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 MEMORANDUM IN OPPOSITION TO NATIVE AMERICAN TELECOM, LLC'S MOTIONS TO STAY OR TO DISMISS

INTRODUCTION

Sprint Communications Company L.P. ("Sprint") opposes Native American Telecom, LLC's ("NAT") motions for a stay or to dismiss this action pending before the South Dakota Public Utilities Commission (the "Commission"). NAT's motion to stay is premised on the federal doctrine of exhaustion of tribal remedies, while its motion to dismiss relies on concepts of protecting tribal sovereignty. Given the common factual background and conceptual overlap to NAT's motions, Sprint responds to both in this brief. With these motions, NAT seeks to have this matter decided by the very entity which lacks the authority to decide it – the Crow Creek Sioux Tribal Court ("Tribal Court"). As neither doctrine on which NAT relies applies here, the Commission is free to address the merits of Sprint's complaint.

Sprint started this action before the Commission to stop NAT's traffic pumping scheme. The scheme NAT has concocted exploits a weakness in the telecommunications

regulatory regime. Long distance carriers like Sprint must rely on local exchange carriers to originate or terminate long distance calls. Here, what NAT purports to bill Sprint for is a charge for terminating access. An entity like NAT prepares the necessary paperwork to operate as a "competitive local exchange carrier," purportedly to provide local telephone services. It then obtains a block of telephone numbers, files a "tariff" with the Federal Communications Commission ("FCC"), and starts billing Sprint and other long-distance carriers under the ruse of providing terminating access to the new "local exchange." NAT then fraudulently bills Sprint for telephone calls that are made to appear as legitimate telephone calls to end users on the Crow Creek Sioux Reservation ("Reservation").

But NAT is not offering a typical terminating access service. For example, in July 2010, Sprint determined that 99.98% of the calls reported as terminating on a NAT phone number were calls to conference call bridge numbers, terminating instead on equipment Sprint believes is located in Los Angeles, California. Federal law requires that NAT's tariff enforcement action be filed before the FCC or in federal court, which is one more compelling reason why the Tribal Court lacks jurisdiction over Sprint.

Months after Sprint started its Commission action, NAT sued Sprint in the Tribal Court. In its tribal complaint, NAT alleged Sprint has refused to pay for what NAT claims are switched access charges due it under tariffs it has on file with the FCC and the Crow Creek Sioux Tribal Utility Authority ("Tribal Utility Authority"). But Sprint does *not* directly interconnect with NAT on the Reservation or anywhere else, and Sprint in fact is not directly connected to NAT for switched access services. *All* of Sprint's long

distance traffic at issue in this case is directed to and handed off in Sioux Falls, South Dakota, at a switch owned by South Dakota Network, LLC. In addition, Sprint has no physical presence on the Reservation. Thus, there is no constitutionally lawful basis to compel Sprint to defend NAT's allegations in Tribal Court. Requiring it to do so would violate its due process rights.

Exhaustion of tribal remedies has no place here. As a threshold matter, the judge-made doctrine applies in federal courts. Moreover, the Federal Communications Act clearly requires that NAT's claims regarding interstate traffic be heard in federal court or before the FCC. 47 U.S.C. § 207. Similarly, to the extent there is intrastate traffic, Sprint is entitled to assert its state law claims before the Commission. *See* SDCL § 49-31-3.

The United States Supreme Court has also recognized that tribal courts possess little, if any, adjudicatory authority over non-tribal members, such as Sprint, subject only to two narrow exceptions. *See Montana v. United States,* 450 U.S. 544 (1981). Where, as in this case, the exceptions are inapplicable and jurisdiction has clearly been vested in other entities, tribal exhaustion would serve no purpose other than delay and need not be followed. *See Strate v. A-1 Contractors*, 520 U.S. 438, 459 n.14 (1997). Under federal and state law, the Commission is the appropriate entity to determine Sprint's state law claims.

FACTUAL BACKGROUND

A. The Parties

1. NAT

According to public records available at the South Dakota Secretary of State, NAT is a limited liability company organized in 2008 under the laws of South Dakota with its principal place of business in Sioux Falls, South Dakota. Affidavit of Scott G. Knudson ("Knudson Aff.") at ¶ 2 and Ex. A. Gene DeJordy and Tom Reiman are NAT's founders and the members personally liable for NAT's debts pursuant to SDCL § 47-34A-303(c). *Id.*[1] Neither Reiman nor DeJordy are enrolled members of the Tribe or any other tribe. Knudson Aff. at ¶ 3 and Ex. B. Neither DeJordy nor Reiman live on the Reservation, DeJordy resides now in Connecticut,[2] while Reiman lives in Sioux Falls. In September 2009 NAT filed its annual report with the Secretary of State listing Reiman as NAT's president and registered agent. Knudson Aff. at ¶ 5 and Ex. D. NAT purports to operate as a competitive local exchange carrier on the Reservation under tariffs filed with the FCC and the Tribal Utility Authority. Knudson Aff. at ¶ 6 and Ex. E; *Id.* at ¶ 7 and Ex. F.

In its brief in support of its motion to stay, NAT claims, without providing any supporting documentation, that NAT is in fact 51% owned by the Tribe, with Widevoice Communications, Inc. and Native American Telecom Enterprises LLC ("NAT

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[1] NAT's public filings can be found on the Secretary of State's corporate database www.sdsos.gov.

[2] According to federal court documents in the Eastern District of Arkansas, DeJordy is a defendant in a lawsuit brought by Alltel Communications, L.L.C. An Affidavit of Service in that file discloses DeJordy lives in Fairfield, Connecticut. Knudson Aff. ¶ 4 and Ex. C.

Enterprise") as the other owners. NAT Brief in Support of Stay at 2. Documents on file with the Secretary of State show Reiman and DeJordy are the organizers of NAT Enterprise, and both remain personally liable under SDCL § 47-34A-303(c) for the debts of NAT Enterprise. Knudson Aff. ¶ 8 and Ex. G. Reiman is the president and registered agent of NAT Enterprise. *Id.* at ¶ 9 and Ex. H.

In an affidavit filed with NAT's motion to stay, DeJordy describes the technology NAT allegedly employs to provide its services. NAT is using WiMax (World Interoperability for Microwave Access) technology. Affidavit of Gene DeJordy dated September 3, 2010, ("DeJordy Aff.") at ¶ 13. The WiMax technology NAT has employs "advanced antenna and radio technology." *Id.* With this technology, NAT "delivers wireless IP (Internet Protocol) voice and data communications." *Id.* DeJordy also claims that NAT has eschewed applying for Universal Service Funds ("USF") or other federal or state funding sources to install its equipment. *Id.* ¶ 11.[3] NAT, however, has sought and received a license from the FCC to operate its WiMax technology. Knudson Aff. at Ex. R.

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[3] It is odd that NAT protests Sprint's refusal to pay NAT's fraudulent bills as hurting the Tribe, while refusing to take part in a generous and legal subsidy scheme. The goal of the USF is to ensure that basic telephone services are available in all areas, by providing funding to companies operating with traditionally hard to serve areas. But to receive a USF subsidy, NAT would have to submit to FCC and Commission oversight of the subsidy, which would have brought its traffic pumping under regulatory scrutiny. Hence, the only plausible reason not to seek USF or other governmental assistance was to avoid having its traffic pumping scheme subject to regulatory oversight.

