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 AMERICAN TELECOM, LLC REGARDING TELECOMMUNICATIONS SERVICES	**)**	**Docket No. TC10-026**

Respondent Native American Telecom LLC's *Reply Brief* in Support of *Motion to Stay/Motion to Dismiss* South Dakota Public Utilities Commission's Docket No. TC10-026

INTRODUCTION

Respondent Native American Telecom, LLC (NAT) requests that the South Dakota Public Utilities Commission (SDPUC or Commission) stay all proceedings in this duplicative state regulatory action until Sprint Communications Company, L.P. (Sprint) exhausts all remedies in the Crow Creek Tribal Court (Tribal Court). NAT's Tribal Court action involves the same questions of law and fact that Sprint seeks to litigate before this Commission.

It is an elementary tenet of federal Indian law that a party may not circumvent or collaterally attack the jurisdiction of a tribal court by filing a parallel action in federal court. The "tribal exhaustion doctrine," which promotes tribal self-government and the authority and development of tribal courts, should result in this Commission following the lead of the federal courts and "staying its hand" until the Tribal Court has had a full and fair opportunity to determine its jurisdiction, and, if the Tribal Court finds such jurisdiction to exist, to adjudicate the merits of the dispute between NAT and Sprint. In the alternative, if this Commission does not invoke the tribal exhaustion doctrine, then NAT's Motion to Dismiss should be granted based upon the *Montana* exceptions to Tribal Court jurisdiction.

Unfortunately, Sprint's "Memorandum in Opposition to NAT's Motions to Stay or to Dismiss" (Opposition Memorandum) makes several incorrect and unsupported allegations to advance its argument that (1) Sprint should be exempt from the tribal exhaustion requirement and (2) neither the Tribal Utility Authority nor the Tribal Court has jurisdiction in this matter. None of Sprint's assertions, however, suffices to exempt it from the tribal exhaustion doctrine or Tribal Utility Authority/Tribal Court jurisdiction.

STATEMENT OF FACTS

A. The Structure and Purpose of Native American Telecom, LLC

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 (DeJordy Affidavit).

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.

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[1] NAT's "Joint Venture Agreement" between the Tribe, NAT ENTERPRISE, and WideVoice is attached to the Second Declaration of Scott R. Swier in Support of NAT's Motion to Stay/Motion to Dismiss (Second Swier Declaration) and marked as "Exhibit 7." 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 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

B. NAT's Efforts on the Reservation and Sprint's Illegal Acts of "Self Help"

In 1997, the Tribe established the Crow Creek Sioux Tribe Utility Authority (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." DeJordy Affidavit ¶ 5.

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

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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").

[3] The Telecommunications Plan was attached to the "Declaration of Scott R. Swier in Support of NAT's Motion to Stay" and marked as "Exhibit 1."

[4] The Approval Order was attached to the "Declaration of Scott R. Swier in Support of NAT's Motion to Stay" and marked as "Exhibit 2." 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."

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] Today, NAT provides telephone and advanced broadband service to residential and business customers on the Reservation. Specifically, NAT's activities on the Reservation include:

- NAT provides 110 high-speed broadband and telephone installations at residential and business locations on the Reservation. Additional installations are taking place on a daily basis.

- NAT has established an Internet Library with six (6) work stations that provide computer/Internet opportunities for residents that do not otherwise have access to computers.

- The demand for the Internet Library's services is so great that NAT is building an additional facility on the Reservation that will serve as a full-service communications center offering free Internet, online education classes, computer classes and instruction, and free telephone access to individuals who would otherwise not have access to even these basic services. This state-of-the-art facility is scheduled to open in November 2010.

- NAT subsidizes these telecommunications services by providing them free-of-charge to Tribal members. Without NAT's subsidies, most of the Tribal members would not be able to afford these telecommunications services.

- NAT has enabled the Reservation to escape the unfortunate and long-standing circumstances that have prevented economic growth. Before NAT's efforts, the Tribal members' inability to pay for telecommunications services was the primary reason that they were not provided with access to these modern services. As such, without the ability to pay for these modern services, economic growth and

[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] DeJordy Affidavit ¶ 10. The Tribe's Press Release announcing the launch of its tribally-owned telephone and advanced broadband telecommunications system was attached to the "Declaration of Scott R. Swier in Support of NAT's Motion to Stay" and marked as "Exhibit 3."

viability were impossible. Now, however, because of NAT, residents are building their own websites to sell their unique native crafts over the Internet. These unprecedented economic opportunities will continue to grow as Tribal member's familiarity with modern telecommunications services increases.

- NAT has created seven jobs (three full-time and four part-time) and an office location on the Reservation. These employment opportunities are substantial considering the well-documented fact that the Reservation's unemployment rate is estimated to be between eighty (80) and ninety (90) percent.

- NAT's business structure is composed of both Tribal and private entity ownership. As a result of this unique "tribal-private entity" partnership, NAT has attracted unprecedented financial and capital investment to the Reservation. This unique business model has replaced the "old model" of non-Tribal service providers providing limited services (at best) and having no economic incentive to ensure the Tribe's services grow, prosper, and become profitable. This "old model" has proven to be a failure. Under NAT's business model, however, the more successful NAT becomes, the more economically successful the Tribe becomes.

DeJordy Affidavit ¶ 9; Affidavit of Thomas J. Reiman, ¶¶ 4-15 (Reiman Affidavit). In sum, NAT's efforts provide the Tribe with a vehicle to "pave the way" for much-needed business, economic, education, and social development on the Crow Creek Reservation.

Shortly after NAT launched its tribally-owned telephone system, Sprint improperly refused to pay NAT's lawfully-imposed Access Tariff.[8] 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.[9] DeJordy Affidavit ¶¶ 14, 16.

[8] 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 numerous other) lawsuits.* DeJordy Affidavit ¶ 15.

[9] 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 compensation, even though NAT incurs costs to terminate Sprint's traffic. DeJordy Affidavit ¶ 16.

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."[10] 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."

As such, the Tribal Utility Authority found "Sprint's non-payment of [NAT's] access tariff

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[10] The Tribal Utility Authority's Order was attached to the "Declaration of Scott R. Swier in Support of NAT's Motion to Stay" and marked as "Exhibit 4." 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).

charges to be a violation of the laws of the Crow Creek Sioux Tribe."[11] 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.

C. Sprint's Characterization of NAT's 2008 Filing with the South Dakota Public Utilities Commission is Misleading

Sprint's Opposition Memorandum attempts to allege that NAT somehow acted "nefariously" in 2008 when it requested a dismissal of its certification application from the SDPUC. (Opposition Brief, pages 11-12). However, a thorough analysis reveals that Sprint's characterization of NAT's actions in this SDPUC matter is misleading.

In September 2008, NAT filed an "Application for Certificate of Authority" with the SDPUC (SDPUC TC 08-110).[12] In December 2008, NAT moved to dismiss its Application based on the Tribe's exercising jurisdiction over NAT's services within the exterior boundaries of the Reservation. Shortly thereafter, Midstate Communications, Venture Communications Cooperative, and the South Dakota Telecommunications Authority intervened and opposed NAT's motion to dismiss on numerous grounds (including jurisdictional, procedural, and precedential grounds). NAT promptly replied to the Intervenors' objections.[13]

In January 2009, the SDPUC issued its Staff Response to NAT's motion to dismiss. The Staff Response fairly couched the issue as "whether NAT has the right to voluntarily dismiss its

[11] The Tribal Utility Authority's Order provides Sprint with an invitation to address Sprint's concerns. However, Sprint has also entirely ignored this part of the Order. DeJordy Affidavit ¶ 19.

[12] NAT requests that this Commission take judicial notice of the docket filings in SDPUC TC 08-110.

