

**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)	

Respondent Native American Telecom LLC’s Brief in Support of Motion to Dismiss

STATEMENT OF THE ISSUE

The issue before the South Dakota Public Utilities Commission (SDPUC or Commission) is whether Defendant Native American Telecom, LLC’s (NAT) Motion to Dismiss should be granted.

STATEMENT OF THE CASE

NAT respectfully requests that the Commission dismiss all proceedings in this action because proper regulatory jurisdiction and adjudicatory jurisdiction rests with the Crow Creek Tribal Court (Tribal Court).

STATEMENT OF FACTS

A. The Structure and Purpose of NAT

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

¹ For sake of clarity, it should be noted that NAT ENTERPRISE is a telecommunications development company and is a **separate and distinct entity** from NAT. The Tribe is a federally

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

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

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

recognized Indian tribe with its tribal headquarters located on the Crow Creek Sioux Tribe Reservation in Fort Thompson, South Dakota. WideVoice is a Competitive Local Exchange Carrier (CLEC). DeJordy Affidavit ¶ 3.

² The lack of sufficient telephone and other telecommunications services upon Native American reservations has been a long-standing problem. While 94% of all Americans have at least one telephone in their home, the Federal Communications Commission (FCC) has found that only 47% of Native Americans living on reservations or other tribal lands have telephone service. The FCC has determined that this lower telephone subscribership is "largely due to the lack of access to and/or affordability of telecommunications services in these areas" *Federal-State Joint Board on Universal Services: Promoting Development and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas, Twelfth Report and Order*, 15 FCC Red. 12208 (2000), at ¶¶ 20, 26 (2000 FCC Report). The FCC has also found that "by enhancing tribal communities' access to telecommunications, including access to interexchange services, advanced telecommunications, and information services, we increase tribal communities' access to education, commerce, government and public services." *Id.* at ¶ 23. See Tracey A. LeBeau, *Reclaiming Reservation Infrastructure: Regulatory and Economic Opportunities for Tribal Development*, 12 Stan. L & Pol'y Rev. 237, 238 (2001) ("Reservation infrastructures, including basic services such as water, electricity, gas and telecommunications, are currently incapable of supporting tribal populations").

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

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

As a result of the Approval Order, NAT properly filed two Access Service Tariffs (Access Tariff) governing termination of telephone traffic on the Reservation. One Access Tariff was filed with the Federal Communications Commission (FCC) for interstate traffic. A second Access Tariff was filed with the Tribal Utility Authority.⁶ DeJordy Affidavit ¶ 8.

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

³ The Telecommunications Plan is attached as “Exhibit 1” to NAT’s Brief in Support of Motion to Dismiss.

⁴ The Approval Order is attached as “Exhibit 2” to NAT’s Brief in Support of Motion to Dismiss. The Approval Order was signed by then-Crow Creek Tribal Chairman Brandon Sazue.

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

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

⁷ NAT has physical offices, telecommunications equipment, and telecommunications towers on the Reservation. NAT also provides a computer training facility with free Internet and telephone

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

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

service to tribal members. In September 2010, NAT will be opening a new stand-alone Internet Library and Training Facility, which will include Internet stations and educational facilities for classes. DeJordy Affidavit ¶ 10. The Tribe’s press release announcing the launch of its tribally-owned telephone and advanced broadband telecommunications system is attached as “Exhibit 3” to NAT’s Brief in Support of Motion to Dismiss.

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

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

¹⁰ Sprint has taken the position, despite its earlier Access Tariff payments and the applicability of lawful tariffs in effect, that the termination of traffic by NAT on the Reservation is not subject to

On March 29, 2010, the Tribal Utility Authority entered an Order agreeing with NAT and finding that Sprint’s “self-help” in refusing to pay NAT’s Access Tariff violated the “filed rate doctrine.”¹¹ DeJordy Affidavit ¶ 17. Specifically, the Tribal Utility Authority found that “[Sprint’s] self-help actions could jeopardize the ability of a carrier, like [NAT], to serve the essential telecommunications needs of the residents of the Crow Creek reservation.” The Tribal Utility Authority also held “[NAT] commenced providing essential telecommunications services . . . to the residents of the Crow Creek reservation pursuant to [the Tribal Utility Authority’s Approval Order]. . . . It is also a matter of public record that [NAT] has commenced offering new and critically needed services on the reservation.” DeJordy Affidavit ¶ 17.

The Tribal Utility Authority’s Order concluded by stating:

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

compensation, even though NAT incurs costs to terminate Sprint’s traffic. DeJordy Affidavit ¶ 16.