2. Sprint

Sprint is a telecommunications company that provides telecommunications services nationwide and is known in the telecommunications regulatory framework as an interexchange carrier ("IXC"). Affidavit of Amy S. Clouser dated September 27, 2010 ("Clouser Aff.") ¶ 2. 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. *Id.* The FCC has also authorized Sprint to provide interstate interexchange services. *Id.*

B. Sprint's role as an IXC subjects it to traffic pumping

As an interexchange carrier ("IXC") Sprint offers long-distance services to its customers around the country. Long-distance calls are those that are made from one local exchange carrier ("LEC") to another. For example, in a typical situation (unlike in this case), a long-distance call may be made from an end user customer in Massachusetts to a called party, or "end user," in South Dakota. The call is delivered to Sprint's long distance network, and Sprint carries the call to the network of the LEC serving the called customer. *Id.* ¶ 3. In some cases, there is a third carrier between Sprint's long distance network and the LEC network serving the called customer. *Id.* at ¶¶ 3, 16-22.

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. *Id.* ¶ 5.

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 has properly defined "terminating access" service. *Id.* 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. *Id.* ¶¶ 5-6; *see also In re Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exch. Carriers*, FCC Docket No. 96-262, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 F.C.C. Rcd. 9923, ¶ 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. Rcd. 6623, ¶ 22 (1997).

C. Sprint seeks to stop NAT's practice of traffic pumping

Traffic pumping is a scheme where a LEC 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 with respect to what NAT wants to bill Sprint, exists only to operate a fraudulent scheme called traffic pumping. *See* Clouser Aff. ¶¶ 9-15. Traffic pumping occurs when a LEC, such as NAT,

partners with a second company (a "Call Connection Company") that has established free or nearly free conference calling, chat-line, or similar services that callers use to connect to other callers or recordings. The Call Connection Company generates large call volumes to numbers assigned to the LEC. The LEC in turn unlawfully bills those calls as if they are subject to terminating access charges, hoping that IXCs unwittingly pay those bills. If the IXC does so, the LEC and Call Connection Company share the revenues. *Id.* ¶ 9. Sprint has seen these traffic pumping schemes target areas where switched access rates are the highest, which tend to be in rural areas. *Id.*

The FCC and the Iowa Utilities Board have ruled that switched access charges do not apply to calls delivered to Call Connection Companies because 1) Call Connection Companies are not end users of local exchange service, 2) such calls are not terminated to an end user's premises, and 3) such calls do not terminate in the LEC's certificated local exchange area.[4] Numerous other cases involving the legality of traffic pumping are pending before federal courts throughout the United States.[5]

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[4] *See In the Matter of Qwest Commc'ns Corp. v. Farmers and Merchants Mut. Tel. Co.*, File No. EB-07-MD-001, Second Order on Reconsideration (Nov. 25, 2009); *In re Qwest Commc'ns Corp. v. Superior Tel. Co.,* No. FCU-07-2, Final Order, (Iowa Utilities Board, Sept. 21, 2009).

[5] *See, e.g., Sprint Commc'ns Co., L. P. v. Superior Tel. Coop.*, No. 4:07-CV-00194 (S.D. Iowa); *Qwest Commc'ns Corp. v. Superior Tel. Coop.,* No. 4:07-CV-0078 (S.D. Iowa), *AT&T Corp. v. Superior Tel. Coop.*, No. 4:07-CV-0043 (S.D. Iowa); *AT&T Corp. v. Reasnor Tel. Co., LLC*, No. 4:07-CV-00117 (S.D. Iowa). There are also several similar suits pending in South Dakota, including three suits involving Sprint. *See Sancom, Inc. v. Sprint Commc'ns Co., L.P.*, No. CIV 07-4107 (D.S.D.); *Northern Valley Commc'ns, LLC v. Sprint Commc'ns Co., L.P.*, No. CIV. 08-1003 (D.S.D.); *Splitrock Prop., Inc. v. Sprint Commc'ns Co., L.P.*, No. CIV 09-4075 (D.S.D.). 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

D. NAT purports to operate under FCC and tribal tariffs that are improper

NAT has two access tariffs at issue that it wants to enforce in tribal court. One is NAT's tariff that it filed with the FCC on September 14, 2009, with an effective date of September 15, 2009. Knudson Aff. ¶ 6 and Ex. E at 1("Issued September 14, 2009, Effective September 15, 2009"). NAT also claims a tariff it filed with the Tribal Utility Authority on September 1, 2009, ostensibly effective that very day. *Id.* at ¶ 7 and Ex. F at 1("Issued September 1, 2009, Effective September 1, 2009"). NAT amended its FCC tariff on October 21, 2009. *See* Knudson Aff. ¶ 10 and Ex. I.[6]

Both of these tariffs employ broad definitions of the so-called tribal services that are covered by the tariffs. The intrastate/tribal tariff provides that it is applicable to:

> 1. APPLICATION OF TARIFF
>
> 1.1 This tariff sets forth the regulations, rates and charges for the provision of the Intrastate Access services and facilities (hereinafter "Services") by NATIVE AMERICAN TELECOM, LLC into, out of and within the State of South Dakota.

Knudson Aff. Ex. F.

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the Minnesota Public Utilities Commission. *See Tekstar Commc's, Inc. v. Sprint Commc'ns Co., L.P.*, No. 08-CV-01130-JNE-RLE (D. Minn.); *Qwest Commc'ns Co. LLC v. Tekstar Commc'ns, Inc.* No. 10-CV-00490 (MJD/SCN). Other cases include *North Country Commc'ns Corp. v. Sprint Commc'ns Co., L.P.*, 09-CV-2685 (S.D. Iowa); *Beehive Tel. Co. Inc. Nevada v. Sprint Commc'ns Co., L.P.*, 08-CV-00380 (D. Ut.); and *Bluegrass Tel. Co., Inc. v. Sprint Commc'ns Co, L.P.*, 410-CV-104 (W.D. Ky).

[6] The changes NAT made do not affect the Commission's jurisdiction. If anything, the changes made NAT's tariff even more one-sided.

The service NAT is seeking to charge for is Switch Access Services under Section 6.1 of the tariff:

> 6. SWITCHED ACCESS SERVICE
>
> 6.1 General
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> Switched Access Service, which is available to Customers for their use in routing or receiving traffic and/or in furnishing their services to End Users, provides a two-point communications path between a Customer and an End User. It provides for the use of common terminating switching and transport facilities. The Company provides Switched Access service, which is furnished in quantities of trunks or busy hour minutes of capacity (BHMC). Switched Access Service consists of local transport and the appropriate end office switching and functions to enable a Customer to utilize the Company's network to accept Calls originated by End Users or to deliver Calls for termination to End Users.

Knudson Aff. Ex. F.