[13] The Tribe also offered "Comments" in support of NAT's motion to dismiss. The substantial briefing and legal efforts by the respective parties leaves no doubt that this SDPUC matter was a heavily "contested" proceeding.

filing for an application for a certificate of authority to provide local exchange services on the . . . . Reservation?" In recommending that NAT's motion to dismiss be granted, the Staff Response opined, "the Intervenors have raised many concerns, but there exists no special reason that the dismissal should not be granted. This docket, which is a filing for a certificate of authority, is not the forum to determine the issues that the Intervenors believe may exist." The Staff Response further explained, "[t]he Intervenors' concerns do not address NAT's technical, financial, or managerial capabilities. . . . The Intervenors would not suffer any prejudice should [NAT's] Motion to Dismiss be granted. NAT has an absolute right to voluntarily dismiss its application and there is no special reason why the dismissal should not be granted." This Commission adopted its staff's Response and found "[NAT's] motion to voluntarily dismiss . . . reasonable and *not contrary to the public interest.*" (emphasis added).

Sprint claims that NAT is improperly operating on the Reservation without this Commission's authority. However, for Sprint to support this allegation, it must imply that this Commission's "Order of Dismissal" was somehow obtained by NAT "under color of darkness" and in a nefarious or illegal manner. These claims and implications are yet another example of Sprint's attempt to mislead this Commission in opposing NAT's motions.

D. Sprint's Actions Have Resulted in Duplicative Federal Court, Tribal Court, and SDPUC Proceedings

i.) Sprint's South Dakota Public Utilities Commission Complaint

Less than two months after the Tribal Utility Authority issued its Order, Sprint filed its currently-pending complaint with this Commission. Sprint's complaint concerns issues identical to those decided by the Tribal Utility Authority. In its complaint, Sprint alleges that (1) this Commission has the sole authority to regulate Sprint's interexchange services within the State of South Dakota; (2) the Tribal Utility Authority lacks jurisdiction over Sprint; and (3) NAT must

seek a Certificate of Authority from this Commission and file a tariff with this Commission before NAT can charge for switched access service.

ii.) NAT's Complaint in Crow Creek Tribal Court

On July 7, 2010, NAT filed a complaint with the Tribal Court.[14] NAT's complaint asks the Tribal Court to enforce the Tribal Utility Authority's Order. In its Tribal Court complaint, NAT alleges that (1) Sprint is unlawfully refusing to compensate NAT for Access Tariffs, and (2) the Tribal Utility Authority and Tribal Court have proper jurisdiction over Sprint in this matter.

At this time, NAT's complaint is pending before the Tribal Court. Sprint has requested that NAT's Tribal Court complaint be dismissed for lack of jurisdiction. The Honorable B.J. Jones has been appointed to serve as the judge in this Tribal Court action. Judge Jones recently established a schedule for the parties to submit briefs on these highly-complex jurisdictional issues.

iii.) Sprint's Complaint in Federal District Court

On August 16, 2010, Sprint filed a complaint with the United States District Court – District of South Dakota. Sprint's complaint concerns issues identical to those decided by the Tribal Utility Authority and contained in NAT's Tribal Court complaint. In sum, Sprint alleges that the Tribal Utility Authority and Tribal Court have no jurisdiction over its activities on the Reservation.

At the present time, Sprint's complaint is pending before the Honorable Karen E. Schreier. NAT has filed a Motion to Stay based upon lack of jurisdiction and the tribal exhaustion doctrine. Sprint recently filed a Motion for Preliminary Injunction. On October 14,

[14] NAT's Tribal Court complaint was attached to the "Declaration of Scott R. Swier in Support of NAT's Motion to Stay" and marked as "Exhibit 5."

2010, a hearing on these issues was held before Judge Schreier in Sioux Falls, South Dakota. Pursuant to Judge Schreier's order, the parties are in the process of submitting final briefs on the issues contested at this October 14, 2010, hearing.

E. The Underlying Dispute Between the Parties

Sprint, a national long distance carrier, would like to avoid its legal duty to pay NAT's lawfully-imposed tariffed access charges simply because Sprint's customers are calling some of NAT's customers, which in turn has increased the amount of money Sprint owes NAT under the governing tariffs. Sprint admits that it previously paid NAT's tariffed rates. Sprint must also concede, under the "filed rate doctrine," that NAT's tariffs are binding and that Sprint pays other carriers, in positions similar or identical to NAT, their tariffed rates for calls to all of Sprint's customers.

Sprint's false, misleading, and disingenuous bases for this refusal to pay is that NAT is somehow involved in an unlawful "scheme." However, Sprint provides no authority for this legally unsupportable claim and its arguments are foreclosed by binding Federal Communications Commission (FCC) precedent. In fact, by engaging in "self help" and not paying NAT's lawfully-imposed tariffed access charges, *Sprint is acting unlawfully*.

The fact of the matter is that Sprint views NAT as a competitor. Sprint's intention is to replicate what it has done in previous cases – eviscerate its competition by refusing to pay legally-imposed access charges – thereby financially "bankrupting" any potential competition.

F. Sprint's Allegations in Opposition to NAT's Motion to Stay/Motion to Dismiss are Misleading

Sprint's alleges that NAT is "exploiting a weakness in the federal regulatory scheme" and engages in "traffic pumping." However, Sprint's "standard" argument of NAT's "exploitation of the system" and "traffic pumping" is simply wrong, a veiled attempt to improperly argue the

merits of this case, and irrelevant to the pending issues of "tribal exhaustion" and proper jurisdiction.

Sprint provides an incorrect and misleading explanation of NAT's services. In addition to those already mentioned in this memorandum, NAT also provides the following services:

- NAT completes Sprint's customers' conference calls. Each month, Sprint bills and collects call termination fees from its customers. Yet Sprint refuses to pay NAT's termination fees for the services NAT provides. As such, Sprint profits handsomely from these calls. *In other words, Sprint bills its customers for the fees, collects the fees from its customers, improperly refuses to distribute their customer's fees to NAT, and keeps a considerable profit.*

- NAT does not engage in illegal "traffic pumping." Sprint knows that NAT's business model is perfectly legal. Sprint simply views NAT as a competitor. NAT has properly filed federal and tribal tariffs that clearly explain that NAT is offering services to conference providers. NAT's business has always been conducted with the utmost transparency. Sprint's attempts to somehow claim that NAT's services and tariffs are improper are incorrect and misleading.

- NAT's advanced telecommunications system is located on the Reservation. In fact, NAT's telecommunications system is located directly behind the Reservation's Youth Center. Sprint could have easily verified this fact by making a simple visual inspection of NAT's facilities. Instead, Sprint chooses to submit false and misleading information as to NAT's operations on the Reservation.

- Sprint incorrectly asserts that calls do not "terminate" on the Reservation. In fact, calls do "terminate" on the Reservation via NAT's advanced telecommunications system.[15]

Reiman Affidavit, ¶¶ 12-15.

[15] It should also be noted that all of the major long distance carriers (including Sprint) offer conference calling services that compete with NAT. In fact, NAT has offered Sprint a termination rate that is similar (if not identical) to the termination rate that Sprint charges the other major carriers for terminating their own respective conferencing services. However, in an effort to drive its competition out of business, Sprint illegally invokes the doctrine of "self help" and refuses to pay smaller competitors' lawfully-imposed fees. In an effort to settle the numerous pending lawsuits between the parties, NAT even offered Sprint a "Tier-One Metro Rate" ($0.01 per minute) even though NAT is legally entitled to collect the higher "Rural Rate." Therefore, Sprint's claim that NAT is involved in a "scheme" to collect these more profitable "Rural Rates" is patently incorrect.

Sprint also submits incorrect and misleading allegations regarding NAT's technology. NAT's 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.