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

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

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

DISCUSSION OF LAW

I. THE COMMISSION SHOULD GRANT NAT’S MOTION TO DISMISS BECAUSE THE CROW CREEK SIOUX TRIBE HAS REGULATORY JURISDICTION AND ADJUDICATORY AUTHORITY IN THIS MATTER

A. Tribal Regulatory Jurisdiction and Adjudicatory Jurisdiction

Among the most vexing issues in Indian law is the scope of federal, tribal, and state civil *regulatory jurisdiction and adjudicatory jurisdiction* in Indian country. Since *Worcester v. Georgia*, 31 U.S. 515 (1832), the United States Supreme Court has struggled to articulate general principles to resolve these issues. Analysis of civil regulatory authority in Indian country invariably begins with identifying relevant codified statutes, and in some instances, pertinent treaty provisions. When Congress has directly spoken, its wishes must be honored. In most cases, however, no federal statute or treaty authorizes or prohibits explicit assertion of state or tribal regulatory power in a particular situation, and the issue will become whether, under general judge-made principles, states or tribes (or both), have that power.

The basic standards are summarized easily enough: (1) Congress possesses broad authority to establish the range of state, federal, and tribal authority in Indian country, including the power to delegate federal authority to tribes and the power to restore inherent tribal authority lost through application of federal policies; (2) tribes possess a substantial measure of inherent,

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

or non-congressionally conferred, authority over their members but somewhat limited power over nonmembers; (3) states may regulate nonmembers engaged in Indian country transactions with the resident tribe or its members unless the balance of federal, state, and tribal interests emanating from applicable federal statutes, regulations, treaties, or tribal self-government rights counsels preemption; (4) states may regulate purely nonmember activities within Indian country absent express congressional direction to the contrary; and (5) states generally may not regulate the Indian country activities of the resident tribe or its members absent exceptional circumstances or congressional authorization. *See generally, American Indian Law Deskbook (Fourth Edition)*, Conference of Western Attorneys General, Chapter 5 (2008).

In other words, it is a fundamental principle of 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. In *Worcester*, the Supreme Court found that Indian tribes have the inherent right to regulate their internal affairs and state officials may only intervene through congressional consent. Indeed, the exercise of state jurisdiction over Indians (in Indian country), “would interfere with tribal sovereignty and self-government,” and is preempted “as a matter of federal law.” *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 15 (1987).

A state court’s *adjudicatory jurisdiction* regarding Indian country-related disputes is generally subject to those same standards used to determine state *regulatory jurisdiction*. *Williams v. Lee*, 358 U.S. 217 (1959). Therefore, a “particularized inquiry” must be undertaken to determine the nature of the involved state, federal, and tribal interests and whether exercise of

such authority would, on balance, interfere more with federal and tribal interests than further state interests.

B. The Tribe Has Regulatory Jurisdiction In This Matter

The Supreme Court has made it clear that a state may enforce its laws without congressional consent only if two factors are satisfied - (1) federal preemption and (2) infringement. *See generally, Williams*, 358 U.S. at 217; *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980). In this case, both of these factors weigh in favor of tribal jurisdiction.

First, the application of South Dakota state law is *preempted* as a matter of fundamental Indian law. The Tribe is undoubtedly endowed with the inherent regulatory jurisdiction to establish the Tribal Utility Authority. The Tribal Utility Authority's purpose is to plan and oversee utility services on the Reservation and to promote the use of these services "to improve the health and welfare of the residents."

In furtherance of this purpose, the Tribe issued its Telecommunications Plan. The Tribal Utility Authority then issued its Order granting NAT the ability to provide telecommunications service on the Reservation subject to the jurisdiction of the laws of the Tribe. NAT properly filed two Access Service Tariffs (Access Tariff) governing termination of telephone traffic on the Reservation. One Access Tariff was filed with the Federal Communications Commission (FCC) for interstate traffic. A second Access Tariff was filed with the Tribal Utility Authority.

The Tribal Utility Authority created a legal and administrative process by which to administer complaints. Sprint refused to pay the lawfully-imposed Access Tariff for services rendered by NAT on the Reservation. As such, NAT invoked the Tribal Utility Authority's legal and administrative processes. The Tribal Utility Authority then properly entered an Order

finding that Sprint's self-help actions "could jeopardize the ability of a carrier, like [NAT], to serve the essential telecommunications needs of the residents of the Crow Creek reservation." As such, application of South Dakota law is *preempted* and the SDPUC should not accept jurisdiction.