The tribal tariff defines the Company, Customer, End User, Switched Access Service and Terminating Access as follows:

> Company: NATIVE AMERICAN TELECOM, LLC, the issuer of this tariff, a competitive local exchange carrier.
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> Customer: The person, firm or corporation who orders services and is responsible for the payment of charges and compliance with the Company's regulations.
>
> End User: Any person, firm, partnership, corporation or other entity including but not limited to conference call providers, chat line providers, calling card providers, call centers, help desk providers, international providers operating within the United States, and residential and/or business service subscribers, which subscribes to or otherwise uses local

> exchange services, interexchange services, Commercial Mobile Radio Service or other wireless services, VoIP services, or other services provided by a local exchange carrier, common carrier, Wireless Provider, VoIP Provider, or other provider of services that transit the Company's facilities. The End User may be, but need not be, the customer of an Interexchange Carrier and may or may not be a customer of the Company. The Company may, in its discretion, access End User fees and surcharges, including, but not limited to Subscriber Line Charges, Federal Universal Service Fund charges, state and federal taxes and regulatory fees.
>
> Switched Access Service: Access to the switched network of the Company and/or any other local exchange carrier for the purpose of originating or terminating communications. Switched Access Service is available to carriers, as defined in this tariff.
>
> Terminating Access: Access service that allows traffic (*e.g.*, Calls) to be delivered to an NPA-NXXX associated with a Company exchange as such traffic originates from another exchange. Terminating Access traffic may include long distance voice telephone Calls that are delivered to Customers, including, but not limited to conference call providers, chat line providers, calling card providers, call centers, help desk providers and international providers operating within the United States, and residential and/or business service subscribers.

Knudson Aff. Ex. F. Except for Section 1.1, the FCC tariff is identical to the language NAT has in its tribal tariff. *See* Ex. E.

While NAT purports to operate under these tariffs, it actually operates in South Dakota without a state certificate of authority. On September 8, 2008, NAT applied to the Commission for a state certificate of authority to provide competitive local exchange service on the Reservation pursuant to ARSD 20:10:32:03 and 20:10:32:15. In NAT's application to the Commission, NAT described its application as "a joint venture with the

Crow Creek Sioux Tribe," to "provide service only within the exterior boundaries of the Crow Creek Indian Reservation." Knudson Aff. ¶ 11 and Ex. J at 1, 3. NAT provided "the biographies of the principal owners" of NAT – Reiman and DeJordy. *Id.* at 3, *see also* Ex. D.

While NAT's application before the Commission was pending, NAT obtained authorization from the Tribal Utility Authority on October 28, 2008, to provide LEC services within the Reservation. Knudson Aff. ¶ 12 and Ex. K. In response, on December 1, 2008, NAT moved to dismiss its application pending before the Commission. The Tribe itself filed comments with the Commission in support of NAT's motion to dismiss. Nowhere in its comments did the Tribe describe itself as the majority owner of NAT. Rather, it described the Tribe as having "entered into an agreement," with NAT to develop a telecommunications system on the Reservation. Knudson Aff. ¶ 13 and Ex. L. The Commission granted NAT's motion as a matter of right, without addressing the merits, on February 5, 2009. *See* Knudson Aff. ¶ 14 and Ex. M. As a result, NAT is operating within the State of South Dakota, purportedly as a local exchange carrier with a tariff that professes to apply to all services "into, out of and within the State of South Dakota." Knudson Aff. Ex. F. NAT does so *without* a certificate of authority from the Commission.

E. NAT bills Sprint for switched access charges based on traffic pumping

NAT has devised a scheme to inflate call volumes artificially to phone numbers assigned to NAT's local calling area, in order to bill Sprint for what NAT wrongly characterizes as tariffed "terminating access" service. But under this scheme, Sprint is

not connecting a call with a called party on the Reservation that is a customer of NAT. Sprint only connects the calls NAT bills Sprint to South Dakota Network, LLC. Moreover, 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. *See* Clouser Aff. ¶¶ 11-15.

In his affidavit, DeJordy proclaims "NAT's services take place exclusively within the exterior boundaries of the Reservation." DeJordy Aff. ¶ 4. This misleading statement is very carefully worded, for the word "services" is not a defined term in NAT's tariffs. NAT may have a telephone switch in Fort Thompson, within Reservation boundaries, but the conference calling traffic South Dakota Network LLC delivers to that switch *absolutely* does not stay on the Reservation.

Sprint has determined that virtually all of the calls NAT has or wants to bill Sprint for are routed to a telephone switch located in Los Angeles, California. Clouser Aff. ¶¶ 10, 19-21. The calls at issue in this dispute are delivered to conference bridge equipment which are typically co-located at or near the switch. *Id.* at ¶ 21. Whether the equipment is located in California or elsewhere, it is certainly not located at an end user's premises on the Reservation, and few, if any, of the parties so communicating reside on the Reservation. Clouser Aff. ¶¶ 15-21. In this case, 99.98% of the traffic for which NAT is seeking compensation was to these conference bridge services. *Id.* at ¶ 15.

In December 2009, Sprint received its first bill from NAT, which used a Texas billing firm called CABS Agent (with whom Sprint is familiar) to prepare and send the bill. A preliminary review of the bill revealed that the charges seemed legitimate, and

thus a check was made payable to CABS Agent and sent to its Texas address in the ordinary course of business. This occurred the next month as well. When Sprint received a third bill totaling more than $75,000, however, Sprint investigated NAT's activities and identified its use of traffic pumping. Sprint has requested return of its funds from NAT, which has refused. Clouser Aff. ¶ 8

F. Sprint does not do business with NAT on the Reservation

Sprint has investigated the factual basis by which NAT claims a right to bill Sprint for switched access services allegedly on the Reservation. NAT's DeJordy claims Sprint provides interexchange services *on* the Reservation. DeJordy Aff. ¶ 15. That is simply not the case. Sprint has *no* physical property on the Reservation, so it cannot be doing business on that basis with NAT. Clouser Aff. ¶ 16. In fact, Sprint does *not* have any facilities on the Reservation, and does *not* interconnect with any NAT equipment on the Reservation. *Id.* ¶¶ 16-20. *All* of Sprint's long distance calls into South Dakota that are at issue here interconnect with South Dakota Network, LLC, a wholly independent entity unrelated to Sprint, which maintains a tandem telephone switch in Sioux Falls. *Id.* It is South Dakota Network, LLC and its equipment that actually interconnect with NAT. *Id.* Sprint simply does not connect any of its long distance calls with NAT. Likewise, if NAT actually has local phone service on the Reservation, Sprint has nothing to do with that service, and any long distance calls from those customers (if they actually exist) would travel over the facilities of South Dakota Network, LLC before reaching Sprint's facilities. *Id.* ¶ 22.

Sprint's investigation also revealed that after South Dakota Network routes a call to NAT's equipment, ostensibly located in Fort Thompson on the Reservation, those calls are then sent to a telephone switch located in Los Angeles, California. Clouser Aff. ¶ 21. This switch is operated by Widevoice Communications, a company Sprint has seen before in traffic pumping cases.[7] *Id.*

G. NAT improperly involves the Tribal Utility Authority and the Tribal Court

On March 26, 2010, NAT contacted the Tribal Utility Authority about Sprint's position that traffic pumping is not a legitimate access service. This communication took place without Sprint's knowledge. On March 29, 2010, the Tribal Utility Authority issued an *ex parte* order stating that Sprint was required to pay the access charges, based on the tariff on file with the FCC and the Tribal Utility Authority:

> [T]his Utility Authority finds Sprint's non-payment of Native American Telecom-Crow Creek's access tariff charges to be in violation of the laws of the Crow Creek Sioux tribe. This finding applies to both the *intrastate* access services subject to the tariff in effect at this Utility Authority and the *interstate* access services subject to the tariff in effect at the FCC.

Tribal Utility Authority Order, at 4 (Mar. 29, 2010) (emphasis added). Knudson Aff. ¶ 15 and Ex. N.

