venue to resolve the current dispute would be before a federal

district court and in a federal action and not an administrative complaint before an administrative body under South Dakota state law and authority.

Factual Background

Native American Telecom, LLC (NAT) is a full service telecommunications carrier that is owned Fifty-One (51%) percent by the Crow Creek Sioux Tribe, with other owners being WideVoice Communications, Inc., a competitive local exchange carrier and Native American Telecom Enterprise, LLC, a telecommunications development company. The company, NAT, provides high-speed Internet access, basic telephone and long distance services on the Crow Creek reservation.

As a tribally-owned enterprise, providing service exclusively on the Crow Creek reservation, NAT obtained authorization from the Crow Creek Tribal Utility Authority (CCTUA) to provide telecommunication services on the Crow Creek reservation. The CCTUA is the tribal authority, duly established by the Crow Creek Tribal Council to regulate utility services, including but not limited to, telecommunications. NAT has two tariffs on file governing termination of traffic that is the subject of the Complaint: one with the FCC (interstate) and one with the Crow Creek Tribal Utility Authority. In October 2009, NAT commenced operations and currently provides high-speed Broadband Internet access, basic telephone and long distance service to tribal members on the Crow Creek Reservation. NAT has physical offices, telecommunications equipment and towers located on the Crow Creek Reservation, including on land held in federal trust for American Indians. Additionally, NAT provides telecommunications services **on and within** the Crow Creek Reservation including an Internet Library and Training Facility with free Internet service and telephone service to tribal members. In

September, 2010, NAT will be opening a new stand-alone Internet Library and Training Facility, which will include Internet stations, educational rooms for GED classes and personal development and training facilities. These actions take place within the exterior boundaries of the Crow Creek reservation and almost exclusively on federal lands reserved in trust for individual American Indians and for the Crow Creek Sioux Tribe. NAT does not provide services within the State of South Dakota outside the exterior boundaries of the Crow Creek reservation.

NAT has created numerous jobs and economic opportunities on the reservation that have become a catalyst for business and economic development on the reservation.

Sprint is a limited partnership that provides interexchange services and provides those services on the Crow Creek Reservation. Sprint paid NAT for charges owed until they received a billing of which the amount Sprint objected to at which time Sprint began to engage in self-help and refused to pay NAT.

After Sprint refused to pay NAT the money owed, NAT lodged a complaint to the CCTUA and in March 2010, the Tribal Utility Authority issued an order stating that Sprint was required to pay the charges, as per the tariff on file with the FCC and the CCTUA. The CCTUA order specifically provided Sprint with the opportunity to address their issues/concerns, but Sprint chose to ignore the Authority. In July 2010, NAT filed suit against Sprint in Tribal Court.

In May 2010, Sprint filed an Amended complaint with the PUC against NAT, and in August 2010, filed a limited appearance to Move to Dismiss the case filed in the Crow Creek Tribal Court and Sprint also has now filed a complaint in federal court.

Motion to Dismiss

The Crow Creek Tribal Utility Authority (CCTUA) objects to the PUC accepting jurisdiction in this matter.

It is a bedrock principle of American Indian law and United States federal policy that, absent Congressional authorization, state jurisdiction over the actions of American Indians and of Tribal Governments especially for actions arising on and within the exterior boundaries and on lands reserved in trust for American Indians is prohibited. This general rule reaches back to the 1832 United States Supreme Court ruling in *Worcester v. Georgia* 31 U.S. 515 (1832) and in sum states that state officials may not exercise any authority in Indian country without the express authorization of Congress. The Court ruled that Indian tribes have the inherent right to regulate their internal affairs and state officials may intervene in those affairs only with congressional consent. The exercise of state jurisdiction over Indians in Indian country, the Supreme Court explained in 1987, "would interfere with tribal sovereignty and self-government," and is therefore preempted "as a matter of federal law." *Iowa Mutual Insurance Co. v LaPlante*, 480 U.S. 9, 15 (1987).

Although the general rule announced in *Worcester* has been relaxed by subsequent Supreme Court decisions, a state may enforce its laws without congressional consent only if two tests are met: the *federal preemption* and the *infringement* tests. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980). In the instant case these tests are insurmountable by Sprint as the facts at issue in this case clearly deal with the ability for the Crow Creek Sioux Tribe to pass laws and administer these laws through its own utility commission and this case directly effects the health, safety and welfare of the

Crow Creek Tribe and its members. These actions took place within the exterior boundaries of the reservation and on lands held in trust for American Indians and the Crow Creek Tribe.

