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December 6, 2010

Ms. Patricia Van Gerpen
SD Public Utilities Commission
500 E. Capitol Ave.
Pierre, SD 57501

Re: In The Matter Of The Complaint Filed By Sprint Communications Company, LP Against Native American Telecom, LLC Regarding Telecommunications Services – (Docket No. TC10-026)

Dear Ms. Van Gerpen:

Attached for electronic filing, please find the Intervening Parties' Brief in Response to Staff's Brief to Motion for Stay and Motion to Dismiss along with Certificate of Service referencing the above stated matter.

If you have any questions, please contact me.

Very truly yours,

RITER, ROGERS, WATTIER & NORTHRUP, LLP

By: Darla Pollman Rogers

Darla Pollman Rogers

DPR-dk
Enclosure

Cc: Service List

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**

INTERVENING PARTIES' BRIEF IN RESPONSE TO STAFF'S BRIEF TO MOTION FOR STAY AND MOTION TO DISMISS

South Dakota Network, LLC ("SDN"), Midstate Communications, Inc. ("Midstate") and South Dakota Telecommunications Association ("SDTA") (collectively referred to as "Intervening Parties") hereby file this Brief in Response to Staff's Brief in the above captioned proceeding.

I. Procedural History

On May 4, 2010, Sprint Communications Company, LP ("Sprint") filed a Complaint before the South Dakota Public Utilities Commission ("Commission") against Native American Telecom, LLC ("NAT"). Sprint's Complaint disputes certain switched access charges being assessed by NAT to Sprint, and asks for a determination that the Commission has the sole authority to regulate Sprint's intrastate interexchange services.

SDTA, SDN, and Midstate sought intervention in this docket, as did other parties. On June 18, 2010, the Commission granted intervention to SDTA, SDN, Midstate, AT&T, and the Crow Creek Sioux Tribe Utility Authority ("CCSTUA").

On June 1, 2010, NAT filed a Motion to Dismiss pursuant to SDCL 15-6-12(b). On June 7, 2010, CCSTUA filed a Motion to Dismiss or in the alternative, a Petition to Intervene. Months later, NAT filed an action against Sprint in the Crow Creek Tribal

Court, and then on July 29, 2010, NAT filed a Motion to Stay in this docket based on the doctrine of "tribal court exhaustion." Sprint, Intervening Parties, and AT&T filed Briefs in Opposition to the Motions to Dismiss and the Motion to Stay and requested that the Commission assert jurisdiction over this matter and that it proceed to an adjudication of the disputes existing between the parties involved. On October 26, 2010, NAT filed a Reply Brief in Support of its Motion to Stay and Motion to Dismiss. On November 15, 2010, Staff filed a Brief in Response to NAT's Motion to Stay and Motion to Dismiss. The Intervening Parties file this Brief for the limited purpose of responding to Staff's Brief.

II. ARGUMENT

A. Position of Staff

Staff's position is that 1) the Commission should grant NAT's Motion to Stay thereby permitting either the tribal court or the federal district court to resolve questions of its jurisdiction regarding Sprint first and 2) the Commission should deny the Motion to Dismiss. The Intervening Parties disagree with Staff's position and recommendation regarding the Motion to Stay for the reasons set forth below, and urge the Commission to move this case forward. In reference to the Motion to Dismiss, the Intervening Parties agree with Staff's recommendation.

B. Motion to Stay

1. The Doctrine of Tribal Exhaustion Is Not Binding on State Courts or Agencies

In Intervening Parties initial brief opposing the Motion to Stay and the Motions to Dismiss, Intervening Parties did not take a position on the Tribal Exhaustion doctrine based upon the clear statutory support that indicates the Commission has jurisdiction over

this controversy. Intervening Parties did indicate support of the position of Sprint that tribal exhaustion does not apply to actions filed before a state court or state administrative body. Based upon Staff's reliance on that doctrine, however, Intervening Parties wish to comment further on the issue herein.

Staff relies primarily on two federal cases, National Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 US 845, (1985) and Iowa Mutual Ins. Co v. LaPlante, 480 US 9 (1987), in support of its position that this Commission should stay its proceedings until after the tribal court has ruled on its jurisdiction. Both cases found that the federal courts had jurisdiction of the issues involved, but remanded the cases back to federal district court with instructions to invoke the doctrine of tribal exhaustion, a federal common law rule, based on the concepts of comity and a deference to tribal self-government. It is important to note, however, that both courts analyzed jurisdiction between tribal court and federal court, not tribal court and state court. The federal rule of tribal exhaustion is a federal rule that is not binding on state courts or state agencies. And although all of the parties cite extensive case law in reference to the doctrine of tribal exhaustion in the federal court arena, no party cites a single case in reference to the State of South Dakota adopting the doctrine of tribal exhaustion. That is because there is no such doctrine in the State of South Dakota and the reliance on any federal case precedent by this Commission is misplaced.