Unfortunately, Sprint's representations regarding the technology used by NAT is incorrect and misleading in numerous ways. However, for sake of clarity and expediency, NAT asserts that five of Sprint's representations are fundamentally incorrect and misleading:

- Paragraph 10 of the Affidavit of Amy S. Clouser (Clouser Affidavit) is incorrect and misleading. In fact, NAT has over one-hundred (100) residential subscribers on the Reservation.

- Paragraph 11 of the Clouser Affidavit is incorrect and misleading. NAT delivers all "line side" subscriber calls to subscribers or subscriber equipment located on the Reservation. In the case of the latter, the subscriber equipment is voice application equipment situated in NAT's "radio hut." NAT's "radio hut" is owned by NAT and located on the Reservation.

- Paragraph 12 of the Clouser Affidavit is incorrect and misleading. The Clouser Affidavit is partially correct in that a call is transported to a WideVoice switch in Los Angeles, California. In fact, this call is known in the industry as the "trunk side" of the call. The switch then transmits the call to NAT's subscribers and subscriber equipment located on the Reservation. This call is known in the industry as the "line side" of the call.

  This long-haul "trombone-like" transport is due to the lack of physical telephone equipment facilities in Fort Thompson, South Dakota or Sioux Falls, South Dakota.

Since the time this network topology was constructed, however, WideVoice has negotiated and obtained physical accommodations to house a telephone switch/media gateway in Sioux Falls, South Dakota. When this network modification is complete, calls will be delivered on the "trunk side" on inter-building facilities to the WideVoice switch and then be transferred to private, "line side" facilities out to the Crow Creek Reservation.

- Paragraph 21 of the Clouser Affidavit is incorrect and misleading. Sprint simply dismisses the rapidly expanding technology that allows telephone switching equipment to be "Geo-Diverse." WideVoice owns and operates such "Geo-Diverse" equipment. The common call control of this "Geo-Diverse" equipment is located in Los Angeles, California, under the Local Exchange Routing Guide (LERG) designator of LSANCARD6S. This common control portion of the fabric controls diverse switch equipment in geographically-diverse locations. In this case, these locations are Los Angeles, California, and Sioux Falls, South Dakota.

- Paragraph 21 of the Clouser Affidavit is also incorrect and misleading in that it simply dismisses the industry's understanding and rules of jurisdictional presence in the North American telephone network (Rules). Under the Rules, a competitive telephone company is not required to have a "phone switch" in each and every rate center. Instead, the rate centers can be aggregated back to a "switching hub" such as Los Angeles, California, or Sioux Falls, South Dakota, by using a "Point of Interface" (POI) registration to provide jurisdiction. This POI designator for NAT is FFTHSDXA1MD, located on the Reservation in Fort Thompson, South Dakota, unlike the local incumbent telephone company that serves that rate center from a telephone switch in Kimball, South Dakota.

Affidavit of Keith Williams, ¶¶ 3-6.

DISCUSSION OF LAW

I. THIS COMMISSION SHOULD GRANT NAT'S MOTION TO STAY BASED UPON THE "TRIBAL EXHAUSTION DOCTRINE"

This Commission (like a federal court) has limited jurisdiction, and in every case, this Commission (like a federal court) must determine at the outset whether it has jurisdiction. Under well-established principles of federal Indian law, the facts of this case authorize that before further proceedings should occur before this Commission, Sprint should be required to exhaust its remedies in the parallel action previously filed by NAT in Tribal Court.

The exhaustion doctrine precludes a party from attacking or evading the jurisdiction of a tribal court in a collateral or parallel federal action until it first exhausts all remedies available in

the tribal court. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 15-17 (1987); *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856-57 (1985). At its core, the exhaustion doctrine recognizes that "[t]ribal courts play a vital role in tribal self-government, . . . [that] the Federal Government has consistently encouraged their development[,]" and that "[a] federal court's exercise of jurisdiction over matters relating to reservation affairs can . . . impair the authority of tribal courts[.]" *Iowa Mut.*, 480 U.S. at 14-15 (citations and footnote omitted). Therefore, a federal court must "stay[] its hand" and may not "consider any relief" until exhaustion is complete. *Nat'l Farmers*, 471 U.S. at 857. While exhaustion is "required as a matter of comity, not as a jurisdictional prerequisite[,]" *Iowa Mut.*, 480 U.S. at 16 n.8, the doctrine is a mandatory "inflexible bar" to a federal court's exercise of jurisdiction. *Bowen v. Doyle*, 230 F.3d 525, 529-30 (2d Cir. 2000) (quoting *Granberry v. Greer*, 481 U.S. 129, 131 (1987)). *See also, Burlington Northern R.R. Co. v. Crow Tribal Council*, 940 F.2d 1239, 1245 & n.3 (9th Cir. 1991) (exhaustion is "not discretionary; it is mandatory" and is "a prerequisite to a federal court's exercise of its jurisdiction").[16] Sprint cannot dispute these fundamental principles.

Sprint cannot disguise its deliberate efforts to circumvent the jurisdiction of the Tribal Court via its duplicative actions.[17] The scope of the parties' respective factual allegations, and

[16] In *Iowa Mut.*, the Supreme Court firmly rejected the argument that a federal court's undisputed subject matter jurisdiction, whether based upon diversity of citizenship or the presence of a federal question, "overrides the federal policy of deference to tribal courts" and excuses the exhaustion of tribal court remedies. 480 U.S. at 17-18. *See also, Stock West, Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1229-30 (9th Cir. 1989) (exhaustion required despite federal court's subject matter jurisdiction).

[17] Under the Constitution and By Laws of the Crow Creek Sioux Tribe, the Tribal Council is empowered and authorized to enact resolutions and ordinances governing the management of all economic and educational affairs and enterprises of the Tribe. The Crow Creek Utility Authority Ordinance was amended in September 1997 to establish the Crow Creek Utility Authority. Under the Crow Creek Utility Authority Plan of Operation, the stated purpose of the Crow Creek Utility Authority is to "plan for, provide, and furnish utility services in all areas of the Crow

the practical effect of any ruling on the merits, is indistinguishable. Thus, exhaustion is plainly warranted.[18]

Next, Sprint cannot reasonably dispute that the respective legal actions arise from activities occurring within the exterior boundaries of the Reservation. Specifically, Sprint challenges the legitimacy and viability of:

- the Tribal Court;
- NAT - a tribally-owned limited liability company;
- high-speed Internet access, basic telephone, and long-distance services on and within the Reservation;
- the Tribal Utility Authority's ability to plan and oversee utility services on the Reservation;
- the Tribal Utility Authority's ability to promote the use of these utility services to improve the health and welfare of the residents;
- the Tribe's Telecommunications Plan;
- the Tribal Utility Authority's Approval Order;
- the Tribal Utility Authority's access tariffs;
- the Tribal Utility Authority's Enforcement Order;
- one of the first new tribally-owned telephone systems in the United States;

Creek Sioux Reservation." *See* "Exhibit 2" of "Declaration of Scott R. Swier in Support of NAT's Motion to Stay."

[18] NAT's complaint in Tribal Court includes the following federal, tribal, and common law claims: *Count I* – Breach of Contract/Collection Action Pursuant to Federal Tariffs; *Count II* – Breach of Implied Contract Resulting from Violation of Federal and Tribal Tariffs; *Count III* – Violation of Section 201 of the Communications Act, 47 U.S.C. § 201; *Count IV* – Violation of Section 203 of the Communications Act, 47 U.S.C. § 203; *Count V* – Breach of Contract/Collection Action Pursuant to Tribal Tariff; *Count VI* – Quantum Meruit (Unjust Enrichment); and *Count VII* – Declaratory Judgment. *See* "Exhibit 5" of "Declaration of Scott R. Swier in Support of NAT's Motion to Stay."