The application of South Dakota state law through the South Dakota state PUC is clearly preempted as a matter of basic federal Indian law. In this case federal and tribal interests promoting tribal self-government and tribal self-sufficiency are of paramount importance as evidenced by the Crow Creek Tribe's creation of a tribal utility authority and the creation of a legal and administrative process by which to administer complaints regarding public utilities who operate within the boundaries of the Crow Creek Reservation. Indeed, the CCTUA has the tariff at issue on file with the Federal Communications Commission and has been approved to carry out regulation of telecommunications within the reservation. The application of South Dakota *vis-à-vis* a PUC hearing on the matter is preempted and the PUC should not accept jurisdiction in this case. The appropriate legal standards and laws which are applicable to this case arise from the Crow Creek Tribe and applicable federal regulations not South Dakota state law or standards.

As well, the application of South Dakota law infringes upon substantial interests of the Crow Creek Sioux Tribe and therefore fails the second standard for the application of South Dakota state law through the action of the PUC and the application of state standards even if they are laws that are procedural in nature. The Crow Creek Tribe has exercised its sovereign powers to create and administer a utility commission and has passed applicable laws and standards that should be applied via the tribal utility. NAT does business within the exterior boundaries of the Crow Creek Reservation and operates

on lands reserved in trust for American Indians. The Crow Creek tribe therefore has a substantial interest in regulating the conduct of telecommunications agencies that provide services on the Crow Creek Reservation and to Crow Creek tribal members. These interests are substantial and cannot be overcome by the interest of the PUC, as the tribe is clearly regulating conduct that occurs within its reservation and with its members.

Sprint, under the facts of this case, cannot show that the tribe's regulatory jurisdiction has been federally preempted and that the application of PUC jurisdiction in this case would not infringe upon the substantial interests of the Crow Creek Tribe to regulate telecommunications conduct within the exterior boundaries of the Crow Creek Reservation. It is a matter of general Federal Indian law that state law is not applicable to Reservation Indians and to Tribal governments since federal and tribal interests in promoting tribal self-government and economic self-sufficiency outweigh any interests the state might have. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144 (1980); *Nevada v. Hicks*, 121 S.Ct. 2304, 2311-12 (2001). Therefore, jurisdiction before the PUC in this case is improper as the state's regulatory authority is federally preempted and the application of PUC jurisdiction and South Dakota law would substantially infringe upon the rights of the Crow Creek Sioux Tribe.

The PUC and the state of South Dakota also do not have adjudicatory jurisdiction for disputes that arise upon and within the exterior boundaries of the Crow Creek Reservation, especially on land that is held in federal trust status for American Indians. It is, once again, a matter of fundamental federal American Indian Law that a state's adjudicatory authority on an Indian reservation cannot exceed its regulatory authority. *Williams v. Lee*, 358 U.S. 217 (1959). This principle has been recently restated, albeit in a

converse application in *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 128 S. Ct. 2709 (2008), where tribal court jurisdiction was limited because the tribe lacked regulatory jurisdiction over non-Indian land within the reservation boundaries and therefore also lacked adjudicatory jurisdiction. As argued above, the Crow Creek Sioux Tribe has appropriate regulatory authority and jurisdiction in this case and has created a public utilities commission of its own with implementing laws and regulations to regulate conduct of telecommunications companies who operate within the exterior boundaries of the reservation and who provide services to tribal members. Since the state of South Dakota does not have regulatory authority in this matter it also therefore does not have *a fortiori* adjudicatory jurisdiction through the PUC, or through the exercise of the state court system. An adjudication before the PUC is therefore improper since it has neither regulatory or adjudicatory jurisdiction over the matter in dispute.