2. Jurisdictional Challenge First Raised Before This Commission

Even if there was some precedent for application of a federal common law rule to a state agency, which there is not, the order of events in this docket would suggest that in this case, it is the Commission, rather than the tribal court that would be entitled to

deference. Sprint filed this Complaint before the Commission on May 4, 2010, and, among other things, asked for a determination that the Commission has the sole authority to regulate Sprint's intrastate interexchange services. NAT, in a Motion to Dismiss, challenged the Commission's subject matter and personal jurisdiction over NAT. In the authority cited by Staff, the federal court stated:

> We believe that examination should be conducted in the first instance in the Tribal Court itself. Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination. That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge. *National Farmers Union*, 471 US at 855-857 (citations omitted) (emphasis added).

Likewise, in the Iowa Mutual case relied upon by Staff, the Court noted that "[A]t the time the "federal action was initiated, proceedings involving the same parties and based on the same dispute were pending before the Blackfeet Tribal Court." Iowa Mutual at 11 (emphasis added). The Court in the Iowa Mutual case embraced the holding of the Court in the National Farmers case:

> Thus, in *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 . . . (1985), we held that the Federal District Court should not entertain a challenge to the jurisdiction of the Crow Tribal Court until after petitioner had exhausted its remedies in the Tribal Court. Our holding was based on our belief that Congress' policy of supporting tribal self-determination "favors a rule that will provide the forum *whose jurisdiction is being challenged* the first opportunity to evaluate the factual and legal bases for the challenge." *Id.*, at 856 . . . (emphasis added; footnote omitted).

The forum whose jurisdiction is being challenged in this case is that of the Commission, and that is the forum that should be given the first opportunity to evaluate the factual and legal bases for the challenge. In both of the federal cases cited by Staff, the initial complaints were filed in tribal courts. By contrast, in the current case, Sprint filed the initial Complaint before this Commission. NAT did not file a Complaint in

Tribal Court until July 7, 2010 (see NAT's Notice of Tribal Litigation). Sprint invoked the jurisdiction of the Commission, and NAT has challenged it, in the first instance, before the Commission. In essence, and to the extent any principles related to "exhaustion" are viewed as relevant to a resolution of the present dispute between the parties, it would seem that the South Dakota Commission, as the first entity presented with the case, should be afforded the first opportunity to address the specific jurisdictional issues.

3. The Doctrine of Tribal Exhaustion is Inapplicable in This Case

Even under the federal doctrine of tribal exhaustion, no exhaustion would be required in this case. First of all, as Staff has noted from the Farmers Union case, the exhaustion principles are not limitless, and must be exercised appropriately. The restrictions on the application of the tribal exhaustion doctrine were further clarified by the Supreme Court in Strate v. A-1 Contractors, 520 U.S. 438 (1997), who reiterated "that National Farmers and Iowa Mutual enunciate only an exhaustion requirement, a "prudential rule, based on comity", and the doctrine "must give way [if] it would serve no purpose other than delay." Id. at 453 and 459. Because NAT appears to be attempting to invoke tribal jurisdiction over Sprint, a non-tribal entity, months after the same issues were already keyed up by Sprint before this Commission, the purpose would seem to be delay-motivated, which falls under the exceptions to the doctrine.

4. Federal District Court Ruling is Precedential

This Commission can look to the recent ruling of the federal district court with regard to the inapplicability of the tribal exhaustion argument in this docket. After NAT brought a claim against Sprint in tribal court nearly two months after Sprint filed the

current complaint, Sprint sued NAT in federal district court, asserting that NAT's traffic pumping activities violated the FCA. As part of that action, Sprint moved for a preliminary injunction, asking the federal district court to enjoin NAT's tribal court action. NAT moved for a stay on the theory of tribal court exhaustion.

On December 1, 2010, the federal district court entered an order rejecting NAT's tribal exhaustion argument, on the grounds that tribal court jurisdiction was lacking, thus the exhaustion rule was inapplicable. Pursuant to the federal and state statutes enumerated below, this Commission should follow the path of the federal district court and conclude that it, rather than the tribal court, has exclusive jurisdiction of intrastate communications services, and that "the doctrine of tribal court exhaustion must give way."

5. Federal and State Law Dictate Jurisdiction in this Case

Another reason that tribal exhaustion does not apply in this docket, and that the Motion to Stay and Motions to Dismiss should be denied is because there are specific federal and state laws conferring jurisdiction over intrastate operations of carriers with a State Commission. As noted in Intervening Parties' original brief in opposition to the Motions to Dismiss and the Motion to Stay, at the federal level, the Communications Act of 1934 (the "Act") grants to the Federal Communications Commission ("FCC") regulatory oversight over telecommunications services. Within that regulatory scheme, state commissions are granted authority and jurisdiction over intrastate services and facilities. 47 USC 152 (b) states "[n]othing in this chapter shall be construed to apply or to give the [FCC] jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication

service." That regulatory authority is conferred upon State Commissions, which are defined by the Act as "the commission, board, or official (by whatever name designated) which under the laws of any State has regulatory jurisdiction with respect to intrastate operations of carriers." 47 USC 153 (41).