- over one hundred (100) high-speed broadband and telephone installations at residential and business locations on the Reservation;
- a new high-speed broadband and telephone installations on the Reservation;
- an Internet Library with six (6) work stations that provide computer/Internet opportunities for Tribal members who do not otherwise have access to computers;
- the construction and opening of a state-of-the-art facility that will serve as a full-service communications center offering free Internet, online education classes, computer classes and instruction, and free telephone access to individuals who would otherwise not have access to even these basic services on the Reservation;
- subsidies that provide telecommunications services, free-of-charge, to Tribal members;
- the Reservation's ability to escape the unfortunate and long-standing circumstances that have prevented economic development and growth;
- past, present, and future employment and economic development opportunities in one of the nation's poorest areas; and
- a unique business structure composed of both Tribal and private entity ownership that has attracted unprecedented financial and capital investment to the Reservation.

Sprint's attempt to characterize this dispute as a "non-tribal affair" finds no support in the law and is inconsistent with the factual record. It is also well-settled that the existence of off-reservation contacts does not excuse application of the exhaustion doctrine where the genesis of a dispute lays on-reservation. *See, e.g., Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Housing Authority*, 207 F.3d 21, 32 (1st Cir. 2000) (dispute arising from tribal housing authority's development of off-reservation low-income housing project for tribal members); *Bank of Oklahoma v. Muscogee (Creek) Nation*, 972 F.2d 1166, 1168-70 (10th Cir. 1992) (exhaustion required in interpleader action filed by off-reservation bank holding funds subject to contract dispute between tribe and non-Indian company stemming from on-reservation gaming activity); *Stock West Corp. v. Taylor*, 964 F.2d 912, 919 (9th Cir. 1992) (although

disputed document "was delivered . . . off the reservation[,]" exhaustion required because totality of facts show that activities giving rise to the allegations were "commenced on tribal lands"). Here, it is clear that the "genesis" of the parties' dispute arises from activities taking place within the Reservation's boundaries.

Finally, Sprint cannot dispute that it has flouted the processes of both the Tribal Utility Authority and Tribal Court. Sprint justifies its actions through letters and filings challenging the Tribal Utility Authority's and Tribal Court's jurisdiction over it and the subject matter of NAT's action. By taking this posture, Sprint ignores a fundamental tenet of the exhaustion doctrine – that tribal courts should enjoy the opportunity in the first instance to adjudicate challenges to their own jurisdiction. *See Nat'l Farmers,* 471 U.S. at 856-57 (tribal court must have a "full opportunity to determine its own jurisdiction[,] . . . to rectify any errors it may have made[,] . . . [and] to explain to the parties the precise basis for accepting jurisdiction").

In sum, through its actions before this Commission, the federal district court, and the Tribal Court, Sprint has defied the requirements of the exhaustion doctrine and the orders of the Tribal Utility Authority. Sprint has caused the very "jurisdictional confrontation" it now purports to avoid, and, in doing so, has both presented a textbook case for application of the exhaustion doctrine and vividly underscored the doctrine's importance in safeguarding the integrity of the Tribal Court.

A. Sprint's Reliance on *Strate*, *Hornell*, *Christian Children's Fund*, and *Hicks* is Misplaced

Sprint disregards the uniform body of federal court precedent that controls this case and instead relies upon multiple cases that are readily distinguishable. NAT has established that the federal courts have uniformly held that the exhaustion doctrine precludes a party from litigating in federal court, as Sprint seeks to do here, those very same issues that are pending in a parallel,

previously-filed tribal court action. Sprint has no answer for this wealth of authority running directly counter to its position. Instead, Sprint either improperly argues the *merits* of this case or relies on authorities that are inapplicable.

Indeed, Sprint principally relies on *Strate v. A-1 Contractors*, 520 U.S. 438 (1997). In *Strate*, however, the Supreme Court was confronted with this limited issue – could a tribal court entertain a civil action between *two non-tribal members* which occurred on a portion of a *public highway maintained by the State* under a federally granted right-of-way over Indian reservation land? *Id.* at 442. In answering this question in the negative, the Supreme Court held that "tribal courts *may not* entertain claims against *nonmembers* arising out of accidents *on state highways*, absent a statute or treaty authorizing the tribe to govern the conduct of nonmembers on the highway in question."[19] *Id.* (emphasis added). In this case, NAT has clearly demonstrated that it is a *tribally-owned* telecommunications company, conducting business on the *Reservation*, and providing employment and economic development opportunities on the *Reservation*. As such, Sprint's reliance on *Strate* is misplaced.

Sprint next cites *Hornell Brewing Co. v. Rosebud Sioux Tribal Court*, 133 F.3d 1087 (8th Cir. 1998), to support its position. However, in *Hornell*, it was "undisputed that the Breweries *d[id] not conduct [its] activities on the Rosebud Sioux Reservation*. . . ." *Id.* at 1091 (emphasis added). Once again, in this case, NAT has clearly demonstrated that it is a *tribally-owned* telecommunications company, conducting business on the *Reservation*, and providing employment and economic development opportunities on the *Reservation*. As such, Sprint's reliance on *Hornell* is also misplaced.

[19] To further demonstrate *Strate*'s limited precedential value, the Supreme Court opined, "T[he] Court expresses no view on the governing law or proper forum when an accident occurs on a tribal road *within a reservation*." *Id.* (emphasis added).

Sprint also relies upon *Christian Children's Fund, Inc. v. Crow Creek Sioux Tribal Court,* 103 F.Supp.2d 1161 (D.S.D. 2000). However, the *Christian Children's Fund* Court found that "[t]he alleged conduct which forms the basis for the complaints in tribal court against CCF *did not occur within the Reservation*. All decisions and related actions regarding the termination of CCF's involvement . . . were *made and implemented off the [R]eservation*."[20] *Id.* at 1166 (emphasis added). Of course, in this case, NAT has clearly demonstrated that it is a *tribally-owned* telecommunications company, conducting business on the *Reservation*, and providing employment and economic development opportunities on the *Reservation*. Sprint's reliance on *Christian Children's Fund* is also misplaced.

Sprint submits that *Nevada v. Hicks,* 533 U.S. 353 (2001) also precludes application of the exhaustion doctrine. In *Hicks,* however, the Supreme Court was presented with the issue of whether a tribal court may assert jurisdiction over civil claims against *state officials* who entered tribal land to execute a search warrant against a tribal member suspected of having violated state law *outside the reservation*.[21] *Id.* at 355. Once again, in this case, NAT has clearly demonstrated that it is a *tribally-owned* telecommunications company, conducting business on the *Reservation*, and providing employment and economic development opportunities on the *Reservation*. Sprint's reliance on *Hicks,* therefore, is also misplaced.

Sprint also incorrectly implies that this Commission (as a *state* political body) can simply ignore both the tribal exhaustion doctrine and the Tribal Court's jurisdiction. Sprint disregards the fact that "[i]f state-court jurisdiction over Indians or activities on Indian land *would interfere*

[20] It should also be noted that in *Christian Children's Fund,* the parties actually exhausted tribal court remedies before proceeding to federal district court. *Id.* at 1163-64.

[21] It should also be noted that the *Hicks* Court specifically stated, "*Our holding in this case is limited* to the question of tribal-court jurisdiction *over state officers enforcing state law*. We leave open the question of tribal-court jurisdiction over *nonmember defendants* in general." *Id.* at 358 n.2 (emphasis added).

with tribal sovereignty and self-government, the *state courts are generally divested of jurisdiction* as a matter of federal law." *Iowa Mut*., 480 U.S. at 15 (citing *Fisher v. District Court of Sixteenth Judicial Dist. of Montana,* 424 U.S. 382, 386 (1976) and *Williams v. Lee,* 358 U.S. 217 (1959)) (emphasis added). *See also Wells v. Wells,* 451 N.W.2d 402, 405 (S.D. 1990) ("[t]he test for determining whether a state court may assume jurisdiction over claims involving Indians . . . [is] 'whether the state action [would infringe] on the right of reservation Indians to make their own laws and be ruled by them.'") (citations omitted); *Matsch v. Prairie Island Indian Community*, 567 N.W.2d 276, 277-79 (Minn. Ct. App. 1997) (holding that a party may not circumvent the jurisdiction or determination of a tribal court by filing a duplicative action in state court).