The Tribal Utility Authority's Order is premised on Sprint's alleged nonpayment of what are claimed to be terminating access charges that CABS Agent billed Sprint purportedly pursuant to NAT's FCC and tribal tariffs. But in its Order, the Tribal Utility

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[7] If, as NAT now claims, Widevoice Communications is a part owner of NAT, that fact only makes the traffic pumping scheme more obvious and NAT's connection to legitimate reservation services even more attenuated. *See* Clouser Aff. ¶¶ 19-22.

Authority identified the complainant as "Native American Telecom-Crow Creek"; the entity, however, to whom the Tribal Utility Authority granted telecommunications authority on the Reservation is Native American Telecom, LLC. *Compare* Knudson Aff. Ex. K *with* Ex. N. Thus, even though NAT has billed Sprint and sued it in Tribal Court, there may be as yet another entity purportedly offering on-Reservation telecommunication services.

In response, Sprint initiated an action against NAT before the Commission to stop NAT's scheme with respect to intra-state traffic. NAT refuses to acknowledge the Commission's jurisdiction over NAT, even though at one time NAT had a tariff on file with the Commission. As it has in the past, the Tribal Utility Authority has also filed a brief in support of NAT before the Commission.[8]

On July 12, 2010, NAT sued Sprint in Tribal Court. Knudson Aff. ¶ 16 and Ex. D. As the facts underlying this case did not take place on the Reservation, involve a federal tariff the Tribal Court cannot enforce, and a nominal tribal tariff that exceeds the tribe's regulatory authority, Sprint moved in Tribal Court by special appearance to dismiss NAT's Complaint. Nevertheless, on August 30, 2010, NAT moved the Tribal Court to establish a scheduling order. Knudson Aff. ¶ 17 and Ex P.

Because the Tribal Court and the Tribal Utility Authority clearly lack jurisdiction over Sprint, Sprint concurrently filed a complaint with the United States District Court for the District of South Dakota to enjoin further proceedings in the Tribal Court.

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[8] The Tribal Utility Authority's arguments as found in its brief in support of NAT are markedly similar to the incorrect and inapplicable legal positions adopted by NAT in this case.

Because NAT is using its Tribal Court action as a vehicle to delay proceeding before the Commission, NAT's motions to stay and to dismiss should be denied.

SUMMARY OF ARGUMENT

NAT hinges its argument for a stay on federal court decisions involving the doctrine of exhaustion of tribal remedies. This rule is a rule of federal common law based on concepts of comity and, where appropriate, a deference to tribal self-government. That federal rule is not binding on state courts or state agencies. Instead, the Commission has been granted broad and sweeping authority to regulate telecommunications within the state. *See* SDCL § 49-31-3.

In spite of this clear and extensive authority, NAT alleges that the Commission should not act in this case because it is operating solely within the Reservation. An analysis of NAT's tariffs and the facts of this case, however, demonstrate that NAT's activities reach beyond the Reservation and impact South Dakota and other states. Additionally, the Reservation itself is the home of non-tribal members in whose interest the Commission can act to protect.

Just as the tribal exhaustion rule does not impact the Commission's course of action in this case, the rule also fails to halt a federal court. "In some cases not falling within the Tribe's inherent sovereign authority, there is no exhaustion requirement because the tribal court simply lacks authority to adjudicate disputes arising from such conduct." *Christian Children's Fund v. Crow Creek Sioux Tribal Court,* 103 F. Supp. 2d 1161, 1163-64 (D.S.D. 2000). That rule applies with full force as Sprint's activities are completely off the Reservation. This case also does not fall within the tribe's legislative

or adjudication of authority because Congress has expressly provided that claims arising under the Federal Communications Act proceed only in federal district courts or before the FCC (*see* 47 U.S.C. § 207) and for state claims to proceed before the appropriate state regulatory body. *See* 15 U.S.C. § 152 (b).

Assuming, arguendo, that the Commission must address the *Montana* decision, neither of the two exceptions to the general rule that tribes cannot regulate non-members is applicable in this case. Sprint and NAT are not tribal members and no consensual relationship exists that can be adjudicated by the Tribal Court. Moreover, Sprint is not present in any way on the Reservation. This case simply falls far short of activity that "imperil[s] the subsistence of the tribal community" necessary to trigger the second *Montana* exception. *Plains Commerce Bank v. Long Family Land and Cattle Co.*, __ U.S. __, 128 S. Ct. 2709, 2726 (2008). Furthermore, South Dakota state law clearly requires that any tribal court action must be premised upon a valid exercise of jurisdiction. SDCL § 1-1-25. All relevant state and federal laws and regulations establish that the Commission should exercise the authority it has over NAT.

ARGUMENT

I. THE DOCTRINE OF EXHAUSTION OF TRIBAL REMEDIES IS AN ISSUE OF FEDERAL LAW NOT BINDING ON STATE TRIBUNALS

In its motion for a stay, NAT cites over and over again to federal court decisions that construe or apply the doctrine of exhaustion of tribal remedies. This rule is a judge-made rule based on concepts of comity and, where appropriate, deference to tribal self-government. *Strate*, 520 U.S. at 453 ("we reiterate that *National Farmers* and *Iowa*

Mutual enunciate only an exhaustion requirement, a 'prudential rule' ... based on comity")(citation omitted); *see also id.* at 450 (describing the rule as nothing "more than a prudential exhaustion rule"). The cases NAT cites in favor of its exhaustion are irrelevant. Federal courts cannot make the rule binding on state courts or state agencies. Congress has plenary authority over Indian affairs under the Indian Commerce Clause. U.S. Const., art. I, § 8, cl. 3; *Cotton Petroleum v. New Mexico*, 490 U.S. 163, 192 (1989); *Washington v. Confederated Bands and Tribes of Yakima Indian Nation*, 439 U.S. 463, 501 (1979). So far Congress has not enacted a statutory equivalent to this common law doctrine that might apply to states. NAT also cites no federal statute that provides for tribal court jurisdiction over a telecommunications lawsuit. Nor could it, for Congress has explicitly decreed that questions of federal communications law must be decided by a federal court or the FCC. *Infra* at pp. 28-31.

Likewise, NAT has cited no South Dakota decision or that of any other state court, that has declared it bound by the federal doctrine. Nor should the Commission believe that it is bound by the doctrine of tribal exhaustion. The Commission has been granted broad and sweeping authority to regulate telecommunications within the state. *See* SDCL § 49-31-3. The South Dakota Supreme Court has explicitly held that the Commission has express "authority and jurisdiction over intrastate facilities" and that the Commission's authority is "extensive and crucial to the overall regulatory scheme." *Cheyenne River Sioux Tribe Tel. Auth. v. Public Utils. Comm'n of South Dakota*, 1999 SD 60, ¶ 21, 595 N.W.2d 604, 610 (S.D. 1999). In making this finding, the court expressly rejected any

argument that the Commission's authority impinged upon tribal self-government[9] (the very principle supporting the tribal exhaustion rule). *Id.* Thus, not only is the tribal exhaustion rule not binding on the Commission, its authority in this case has been examined and approved.

II. STATE LAW DIRECTS THAT THE COMMISSION HAS JURISDICTION IN THIS CASE

While the FCC and federal courts adjudicate interstate traffic, basic telecommunications law establishes that state public utilities commissions adjudicate intrastate tariffs.[10] The South Dakota Legislature has granted the Commission authority over NAT: "The commission 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. 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 Commission also has jurisdiction over all tariffs affecting the state, *see*

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[9] The Tribal Utility Authority also argues that the tribal exhaustion rule bars the Commission from acting in this case. Tribal Utility Authority Brief at 9-12. It offers no new argument from that of NAT and, for the reasons explained above, its argument is not persuasive.