Our state laws recognize this federal congressional and legislative authority and have codified them in our state statutes. SDCL 49-31-3 states:

> 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. . . The commission may exercise powers necessary to properly supervise and control such companies. (emphasis added).

SDCL 49-31-3 further identifies specifically that the "commission shall inquire into any complaints, unjust discrimination, neglect or violation of the laws of the state governing such companies."

Guidance can also be gleaned from the South Dakota Supreme Court, which provided analysis of the congressional and legislative authority the federal government grants to this State Commission:

> The regulatory scheme of telecommunications services specifically grants the PUC authority and jurisdiction over intrastate facilities. *See* 47 USC 152(b). The authority of the PUC is extensive and crucial to the overall regulatory scheme. *See* SDCL Ch. 49-31. Among other things, it has 'general supervision and control of all telecommunications companies offering common carrier services within the state to the extent such business is not otherwise regulated by federal law or regulation.'" SDCL 49-31-3; Cheyenne River Sioux Tribe Telephone Authority v. Public Utilities Commission of South Dakota, 1999 SD 60, ¶20, 609, 595 NW 2d 604.

In the same case, the Supreme Court concluded that the Commission's authority to regulate intrastate communications is not preempted by federal law, but rather is a

significant, as well as authorized, part of the overall regulatory scheme. Cheyenne River at ¶ 28 and ¶ 30. In regard to preemption the Supreme Court said

> [When] determining whether a state may exercise jurisdiction, the question to be addressed is whether assumption of jurisdiction would stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. American Phone Inc. v. Northwestern Bell Tel. Co., 437 NW2d 175, 177 (SD 1989) (citing North Carolina Util. Comm'n v. FCC, 537 F2d 787 (4th Cir. 1976) (quoting Louisiana Public Serv. Comm'n v. FCC, 476 US 355 (1986). . . [W]e find that PUC's authority to regulate in this area (intrastate communications) is not preempted by federal law, but rather, is a significant, as well as authorized, part of the overall regulatory scheme. *See* Rice v. Rehner, 463 U.S. 713, 726 (1983).

Finally, in the Cheyenne River case, our State Supreme Court also analyzed whether or not exercise of jurisdiction over intrastate communications would infringe upon tribal interests.

> The primary purposes and objectives of Congress in regulating telecommunications are to protect telecommunications' consumers. Consumers are ensured, through this regulation, of adequate facilities and reasonable rates. This protection applies to all consumers, whether they reside on or off an Indian reservation. Such regulation is an important government function, and PUC's regulatory authority furthers its objectives and purposes; it does not interfere with them. Cheyenne River at ¶ 28.

It is clear by reviewing the federal law, state law and administrative rules, and our own Supreme Court's analysis of the congressional and legislative intent of federal law that the Commission has jurisdiction over intrastate communications. Accordingly, the Motion to Stay should be denied, and this Commission should determine that it has jurisdiction of the issues and the parties in this docket, and then proceed to adjudicate the merits of the case.

C. Motion to Dismiss

Intervening Parties concur with Staff's recommendation that the Motion to Dismiss should be denied. Intervening Parties rely on the arguments set forth above and in the arguments set forth in their prior Brief in Opposition to Motion for Stay and Motion to Dismiss to support denial of the Motions to Dismiss.

III. Conclusion

Intervening Parties assert that this Commission has jurisdiction over intrastate access services, and over the parties in this docket, pursuant to both federal and state law. The doctrine of tribal exhaustion is not applicable to this docket, for the reasons hereinabove stated. Federal and state statutes and rules, along with clear direction from the South Dakota Supreme Court, dictate that this Commission deny the pending motions and move forward with a determination that it has jurisdiction over the subject matter and parties in this docket, and then proceed to adjudicate the merits of the issues presented by the parties. Intervening parties urge that the Commission deny the Motion to Stay and the Motions to Dismiss.

Dated this 6th day of December, 2010.

(Signature pages to follow).

Dated this 6th day of December, 2010.

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CERTIFICATE OF SERVICE

I, Darla Pollman Rogers, certify that a copy of the Intervening Parties Brief in Response to Staff's Brief to Motion for Stay and Motion to Dismiss, dated December 6, 2010, filed in Commission Docket TC10-026, was served upon the PUC electronically, directed to the attention of:

Ms. Patty Van Gerpen
Executive Director
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A copy was also sent by e-mail to each of the following individuals:

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