In this case, there is no doubt that this Commission's exercising of jurisdiction would undermine the authority of the Tribal Court over Reservation affairs and would improperly infringe on the right of the Tribe to govern itself. It is immaterial that Sprint is not an Indian. Sprint has contacts with the Reservation and with a tribally-owned limited liability company. The United State Supreme Court has consistently guarded the authority of Indian governments over their reservations. The South Dakota Supreme Court has done likewise.

B. <u>The "Tribal Court Exhaustion Doctrine"</u>

In *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987) and *Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians,* 471 U.S. 845 (1985), the Supreme Court announced the doctrine of "tribal court exhaustion." This doctrine is designed to protect the integrity of tribal courts, vital as those courts are to the exercise of tribal self-government. Under this doctrine, Sprint may not challenge the jurisdiction of the Tribal Court or litigate the merits of the dispute already pending

before the Tribal Court, until Sprint first exhausts all remedies available in the Tribal Court regarding similar issues.

The federal courts have uniformly held that, under the tribal court exhaustion doctrine, a party may not circumvent or attack a tribal court's jurisdiction by filing a duplicative federal court action. Because this dispute strikes at the very heart of the Tribe's self-determination – including Sprint's efforts to pierce the Tribe's sovereign immunity and the Tribe's exercise of regulatory and adjudicatory oversight over economic development activities on the Reservation – it presents a classic case for application of the tribal court exhaustion doctrine. Accordingly, this Commission should follow the federal courts' lead and "stay its hand" until Sprint exhausts its remedies in Tribal Court.[22]

C. The "Tribal Court Exhaustion Doctrine" Applies In This Case

"Tribal courts play a vital role in tribal self-government, and the Federal Government has consistently encouraged their development." *Iowa Mut.,* 480 U.S. at 14-15 (internal citation and footnote omitted). "A federal court's exercise of jurisdiction over matters relating to reservation affairs can . . . impair the authority of tribal courts[.]" *Id.* at 15 (citations omitted). Accordingly, a party may not attack or circumvent the jurisdiction of the tribal court in a collateral or parallel

[22] The duration of such a stay would likely turn on the Tribal Court's jurisdictional determination. For example, in the federal court context, if the Tribal Court concludes that it lacks jurisdiction over Sprint or the subject matter of the dispute, the federal court would then proceed to adjudicate the merits of the dispute. If, however, the Tribal Court concludes that it possesses jurisdiction, then the federal court would "stay its hand" until the Tribal Court adjudicates the merits of the dispute. After the Tribal Court's adjudication on the merits, and the parties' exhaustion of any available appellate remedies, the federal court could then proceed to review the Tribal Court's jurisdictional determination. If the federal court upholds the jurisdictional determination under federal law, then it would not re-adjudicate the merits. If, however, the federal court finds that the Tribal Court acted without jurisdiction, it would then adjudicate the merits of the dispute.

federal action unless and until it first exhausts all remedies available in tribal court. *Id.* at 16-17; *Nat'l Farmers*, 471 U.S. at 856-57.[23]

While the exhaustion of tribal court remedies is "required as a matter of comity, not as a jurisdictional prerequisite[,]" *Iowa Mut.*, 480 U.S. at 16 n. 8, the doctrine is a mandatory "inflexible bar" to a federal court's exercise of jurisdiction. *Duncan Energy Co. v. Three Affiliated Tribes of Fort Berthold Reservation*, 27 F.3d 1294, 1300 (8th Cir. 1994); *Bowen v. Doyle*, 230 F.3d 525, 529-30 (2nd Cir. 2000). Further, because the "federal policy of promoting tribal self-government encompasses the development of the entire tribal court system, . . ." "[a]t a minimum, exhaustion of tribal remedies means that tribal appellate courts must have the opportunity to review the determination of the lower tribal courts[,]" *Iowa Mut.*, 480 U.S. at 16-17, and a federal court must "stay[] its hand" until tribal appellate review is complete, *Nat'l Farmers*, 471 U.S. at 857. Following the exhaustion of tribal court remedies, the tribal courts' determination of tribal jurisdiction is subject to challenge in federal court – until then, "it would be premature for a federal court to consider any relief." *Id.; see also Iowa Mut.*, 480 U.S. at 19.

To NAT's knowledge, the federal courts have arrived at complete unanimity on the precise question presented here. With the exception of occasional district court opinions that have been overturned on appeal, the federal courts have uniformly held that the tribal court exhaustion doctrine precludes a party such as Sprint from litigating in federal court those very same issues that are pending in a parallel tribal court action.

For example, in *Gaming World Int'l Ltd. v. White Earth Band of Chippewa Indians*, 317 F.3d 840 (8th Cir. 2003), the Eighth Circuit considered a dispute stemming from a casino

[23] The tribal court exhaustion doctrine applies regardless of whether a party collaterally attacks the jurisdiction of a tribal court directly, see *Nat'l Farmers*, 471 U.S. at 856-57, or indirectly by seeking to litigate the merits of a dispute already before a tribal court, see *Iowa Mut.*, 480 U.S. at 11-13, 16-17.

management agreement between Gaming World and the Band. The dispute arose when the tribal council terminated the agreement and Gaming World initiated arbitration proceedings. *Id.* at 846-47. The Band subsequently sued Gaming World in tribal court, seeking a declaration that the management agreement was invalid. *Id.* at 846. Gaming World objected to tribal court jurisdiction and, one month later, sued the Band in federal court, seeking a declaratory judgment as to the validity of the agreement and an order compelling arbitration. *Id.* Recognizing that "[t]he first filed declaratory action [in tribal court] encompasses all of the issues between the parties . . . [and that] Gaming World's subsequent petition for declaratory relief and arbitration was a clear attempt to evade tribal court jurisdiction," the Eighth Circuit held:

> [T]he district court erred by not deferring for exhaustion of tribal court remedies and by proceeding to rule on the motion to compel arbitration. *Our decision in* [Bruce H. Lien Co. v. Three Affiliated Tribes*, 93 F.3d 1412 (8th Cir. 1996)] and those in similar cases decided by the Fifth, Ninth, and Second Circuits teach that exhaustion should be required when a party tries to avoid tribal court jurisdiction by seeking an order to compel arbitration in federal court.* This is especially true if the underlying dispute involves *activities undertaken by tribal government within reservation lands.* Failure to require exhaustion in these circumstances would undermine the important federal policy to foster tribal self government through the development of tribal courts as enunciated in *Nat'l Farmers Union Ins. Co.* and *Iowa Mut. Ins. Co.*

Id. at 851-52 (emphasis added) (footnote omitted).

The Eighth Circuit was also confronted with the exhaustion doctrine in *Bruce H. Lien Co. v. Three Affiliated Tribes,* 93 F.3d 1412 (8th Cir. 1996). There, the Chairman and Secretary of the Three Affiliated Tribes Tribal Business Council, purportedly acting on behalf of the Tribes, executed a gaming management agreement with the Bruce H. Lien Company that included an arbitration clause and corresponding waiver of sovereign immunity. *Id.* at 1414-15 n.2. When the company demanded arbitration, the Tribes sued in tribal court seeking a ruling that the

management agreement was "null and void under Tribal law due to lack of proper authority and failure to garner approval by the [Tribal Business Council]." *Id.* at 1415-16. After the Tribes obtained a preliminary injunction from the tribal court enjoining the company and the American Arbitration Association from proceeding with the arbitration, the company filed suit in federal court seeking to enforce the arbitration clause. *Id.* at 1416. The Eighth Circuit concluded:

> [T]he Tribes are challenging the legal validity of the contract itself, specifically the actions of its former Chairman leading to the execution of the contract. This challenge to the document itself therefore calls into question all provisions contained therein (including provisions relating to arbitration, sovereign immunity, and federal district court jurisdiction). . . .
>
> [T]he issue becomes where the decision regarding the contract's validity is to be made. In the end we are convinced that the question must first be promptly addressed in the Tribal Court, subject to appropriate review by the District Court.