[10] *See* 47 U.S.C. § 152 (b) ("nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service").

SDCL § 49-1-11, and the management practices of all telecommunications companies. SDCL § 49-31-7.1[11]

NAT has clearly violated South Dakota law by offering local exchange service in South Dakota without a certificate of authority issued by the Commission. SDCL §§ 49-31-3; 49-31-69. Similarly, to the extent that NAT's intrastate tariff purports to regulate traffic outside of the Reservation, 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).

This broad authority is further enumerated under SDCL § 49-31-7.1, entitled "Powers and Duties of Commission." Under this provision, the Commission may:

> inquire into the management of the business of all telecommunications companies subject to the provisions of this chapter, and the commission shall keep informed as to the manner and method in which the same is conducted, and may obtain from such telecommunications companies full and complete information necessary to enable it to perform the duties and carry out the objects for which it was created.

SDCL § 49-31-7.1(3). Not only does the Commission have the authority to regulate NAT, but it also has the authority to inquire into NAT's management practices.

The South Dakota Supreme Court has recognized the Commission's primacy over telecommunications in the state:

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[11] Despite this clear authority, the Tribal Utility Authority argues that the Commission has been federally preempted. Tribal Utility Authority Brief at 4-9. In making such an argument the Tribal Utility Authority ignores the entire telecommunication regulatory structure as established by Congress and carried out by the FCC and state utility authorities. In any event, the Commission can determine the scope of its jurisdiction over NAT.

> The regulatory scheme of telecommunications services specifically grants [the Commission] authority and jurisdiction over intrastate facilities. *See* 47 U.S.C. § 152(b). The authority of [the Commission] 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.

Cheyenne River, 1999 SD 60, ¶ 21, 595 N.W.2d at 609. Through its regulation, the Commission protects public welfare. "Public service commissions are generally empowered to, and are created with the intention that they should regulate public utilities insofar as the powers and operations of such utilities affect the public interest and welfare." *In re Establishment of Switched Access for US West Commc'ns, Inc.*, 2000 SD 140 ¶ 21, 618 N.W.2d 847, 852 (S.D. 2000) (quoting *Northwestern Bell Tel. Co. v. Chicago & N.W. Transp. Co.*, 245 N.W.2d 639, 642 (S.D. 1976)).

Despite this clear authority, NAT argues that the Commission lacks authority to adjudicate this matter, or should stay any action until the Tribal Court has ruled, because NAT provides service on the Reservation. The FCC has recognized the primacy of the Commission to protect non-tribal members living on the 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[12] status over tribal members on the reservation.

[12] The term "ETC" stands for eligible telecommunications carrier, as defined under 47 U.S.C. §§ 254(e), 214(e). By meeting certain specific criteria and receiving designation

Conversely, the FCC also determined that the Commission possessed authority to determine ETC status with respect to non-tribal members on the reservation. *Id.* at ¶ 23.

On its face, NAT's tribal tariff applies to traffic off the Reservation and with non-members. Ex. F. It declares, first, that it applies to NAT's services "into, out of and within the State of South Dakota." *Id.* Nothing in the tribal tariff restricts it to End Users who are members of the Tribe on the Reservation.[13] Under the tribal tariff definition, an End User can be anyone anywhere within the national public switched telephone network. *Id.* The WiMax technology is radio-based, *see* DeJordy Aff. at ¶ 13; those signals certainly will not stop at the Reservation boundaries. Indeed Sprint's traffic analysis shows 99.98% of the traffic going to NAT is to conference bridge equipment likely located in California. Clouser Aff. at ¶ 15. Plainly, the Commission has jurisdiction to determine that within the State of South Dakota NAT must have a certificate of authority in order to operate lawfully.

Cheyenne River also establishes that the Commission can exercise jurisdiction even on the Reservation to protect non-members living there. 1999 SD 60, ¶ 29, 595 N.W.2d at 611. Census data show a significant percentage of residents on the Reservation – about 13% – are not of American Indian descent. *See* Knudson Aff. Ex. Q. The most recent census data available demonstrates that of the 2,225 residents of the

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from the appropriate regulatory body, an ETC is eligible to receive Federal universal service support.

[13] The Tribal Utility Authority ignores this clear language of the tariff and any tariff or traffic analysis by arguing that NAT provides service only on the Reservation. Tribal Utility Authority Brief at 3. In addition to the facts belying such a contention, the FCC has established in *Western Wireless* that the Commission plays a role in regulating non-tribal members living on the Reservation.

Reservation, only 1,936 are classified as being of American Indian descent. *Id.* This figure demonstrates that a significant portion of the population within the Reservation boundaries are not tribal members. In *Cheyenne River*, a case NAT never cites, the South Dakota Supreme Court upheld the Commission authority to regulate telecommunications services to non-members on that reservation (1999 SD 60, ¶ 29, 595 N.W.2d at 611), as did the FCC in *Western Wireless*. 16 F.C.C. Rcd. 18145, ¶ 24.[14]

The real issue for the Commission is whether it can regulate NAT's intrastate services as a communications service that can be tariffed, or whether the WiMax service is an information service subject only to federal law. The Commission has jurisdiction to make that call, as does the FCC or a federal court. But the Crow Creek Tribal Court does not.

III. EVEN UNDER THE FEDERAL EXHAUSTION DOCTRINE, NO EXHAUSTION WOULD BE REQUIRED

In *Strate*, the Supreme Court articulated very significant restrictions to the tribal exhaustion of remedies doctrine:

> When, as in this case, it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by *Montana's* main

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[14] The Reservation was covered by the General Allotment Act, or Dawes Act, of Feb. 8, 1889, 25 Stat. 888, which allowed individual *tribal* members and other non-members eventually to obtain fee title to quarter-section allotments. A substantial part of the Reservation has consequently become fee land, and much of that fee land is owned by non-Indians. *See* Knudson Aff. ¶¶ 20-21 and Ex. S (60 percent of Reservation land in Buffalo County is fee land) and Ex T (over 40 percent of Reservation land in Hughes County is taxable, i.e. , fee land). Both these facts circumscribe the Tribe's regulatory jurisdiction, and correspondingly, the Tribal Court's adjudicatory jurisdiction. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 193, n.1 (1978); *Montana v. United States*, 450 U.S. 544, 599-560, n.9 (1981). Thus, the Tribe has surrendered it any gatekeeping right." *Strate*, 520 U.S. at 456.

> rule, it will be equally evident that tribal courts lack adjudicatory authority over disputes arising from such conduct. As in criminal proceedings, state or federal courts will be the only forums competent to adjudicate those disputes. Therefore, when tribal-court jurisdiction over an action such as this one is challenged in federal court, the otherwise applicable exhaustion requirement, see *supra*, at 1410-1411, must give way, for it would serve no purpose other than delay.