In addition, the state through the PUC does not have civil adjudicatory jurisdiction to hear this dispute based upon the United States Supreme Court's decision in *Montana v. U.S.*, 450 U.S. 544, 565-66 (1981), since the exercise of tribal adjudicatory jurisdiction is appropriate in this case under either one of the Montana exceptions. In short, the two Montana exceptions that allow for tribal civil adjudicatory jurisdiction are (1) the consensual relationship exception (2) the substantial tribal interest exception when the activity of the non-Indian "threatens or has some direct effect on the political integrity, political security or the health and welfare of the tribe". *Id.*

First, Sprint has entered into a consensual relationship through providing telecommunications services on the Crow Creek Reservation through its business dealings with NAT. Indeed, the charges at issue in this case were even paid for a short

period of time to NAT and it can easily be presumed that Sprint has therefore been in a consensual relationship with the Crow Creek Sioux Tribe and with its tribal members with the exterior boundaries of the Crow Creek Reservation. The application of tribal adjudicatory jurisdiction in this case is therefore applicable under the first *Montana* exception.

Second, the actions of Sprint directly effect the political integrity and health safety and welfare of the Crow Creek Sioux Tribe, and therefore civil adjudicatory jurisdiction is appropriate before the tribal utility and the tribal court system and not before the PUC. By filing this action in the PUC, Sprint has essentially attacked the very ability for the Crow Creek Tribe to regulate and administer telecommunications on and within the Crow Creek reservation. The Crow Creek Tribe and its utility has lawfully created its own public utility commission and its own regulatory laws for telecommunications companies on the Crow Creek Reservation. Sprint through its attempt to “end run” the tribal utility and the tribal court process has leveled a direct threat at the political autonomy and authority of the Crow Creek Sioux Tribe to lawfully regulate conduct within the boundaries of the reservation which has a direct effect on the political integrity and economic security of the Crow Creek Sioux Tribe. The second *Montana* exception is therefore met and the PUC must abstain from hearing this case and dismiss the complaint outright.

The PUC does not have appropriate regulatory or adjudicatory authority in this case since state law in this matter has been federally preempted and the application of state law and jurisdiction would infringe upon the sovereign right of the Crow Creek Sioux Tribe to regulate conduct through the CCTUA. In addition, civil adjudicatory

authority in this case would be appropriately before the tribal court system, as is currently the case, under either one of the Montana exceptions argued above. The PUC should therefore dismiss the claim brought forward by Sprint and abstain from hearing this dispute.

Motion to Stay

There is a very important and significant difference between the Motion to Stay and the Motion to Dismiss that were filed with the PUC by NAT. The Motion to Stay is offered as a vehicle for the state to follow the Indian Abstention Doctrine (Tribal Exhaustion), while the Motion to Dismiss bypasses this doctrine and requires that the PUC address the question of jurisdiction.

The Indian Abstention Doctrine permits tribal courts to exercise *initially* exclusive jurisdiction over actions arising on the reservation, involving non-Indian parties and involving reservation affairs, until parties expend all available tribal remedies. In *National Farmers Union*, the Court listed three reasons for the exhaustion of tribal remedies. The Court recognized that exhaustion will: (1) promote the congressional policy of strengthening tribal self-governance; (2) serve the orderly administration of justice; and (3) provide the parties and court involved with the benefit of the tribal court's expertise. *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 856-57 (1985). All three of these purposes for exhaustion are aimed towards strengthening and validating the tribal system, a goal which the federal government has consistently encouraged.

In *Iowa Mutual*, the Court recognized that the first basis for the exhaustion of tribal court remedies, the policy encouraging tribal self-government, recognized that

Indian tribes retain attributes of sovereignty over both their members and their territory. *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987). In addition, the *Iowa Mutual* Court recognized that tribal civil jurisdiction over the actions of non-Indians on reservation lands is also an important part of tribal sovereignty. *Id.* At 18.

The second purpose of exhaustion, the orderly administration of justice, recognizes that exhaustion serves as a preventative measure against jurisdiction chaos by having parties first exhaust all available tribal remedies where a case involves reservation affairs. This present case is a great example of the very jurisdiction chaos and procedural nightmare the doctrine seeks to avoid. Presently there is a complaint in state forum filed with the PUC, there is a complaint filed with the CCTUA, a legal action filed in Crow Creek Sioux Tribal Court and Sprint has filed a federal complaint. The duplication is litigation is expending the time, resources and money of both state and tribe. As such, by the PUC granting the Motion to Stay and directing the parties to first exhaust all available tribal remedies, this Commission can assure the prevention of conflicting adjudications and wasted judicial resources, a result the Supreme Court sought to avoid in creating the Indian Abstention Doctrine.