Id. at 1417.

In *Reservation Telephone Cooperative v. Three Affiliated Tribes of the Fort Berthold Reservation*, 76 F.3d 181 (8th Cir. 1996), three telephone cooperatives challenged the authority of multiple tribes to impose possessory interest tax on telephone lines and rights-of-way within their reservation. *Id.* at 182. Each cooperative provided telephone service to the reservation through telephone cables crossing reservation lands by virtue of rights-of-way granted by the Secretary of the Interior.[24] *Id.* at 182-83.

In 1990, the tribes enacted a tax on interests in real and personal property located within the exterior boundaries of the reservation and used for business or profit. This possessory

[24] Congress authorized the Secretary of the Interior to grant these rights-of-way in Section 3 of its Act of March 3, 1901, 31 Stat. 1083 (codified at 25 U.S.C. § 319) (1901 Act). The 1901 Act further authorizes the Secretary of the Interior to tax telephone lines for the benefit of Indian tribes, but leaves intact the authority of state, territorial, or municipal authorities to assess a tax on telephone lines laid pursuant to federal rights-of-way. *Id.* at 183.

interest tax was assessed on 100 percent of the actual value of the possessory interest as determined by the tribal tax commission. *Id.* at 183. Under tribal law, the cooperatives' property interests situated within the reservation were subject to the possessory interest tax and to tribal remedies and appeal provisions. As such, the tribal tax commission sent the possessory interest tax forms to the cooperatives with a letter indicating the tribes' intent to collect the taxes. Subsequently, the tribes sent a notice to the cooperatives setting a deadline for filing possessory interest tax returns. *Id.*

In an attempt to avoid paying the taxes, the cooperatives filed an action for declaratory judgment in the United States District Court for the District of North Dakota. The cooperatives asserted various grounds for invalidation of the tribal tax and sought to enjoin the tribes from enforcing the tax. *Id.* The district court held that the cooperatives were required to present their arguments to the tribal court before the federal court action would be allowed to proceed.[25] *Id.* at 184. In affirming the district court's decision, the Eighth Circuit found the cooperatives' opposition to the tribal exhaustion doctrine to be "both incongruous and inconsistent with the policy of tribal self-governance. . . . " *Id.* at 185. The Eighth Circuit concluded by opining that "if a federal court 'accepts the reasoning that a party does not have to exhaust tribal remedies in a case where the party says the underlying tribal action is preempted, there will never be an exhaustion rule.'" *Id.* (internal citations omitted).

In this case, Sprint seeks to litigate a dispute before this Commission involving (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

[25] Shortly thereafter, upon a motion by the cooperatives, the district court amended its stay order to provide instead that the case be dismissed without prejudice pending exhaustion by the cooperatives of their tribal remedies. *Id.* at 184.

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.

NAT filed an appropriate action in Tribal Court. Approximately one month later, Sprint filed a plainly duplicative action in the federal district court and informed the Tribal Court that it contests the jurisdiction of the Tribal Court over it and the subject matter of the dispute. The tribal court exhaustion doctrine unquestionably bars Sprint's transparent attempt to circumvent (and disregard) the jurisdiction of the Tribal Court. Accordingly, this Commission should not proceed further in this action until Sprint fully exhausts its remedies in the Tribal Court.

D. Tribal Exhaustion in this Dispute – a Quintessential Tribal Affair Stemming from the Tribe's Exercise of Self-Government and Turning on the Interpretation of Tribal Law – Fulfills the Doctrine's Underlying Policies

The policies underlying the tribal court exhaustion doctrine underscore the importance of its application to this dispute. In addition to promoting the substantive federal policies of tribal self-government, self-determination, and the authority and development of tribal courts, the tribal court exhaustion doctrine advances several prudential policies. *See Iowa Mut.,* 480 U.S. at 14-17; *Nat'l Farmers,* 471 U.S. at 856-57. Judicial efficiency, the "orderly administration of justice," and the avoidance of "procedural nightmare[s]" demand that a tribal court be afforded full opportunity to determine its jurisdiction, evaluate any challenges thereto, rectify any errors, and develop a full record before a federal court intervenes. *Nat'l Farmers,* 471 U.S. at 856-57. Moreover, exhaustion encourages tribal courts "to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review." *Id.* at 857 (footnote omitted).

By contrast, allowing litigants like Sprint to evade proper exercises of tribal court authority through the filing of duplicative actions in other courts would sap tribal courts of their authority and undermine tribal self-government:

> [U]nconditional access to the federal forum *would place it in direct competition with the tribal courts,* thereby impairing the latter's authority over reservation affairs. Adjudication of such matters by any nontribal court also infringes upon tribal law-making authority, because tribal courts are best qualified to interpret and apply tribal law.

Iowa Mut., 480 U.S. at 16 (emphasis added) (citations omitted). The importance of the tribal court exhaustion doctrine has accordingly been affirmed in numerous cases. *See, e.g., Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.,* 207 F.3d 21, 32-33 (1st Cir. 2000) ("[H]aving a tribal court address, in the first instance, the scope of its jurisdiction over a dispute that stems from actions taken in the course of tribal governance promotes efficiency and sensibly allocates scarce judicial resources"); *Calumet Gaming Group-Kansas, Inc. v. Kickapoo Tribe of Kansas,* 987 F.Supp. 1321, 1329 (D. Kan. 1997) ("If exhaustion is not required, the legitimacy and independence of the tribal court system come into serious question. Allowing litigants to bypass tribal institutions by filing an action in federal court would undercut the tribal court system") (citations omitted).

The federal courts have not hesitated to require exhaustion in cases implicating these policies. *See, e.g., Duncan Energy,* 27 F.3d at 1300 (dispute over tribal taxation and employment rights); *Navajo Nation v. Intermountain Steel Bldgs., Inc.,* 42 F.Supp.2d 1222, 1229 (D.N.M. 1999) (case turning on tribal law and custom of insurance, contract, and tort). "Federal court restraint is 'especially appropriate' where the issues between the parties grow out of '[t]ribal governmental activity involving a project located within the borders of the reservation.'" *Gaming World,* 317 F.3d at 850 (quoting *Bruce H. Lien,* 93 F.3d at 1420).

Disputes such as the present one between NAT and Sprint go to the heart of tribal self-government, self-determination, and the disposition of tribal resources. By filing its duplicative actions, Sprint seeks to place this Commission, the federal district court, and the Tribal Court on the very "collision course" that the exhaustion doctrine forbids. Sprint's strategy offends the policies of judicial efficiency, the orderly administration of justice, tribal-court development, and tribal law-making authority set forth by the Supreme Court in *Iowa Mut.* and *Nat'l Farmers*. Therefore, in keeping with the numerous decisions set forth above, the purpose of the exhaustion doctrine, and the important policies underpinning the doctrine, the Tribal Court should have the first opportunity to address these quintessential tribal affairs.

E. Sprint's Unsupported Claims of "Tribal Exhaustion Exceptions" Do Not Apply

In *Nat'l Farmers*, the Supreme Court articulated three exceptions to the requirements of the exhaustion doctrine:

> We do not suggest that exhaustion would be required where an assertion of tribal jurisdiction [1] "is motivated by a desire to harass or is conducted in bad faith," or [2] where the action is patently violative of express jurisdictional prohibitions, or [3] where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction.