Strate, 520 U.S. at 459 n.14 (citations omitted). NAT attempts to avoid these limitations by merely denying its applicability, claiming that "an exhaustive jurisdiction analysis at this juncture would be premature." NAT Brief in Support of Stay at 17. NAT argues that the Tribal Court should get to weigh in first on its jurisdiction, but the Supreme Court said in *Strate* that when the tribal court's lack of jurisdiction is clear, exhaustion does *not* apply. 520 U.S. at 459 n.14. That is the case here. And, the jurisdictional analysis is straightforward and clear.[15]

The question of exhaustion of tribal remedies can be promptly resolved in this case. First, Sprint is not exchanging traffic directly with NAT on the Reservation, or anywhere else. *Supra* at 14-15. The lack of a presence on the Reservation is critical. The Eighth Circuit Court of Appeals stated in *Hornell Brewing*:

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

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[15] NAT's analysis of the exhaustion requirement hangs on its assertion the exhaustion rule as announced in *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845 (1985) and *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987), applies. NAT cites to the American Indian Law Deskbook as authority (Brief on Motion to Dismiss at 7), but that treatise states that *Strate* articulated a "abroad exclusion from the *National Farmers Union* exhaustion requirement." Conference of Western Attorneys General, American Indian Law Deskbook, at 231 (4th ed. 2008). This treatise added "the fundamental thrust of *Strate* was reaffirmed four years later in *Nevada v. Hicks*, 533 U.S. 852 (2001)." *Id.*

> ...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.

Hornell Brewing Co. v. Rosebud Sioux Tribal Court, 133 F. 3d 1087, 1093-94 (8th Cir. 1998); *see also Christian Children's Fund,* 103 F. Supp. 2d at 1166 (no tribal court jurisdiction because activity was off-reservation).

Hornell establishes that the Tribal Court lacks jurisdiction over NAT's claims because the Sprint calls at issue interconnect to South Dakota Network LLC on its switch in Sioux Falls, *not* to NAT. Clouser Aff. ¶ 18. Moreover, analysis of the actual traffic pumping scheme NAT has devised shows that – contrary to what NAT's principal DeJordy professes – virtually all calls to NAT's exchange do not terminate to an End User premises on the Reservation. *Id.* ¶¶ 18-21. Instead, the telephone switch where the calls were routed is physically located in Los Angeles, where calls were directed to conference bridge equipment likely co-located there, rather than terminating to an End User located on the Reservation. *Id.* ¶ 21.

Second, exhaustion is not required because Congress has divested the Tribal Court of any jurisdiction over NAT's claims against Sprint. In *Nevada v. Hicks*, 533 U.S. 353 (2001), the Supreme Court discussed the role of federal statutes in this process:

> It is true that some statutes proclaim tribal-court jurisdiction over certain questions of federal law. ... But no provision in federal law provides for tribal-court jurisdiction over § 1983 actions.

Id. at 367. The same is true in this case, as the Federal Communications Act does not provide for tribal court jurisdiction. *See* 47 U.S.C. § 207, (discussed *infra* at p. 28). Without any statutory authority for tribal court adjudication of NAT's claims, exhaustion of tribal court remedies would serve no purpose other than delay and, thus, is not required in this case. *See Strate*, 520 U.S. at 459 n.14; *Hicks*, 533 U.S. at 369. The timing of NAT's Tribal Court complaint – coming months after Sprint started its Commission action – shows how NAT filed the Tribal Court action in an effort to keep this controversy away from state or federal review.[16] *See* Knudson Aff. Ex. O.

NAT's tribal law suit clearly does not fall within the Tribal Court's jurisdiction because NAT's claims are pre-empted by federal law. NAT seeks damages in Tribal Court under sections 201, 203, and 206 of the Federal Communications Act, 47 U.S.C. §§ 201, 203, 206. *See* Tribal Court Complaint ¶¶ 34-54 (Knudson Aff. ¶ 16 and Ex. O). Yet section 207 of the Act, which gives NAT a cause of action to pursue such remedies, expressly requires that those claims be pursued only in federal court or before the FCC:

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[16] The Tribal Utility Authority, by arguing that the Commission lacks any jurisdiction to hear this case on the basis of federal preemption (Brief at 6), appears to be advocating for a similar result.

> Any person claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to [the FCC]...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 (emphasis added). "By its express language, [the FCA] established 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." *Alltel Commc'ns v. Oglala Sioux Tribe*, No. Civ.10-5011, 2010 WL 1999315, at *12 (D.S.D. May 18, 2010) (quoting *AT&T Corp. v. Coeur D'Alene Tribe*, 295 F.3d 899, 905 (9th Cir. 2002)).

As revealed by the DeJordy affidavit, the technology NAT proposes to use presents a serious federal law question whether there is exclusive federal authority over the technology and whether NAT can even employ an access tariff. The WiMax technology NAT is using is a form of wireless technology. DeJordy Aff. ¶ 13. NAT describes it as licensed, and indeed, NAT has obtained a radio-spectrum license from the FCC. Knudson Aff. at ¶ 19 and Ex. R. Radio-based service can readily extend off the Reservation, something NAT represented to the Commission that it would not do when it applied for authority to operate within South Dakota.[17] Knudson Aff. Ex. J at 1, 3.

Congress has determined that the regulatory regime depends on whether the service is telecommunications or information services. The former is:

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

[17] This fact, again, is contrary to that alleged by the Tribal Utility Authority in its efforts to divest the Commission of jurisdiction in this case.

47 U.S.C. § 153(43) (emphasis added). Alternatively, the provision of information service means:

> the offering of a capacity for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any capability of the management, control, or operation of a telecommunications system or the management of a telecommunications service.

47 U.S.C. § 153(20). Services that involve a change in protocol are information services. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 977 (2005).

NAT claims it is providing "wireless IP (Internet Protocol) voice and data services." Dejordy Aff. ¶ 13. In the event this service were deemed CMRS (Commercial Mobile Radio Service), NAT could not lawfully use a tariff to bill Sprint – it would have to negotiate with Sprint for a contractual right to do so. *See In re Pet.'s of Sprint PCS and AT&T Corp. for Declaratory Ruling Regarding CMRS Access Charges*, 17 F.C.C. Rcd. 13192 (2002); *see In re Implementation of Sections 3(N) and 332 of the Communications Act Regulatory Treatment of Mobile Servs.*, 9 F.C.C. Rcd. 1411, ¶ 178 (1994) (To avoid the introduction of these anticompetitive practices, to protect consumers and the public interest, and because continued voluntary filing of tariffs is an unreasonable practice for commercial mobile radio services under Section 201(b) of the Act, we will not accept the tariff filings of CMRS providers.). If NAT's service were deemed a version of VoIP service (Voice over Internet Protocol), which DeJordy's affidavit suggest in the case, as a matter of federal law NAT could not assess access charges to such traffic. *PAETEC Commc'ns, Inc. v. CommPartners LLC*, Civ. No. 08-

0397, 2010 WL 1767193, at *2 (D.D.C. Feb. 18, 2010) ("Information services are not subject to the access charges regime."); *Southwestern Bell Tel., L.P. v. Missouri Pub. Serv. Comm'n*, 461 F. Supp. 2d 1055, 1081-82 (E.D. Mo. 2006) (federal access charges are inapplicable to an "information service" like IP-originated traffic); *Vonage Holdings Corp. v. Minn. Pub. Utils. Comm'n*, 290 F. Supp. 2d 993, 1001 (D. Minn. 2003) (VoIP traffic subject to regulation as an information service not as a telecommunications service). Indeed, if NAT's service is deemed information service of any type, Congress has ruled that it would not be subject to access tariff pricing. In short, what NAT appears to be providing may be something that under section 207, only federal courts or the FCC can address.