State support for application of the Doctrine has been found both from the Supreme Court in *Iowa Mutual Insurance Co. v. LaPlante* and in recent federal court case law. The *Iowa Mutual* Court indicated that exhaustion applies to state when it used the phrase “any nontribal court.” *Iowa Mutual*, 480 U.S. at 16. The plain meaning of the term must encompass all courts that are not within the judicial systems of the various Indian Nations. In *Iowa Mutual*, the court looked toward an infringement analysis where an activity involved a reservation affair and the Court clearly sets forth its primary reason

for requiring exhaustion: the promotion of tribal self government. *Id.* At 16. The Court continued to focus on the infringement test and referred to both state, *Fisher v. District Court*, and federal courts, *Santa Clara Pueblo v. Martinez*, as cases for authority supporting abstention. *Iowa Mutual*, 480 U.S. at 16. Arguably, the Court was including states within the scope of application of the Doctrine.

Two federal courts that have addressed whether the application of the Indian Abstention Doctrine should be applied to the states and have adopted the view that the Doctrine should be applied to the states. *Bowen v. Doyle*, 880 F.Supp. 99 (W.D.N.Y. 1995) and *Tohono O'odham Nation v. Schwartz*, 837 F.Supp. 1024 (D.Ariz. 1993). The *Bowen* court found that the exhaustion rule should have equal application to state courts as well as federal courts. The court reasoned that litigation of reservation disputes "in a forum other than the tribe's simply 'cannot help but unsettle a tribal government's ability to maintain authority.' ...The same disruption occurs whether it is a federal or a state court that asserts jurisdiction over a civil dispute that is otherwise within the tribal court's authority." *Bowen v. Doyle*, 880 F.Supp. 99, 124 (W.D.N.Y. 1995). The *Schwartz* court, relying on the reasoning that "the question of tribal court jurisdiction should be determined, in the first instance, by the tribal court," stated that the action was improperly brought in state court prior to exhaustion of the issues in tribal court. *Tohono O'odham Nation v. Schwartz*, 837 F.Supp. 1024, 1033 (D.Ariz. 1993). These cases suggest that the Indian Abstention Doctrine should apply to the state where the claim involves a reservation affair. It is important to note that exhaustion does not divest the nontribal court of jurisdiction, but rather prevents litigants from racing to a state forum to avoid tribal remedies as occurred in this present case. Tribal court jurisdiction is limited

through treaty provisions, federal statutes and tribal code. If the tribe does not have jurisdiction over a matter then that determination should be made by the tribal court, with the critical point being that the determination must be made by the tribe, not for the tribe. The parties and the tribe involved in a dispute are very well aware that decisions made by tribal courts are subject to review by federal courts and as such the tribal court uses the federal rules of civil procedure and federal court law to make its determination in legal disputes.

The respect of either a state or tribe's laws goes hand in hand with the exercise of its sovereignty. It is essential that the tribe make the determination of what is crucial to protect tribal self-government and continued control over internal relations, because it is in the best position to make such a determination. This civil disputes involves NAT (company owned in majority by the tribe), the Crow Creek Tribal Government through the Crow Creek Tribal Utility Authority (internal relations, regulation and development), tribal economy (stable business environment, employment and economic development), goods and utility services provided on the reservation (infrastructure, phones, internet service, and learning centers), and it is critical to the Crow Creek Sioux Nation that their laws, utility authority, courts and sovereignty be recognized and respected. Involvement by the PUC, before the tribe is given the opportunity to address the jurisdiction issues in this matter, lies in direct conflict with all notions of tribal sovereignty.

CONCLUSION

For all the above stated reasons, the South Dakota Public Utility Commission should not accept jurisdiction in this matter. Crow Creek Tribal Utility Authority respectfully urges that the South Dakota Public Utility Commission grant the Motion to

Dismiss. If the PUC does not grant the motion to dismiss than the CCTUA respectfully requests the PUC to follow the federal courts' reasoned procedure and invoke the Indian Abstention Doctrine in this matter.

Dated this 23rd day of August, 2010.

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CERTIFICATE OF SERVICE

I, Judith H. Roberts, certify that on August 23, 2010, the **Brief by Crow Creek Tribal Utility Authority (CCTUA) on the Motion to Stay and on the Motion to Dismiss Filed by Native American Telecom, LLC in the Matter of in re: Spring Communications Company, LP (“Spring”) v. Native American Telecom, LLC (“NAT”)** was served via electronic mail upon the following:

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