471 U.S. at 856 n.21 (internal citation omitted). It is clear, however, that none of these exceptions apply here.

i.) "Bad Faith or Harassment" Exception

With respect to the "bad faith or harassment" exception, NAT's decision to seek judicial relief from the Tribal Court to enforce the Tribal Utility Authority's Order arising out of NAT's activities on and within the Reservation cannot reasonably be viewed as an exercise in bad faith or harassment.

ii.) "Federal Prohibition" Exception

Under the second exception, exhaustion is not required when a federal law expressly vests jurisdiction over a dispute in the federal courts to the exclusion of other forums. *See, e.g., El Paso Natural Gas v. Neztsosie,* 526 U.S. 473, 483-87 (1999) (Price-Anderson Act); *Blue Legs v. United States Bureau of Indian Affairs,* 867 F.2d 1094, 1096-98 (8th Cir. 1989) (Resource Conservation and Recovery Act). Here, however, such is clearly not the case. And while an exhaustive jurisdiction analysis at this juncture is premature and contravenes the fundamental purpose of the exhaustion doctrine[26] - it is clear that the Tribal Court has jurisdiction over the dispute between NAT and Sprint.

The Federal Communications Commission (FCC or Commission) has never foreclosed an Indian tribe's sovereign authority to initiate and regulate its own telecommunications system. In fact, the FCC recognizes that access to modern telecommunications services is critical to the successful development of all Indian communities. The FCC is committed to facilitating increased access to telecommunications in Indian Country and recognizes that Tribal governments have the right to set their own telecommunications priorities and goals for the welfare of their membership. In fact, the FCC has opined, "As domestic dependent nations, Indian Tribes *exercise sovereign powers over their members and territory*. . . . In this regard, the Commission recognizes that the federal government has a *longstanding policy of promoting tribal self-sufficiency and economic development*." (emphasis added). The Commission has been steadfast in "[affirming] its commitment to promote a *government-to-government relationship*

[26] *See Petrogulf Corp. v. Arco Oil & Gas Co.,* 92 F.Supp.2d 1111, 1117 (D. Colo. 2000) ("By arguing that this case falls under neither of the *Montana* exceptions, plaintiff addresses whether the tribal court has jurisdiction over this case, not whether the tribal court should be permitted to address that question *before* the case is brought in state or federal court. As the Supreme Court has stated, the questions are distinct") (emphasis in original).

between the FCC and federally-recognized Indian Tribes." *See generally* Federal Communications Commission, *Expanding Telecommunications Access in Indian Country*, pages 9, 18 (July 2006).

iii.) "Futility" Exception

Sprint's speculation that NAT's pursuit of Tribal Court remedies would be futile is not enough to except Sprint from exhausting its Tribal Court remedies. "As long as a tribal forum is arguably in existence, as a general matter, [the federal court] [is] bound by *National Farmers* to defer to it." *Basil Cook Enterprises, Inc. v. St. Regis Mohawk Tribe*, 117 F.3d 61, 66 (2nd Cir. 1997). Thus, if "the availability of a remedy at tribal law is facially apparent[,]" federal plaintiffs "must direct their arguments to the [t]ribal [c]ourt in the first instance." *Id.*

Here, the Crow Creek Tribal Court is a fully functioning and vital court system. Proceedings before the Tribal Court are governed by a comprehensive set of rules which are designed to ensure the orderly and impartial administration of justice, and litigants enjoy a right of appeal from the determinations of the Tribal Court. If Sprint chooses not to avail itself of the procedures and protections being afforded it by the Tribal Court, that decision cannot operate to undermine the application of the exhaustion doctrine. *See Bank of Oklahoma v. Muscogee (Creek) Nation*, 972 F.2d 1166, 1170 (10th Cir. 1992); *see also Williams-Willis v. Carmel Fin. Corp.*, 139 F.Supp.2d 773, 780-81 (S.D. Miss. 2001) (holding that alleged potential for bias in tribal forum does not excuse failure to exhaust).

A party cannot simply presume that it will not receive a fair trial in tribal court. "Absent any indication of bias," a tribal court should not be presumed to be "anything other than competent and impartial." *Duncan Energy*, 27 F.3d at 1301; *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) ("Tribal courts have repeatedly been recognized as appropriate forums for

the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians"). Sprint's facts in this regard are nebulous, its logic is confused, and its understanding and appreciation of the implications of its argument on tribal sovereignty is non-existent.

Sprint's assertion that this Commission should not adhere to the tribal exhaustion doctrine because the "bad faith," "federal preemption," or "futility" exceptions may apply is misplaced. This Commission should follow the well-established exhaustion doctrine and allow the Tribal Court to first determine its jurisdiction.

F. The Federal Communications Commission – "Expanding Telecommunications Access in Indian Country"

It is important for this Commission to note that the FCC recognizes that access to modern telecommunications services is critical to the successful development of all Indian communities.[27] Federal Communications Commission, *Indian Telecom Initiatives*, pages 1-4. Among other benefits, telecommunications access enhances:

- Educational and learning opportunities through access to the Internet;
- Employment and business opportunities;
- Public safety services, including access to emergency services and long distance medical services; and
- Access to government services.

Id. at 4. Without question, the FCC is "*committed to facilitating increased access to telecommunications in Indian Country.*" *Id.* (emphasis added).

The FCC also recognizes that Tribal governments have the right to set their own telecommunications priorities and goals for the welfare of their membership. Federal

[27] For more information on the FCC's efforts to recognize tribal governments' sovereignty and its Indian Telecom Initiatives, *see* www.fcc.gov/indians/.

Communications Commission, *Expanding Telecommunications Access in Indian Country*, pages 9, 18 (July 2006). The FCC acknowledges the unique legal relationships that exist between the federal government and Tribal governments, as reflected in the Constitution of the United States, treaties, federal statutes, Executive Orders, and numerous court decisions. *Id.* at 18. "As domestic dependent nations, Indian Tribes *exercise sovereign powers over their members and territory*. . . . In this regard, the [FCC] recognizes that the federal government has a *longstanding policy of promoting tribal self-sufficiency and economic development*." *Id.* (emphasis added).

The FCC has been steadfast in "[affirming] its commitment to promote a *government-to-government relationship* between the FCC and federally-recognized Indian Tribes."[28] In fact, the FCC recently established an Office of Native Affairs and Policy, which recognizes the importance of "Tribal Nations and Native communities exercis[ing] their sovereignty and self-determination to ensure a bright future for their generations. . . ."[29] Federal Communications Commission, *FCC Establishes Office of Native Affairs and Policy,* August 12, 2010.

II. IF THIS COMMISSION DOES NOT INVOKE THE "TRIBAL EXHAUSTION DOCTRINE," THEN THIS COMMISSION SHOULD GRANT NAT'S MOTION TO DISMISS BASED UPON THE *MONTANA* EXCEPTIONS TO TRIBAL COURT JURISDICTION

[28] "Notwithstanding . . . efforts to promote ubiquitous service, the Commission has recognized that certain communities, *particularly Indian reservations and Tribal lands, remain underserved, with some areas having no service at all*." Federal Communications Commission, *In the Matter of Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes,* Policy Statement (June 8, 2000) (emphasis added).

[29] *See generally* "Statement of Commissioner Michael J. Copps" (dated August 12, 2010) (recognizing the establishment of the FCC's Native Affairs and Policy Office); FCC Press Release (dated June 22, 2010) "Commissioner Michael J. Copps Applauds the Appointment of Geoffrey Blackwell to Lead New Initiatives for Indian Country" (ensuring "robust government-to-government consultation with Tribal governments").