The same section 207 analysis holds for any of NAT's claims premised on Sprint's alleged violation of NAT's tribal tariff. On its face, the tribal tariff purports to regulate long distance calls in a manner very similar to NAT's FCC tariff. *Compare* Ex. F *with* Ex. E. But the Tribal Utility Authority can only regulate, if at all, a tribal tariff by which NAT provides only local exchange services within Reservation boundaries to tribal members. Given the technology NAT is apparently using, only a federal court or the FCC under section 207, or the Commission, under its plenary authority over intrastate telecommunications services, can sort out who regulates NAT. The Tribal Utility Authority or the Tribal Court cannot.

It is obvious that NAT has tried to manufacture Tribal Court jurisdiction and filed its complaint in Tribal Court in order to use the tribal exhaustion doctrine to delay the Commission proceedings. NAT was formed in 2008 by two non-Indians who remain

personally liable for NAT's debts. Knudson Aff. Ex. A. One of those, Thomas Reiman, is NAT's president and registered agent with an office in Sioux Falls, not on the Reservation. Knudson Aff. Exs. A and D. NAT offers no record support that now, in 2010, the Tribe owns 51% of NAT or how the Tribe actually funded that investment. Indeed, NAT Enterprise, one of the purported owners of NAT, discloses that in 2010 it, too, was owned by the founders of NAT. Knudson Aff. Exs. G and H. NAT and NAT Enterprise have the same president and registered agent. *Compare* Knudson Aff. Exs. A and D *with* Exs. G and H. Where the creators of NAT are non-Indian entrepreneurs, they cannot claim tribal identity for NAT by allegedly offering the Tribe a 51% share of NAT. Because only non-Indians remain liable for NAT's debts, it cannot be deemed a tribal entity.

As there is no room for tribal court adjudication of NAT's claims in Tribal Court, exhaustion of those remedies would serve no purpose other than delay and thus is not required in this case. *Strate,* 520 U.S. at 459 n.14. Because the lack of tribal authority is clear, there is no need for Sprint to exhaust the jurisdictional issue in Tribal Court. *See Hicks*, 533 U.S. at 374.

IV. THE COMMISSION IS NOT REQUIRED TO DISMISS UNDER *MONTANA*

NAT starts its argument for dismissal with a lesson in Indian law, starting with *Worcester v. State of Georgia*, 31 U.S. 515 (1832). NAT Brief in Support of Dismissal at 6-7. NAT then argues that the Commission's regulatory jurisdiction is inapplicable in the absence of congressional authorization, essentially because the Tribe has the right of self-

government, including the right to develop a telecommunications regulatory scheme. *Id.* at 8-9. But that assertion, even if correct, only establishes that the Tribe may regulate NAT's services to Tribal members *solely* within the exterior boundaries of the Reservation. But NAT's activities are not so limited, and the Commission is endowed under both federal and state law to regulate NAT's provisions of telecommunications services outside Reservation boundaries and to non-members within those boundaries.

NAT goes on to argue that dismissal is required under *Montana v. United States*, 450 U.S. 544 (1981), because the Commission's regulatory authority, if exercised over NAT, would somehow imperil the sovereignty of the Tribe. NAT Brief in Support of Dismissal at 10-11. But as the Tribal Court lacks jurisdiction over the subject matter of this case, it also lacks jurisdiction over Sprint. In *Montana*, the Supreme Court established that a tribe's powers do *not* extend to the activities of nonmembers of the tribe, except in two limited circumstances. The FCC applied this same test in *Western Wireless*. The test under which tribal court jurisdiction over non-members is appropriate is as follows:

> (1) "a tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter into consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements"; and
>
> (2) "a tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when the conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."

450 U.S. at 565-66. In *Hicks*, the Court made clear that *Montana*'s main rule applied to trust land, as well as fee land. "Today, the Court finally resolves that *Montana v. United*

States, 450 U.S. 544 (1981), governs a tribe's civil jurisdiction over non-members regardless of land ownership." *Hicks,* 533 U.S. at 387 (O'Conner, J. concurring).

As subsequent Supreme Court cases have demonstrated, the *Montana* exceptions are to be *narrowly* construed, and NAT bears the burden of demonstrating jurisdiction. *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 659 (2001) (tax on non-member on fee land presumptively invalid); *see Progressive Specialty Ins. Co. v. Burnette*, 489 F. Supp. 2d 955, 958 (D.S.D. 2007) ("tribal jurisdiction over non-members is 'presumptively invalid'") (quoting *Atkinson*, 532 U.S. at 659).

A. Neither NAT nor Sprint is a tribal member

Under the first *Montana* exception, tribal court jurisdiction may only be exercised where a non-tribal member enters into a consensual relationship with a tribe or a tribal member. 450 U.S. at 565. In this case, however, NAT is a limited-liability company, organized under the laws of the State of South Dakota. Knudson Aff. Exs. A and D. This South Dakota company was founded by two individuals who do not reside on the Reservation. *Id.* In documents filed with the South Dakota Secretary of State, NAT's principal executive office is located in Sioux Falls. *Id.* Defendant Sprint is obviously not a tribal member, being a limited partnership with its principal place of business in Overland Park, Kansas. Clouser Aff. ¶ 2.

The recent unsubstantiated claim that NAT is now 51 percent owned by the tribe and in part by a closely related entity, NAT Enterprises, does not confer tribal court jurisdiction over Sprint. In *Plains Commerce Bank*, the Court held the tribal court lacked the power to hear a claim of discrimination asserted by two tribal members against a non-

tribal bank which had foreclosed on their land within the reservation and sold that land over their protest to a non-Indian. 128 S. Ct. at 2720. Likewise, here, it matters not whether NAT's non-tribal organizers have engaged in some type of shell game to create the appearance of NAT being a tribal entity. *Plains Commerce Bank* precludes the Tribal Court here of *any* adjudicatory power over Sprint.

B. No consensual relationship exists that would support jurisdiction

In addition to NAT's tribal lawsuit not involving a tribal member, no consensual relationship has been established that would support tribal jurisdiction or regulation under *Montana* and its progeny. Sprint has not consented to Tribal Court jurisdiction. Clouser Aff. ¶ 2. Nor does its status as a telecommunications provider confer Tribal Court jurisdiction. Providing telecommunications services on a reservation "as a matter of law" does *not* create a "consensual relationship with the tribe or its members." *Reservation Tel. Coop. v. Henry*, 278 F. Supp. 2d 1015, 1023 (D.N.D. 2003) (tribe had no authority to tax utility's property within reservation). Because "[a]n individual has no organic, economic or political right to service by a particular utility merely because he deems it advantageous to himself, . . . it is inaccurate to view a request for service by a potential electric customer from an electric supplier as forming a 'consensual relationship' similar to that which occurs in other commercial contexts." *In re Application of Otter Tail Power Co.*, 451 N.W. 95, 105 (N.D. 1990) (internal quotations omitted). Instead, the provision of telecommunications services is regulated by the FCC or the Commission. *See* 47 U.S.C. § 151 *et seq.*; *Cheyenne River*, 1999 SD 60, ¶ 30, 595 N.W.2d at 611

(holding that the Commission had authority over the sale of a telephone exchange located on a reservation).