Second, the application of South Dakota state law *infringes* upon substantial Tribal interests. After over one year of planning and infrastructure development, NAT launched one of the first new tribally-owned telephone systems in the United States. NAT provides telephone and advanced broadband service to residential and business customers on the Reservation. NAT has physical offices, telecommunications equipment, and telecommunications towers on the Reservation. NAT also provides a computer training facility with free Internet and telephone service to tribal members. In September 2010, NAT will be opening a new stand-alone Internet Library and Training Facility, which will include Internet stations and educational facilities for classes.

The telephone and advanced broadband network system on the Reservation enables the Tribe to pursue new economic development opportunities. The broadband network supports high-speed broadband services, voice service, data and Internet access, and multimedia. This telecommunications system is the Tribe's new vehicle for "paving the way for much-needed business, economic, social and educational development on the . . . Reservation."

In this case, both the *preemption* and *infringement* factors weigh in favor of tribal regulatory jurisdiction. As such, the Commission should not accept regulatory jurisdiction in this case.

C. The Tribe Has Adjudicatory Jurisdiction In This Matter

The seminal United States Supreme Court decision concerning state adjudicatory

jurisdiction in Indian country is *Williams v. Lee*, 358 U.S. 217 (1959). Under the *Williams* case and its progeny, a state's adjudicatory jurisdiction cannot exceed its regulatory jurisdiction. In this case, however, as outlined above, since the Tribe has proper regulatory jurisdiction, it also has proper adjudicatory jurisdiction.

The Supreme Court's decision in *Montana v. U.S.*, 450 U.S. 544 (1981), also weighs in favor of tribal adjudicatory jurisdiction. In *Montana*, the Supreme Court found two exceptions that allow for tribal adjudicatory jurisdiction – (1) the consensual relationship exception and (2) the substantial tribal interest exception when the activities of the non-Indian “threatens or has some direct effect on the political integrity, political security or the health and welfare of the tribes.” *Id.* at 565-66.

Sprint has entered into a consensual relationship by providing telecommunications services on the Reservation through its business dealings with NAT. The access charges at issue in this case were even paid to NAT by Sprint for a period of time. Clearly, Sprint has been in a consensual relationship with NAT, the Tribe, and the Tribe's members within the exterior boundaries of the Reservation. The application of tribal adjudicatory jurisdiction in this case is applicable under the first *Montana* exception.

Second, Sprint's actions directly threaten and have direct effects on the political integrity, political security, health, and welfare of the Tribe. By filing this SDPUC action, Sprint has attacked the Tribe's ability to regulate and administer telecommunications services on the Reservation. In sum, Sprint is denying the Tribe the ability to obtain modern telecommunications services in a rural, high-cost area where the lack of sufficient services has been a long-standing problem of epidemic proportions.

Sprint's actions beg the question – why does Sprint want to prevent the Tribe from enhancing its members' access to telecommunications services? Is it simply because Sprint does not want advanced telecommunications and informational services to prosper on the Reservation? Or is it because Sprint finds it economically advantageous to erect barriers to increased educational, commercial, health care, and public safety opportunities for the Tribe?

Whatever the answer, Sprint has never attempted to provide these opportunities despite the FCC's determination that the Tribe's unfortunate circumstances are "largely due to the lack of access to and/or affordability of telecommunications services in these areas." Conversely, NAT's efforts unquestionably enhance the Tribe's access to high-quality telecommunications services. NAT provides these critically-needed educational, commercial, health care, and public safety opportunities for the Tribe on the Reservation. Where Sprint has strenuously labored to prevent progress, NAT has succeeded in leading the way to growth and technological advancement.

The application of tribal adjudicatory jurisdiction in this case is also applicable under the second *Montana* exception. Sprint's actions directly threaten and have direct effects on the political integrity, political security, health, and welfare of the Tribe.

CONCLUSION

This dispute involves (1) NAT (a tribally-owned company), (2) NAT's actions on and within the exterior boundaries of the Reservation, (3) the Tribe's and Tribal Utility Authority's regulatory authority, (4) the Tribal Court's adjudicatory authority, (5) the Tribe's financial stability, (6) the Tribe's economic development efforts, (7) employment opportunities for the Tribe's members, and (8) the Tribe's sovereign immunity. Defendant NAT's Motion to Dismiss

should be granted because proper regulatory jurisdiction and adjudicatory jurisdiction rests with the Tribe, the Tribal Utility Authority, and the Tribal Court.

Dated this 6th day of September, 2010.

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CERTIFICATE OF SERVICE

I, *Scott R. Swier*, certify that on *September 6th, 2010*, *Respondent Native American Telecom LLC's Brief in Support of Motion to Dismiss*, was served via *electronic mail* upon the following:

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