A. Tribal Regulatory Jurisdiction and Adjudicatory Jurisdiction

As previously indicated, NAT believes that an exhaustive jurisdiction analysis at this juncture is premature and contravenes the fundamental purpose of the tribal exhaustion doctrine. Nonetheless, Sprint provides an exhaustive jurisdictional analysis and predictably concludes that this case does not fall within either of the exceptions in *Montana v. U.S.*, 450 U.S. 544 (1981). However, Sprint's *Montana* analysis disregards the fundamental principle of the tribal exhaustion doctrine – the issue currently before this Commission is *not* whether the Tribal Court *has jurisdiction* over this case, but *whether* the Tribal Court *should be permitted* to address that question *before* the case is brought before this Commission. And although NAT believes it to be inappropriate at this time, NAT submits that this Commission should grant its Motion to Dismiss based upon the *Montana* exceptions to tribal court 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 easily summarized: (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, 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, 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).

B. The Tribal Utility Authority Has *Regulatory Jurisdiction* In This Case

Jurisdiction gives tribes the governmental power required to operate cultural and economic programs on which to build a future for the people living on the reservation. Indians see this ability to make and enforce laws in particular territory as an essential force necessary to

preserve a geographic and cultural core, and to perpetuate their survival as tribal peoples. David H. Getches, et al., *Cases and Materials on Federal Indian Law* 456-57 (5th ed. 2005). Within the Tribe's inherent sovereignty exists cultural sovereignty, "the effort of Indian nations and Indian people to exercise their own norms and values in structuring their collective futures." Wallace Coffey & Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations,* 12 Stan. L & Pol'y Rev. 191, 196 (2001). Utility service and regulation is a natural progression of tribal self-governance.

Regulation of utility systems and services is a relatively recent exercise of tribal sovereignty that is both complex and evolving. The extent to which federal and state regulatory authority over telecommunications services in Indian Country exists has never been universally defined. In most cases, for example, because the tribes have not exercised their authority to regulate telecommunications services within reservation boundaries, the state regulatory agencies have exercised jurisdiction over telecommunications services within Indian Country by default.

Tribal sovereignty goes to the heart of the Tribe's power to self-govern. 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 FCC for interstate traffic. A second Access Tariff was filed with the Tribal Utility Authority.

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. NAT will soon 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." Crow Creek Sioux Tribe Press Release, "*Crow Creek Sioux Tribe Launches New Tribally Owned Telephone and Advanced Broadband Telecommunications System*," February 8, 2010.

The Tribal Utility Authority also created a legal and administrative process to administer complaints. Sprint refused to pay the lawfully-imposed access tariffs 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 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." For these

reasons, the Tribal Utility Authority has properly assumed regulatory jurisdiction over this matter.

C. The Tribal Court Has *Adjudicatory Jurisdiction* In This Case

The Supreme Court's decision in *Montana*, 450 U.S. at 544, 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, the economic security, or the health or welfare of the tribes."[30] *Id.* at 565-66.

First, Sprint has entered into a "consensual relationship" with the Tribe by providing telecommunications services on the Reservation. Without the advanced telecommunications system located on the Reservation, Sprint's customers simply could not complete their calls to Reservation residents.

Sprint further engaged in a "consensual relationship" with the Tribe by actually paying the access fees at issue in this case. On December 10, 2009, NAT forwarded its initial "Cover

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[30] Sprint cites the South Dakota Supreme Court's decision in *Cheyenne River Sioux Tribe Telephone Authority v. Public Utilities Commission of South Dakota*, 595 N.W.2d 604 (S.D. 1999) in support of its position that the Tribal Court lacks jurisdiction in this matter. In *Cheyenne River*, our Supreme Court held that the SDPUC had jurisdiction to regulate a proposed sale of three telephone exchanges by U.S. West to a tribal subsidiary company. The tribe and U.S. West alleged that (1) the first *Montana* exception (consensual relationship) applied, (2) the state lacked jurisdiction because it infringed on tribal sovereignty, and (3) that federal telecommunications law preempted the state's actions. The Supreme Court found that both federal and state law authorized state regulation. However, the Supreme Court did not consider the second *Montana* exception. Also, the tribe and U.S. West had expressly provided that the sale of the telephone exchanges was conditional upon approval by the SDPUC. Finally, because the tribe and U.S. West failed to timely raise jurisdictional questions, these issues were note fully litigated. *See In re U.S. West Communications, Inc.*, SDPUC TC94-122, 1997 WL 912965. As such, the Supreme Court's jurisdictional language should be considered dicta.

Letter" and Invoices for payment to Sprint.[31] This "Cover Letter" to Sprint clearly designated CABS Agent as NAT's billing and collection agency. This "Cover Letter" also provided Sprint with precise details of NAT's services, ownership structure, and purpose. In January 2010, Sprint voluntarily paid NAT's Invoices in the amount of $18, 544.26. In February 2010, Sprint once again voluntarily paid NAT's Invoices in the amount of $10,911.96. As a result of these multiple payments, Sprint voluntarily paid NAT's Invoices in the total amount of $29,456.22. It was only in March 2010 that Sprint ceased paying NAT's Invoices. Reiman Affidavit, ¶¶ 16-22.

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 effect the "political integrity, the economic security, or the health or welfare of the tribe." Sprint's actions attack the Tribe's ability to regulate and administer telecommunications services on the Reservation. Once again, it is important to recognize that Sprint's claims threaten the legitimacy and viability of:

- the Tribal Court;
- a tribally-owned limited liability company;
- high-speed Internet access, basic telephone, and long-distance services on and within the Reservation;
- the Tribal Utility Authority's ability to plan and oversee utility services on the Reservation;
- the Tribal Utility Authority's ability to promote the use of these utility services to improve the health and welfare of the residents;
- the Tribe's Telecommunications Plan;

[31] The "Cover Letter" that accompanied NAT's initial Invoices to Sprint is attached to the Reiman Affidavit and marked as "Exhibit 8." NAT's initial Invoices to Sprint are attached to the Reiman Affidavit and marked as "Exhibit "9."

- the Tribal Utility Authority's Approval Order;
- the Tribal Utility Authority's access tariffs;
- the Tribal Utility Authority's Enforcement Order;
- one of the first new tribally-owned telephone systems in the United States;
- over one hundred (100) high-speed broadband and telephone installations at residential and business locations on the Reservation;
- a new high-speed broadband and telephone installations on the Reservation;
- an Internet Library with six (6) work stations that provide computer/Internet opportunities for Tribal members who do not otherwise have access to computers;
- the construction and opening of a state-of-the-art facility that will serve as a full-service communications center offering free Internet, online education classes, computer classes and instruction, and free telephone access to individuals who would otherwise not have access to even these basic services on the Reservation;
- subsidies that provide telecommunications services, free-of-charge, to Tribal members;
- the Reservation's ability to escape the unfortunate and long-standing circumstances that have prevented economic development and growth;
- past, present, and future employment and economic development opportunities in one of the nation's poorest areas; and
- a unique business structure composed of both Tribal and private entity ownership that has attracted unprecedented financial and capital investment to the Reservation.

In sum, state regulation would directly infringe upon the rights of the Tribe to make its own laws and be ruled by them.

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 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 on the Reservation.

Therefore, the application of tribal regulatory and adjudicatory jurisdiction in this case is also proper under the second *Montana* exception. Sprint's actions undoubtedly threaten and have a direct impact on the political integrity, economic security, health, and welfare of the Tribe.

CONCLUSION

Because this case goes to the core of the exhaustion doctrine, NAT respectfully requests that this Commission stay all proceedings in this duplicative action until the Crow Creek Tribal Court has a full and fair opportunity to determine its jurisdiction over Sprint and the subject matter of NAT's action, and if it finds such jurisdiction to exist, to adjudicate the parties' dispute on the merits. In the alternative, NAT respectfully requests that its motion to dismiss be granted because this Commission does not have jurisdiction NAT's activities on the Reservation.

Dated this 25th day of October, 2010.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on *October 25th, 2010*, the foregoing "*Reply Brief in Support of NAT's Motion to Stay/Motion to Dismiss South Dakota Public Utilities Commission's Docket No. TC10-026*," was served *via electronic mail*, upon the following:

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