In addition to requiring a consensual relationship, the Supreme Court has also held that the proposed regulation must bear a nexus to any such relationship. "*Montana* limits tribal jurisdiction under the first exception to the regulation of the activities of nonmembers." *Plains Commerce Bank*, 128 S.Ct. at 2721; *see Atkinson*, 532 U.S. at 656. "Even then, the regulation must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations." *Plains Commerce Bank*, 128 S.Ct. at 2724. In this case, Sprint's alleged activities, *i.e.*, nonpayment of access charges, do not bear a sufficient nexus to justify regulation because no consensual relationship exists to be regulated for doing business with a South Dakota limited liability company, owned or operated by non-members of the Crow Creek Sioux Tribe.[18]

C. No conduct supports an exercise of inherent jurisdiction

The Commission must reject NAT's argument that the second *Montana* exception requires dismissal, in order to protect "the political integrity, political security, health and welfare of the Tribe." NAT Brief in Support of Dismissal at 10. The second *Montana* exception recognizes that tribes also may retain inherent jurisdiction over "the conduct of non-Indians on fee lands within its reservation when the conduct threatens or has some

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[18] Nor would it matter even if the tribe in fact owns part of NAT. As noted, *supra* at 33-34, in *Plains Commerce Bank*, the borrower was a South Dakota LLC owned by members of the Cheyenne River Sioux Tribe. The fact the bank in that case chose to do business with tribal members involving fee land on a reservation did not confer adjudicatory jurisdiction over the bank. 128 S. Ct. at 2720.

direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 566. This second *Montana* exception is also narrowly applied. As the Supreme Court observed in *Atkinson*:

> [*M*]*ontana's* second exception can be misperceived. The exception is only triggered by *non-member conduct* that threatens the Indian tribe; it does not broadly permit the exercise of civil authority wherever it might be considered 'necessary' to self-government. Thus, unless the drain of the non-member's conduct upon tribal services and resources is so severe that it actually 'imperils' the political integrity of the Indian tribe, there can be no assertion of civil authority beyond tribal lands.

532 U.S. at 657 n.12 (emphasis in original). The tribe's inherent jurisdiction is not triggered in this case because Sprint's allegedly wrongful conduct has not occurred on non-fee lands within the reservation, nor has it directly affected the political integrity, economic security, health, or welfare of the tribe.

NAT alleges in tribal court that Sprint improperly failed to pay NAT's invoices.[19] *See* Knudson Aff. Ex. O. Sprint's decision not to pay the invoices, however, did not take place on the Reservation; instead it took place in the state of Kansas, the location of Sprint's headquarters. Nor did NAT receive payment on the Reservation; payment went to an unrelated billing agent in Texas. Similarly, the calls were sent to a telephone switch outside the Reservation and delivered to conference bridge equipment rather than end user premises on the Reservation. Clouser Aff. ¶ 10.

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[19] The Tribal Utility Authority also alleges that Sprint's initial payment of these improper invoices establishes a consensual relationship. This argument, however, fails for as demonstrated by the Clouser Affidavit, payment was remitted to the third-party billing agent. Clouser Aff. ¶ 10. Similarly, once the true nature of the billing charges to revealed to be traffic pumping, all such payments ceased and Sprint demanded return of its funds. *Id.* at ¶ 8.

Not only has it not committed any wrongful conduct on the Reservation, but Sprint's conduct does not directly imperil the political integrity, economic security, health or welfare of the tribe. The business NAT attributed to Sprint does not affect tribal members because calls delivered to a Call Connection Company have no direct affect on the tribe. The second *Montana* exception is designed to allow a tribe to do only "what is necessary to protect tribal self-government or to control internal relations." *Strate*, 520 U.S. at 458-59. "The conduct must do more than injure the tribe, it must 'imperil the subsistence' of the tribal community.'" *Plains Commerce Bank*, 128 S.Ct. at 2726 (quoting *Montana*, 450 U.S. at 566); *see* Felix S. Cohen, Handbook on Federal Indian Law, § 4.02[3][C], at 232 n.20 (2005) (the "elevated threshold for application of the second *Montana* exception suggests that the tribal power must be necessary to avert catastrophic consequences.").

Both courts and the FCC have rejected NAT's argument that the second *Montana* exception applies. In *Reservation Telecom Coop v. Henry*, the court held:

> The Defendants have wholly failed to establish that *Montana's* second exception applies and justifies the imposition of a possessory interest tax. The Cooperative's actions of providing telecommunication services, and the related sales and service of telephone equipment, do not endanger the tribe's political integrity, the economic security, or the health or welfare of the tribe.

278 F. Supp. 2d at 1024; *see also Cheyenne River*, 1999 SD 60, ¶¶ 18-23, 595 N.W.2d at 608-09 (PUC's exercise of authority over tribe's agreement to purchase on-reservation portion of telephone exchange did not infringe on exercise of tribal self-government).

The FCC likewise rejected Western Wireless' assertion that the second *Montana* exception applied to its services on the Pine Ridge Reservation:

> We are not persuaded that, in the circumstances of this case, tribal regulation of the relationship between non-members 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, therefore, we believe it may do so.

Western Wireless, at ¶ 23.

As NAT, and certainly, Sprint is not a tribal member, and no allegedly wrongful conduct has occurred within the Reservation, the Tribal Court cannot assert jurisdiction under *Montana*. *See Hornell Brewing*, 133 F. 3d at 1093 (where complained-of activities are off the reservation, tribal court lacked any adjudicatory authority over non-member).

D. South Dakota state law also recognizes that the Tribal Court is not the proper court for NAT's action

The doctrine of tribal exhaustion remains a federal doctrine governing the relationship between federal courts and tribal courts. Just as the doctrine requires that a tribal court have jurisdiction, South Dakota state law also requires that in order for a tribal court judgment to be valid, the tribal court must have jurisdiction over the case in the first instance – a requirement clearly lacking here.

> No order or judgment of a tribal court in the State of South Dakota may be recognized as a matter of comity in the state courts of South Dakota, except under the following terms and conditions:
>
> (1) Before a state court may consider recognizing a tribal court order or judgment the party seeking recognition shall establish by clear and convincing evidence that:
>
> (a) The tribal court had jurisdiction over both the subject matter and the parties;

(b) The order or judgment was not fraudulently obtained;

(c) The order or judgment was obtained by a process that assures the requisites of an impartial administration of justice including but not limited to due notice and a hearing;

(d) The order or judgment complies with the laws, ordinances and regulations of the jurisdiction from which it was obtained; and

(e) The order or judgment does not contravene the public policy of the State of South Dakota.

SDCL § 1-1-25. These conditions must be established by clear and convincing evidence. *Red Fox v. Hettich*, 494 N.W.2d 638 (S.D. 1993). If the legislature had intended comity to mean South Dakota courts or agencies must defer to tribal courts, it could have done so expressly in SDCC § 1-1-25. The fact the legislature did not suggests the legislature did not intend for comity to require such deference. The Commission can adjudicate this action.

CONCLUSION

NAT is plainly incorrect that the Tribal Court must first hear this case. By the clear terms of federal and state telecommunications law and by the terms of the doctrine of tribal exhaustion, the Tribal Court has no adjudicatory authority over this case. Instead, the Commission has authority to adjudicate Sprint's Complaint before the Commission.

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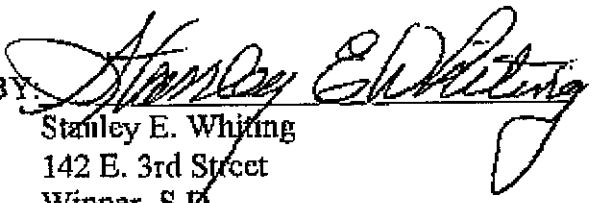
BY: 

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